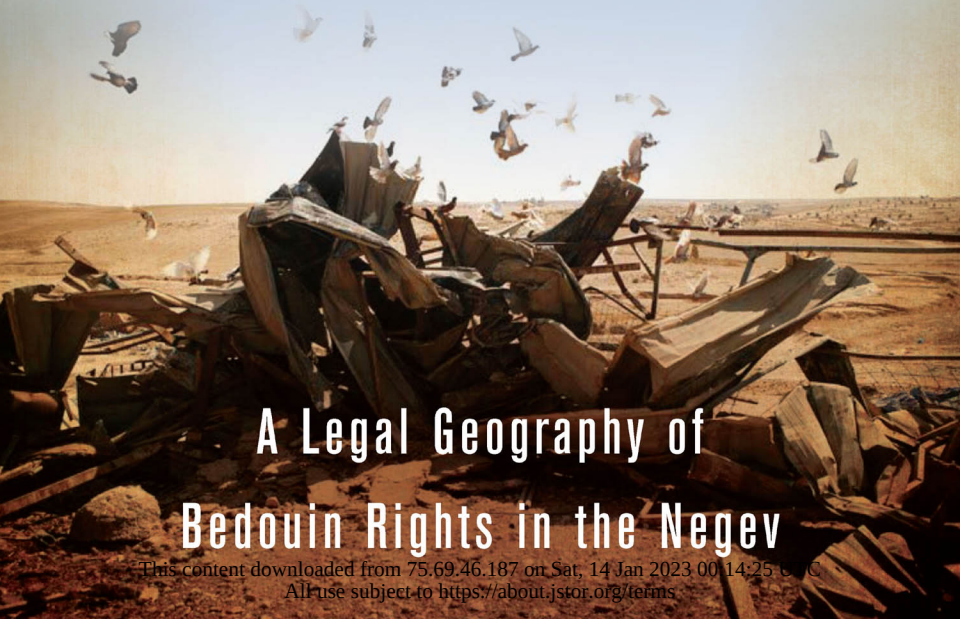
ALEXANDRE KEDAR
AHMAD AMARA
OREN YIFTACHEL

EMPTIED LANDS



A Legal Geography of Bedouin Rights in the Negev

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To Claudia, my wife, best friend, and life partner, with all my love.
(Sandy Kedar)

To my father, Abo Amir, and son, Yazan, with much love.
(Ahmad Amara)

To the the al-ʿUqbi tribe and all Bedouin Arabs,
and to the struggle for recognition, justice, and dignity.
(Oren Yiftachel)

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I LEGAL AND GEOGRAPHIC FOUNDATIONS OF THE NEGEV

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INTRODUCTION:

TERRA NULLIUS IN ZION?

I.1 ROCKETS IN "OPEN SPACE"

Four events that occurred during the violent summer of 2014 provide an appropriate starting point to this book. During what was known as Operation Protective Edge or the War on Gaza, Israel bombed large parts of the Gaza Strip and Hamas launched rockets on Israeli cities and towns.[1] The first event occurred in July 2014, when journalist Elisheva Goldberg visited the unrecognized Bedouin village she named Tel al-Barad, home to approximately 300 people:[2]

> When I visited one recent afternoon, a rocket had just landed in the village's livestock pen. According to government sources, the rocket had fallen in one of the country's "open areas"—a term Israeli officials frequently use when describing rocket attacks, and one implying that the rockets dropped harmlessly in empty fields. But "open areas" are not always empty. They also encompass many of the Bedouin villages of southern Israel.[3]

The second event occurred on July 18, 2014, the eleventh day of fighting. In the early evening a rocket launched from Gaza fell on another Bedouin unrecognized village, Qasr al-Sir, near the city of Dimona, killing an Israeli Bedouin citizen, Auda al-Wajj, and wounding two of his daughters. The Israeli daily *Haaretz* reported that

> the family . . . lived in an unnamed patch of tin houses some three kilometers from Dimona [or 30 kilometers east of Beersheba]. The rocket exploded in the yard outside their house, and showered it with shrapnel. . . . No sirens sounded . . . and

> there's nowhere to hide," Sheikh Juma'a Akshahar told *Haaretz*. . . . "The state isn't intercepting these rockets and isn't protecting the citizens in the shacks. We are transparent."[4]

Internal security minister Yitzhak Aharonovich arrived at the scene and told Sheikh Juma'a that Iron Dome cannot cover 100% of the area and does not protect open areas.[5] Aharonovich was referring to the effective Iron Dome missile-defense system, which is credited with the small number of Israeli casualties. The low number is also attributed to people taking shelter within seconds of hearing a siren. However,

> none of these [protective] mechanisms operate in "open areas." . . . For the Bedouins of southern Israel—who are Arab, Palestinian, and Israeli all at once—there is nowhere to run. They find themselves both outside the protection of the Israeli state and targeted by Hamas. They are a population that has fallen through the cracks—a population protected by no one.[6]

A petition by the Association for Civil Rights in Israel to the High Court of Justice on behalf of local Bedouins soon followed, requesting that the state supply Bedouin villages with defensive facilities similar to those provided to nearby Jewish settlements. The Court rejected the petition, upholding the government's position that the lack of shelters and mobile safe rooms (*mamad*) is not the result of discrimination against the Bedouins but rather their illegal

Figure 1. Bedouin unrecognized village near Beersheba.

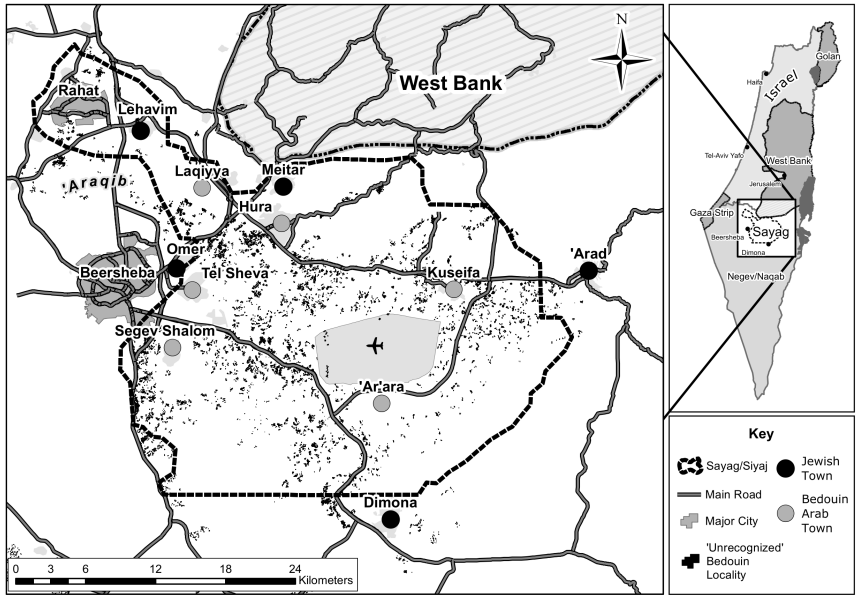
settlement and unauthorized building. According to the Court, "While the state is obliged to its residents' security in general, it has no specific obligation to provide protection to all residents." The panel of three justices added that the state policy on this matter "does not contain any flaw that would justify this court's intervention."[7]

The perception and treatment of a Bedouin Arab village that has existed for at least six decades and accommodates several hundred residents merely as an "open space" or "open area," an Israeli version of the *terra nullius* doctrine, is a telling entry point to this book, in which we analyze the legal geography of the contested Negev (in Arabic, Naqab) region.[8] Most Bedouin localities in this region are officially classified as "unrecognized" and "illegal," and their populations are considered "trespassers" on state land. The lack of recognition of dozens of villages, though their inhabitants commonly live on their ancestors' land, derives from state denial of the indigenous land regime that existed in the Negev before the establishment of Israel in 1948 and from Bedouin indigeneity.

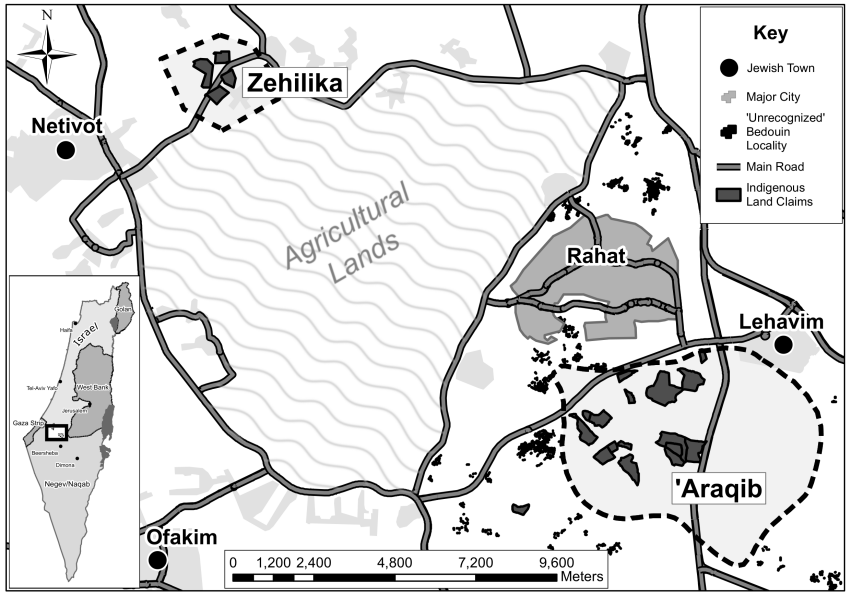
Since its establishment, the Jewish State has dedicated major efforts to securing its control over the land. In this framework Israel and its indigenous Bedouin citizens have been entangled in a protracted legal and territorial battle over traditional tribal land in the Negev region. This is the most intense and extensive land dispute currently taking place within Israel proper (i.e., excluding the post-1967 occupied territories). The heart of this land dispute lies in opposing conceptualizations of ownership, possession, and land use. On the one hand, the Bedouins claim land rights based on customary and official laws, possession and cultivation of the land for generations, and tax payments to previous regimes, which, in their view, should provide proof of ownership and be integrated into contemporary land laws. On the other hand, Israel, drawing on highly formalist and, in our eyes, distorted legal interpretations of Ottoman and British statutes, views all Bedouins residing in their villages as illegal trespassers invading state land. The Bedouins are often portrayed by the state as intrinsically nomadic invaders from other regions who survived well into the twentieth century as pastoralists and plunderers. As such, they did not acquire any rights to Negev lands. Their "illegality" is implicated in a number of situations, including criminalization, house demolition, and the treatment of their habitation areas as empty, thus deserving no state protection in times of war.

Several maps illustrate some of this dispute. Map 1 illustrates the location of the Bedouin living area in relation to the entire Israel/Palestine region and marks the *siyaj* (*sayag* in Hebrew, literally "fenced") region, into which all Bedouins were concentrated after the 1948 war. Map 2 zooms in on the Bedouin regions around Beersheba, including our main focus of the ʻAraqib area, which lies some 10 kilometers north of Beersheba. It shows the spatial pattern of Bedouin informal (mostly unrecognized) localities, where more than 100,000 Bedouins resided in 2016, and the seven planned towns into which the state attempted to urbanize the entire indigenous population of the region in the past. Map 2 zooms in on the land claims of the tribes in and around ʻAraqib. Map 3 provides further necessary background by showing the extent of Bedouin land claims and current "unrecognized" development in the Beersheba metropolitan region.

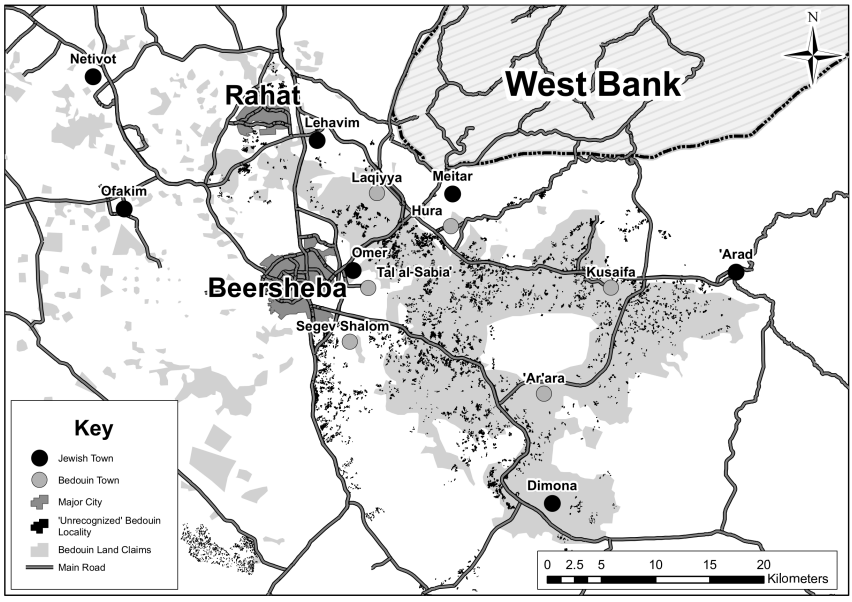
As will become clear in the following chapters, contrary to state claims, Bedouin Arabs have resided in the Negev/Naqab region of southern Israel/Palestine for centuries before the establishment of Israel, subsisting on a mixed economy that combined pastoralism and agriculture.



Map 1. Location of Bedouins and the siyaj region in Israel/Palestine. Source: adapted and updated from Avinoam Meir, *As Nomadism Ends: The Israeli Bedouin of the Negev* (Boulder, CO: Westview Press, 1997), 114.



Map 2. Location and land claims of al-ʻUqbi in ʻAraqib and Zehilika. Source: al-ʻUqbi archives and the Israeli Land Authority.



Map 3. Bedouin land claims and the unrecognized Bedouin localities. Source: Regional Council of the Unrecognized Villages, aerial photograph 2015; and Israel Land Authority.

A short caveat on the term *Negev* is in order here. Although *Negev* is the standard geographic term used in the study of southern Israel/Palestine, it has not been constituted as a defined geographic unit or as a separate administrative unit under any of the last three regimes that exercised power over the area (Ottoman, British, and Israeli). *Negev* is a biblical term that refers to a smaller area of land than what is considered the Negev region today. Further, in its earlier English version, the "Negeb" (with a *b*) used to refer mainly to a climatic unit of a desert region and not to a geographic or politically defined territory. During Ottoman rule, part of the region was under the administration of the Gaza Subdistrict, which was in turn part of the Jerusalem Governorate. Later, in 1900, the Ottomans established the Bir al-Sabia' kaza (Beersheba Subdistrict), which came to include large parts of the region's territory. The British largely maintained the administrative division but stretched it all the way to the Dead Sea. This meant that the Beersheba Subdistrict came to constitute an area of 12.5 million *dunum*s of British Palestine, constituting nearly half the land mass (a *dunum* is about one-fourth of an acre). The region was generally referred to by its Arab inhabitants as the Bir al-Sabia or Bilad Ghazza. However, today Palestinian Arabs refer to it as the Naqab. In this book we continue to refer to the region as the Negev/Naqab, as it is currently known to the locals and to others.[9]

Throughout the past several centuries, the Bedouins, like other indigenous peoples, developed a distinct land regime that regulates their settlement system and self-rule over property, including ownership, division, sale, and conflict resolution. Since the 1970s, despite their partial urbanization and incorporation into the Jewish state, the Bedouins have continued to hold to many aspects of their traditional culture, customary law, and social organizations. Their settlement system, based on traditional patterns of landownership, is still in place in the north, northeastern, and central Negev, where the unrecognized localities exist. In other parts of the Negev, Israel has evicted and destroyed most Bedouin settlements.

I.2 *TERRA NULLIUS*?

Israel is a settler state, established through waves of immigration and settlement by Jewish refugees and immigrants (initially from Europe and later mainly from Arab and Muslim countries and the former Soviet Union), who settled into what was predominantly an Arab region during the Ottoman and

British periods. The state was established between 1947 and 1949 through a violent conflict known as the War of Independence for the Jews or the *Nakba* (disaster) for the Palestinians. Close to two-thirds of all Palestinians, including most Bedouins, were driven out of their lands by Jewish forces and became refugees. Most have remained refugees to this day.

Israel's approach to Bedouin indigenous space developed during its formative years and has increasingly resembled the colonial legal-geographic concept of *terra nullius*. To be sure, the precise definition of *terra nullius* is tricky. It is clear that the doctrine derives from the Roman legal concept of *res nullius* and evolved to represent lands belonging to no one, emptied of sovereignty, ownership, or long-term possession rights. The concept denotes practices used by European powers and settlers to dispossess indigenous populations, exploit their natural resources, and settle their lands.[10] By delegitimizing indigenous histories, legal systems, and property rights and by granting such rights to the incoming settlers, *terra nullius* is one of the most effective and notorious hallmarks of the racist colonial period, as noted by David Hollinsworth, reporting on the case of Australia.

> Australia was declared to be *terra nullius* (land legally owned by no one), an unencumbered wilderness able to be claimed by the British Crown. This strategy enabled the British to class their occupation as "peaceful settlement" rather than invasion. . . . No treaties or agreements [were signed] with Indigenous leaders. No compensation or legal recognition of Indigenous property rights was made.[11]

Terra nullius is obviously more than a legal concept. It is a frame of mind typifying settler societies and colonizing regimes involved in ongoing external or internal colonial expansion, often at the expense of indigenous groups and national minorities. The powerful effect of the concept is not only legal but also cultural, historical, and ultimately political: stripping the indigenous people and their culture of their status as rightful owners of land, resources, and political power and legitimating such dispossessions by presenting the land as empty.

Notably, the Bedouin Arabs who remained in Israel after the 1948 war did receive citizenship. In 1966 the military rule initially imposed on them in 1948 by Israel was lifted as the Bedouins formally became full citizens. However, this citizenship status did not prevent their long-term marginalization, discrimination, and exposure to a major government effort to *Judaize* the Negev

(and the rest of the country). The main thrust was massive land nationalization and widespread Jewish settlement in peripheral regions, including the Negev. Like other settler societies that expanded into regions populated by minority groups, the Judaization effort was greatly assisted by a legal formulation that denied most Arabs landownership, possession, or recognition of their localities. Thus a parallel process to Judaization has been the *de-Arabization* of the Negev land, through eviction, destruction, renaming, legal denial, and coerced urbanization and spatial concentration, which continue to this day.

1.3 ʿARAQIB: CHALLENGING LEGAL GEOGRAPHY

The third event to open this book occurred in June 2014, when the Israeli Supreme Court heard an appeal entered by the al-ʿUqbi, a prominent Bedouin tribe whose story and struggle to secure its traditional lands will accompany us throughout this book.[12] At this stage it should be noted that we are involved in the *al-ʿUqbi* case. One of us (Oren Yiftachel) submitted an expert opinion in support of the al-ʿUqbi family's claim in the District Court, and the other two of us collected, processed, and analyzed research material in preparation for drafting the expert opinion. We also assisted the al-ʿUqbi family's lawyers, led by attorney Michael Sfard, in the appeal proceedings. We are also involved in supporting other ʿAraqib tribes in their ongoing land claims.

The al-ʿUqbi Supreme Court appeal challenged a 2012 District Court decision to register their lands as state property. The tribe was the main traditional landowner in the ʿAraqib area, 8–14 kilometers north of Beersheba.[13] The Bedouin plaintiffs, headed by Nuri (Hassan) al-ʿUqbi, assembled data, evidence, expert opinions, and legal, geographic, and historical data that seriously challenged the Dead Negev Doctrine (DND)—the Israeli legal variant of *terra nullius*—on which we expand in the following section.[14] A long trial in the Beersheba District Court ended in a victory for the state, with a ruling that ʿAraqib lands were *mawat* (dead lands) and, as such, should be registered as state property.

ʿAraqib became a focal point of the decades-long conflict between the indigenous Bedouins and the Israeli settler state, revolving around issues of land, settlement, planning, political power, and legal jurisdiction. In the chapters that follow we examine in detail the case as a key illustration of the indigenous Bedouin struggle to protect their rights and property.

The fourth event to open our book remains in ʿAraqib, where the most famous "unrecognized" Bedouin village, also named ʿAraqib, was demolished by state authorities for the seventy-eighth time in June 2015.[15] The village is located about 10 kilometers north of Beersheba, on land purchased by the al-Turi Bedouin clan from the al-ʿUqbi tribe at the beginning of the twentieth century. The contested site now accommodates a few dozen people. The series of demolitions began in July 2011, when the state decided to evict the community of 300 who resettled in the village during the 1990s after being displaced in the 1950s. ʿAraqib became the symbol of Bedouin resistance, and its ongoing struggle has gained public attention in Israeli and the foreign media.[16]

The Bedouin return to the land has touched a raw nerve with the public, exercising one of the worst fears of the Jewish state: the Palestinian right of return. Hence, despite the Bedouins' Israeli citizenship and despite the fact that their lands are still under legal dispute, the state has been adamant about preventing a return to the historical tribal site.

Why has the state acted so harshly against the Bedouins in general and against residents of ʿAraqib in particular? Although the sources of the conflict are deep and complex, it has two major foundations. First, the dispute reflects the difficulties experienced by "modern" states and legal orders, especially in colonial settler societies, to fully and equitably include indigenous peoples and their reluctance to do so. Second, the tension between Israel and the Bedouin Arabs should be placed in the context of the ethno-national territorial conflict, which stands at the core of the Zionist-Palestinian struggle.[17] Related to the conflict is the inherent tension between Israel's claim to be a democracy and its self-definition as a Jewish state. This tension is especially evident in issues that lie at the core of the Zionist project, such as the Judaization of the land.

Thus the conflict between the indigenous Bedouins and the state extends beyond the case of ʿAraqib. It is most conspicuously manifested by the current classification of thirty-five Bedouin villages and localities as unrecognized and eleven other communities as only partly recognized. These localities accommodate more than 100,000 people, constituting almost half the current Negev Bedouin population. The other half resides in seven modern towns—state-planned towns built between the 1960s and the 1990s—into which mostly landless Bedouins were resettled in accordance with state planning policy.[18] Living conditions in the towns are better than those in the unrecognized

villages, with the provision of most (basic) civil services denied in the villages. Yet the towns have remained among the poorest in Israel and are replete with social and economic problems.[19] However, it is the DND—the lack of recognition of Bedouin land rights, traditional villages, and distinct cultural needs—that remains the central axis of the conflict between the Jewish state and its indigenous Bedouin Arab minority.

Until recently, the DND never faced serious academic or judicial challenge. In this book we present such a challenge by examining the DND's various components and by exposing the manner in which it has caused collective dispossession. Based on thorough research, we reexamine the DND's historical, geographic, and legal foundations. We demonstrate how those who apply the doctrine use sweeping generalizations and treat all Bedouin land claims uniformly, ignoring or manipulating historical evidence that supports Bedouin landownership and continuously overlooking developments in relevant legal and academic spheres during the last couple of decades.

I.4 THE DEAD NEGEV DOCTRINE IN A NUTSHELL

The Negev/Naqab region, a sparsely populated, semi-arid region covering about the southern half of Israel/Palestine, has seen the most conspicuous application of the *terra nullius* framing (see Map 1). The region was never officially designated as *terra nullius*, but the concept was introduced implicitly through policies that "emptied" the Negev, through the distortion of the Bedouin past and the subsequent denial of their customary law, property regime, right to return, land control, freedom of movement, and collective culture.

Most relevant to this book is the translation of the *terra nullius* concept into the Israeli land regime. A key move here was the classification of the entire Negev region (and of unsettled areas in other parts of the country) as "dead land" or *mawat*. The term derives from Muslim tradition and later appears in the 1858 Ottoman Land Code (OLC) and in British Mandate legislation. As described in great detail in what follows (and in Chapter 4), the Israeli legal authorities formulated what we term here the Dead Negev Doctrine (DND): a set of legal assertions, based on putative geographic and historical assumptions, under which virtually all land held, used, inherited, purchased, inhabited, grazed, or cultivated by Negev Bedouins is considered "dead," with its "rightful" owner being the Jewish state.[20]

The DND was forged during the state's attempt to complete a land title settlement (registration) process initiated by the British Mandate in 1928. The British aimed to systematically organize the various ownership traditions in Palestine based on cadastral surveys and clear land divisions, but by 1948 they had settled only about 20% of Palestine. Critically, the land registration project never reached the Negev, and therefore almost all its land remained unregistered. The only and significant exception was lands purchased by Jewish organizations and settlers from their previous Bedouin owners. Those lands amount to more than 100,000 *dunum*s and are registered in the Israeli land registration offices based on purchases from the previous Bedouin owners. As elaborated later in this book, the existence of such lands starkly illustrates major problems with the credibility of the DND.

The British authorities declared that Ottoman law would continue to apply in Palestine unless repealed or amended by the British Mandate government. Similarly, Israel has kept previous land legislation in force, unless repealed or amended by the Israeli government. As a result, Ottoman and British legislation continued to apply in Israel and became part of its legal system, as Israel claimed the maintenance of legal continuity. In the 1970s Israel applied the Mandate land registration process to the Negev. However, the state's legal approach modified many of the land settlement principles used by the British. For decades the state decided not to act on the Bedouin land registration claims and instead sought to settle these claims by offering minimal compensation to the claimants. After failing to resolve the vast majority of these claims, since 2004 the state has undertaken a central strategy of submitting "counterclaims" to all lands claimed by the Bedouins. To date, Israeli courts have fully supported the DND and have consistently ruled, without a single exception, that land traditionally owned, inhabited, cultivated, or grazed by the Bedouins should be classified as *mawat* and thus belongs to the state. The DND, which is still applied by the Israeli courts, is a most vivid expression of the ongoing effect of the *terra nullius* concept on contemporary Israel/Palestine in general and on its indigenous groups in particular.

Defining the DND is not a facile endeavor. Like *terra nullius*, "by definition, [it] covers its tracks."[21] The DND is constantly wavering between norms and facts, substance and procedure, law, history, and geography; these deceiving characteristics make it difficult to pin it down. The DND's inherent stealthi-

ness is an important channel by which its hegemonic power is forged. However, for clarity, as they are never so articulated, we distill and highlight eight core DND components:

1. Israel alleges legal continuity with and scrupulous application of Ottoman and British land laws, particularly those regulating *mawat* (dead) land. Israeli jurists erected impassable legal barriers, which effectively transform *mawat* into state land. Because previous regimes did not recognize Bedouin land rights, so the story goes, Israel did not dispossess the Bedouins but merely protected state property.
2. The Bedouins did not have an organized and functioning land system that allocated recognizable property rights.
3. The Ottoman, British, and Israeli regimes never recognized Bedouin legal autonomy or their traditional land rights.
4. The Bedouins did not register their land until the date decreed by the British Mewat Land Ordinance (April 16, 1921), anchoring the status of their land as *mawat*, unless they could prove possession and cultivation before the introduction of the 1858 OLC.
5. At least until 1921 the Bedouins did not cultivate the Negev land in any systematic manner.
6. At least until 1921 the Bedouins were nomads and did not have permanent settlements or localities.
7. The Bedouins are not an indigenous group; hence they are not entitled to indigenous rights recognized in international and national jurisdictions.
8. The legal burden to establish Bedouins' rights against these stipulations rests solely on the Bedouins. Unless they overcome what in reality are insurmountable procedural and evidentiary hurdles, the land is demarcated as *mawat*, and Bedouin land claimants are branded as trespassers, devoid of any right to their ancestral lands. Such methods foster the slippery quality of the DND.

These major claims constitute two basic, partly overlapping and mutually reinforcing planks: legal (components 1–4, 7, and 8) and historical-geographic (components 5 and 6).

As fully detailed in this book, the consequences of the DND have been pro-

found and severe. For about half the Bedouins, who remained on their ancestors' lands and refused to urbanize and relocate to the Bedouin towns planned by the state, the application of the DND means widespread criminalization as trespassers on the claimed lands inherited from their forefathers or purchased from other Bedouins. In recent years the state has intensified its effort to order, organize, and Judaize the region, resulting in a sharp rise in house demolitions and new pressures to urbanize.

1.5 APPROACH

We attempt to critically examine, for the first time, the legal history and legal geography of the Negev. We focus on empirical, judicial, and conceptual analyses of the main elements of the DND and on solutions to the conflict proposed by both state and indigenous bodies. We also engage seriously with the issue of Bedouin indigeneity, which is linked to the long history of the Bedouins in the region, and to their changing status under international and comparative law and norms.

Our main findings highlight the enduring presence of the Israeli variant of *terra nullius* as a policy framework in the Negev, which in itself is a recent flashpoint of the struggle over Israel/Palestine. The detailed analysis illuminates the main pillars and rationales of the DND as well as the inaccuracies, distortions, and contradictions of the policy. We thus aim to systematically unsettle, for the first time, the legal-geographic approach used by Israel toward the Negev and its indigenous population, or, in other words, *to critically test the hegemonic Dead Negev Doctrine*.

We also seek to provide a firm scholarly foundation for a better transformation of the legal, planning, and development approaches advanced by the Israeli state toward the region and its indigenous people. We show historically and comparatively how the *terra nullius* doctrine has been rescinded, annulled, and derided by international law and many states. We wish to contribute to overturning the harsh DND, arguing that such a move would benefit the Negev inhabitants, Jews and Arabs alike, and assist in the creation of a more just and sustainable regional society.

In the chapters that follow, we analyze and critique the DND by means of a systematic and careful study of the two planks on which it was constructed: geography and law. This investigation is followed by engagement

with the Bedouin indigenous status and articulation of an alternative politics of recognition. To accomplish these tasks, we use a variety of methods and approaches.

1. We carry out a novel and thorough analysis of the *historical geography of the Negev* for the last 200 years (which has been conspicuously underresearched) based on newly revealed Ottoman, British, and Israeli archival material; and construct a geography "from below" based on Bedouin documents, memoirs, and oral history. Simultaneously, we offer a fresh analysis of the late Ottoman and British Mandate land regimes through the particular perspective of the land dispute with the Bedouins.
2. We conduct a thorough *legal analysis* of Ottoman, British, and Israeli legislation, adjudication, and law enforcement pertaining to the Negev, focusing on Bedouin land, settlement, and cultural autonomy. This original analysis spans three ruling regimes and is based on new surveys of legal and archival sources in Jerusalem, Istanbul, Ankara, London, Amman, and Washington, DC, as well as private Bedouin archives.
3. We perform a detailed survey and analysis of new *developments in international law* pertaining to Bedouin rights as an indigenous group. We thereby contribute to a better understanding of Bedouin land status and simultaneously add new insights into the growing literature on indigenous peoples in general.
4. We carry out a *comparative review* of recent developments concerning indigenous land rights in common law and other jurisdictions.
5. We apply conceptual frameworks, derived from critical legal studies, legal geography, urban theories, and political geography, to the case of the Negev Bedouins, utilizing such concepts as settler colonial society, indigeneity, "gray space," and internal colonialism, which have been rarely used to analyze the case of the Bedouin Arabs.
6. We translate these critical analyses into proposals for transforming the denial embedded in the DND into recognition. In other words, philosophically, we seek to transform *terra nullius* into *transitional and distributive justice*. Thus in the latter parts of the book we outline possible avenues for future corrective legal and spatial practices, drawing on indigenous mobilization and the concepts of human rights and equality.

1.6 BOOK STRUCTURE AND MAIN FINDINGS

This book is divided into five parts. In the present part (Part I), we introduce the book's topics by outlining the conflict's legal and geographic origins. In Chapter 1 we review the existing literature and approaches to the study of Negev Bedouins and present several critical theoretical approaches that frame and inspire our book, including legal geography, (post)colonial studies, urban studies and planning, and indigenous identity and mobilization. Finally, we offer an overview of the DND.

In Part II we examine the legal frameworks governing Bedouin land possession since the late Ottoman era through the British Mandate period and up to the current Israeli period. We closely examine the Israeli construction of the DND and its attempt to reinterpret Ottoman and British legislation. Based on legal-historical research, we demonstrate that the state's claims of legal continuity from the Ottoman and Mandatory regimes that preceded Israel are unsupported. Likewise, we demonstrate that Israel's assertion that the Bedouins lacked land rights cannot be sustained.

In Part III we empirically and then critically examine the historical-geographic components of the DND. We demonstrate that, contrary to prevalent official descriptions, beginning in the Ottoman period, the Bedouins gradually transformed from seminomadic agropastoralists into settled agriculturalists who enjoyed extensive legal autonomy. During this period, the indigenous community ruled itself in most aspects of life, most notably by coding and institutionalizing a land and settlement system, which was accepted by both Ottoman and British rulers as well as by the new Zionist settlers and establishment. In this part we also show that the large tracts of land in the northern Negev were not *mawat*. They had been owned, possessed, inhabited, and cultivated by Bedouin Arabs for generations—Bedouin Arabs who accumulated significant property rights under both Ottoman and British rule.

In Part IV we explore the changing legal geography of indigeneity and its effects on Negev Bedouins. After arguing that the Bedouins are an indigenous people, we review international and comparative law pertaining to land conflicts between indigenous groups and settler and nation-states. We show that in recent decades the organization and mobilization of indigenous peoples around the world have resulted in a marked change, whereby states and international bodies increasingly recognize indigenous rights. Our analysis shows that the

2007 UN Declaration on the Rights of Indigenous Peoples has increasingly (though not fully) assumed the status of binding customary international law. The changing international legal environment places added pressure on Israel to reform its DND in particular and policies toward the Bedouins in general.

In Part V we examine the evolution of state proposals and strategies in resolving the dispute. We first review and analyze several generations of Israeli development plans, such as coerced urbanization, modernization, law enforcement, and nationalization of land. Most important, we outline the main recommendations and proposed solutions for the Bedouin land issue advanced by the recent Goldberg and Prawer governmental commissions appointed for this purpose and the heated controversy surrounding them. We also systematically analyze the state's land use and development plans for the region, noting that despite the plans' evolution over time, the Bedouins, who form about a third of the population of the Beersheba metropolis, are presently absent from most plans, thus causing profound hardship and distress. We then present the indigenous voices and visions for the region's future. We outline an alternative plan devised by the representative organization of the Negev Bedouins, the Regional Council of the Unrecognized Villages, along with other NGOs and experts, as a promising strategy to resolve a major part of the conflict.

In the Conclusion we revisit the *al-'Uqbi* case and deal with the possible transformation of the DND into *transitional justice*. We further demonstrate that Israeli law does have sufficient tools to overwrite or bypass the debilitating DND. A new enlightened and savvy political approach would enable the Bedouins to attain property rights to their ancestors' lands and introduce criteria of distributive justice for the future management of land and development needs.

Hence we conclude that it is possible and necessary to replace the DND with a decolonizing approach based on principles of recognition, equality, and transitional justice. The process of reconciliation between the Bedouin Arabs and the state will bring about a more egalitarian and fair allocation of space and will benefit everyone living in the Negev—Bedouins, Jews, and others—as well as the entire Jewish and Palestinian nations' conflict.

1 THE LEGAL GEOGRAPHY OF INDIGENOUS BEDOUIN DISPOSSESSION

In this chapter we establish the scholarly frameworks for the empirical investigations of the chapters that follow as well as offer an overview and explanation of the Dead Negev Doctrine (DND). To these ends, in the following pages we review and critique the state-of-the-art research on Bedouin Arabs; define key concepts such as ethnocracy, settler society, "gray space," and hegemony; discuss the emergence and nature of legal geography; and comparatively analyze the dispossession of indigenous peoples and the evolution and nature of *terra nullius* and the DND as key legal-geographic concepts.

1.1 CURRENT PARADIGMS IN STUDYING THE NEGEV BEDOUINS

As we suggest in the following sections, critical legal geography of settler colonial and postcolonial societies is an appropriate prism through which to analyze the conflict between Israel and the Bedouins. The reason is plain to see: The main geographic and legal dynamic in the Negev since 1948 has been the entry, conquest, and settlement of Jewish groups and the parallel eviction and marginalization of the indigenous Bedouin Arabs. However, despite this obvious process, which frames relations between the Bedouins and the Israeli state, almost all Israeli research on the Bedouins ignores this perspective. The anthropological, geographic, and historical literature on Bedouin society is extensive and rich, but until recently, most studies on the subject deal with the Bedouins as a postnomadic minority undergoing modernization and urbanization in a modern nation-state.[1]

This literature focuses on modernization and urbanization and their effects on the family and on the Bedouins' economic and social structures.[2] Some of the studies also deal with such key issues as housing, economics, and, most important for our purposes, land.[3]

In most studies to date, the expanding control of the (Jewish and the Judaizing) state in the Negev functions as an uncontested point of departure. The Bedouins are presented as a landless group in a postnomadic process. Most of these studies unproblematically accept the state's hegemonic narrative and the legal DND.

In recent years a more critical viewpoint has developed, one that analyzes the Bedouins as a peripheral minority in the framework of an ethnic state[4] with closer reference to the context of the Jewish-Palestinian conflict.[5] However, researchers have paid only scant attention to the question of land, particularly to its legal aspects. While several nonlegal scholars have of late dealt with the quarrel over land between the state and the Bedouins and despite their innovative work, they have not sufficiently analyzed the legal context of the land conflict.[6]

Furthermore, although there has been ample legal writing on the Arab-Palestinian minority in Israel and its struggle with the state over land[7] only a few legal scholars have paid significant attention to the land conflict in the Negev. A few reports have been written by state bodies and officials and by organizations seeking social change, but there have been few legal academic publications on the subject that attempt an in-depth study from the Ottoman period.[8]

Nevertheless, a few points of progress on the subject have been made, and they are the focus of our research. In the 1980s geographer Ghazi Falah published a pioneering book in Arabic, *The Forgotten Palestinians*, which paid much attention to the land dispute. Falah also published several important articles in English.[9] Then, in the mid-1990s, Ronen Shamir published a path-breaking critical article in which he offered an important theoretical perspective on the land conflict and analyzed a few prominent court judgments.[10] Throughout the following decade, Issi Rosen-Zvi provided an important perspective on the legal and territorial conflict between the state and the Bedouins. In the early 2000s, Oren Yiftachel, Haim Yacobi, and Ismael Abu-Saad presented a critical analysis of the land dispute as part of an internal colonial system of spatial regulation.[11] During the same period, geographer Avinoam Meir began developing a critical ethnographic perspective on the Ottoman

Land Code and its application in the Negev, and Alexandre (Sandy) Kedar offered a preliminary examination of the Bedouin situation from an international law perspective, including the rights of indigenous peoples.[12] The volume *Indigenous (In)Justice*, which two of us co-edited, brought the Negev case within an international and comparative context, including a chapter dedicated to the land disputes and its legal dimensions.[13] A recent edited volume led by Mansour Nasasra has also taken on the colonial framework in an attempt to resituate the Bedouin case within that context.[14]

Some additional recent works examine the situation of the Negev Bedouins from a more critical perspective.[15] In addition, several works have come from scholars who deny Bedouin land rights and indigeneity and are affiliated in one way or another with the state and its legal position.[16] However, most of these studies have not attempted to analyze systematically the land regime in the region, with its enormous legal, social, and territorial implications, from an interdisciplinary perspective, which combines history, geography, law, and settler colonial studies to analyze the conflict.

1.2 THE NEED FOR A NEW APPROACH

Given the deficiencies outlined in Section 1.1, we suggest that a new approach is needed that highlights the ethnocratic Israeli-Jewish internal colonization of the Negev as a foundational process in shaping Bedouin lives and Jewish-Arab relations, in addition to other common modern-state policies of ordering space and population. Hence we advocate the settler colonial approach as a necessary addition to, or even as a framework for, previous studies. Given the status of the Bedouins as citizens, the *internal settler colonial* paradigm appears most appropriate.

As we argue in Section 1.3, credible research should no longer sidestep the issue of the Israeli ethnocratic regime and continue to treat the regime as unproblematically "Jewish and democratic." Analysts and policy makers should use the most comprehensive and robust analytical frameworks that can best interpret community dynamics. Recent works have begun to adopt such a critical approach, but much remains to be done, especially in addressing the legal geography of the land dispute in the Negev.[17]

This does not mean, of course, that studies taken from other angles are of lesser value; rather, such studies would benefit from dealing seriously with the

internal colonial dynamic. Further, the credibility of studies using the colonial angle will be tested by their engagement with other scholarly perspectives that highlight the complexity of societal processes beyond the colonizing-indigenous binarism.

Scholarly accuracy, however, is not the only aspect here; adopting a settler colonial framework is also an act of mobilization that unveils vitally important forces in a critical and possibly liberating manner. The use of the colonial angle also exposes the previous scholarly "politics of depoliticization," because it shows how overlooking the colonial setting conceals state and ethnic oppressions. Hence our call is for a scholarship that is not only accurate but also amends the distortions of the power-knowledge nexus of previous studies—that is, it opens up the scholarly discussions to approaches removed from state power, agenda, or vocabulary.

Our perspective requires some necessary definitions. Colonialism is, of course, a much discussed and debated term. Space does not allow us to enter these debates here.[18] For this book, suffice it to define colonialism as a systematic societal project of an external group seizing, appropriating, settling, and expanding control over contested regions, lands, people, and resources. In colonialist relations the external group is placed "above" the land's previous inhabitants. Colonialism is not limited to the "blue water" European form prevalent during "the colonial era." Throughout human history, other colonial systems have developed, most notably territorially contiguous systems of expansion and appropriation over neighboring groups and regions.

As already noted, colonialism can be both *external* (and hence often imperial), expanding beyond the boundaries of sovereignty, and *internal*, affecting internal frontier areas. The internal variety is particularly important for this book, because settler colonial projects continued to seek enhancement of their project, even after statehood.[19] It implies the adoption of land and planning policies that develop but also discriminate, exploit, and displace minority populations in frontier areas within the sovereign state. As developed in the works of Michael Hechter, Elia Zureik, and David Walls,[20] the relationship between settlers and an area's native population is similar to a colonial relationship between nations. The formal citizenship of the native community, if such citizenship exists, is emptied of much of its content through a series of discriminatory laws and regulations. Nadim Rouhana and Areej Sabbagh-Khoury referred to such citizenship and relations with the state as settler-colonial citizenship.[21]

The internal colony produces resources and power for those ethnically or economically close to the government and generally alienates the native population, which is different in its ethnic, religious, or racial identity.

With regard to studying the Bedouins, we suggest that important aspects of Bedouin life—modernization, urbanization, patriarchy, education, tribalism, human rights, gender, and globalization—cannot be separated from this meta-colonial point of reference. Consequently, we propose several main scholarly perspectives through which the Bedouins should be studied: settler society, indigeneity, legal geography, political economy, critical planning theory, and "gray space." This term denotes the existence of growing spheres of society, such as the Bedouins, in a long-term setting between full membership, safety, and legality, and eviction, destruction, or death.[22] We elaborate on each of these approaches later in the book. This is not an exhaustive list by any means but rather a suggestion for research areas that can tease out the profound impact of colonized subordination. Importantly, these directions are not entirely new; previous studies have followed Zureik's pioneering study and placed Zionism within the colonial framework.[23] Several studies have even analyzed practices of internal colonialism toward Israel's Palestinian citizens.[24] However, apart from a few exceptions, few scholars have used these colonial perspectives to explore and explain the plight of the Bedouins in the Negev. In the next section we examine the concept of ethnocratic settler societies and then discuss the legal geography of indigenous displacement.

1.3 ETHNOCRATIC SETTLER SOCIETIES

Oren Yiftachel developed the concept of ethnocratic states, according to which ethnocracy is a distinct regime that facilitates the expansion of a dominant ethnic nation in a multiethnic territory while maintaining a façade of formal democracy.[25] In such regimes a constant tension is conspicuous between two opposing principles of political organization: the *ethnos* (community of origin) and the *demos* (residents of a given territory). In the heyday of ethnocracies the ethnos enjoys clear legal and institutional prominence. Ethnicity rather than citizenship constitutes the main criterion for distributing power and resources.

The regime subtype "settling ethnocracy" stresses the ethnic settlement project as a constitutive element of the regime and its metaproject of seizing and controlling a contested territory. In the formative periods of settler soci-

eties, such as Australia, Northern Ireland, Canada, New Zealand, the United States, and most South American societies, the state is usually deeply involved in a strategy of ethnic migration and settlement, which aims to alter the territory's geographic and ethnic structure. The founding or "charter group" of settlers usually refrains from mixing with indigenous populations and "inferior" groups, such as later immigrants, ex-slaves, or peripheral minorities. These societies are based on deeply ingrained patterns of segregation, which frequently give rise to the formation of four main ethnoclasses: founders, immigrants, indigenous peoples, and "foreigners."

1. The *founders* (also called the *charter group*) achieve dominant status as a result of the high military, cultural, political, and economic standing established during the state's formative years. Furthermore, intergenerational mechanisms, such as the land regime and rules of inheritance and transfer of property rights over time, reproduce the founders' privileged position in different societal realms.
2. The *immigrants* come from a different ethnic background from that of the founders (and are often split into a number of subgroups based on ethnic background and race). Formally, the immigrants are part of the new nation being built in the settler society. However, although they undergo a prolonged process of upward assimilation into the founding group, they often linger in lower economic, geographic, and political positions.
3. *Indigenous peoples* and *ethno-national minorities* are the two major marginalized groups. Indigenous peoples include what are also called first nations and are characterized by long-term residence and autonomous self-rule on the land in question, which leads to contemporary claims for land, resources, and cultural autonomy. Given the structural conflict with the powerful settling group, these groups typically suffer marginalization and isolation. Such groups include the Native Americans and Inuit in North America, the Maya and Awas Tingni in Latin America, the Aborigines in Australia, the Maoris in New Zealand, the Sami in Scandinavia, the San and Massai in Africa, and the Jumma and Orang Asli in Asia, as well as the Bedouins, as part of the national native Palestinian minority in Israel.[26] Under *ethno-national minorities* we include other "alien" groups who are not fully included in the settling nation, such as the Chicanos in the American Southwest in the nineteenth-century[27] or the Tamils in Sri Lanka.[28]

4. *Foreigners* are typically *noncitizens* who arrived in ethnocratic settler societies in the last few decades as a result of economic globalization, labor migration, and asylum seeking. Typically, the ethnocratic state would present these groups with difficult obstacles for receiving residency or citizenship status, condemning them to the temporary margins of society. The main difference between them and indigenous groups is spatial and cultural: Foreigners make no collective land or autonomy claims, and their residence is almost entirely limited to urban regions. Foreigners are distinct from the immigrant group by their temporary status and resulting lack of civil and political rights.

Even though these are socially constructed categories and while some movement exists between them, these four groupings persist in settler societies for long periods. How does such a stratified society operate without a collapse of the unequal political order? Antonio Gramsci's writing gives us a clue through the concept of hegemony, which serves as an important theoretical foundation for understanding ethnocratic societies. In his *Prison Notebooks*, Gramsci showed how Italian elites constructed hegemonic systems of production and knowledge in which certain "truths" enjoyed complete precedence. Such hegemony marginalized and excluded ideas and movements that might have challenged their dominance.[29] The power of this "hegemonic moment" is grounded in representing nationalist and capitalist agendas, which chiefly benefit the elites, as working for the benefit of the entire nation. Likewise, because their privileged position is often premised on the continued functioning of discriminatory principles and practices, the elites of the ethnocratic states generally attempt to prevent, silence, or deflect open debate about the nature of the ethnocratic system. As we show in Section 4.4, such processes take place in Israel as well.

The project of territorial expansion and domination is presented as something "taken for granted" or as an ultimate "truth" upon which society is built. This "truth," backed up by the material and political clout of the elites, regularly infiltrates various realms of society, hence reproducing its dominance as a main frame of reference. Such realms include the language of the media, subjects for academic research, political speeches, literary works, popular music, and legal discourses and institutions. As outlined in what follows, this is appropriate for Israel, which has constructed a hegemonic discourse regard-

ing the "illegal" and "trespasser" status of the indigenous Bedouins, who are generally perceived as a "danger" to the state and its Judaization project. The blame in this type of discourse is placed on the shoulders of the indigenous victims, who refuse to leave their ancestors' lands.

However, it is important to stress that, like most political structures, especially those based on exclusion, control, and inequality, the ethnocratic system is unstable in the long run. Although powerful, the rule of the settling society also contains genuine internal tensions between its professed commitments to the ethnos and to the demos. The ethnocratic state strives to restrict its reliance on tangible force or unconcealed intimidation. Instead, it aspires to reinforce the hegemony of the founders and to convince at least the founders themselves and later groups of immigrants of the legitimacy of its power. Thus, even though deep structures and "truths" support a discriminatory regime, ethnocratic states contain several democratic features, such as free elections, some separation of powers, independent media, and a partly autonomous judiciary professing a commitment to the rule of law. Thus tensions and contradictions resulting from the distortions of the hegemonic moment have the potential to create counterhegemonic challenges even within the existing structures. Such tense settings, in which spatial conflict is paramount, require a more careful look at the region's legal geography.

1.4 LEGAL GEOGRAPHY: CRITICAL PLANNING THEORIES AND GRAY SPACES

Until about twenty-five years ago, legal and geography scholars rarely conversed.[30] However, since the late 1980s, the newly formed field of *legal geography* has deepened immensely, simultaneously broadening its topical scope.[31]

Scholars interested in legal geography have begun to investigate the ways in which law—as a system of institutions, procedures, texts, and practice—and space have been mutually constitutive of each other in the construction of particular spatial-legal orders. They are looking into the discursive and material dimensions of law and space, how state and social actors use them, and how they materialize into a force that shapes social and political life.[32] Furthermore, this new inter- and multidisciplinary line of inquiry increasingly focuses on the study of the complex ways in which the law and the spatial sphere orient each other, in close affinity to frameworks of identity and political and eco-

nomic power.[33] As a result, legal geographers have gradually moved beyond the binary treatment of law and space as two distinctive, autonomous realms in favor of an understanding that they are "conjoined and co-constituted."[34]

Critical legal geography examines how spatial-legal alignments contribute to the legitimation and persistence of hierarchical social orders. Critical legal geography draws attention to neglected and hidden areas and boundaries and to those taken for granted, within which hierarchical social orders are forged. These areas contribute to the creation of a legal geography of power and powerlessness, of zones of security and those of insecurity, of legal and illegal presence, of emplacement and displacement.[35]

The institution of property in general and of land in particular is a major field in which power, space, law, and capital intertwine; therefore they constitute an important focal point for research studies that combine law and geography.[36] As David Delaney so aptly describes:

> Displacement is [often] effected through the force of reason: the careful parsing of propositions, . . . the canons of statutory interpretation, . . . [and] the submission before grammatical imperatives, which can result, no less than the application of steel-toed boots to a door, in the scattering of people. . . . The homeless, the refugees, the deportable aliens, . . . the removed indigenous peoples, and the vagrants, like the rest of us, inhabit a material world that is drenched with the signifiers of sovereignty and property, nationhood, and ownership . . . that make our hyper-territorialized life-worlds meaningful in terms of power.[37]

Thus we are inspired by the claims of critical legal geographers that law is never a neutral organizing envelope, simply articulating impartially the rules of the game, as commonly assumed by concepts such as the rule of law. Quite the contrary: Legal procedures are often shaped and imbued within power relations and should thus be analyzed as part of the ceaseless struggles over resources, identities, and influence.

This critical perspective is also highly applicable to planning, because "the plan," which is a statutory document framed within a legal framework advanced by formal institutions, is often portrayed as a neutral professional guideline for development. Here our approach is inspired by *critical planning theories*, which emerged through the engagement of planning and critical philosophies. These theories question the nature of planning and planners and their social role in shaping space and society. They expose the dark side of planning used by pow-

erful groups and state administrations to marginalize, oppress, and discriminate against weakened groups.[38] Urban and regional planning under such circumstances can no longer live up to its somewhat naïve self-portrayal as a positive and instrumentalist societal force but must be regarded as double-edged, with a wide spectrum between the two edges. That is, with the same tools of land and development policies, planning can advance and strengthen communities, equality, and social justice, or it can cause the opposite effect: deepen elite control, oppression, minority fragmentation, and social conflict.[39]

As becomes apparent in Chapter 9, the plans for the Negev were never neutral or purely professional but rather were highly important tools to further the agendas of the settler state in relation to the indigenous group. Because the vast majority of Bedouin lands are also claimed by the state, residents of the villages are unable to receive building permits or even to apply to get such permits. This is how more than 60,000 houses and structures have been deemed illegal by the authorities.[40] As a result, virtually all the Bedouins living on their ancestors' land in the Negev have been forced and condemned into a "gray space"—a zone of instability and threat located between the lightness of full membership, approval, and security and the darkness of exclusion, denial, and eviction.

Gray spacing is a sociopolitical policy approach that is widely exercised by state authorities particularly but not only in the Global South-East. This approach keeps large portions of the population in a state of "permanent temporariness," during which their spatial, economic, and political rights are insecure and unequal to mainstream groups in society. Such populations are typically placed for decades in a state of criminality ("invaders," "trespassers," "illegal traders," etc.) and thus typically remain impoverished and marginalized. Large-scale and long-term gray spacing has been described as spawning a process of "creeping apartheid," in which rights and capabilities are separate and unequal, although apartheid is not declared as a formal regime.

Nevertheless, despite the power asymmetry, it is important to emphasize the agency of all social actors in imagining, understanding, performing, and enacting law and space and their contribution to the materialization of the particular spatial and legal order. Hence indigenous peoples' displacement and their ongoing struggle for re-emplacement are a fertile ground for critically examining the ways in which law, geography, and power co-constitute each other, and they are highly relevant to our analysis of the land dispute between Israel and the indigenous Negev Bedouins.

1.5 THE DISPLACEMENT OF INDIGENOUS PEOPLES

Indigenous peoples share common problems resulting from widespread dispossession and marginalization. A recent report by the International Law Association noted:

> First, the oppressors took away the land that indigenous peoples, in line with their cosmovision, had freely shared. Second, the subjugator's way of life was imposed. Third, political autonomy was drastically curtailed. Fourth, indigenous peoples have often been relegated to a status of extreme poverty, disease, and despair.[41]

These actions often took place by smothering a "patina of legality on the armed confiscation of the assets of Indigenous peoples."[42] As part of this process, the emerging international law during previous centuries commonly served as justification for colonization and conquest.[43]

Although scholarship on the dispossession of indigenous peoples abounds, our purpose here is merely to place the Bedouin case in its larger context. As we show in Part IV, since World War II, international and national law and practice have been significantly transformed, but the dark heritage of colonialism still strongly affects contemporary norms regarding indigenous land rights.[44] Furthermore, Israel's approach to Bedouin land claims resembles that of early attitudes of settler societies toward indigenous land, particularly the notion that the land inhabited by indigenous peoples is "empty," epitomized by the *terra nullius* doctrine. In this section we highlight those international and comparative *historical* cases that resonate with Negev Bedouins' dispossession. In Part IV we return to *contemporary* international and comparative cases to look for lessons and possible solutions to the current dispute.

Of particular interest are territories that, like modern-day Israel, were under British rule and were influenced by British law.[45] Until the mid-twentieth century the British Empire ruled much of the world, including Palestine. Legal expertise circulated among common law countries and reinforced the development of doctrines that legitimated the denial or the weakening of indigenous land rights in the United States, Canada, New Zealand, Australia, India, and many former British possessions.[46] Within this context members of the "common law epistemic community" corresponded with each other while legal actors were moving across regions, carrying with them legal structures, cultures, and doctrines.[47] They implemented and adapted these to their new

locations, leaving traces, traditions, and lines of communication that continued to influence former possessions long after the British left.[48]

The dominant discourses, principles, and body of law developed for and in settler societies and applied to indigenous land have been persistently discriminatory.[49] As the scholarship of seventeenth- and eighteenth-century thinkers demonstrates, much of the development of liberalism in general and modern property and international law theories in particular took place with an eye on the European colonization project and still bears its imprint. John Locke, for instance, was deeply involved in drafting the constitution of colonial Carolina, served as secretary to the Council of Trade and Plantations, was Secretary to the Lords Proprietor of Carolina, and was a member of the Board of Trade. His influential "mixed labor" justification of private property conditions the acquisition of property rights on the removal of resources from nature and combining them with one's labor—a concept that suits European settlers but is in tension with the relationships with nature that characterize many indigenous peoples.[50]

In *The Law of Nations; or the Principles of Natural Law* (1758), Emmerich de Vatell argued that "the discovery of the new world" gave rise to the question of

> whether a nation may lawfully take possession of some part of a vast country, in which there are none but erratic nations whose scanty population is incapable of occupying the whole? . . . Those nations cannot exclusively appropriate to themselves more land than they have occasion for, or more than they are able to settle and cultivate. Their unsettled habitation in those immense regions cannot be accounted a true and legal possession; and the people of Europe, too closely pent up at home, finding land of which the savages stood in no particular need, and of which they made no actual and constant use, were lawfully entitled to take possession of it, and settle it with colonies.[51]

As these and additional statements demonstrate, several major, often overlapping and occasionally inconsistent methods aided colonizers in justifying the seizure of indigenous land. These included inter alia *terra nullius*, occupation, improvement, conquest, and relinquishment of land by treaty or purchase.[52]

Because of the affinity of the DND with *terra nullius*, we focus mainly on this concept. But before doing so, we briefly address the doctrine of conquest, which also is relevant to the analysis of the situation of the Negev Bedouins.

1.5.1 Conquest

Although dispossessing justifications were not clearly demarcated and separated and although often several rationales were used in combination, some scholars stress the importance of conquest as a major legal justification for taking indigenous land. This is relevant to our case, because in the Israeli context, in which the state was established in the midst of a war, its shadow can be occasionally detected as a partial justification for Bedouin dispossession.[53] Conquest connotes rights acquired by winning "just" wars against indigenous peoples, yet it bears further meanings.[54] As Joseph Singer recently argued:

> When Europeans first came here, America was not an empty land. The colonial powers acquired the land from the native inhabitants by conquest. Sometimes they simply occupied native lands; sometimes they entered treaties to force Indian nations to sell their land; and sometimes they engaged in conquest by legislation, simply passing a statute transferring Indian title to the colonial power.[55]

Steven Paul McSloy points out similarly that conquest took place as an ongoing process in which military power served as only one component: "The real conquest was on paper, on maps and in laws." These documents showed that Native Americans were "'conquered' merely by being 'discovered.'"[56]

In *Johnson v. M'Intosh* (1823), which is considered one of the earliest and most influential expositions of the conquest doctrine, U.S. Supreme Court chief justice John Marshall revealed in an exceptionally candid yet ambivalent language how settlers' courts deferred to the conqueror and simultaneously institutionalized and legitimized indigenous dispossession.[57] In the following passage from the decision, we find combined traces of conquest, discovery, *terra nullius*, and improvement. According to Marshall:

> *Conquest gives a title which the Courts of the Conqueror cannot deny*. . . . The British government . . . whose rights have passed to the United States, asserted title to all the lands occupied by Indians. . . . *These claims have been maintained and established . . . by the sword. It is not for the courts of this country to question the validity of this title*. . . .
>
> The tribes of Indians inhabiting this country were fierce and *savages*, whose occupation was war, and whose *subsistence was drawn chiefly from the forest*. To leave them in possession to their country was to leave the country a *wilderness*. . . .

> Frequent and bloody wars . . . *unavoidably ensued*. . . . The soil . . . being no longer occupied by its ancient habitants, was parcelled out according to the will of the sovereign power.[58]

It is time to turn now to the key and commonly used concept of *terra nullius*, which still echoes in the struggle over Bedouin land claims in the Negev.

1.5.2 *Terra Nullius*

As noted, *terra nullius* is a legal-geographic doctrine that is used to justify and legalize European seizure of indigenous territories across various world regions. It "is not a single idea, but rather a sprawling collection of assumptions, attitudes, aspirations and antipathies."[59] *Terra nullius* and the related terms *res nullius* (object belonging to no one) and *territorium nullius* (territory belonging to no one) were used to denote several intertwined and sometimes contradictory justifications for colonial dispossession of indigenous land, territory, and sovereignty. Furthermore, a heated debate is taking place—especially, though not exclusively, in post-*Mabo* Australia—about the very existence, beginning, and scope of the doctrine and the term. It is clear, however, that "*terra nullius* was put into practice for many years before it received formal expression as legal doctrine."[60] This should be of no surprise, because the Aborigines lacked legal standing to challenge it.[61]

Under the standard representation, *terra nullius* applied to lands not possessed by any person or nation or, alternatively, occupied by non-Europeans and used in ways not recognized by European legal systems. In territories occupied by indigenous peoples considered by their colonizers to stand too low on the development scale to have the capacity to own the land, such as in Australia, the land was considered empty, waste, "legally unoccupied until the arrival of a colonial presence"[62] and thereby open for the taking. Consequently, many natives have become trespassers on their own land.[63] Karin Mickelson stresses that unlike other doctrines justifying colonial acquisition, *terra nullius* served as a means for acquiring an *original* and not a *derivative* title. "This required that the area . . . had been *terra nullius*: previously unoccupied, and thus open to lawful appropriation." Thus, similar to the DND, *terra nullius* "had both a descriptive and a normative aspect."[64]

The term *terra nullius* rose to prominence because of its invocation—in order to repudiate it—in two major modern legal decisions. In the Western

Sahara case (1975), the UN asked the International Court of Justice for an advisory opinion on whether "Western Sahara . . . [was] at the time of colonization by Spain, a territory belonging to no one (*terra nullius*)?" The Court answered negatively, because land accommodating "tribes or peoples having a social and political organization were not regarded as *terra nullius*."[65]

In *Mabo v. Queensland (No. 2)* (1992), the Australian Supreme Court adopted the view (most notably expounded in Australia by Henry Reynolds in his 1987 *Law of the Land*) that an "enlarged notion of terra nullius" justified European acquisition of inhabited territories such as Australia.[66] The "theory that the indigenous inhabitants of a 'settled' [by Europeans] colony had no proprietary interest in the land" was justified because they were conceived of as too "low in the scale of social organization," and therefore "Europeans had a right to bring lands into production if they were left uncultivated." Therefore both indigenous peoples "and their occupancy were ignored in considering the title to land. . . . The Crown's sovereignty . . . under the enlarged notion of *terra nullius* was equated with Crown ownership of the lands."[67]

The scholarship of Henry Reynolds—and of a growing group of Australian critical scholars on the history of colonization that emerged during the 1980s—played a central part in preparing the intellectual ground for the *Mabo* decision and, together with that decision, played an important role in triggering the Australian "history wars."[68] Following *Mabo*, a heated debate took place about the chronology, scope, and meaning of the *terra nullius* doctrine and its application to dispossess Aborigines. Several conservative scholars, including David Ritter, Bain Attwood, Merete Borch, Michael Connor, and Keith Windschuttle, challenged claims advanced by historians such as Henry Reynolds and argued that they had "invented" *terra nullius* during the 1970s. One of these scholars' central arguments is that the term *terra nullius* is absent from the eighteenth- and nineteenth-century legal record.[69]

Notwithstanding the controversy, when one examines the issue closely, it appears that the disagreement regarding historical facts is narrower than usually perceived.[70] The claim that the precise expression *terra nullius* is missing from early legal materials and appears only in the twentieth century is not fully accurate. However, scholars such as Andrew Fitzmaurice, Stuart Banner, Lauren Benton, and Benjamin Straumann demonstrate convincingly that its regular application began only in the twentieth century. These and additional scholars also persuasively demonstrate that this "modern" term denotes a con-

cept or a wide understanding that played a key role in colonial dispossession of indigenous peoples under the justification that the land was "empty."[71]

Although earlier statements on Australia as *terra nullius* can be found, the regular application of the term began only in 1909, in conjunction with the debate concerning the polar regions.[72] Notwithstanding the absence of the term itself, the French, Dutch, and English, from the seventeenth century on,

> represented what would appear to any neutral observer as conquests—that is, the taking of something that belongs to somebody else—to be something . . . that belonged to nobody. . . . They called this the "occupation" of territory and they distinguished it from conquest. It is hard to legitimize taking things that belong to other people, but much easier to justify taking things that belong to nobody.[73]

For Fitzmaurice, then, *terra nullius* was used as a "shorthand for occupation, and sometimes even for conquest."[74]

Lorenzo Veracini, another interlocutor in the debate, argues that *terra nullius* is not found in eighteenth- and nineteenth-century legal sources, not because of its absence but, on the contrary, because of its hegemonic presence. Aboriginal plaintiffs could not challenge *terra nullius* in court and claim that they owned their land precisely because of the application of "a cluster of versions of terra nullius," which admittedly operated without mentioning the term *terra nullius* as such. In sum:

> *Terra nullius* was not tested because its legality was not in doubt . . . in its operative logic and by definition *terra nullius* covers its tracks. . . . [It] successfully ruled native title and itself out of the record. . . . *Terra nullius* has the remarkable characteristic of denying itself ex post facto by its very being operative.[75]

Stuart Banner notes that a long tradition associates property rights with cultivation. The dominant position professes that, if land is sparsely populated, its inhabitants do not own it. Thus the British and the Americans treated some places, such as Australia, British Columbia, and California, as "*terra nullius*—a land owned by no one, and therefore available for the taking,"[76] whereas they possessed other places, such as New Zealand, Fiji, Tonga, Alaska, and Hawaii, differently.[77]

Thus *terra nullius* has been used as shorthand for an array of legal and other mechanisms that justify the denial of indigenous land rights in areas they have

inhabited for a long period. The debate highlights a key point for this book: The exact terms used in various centuries to dispossess indigenous peoples may have varied, but the concept of *terra nullius* has prevailed for long periods, defining areas settled for centuries by indigenous peoples as not given to property or sovereignty rights. Such an approach continues to be used in Israel's seizure of Bedouin land in the Negev.

Like *terra nullius*, the DND pretends that the Bedouins never acquired landownership, because they were nomadic during the relevant period and did not engage in agriculture. Hence, the DND claims, the land was empty, deserted, or dead. Similar to *terra nullius*, the DND encompasses both descriptive and normative aspects[78] and denies indigenous Bedouin land rights while simultaneously denying this very denial. This has recently prompted an academic confrontation over the existence and scope of the DND, to be detailed in Section 4.4.

1.6 *TERRA NULLIUS*, ETHNOCRATIC SETTLER STATES, AND THE LEGAL GEOGRAPHY OF INDIGENOUS PEOPLES' DISPLACEMENT

Whether using conquest, discovery, treaties, or private transactions, "the remaking of property relations in colonial contexts clearly entails powerful (and ongoing) processes of displacement, whereby indigenous peoples are wrenched from their local life-worlds."[79] Simultaneously colonial dispossession entails ongoing and sustained repression, denial, and forgetting.[80] By blocking out threatening memories, the new property regime confers novel meanings to space.[81] By freezing this "initial" spatial (re)arrangement, the newly established property system facilitated, over the course of generations, the perpetuation of the novel power structure and property relations. Furthermore, the courts of the settler societies are "'white man's courts' . . . judicial institutions established by the dominant settler society, staffed almost entirely by non-Aboriginal judges, interpreting and applying the laws of the dominant society."[82]

This turn of events also highlights powerful "nomospheric" processes, to use Delaney's term, in which the legal and the spatial, both as material and discursive, are intertwined and mutually constitutive. The introduction and production of Western property regimes involves a series of legal and spatial cuts. It is a process of social and spatial pulverization, often violent, in which dis-

tinct units are (re)defined, demarcated, and detached.[83] Maps, cadastral grids, blocks, and parcels as well as "keep out" signposts, barbed-wire fences, and planted trees carve distinctive and defined properties out of indigenous space. These instruments deny previous land relations and legitimate current ones.[84] Land survey and registration play a key role in such displacement processes. They "served as a form of organized forgetting . . . a conceptual emptying of space. . . . A native space . . . could thus be conceptually remapped as vacant land."[85] In this way, seizure and reallocation of indigenous lands are converted into self-evident spatiolegal arrangements, which approve, reinforce, and help to forget the radical nomospheric transformation that occurred alongside the establishment of these settler societies.

As Seth Gordon puts it, "[Indigenous] peoples felt the effects of the . . . Europeans who came . . . equipped with the most effective of weapons—legal doctrines that would justify the taking of native lands as well as institutionalize political, cultural, economic, and spiritual hegemony."[86] Indeed, often settlers' legal systems attribute "an aura of necessity and naturalness"[87] to the new land system, maintaining the new state of affairs and preventing any further apportionment of land. An arsenal of formalistic legal tools plays a meaningful role in this project.[88] Property doctrines "were routinely interpreted in a false manner" to justify granting land rights to the Crown or to settlers.[89] Legal procedure and obstacles—such as time limits and questions of jurisdiction and standing (including statutes of limitations, evidentiary rules, and hindrances) and the misrepresentation of precedents and manipulation of legal categories—facilitated the dispossession of indigenous peoples while simultaneously denying this dispossession.[90] Such policies were sometimes combined with partial recognition of indigenous land rights, at least at the formal level. For instance, the relations between the Maori and non-Maori populations were formalized in 1840 with the Treaty of Waitangi, which, though recognizing Maori land rights, afforded the British Crown exclusive rights to purchase lands from them.[91]

Furthermore, promises and treaties were often breached. As the title of a famous book by Vine Deloria indicates, Native Americans were often moved and removed in a "trail of broken treaties."[92] The relocation of eastern tribes west of the Mississippi River transformed them into "proxy invaders" of Indian territory in this region. However, these relocations also "were temporary, it being only a matter of time before the frontier rabble caught up with them."[93] In addition, "Titles given in the West proved less substantial than those in the

East, for they had no foundation in antiquity."[94] As we will see, similar occurrences happened, and continue to happen, in relation to Negev Bedouins. Thus land dispossession, transfer, and discriminatory allocation are buried under a mountain of legal technicalities. These combined legal constructs silence the fundamental questions behind these methods and result in discussions that are seemingly technical, neutral, and void of political positions and biases. Simultaneously, these tropes facilitate the dominance of a narrative celebrating the existence of an equitable property regime and thereby contribute not only to the creation but also to the endurance and persistence of such discriminatory land regimes.[95]

Yet, as we will see in Part IV, some of these "white man's" legal systems have recently become key factors in a radical transformation of the recognition of indigenous rights. We now turn to an in-depth look at the legal history and present application of the DND.

1.7 THE DEAD NEGEV DOCTRINE IN CONTEXT

There are currently forty-six Bedouin "villages," that is, localities in various sizes, composed of clusters of informal buildings and patches of agriculture and open spaces. Eleven localities have been fully or partly recognized. Israel classifies ʻAraqib and thirty-four other Bedouin localities as unrecognized villages. These communities lack basic services, such as electricity, running water, paved roads, public transport, and schools. Each one accommodates between 300 and 11,000 people, and altogether the Bedouin population in these localities is 110,000. Thirty-seven of the Bedouin villages, ʻAraqib among them, sit on land that the inhabitants inherited from their ancestors, although the state denies their land claims.[96] Nine of the villages are home to (internally) displaced Bedouins whom the state, in the 1950s, forcibly transferred from different parts of the Negev into the *siyaj* closed area, where they were held under a military government until 1966. Most of the lands belonging to these displaced Bedouins—in the western, northern, and southern sections of the Negev—were expropriated.[97] Over the years, most of these internally uprooted individuals went to live in the seven planned urban townships, where they received land parcels on which to build and live.

Most of the Bedouins who claim ownership over and reside on their ancestral lands have remained in their villages, refusing to relocate to the state-

planned towns. Following dozens of petitions to the Israeli Supreme Court, primarily brought by human rights organizations, in the late 1990s the Israeli government started providing partial public services to the villages and granted municipal status to eleven villages. Yet the question of landownership has not been resolved, and nine of these villages still lack an outline-zoning plan.

Throughout the past decades, since the establishment of Israel in 1948, the Israeli government has studied a number of options and plans to resolve the Negev Bedouin land and housing issue. Since 2004 the government has devised several plans and policies, which culminated in what became known as the Prawer-Begin strategy to "solve" the Bedouin question. Discussed in detail in Chapter 9, the Prawer-Begin strategy does not provide a comprehensive and satisfactory solution. Although seemingly granting the possibility of attaining legal status to some of the villages, it proposes forcefully relocating tens of thousands of Bedouins. The Prawer-Begin plan has caused widespread opposition among indigenous communities and human rights organizations. Notably, it has also caused anger among elements on the Jewish nationalist right because of its putative agreement to allocate land to the Bedouin "invaders." The dual criticism from both ends of the political spectrum seriously hampered the acceptance and implementation of the government strategy, resulting in its "temporary shelving" in early 2014 to allow for "rethinking." Despite several hard-line public statements that have been made about the imminent return of the Prawer-Begin plan, at the time of this writing there has been no change in the government decision to "rethink" its policies in the Negev.[98]

Because of the stalemate and the lack of statutory planning for the villages, practically all building activity is still forbidden, and in late 2015 more than 60,000 buildings were still classified as illegal. Consequently, their residents are subject to eviction and their homes to periodic demolition.[99] In 2013 the state executed more than 900 house demolitions in Bedouin villages and a similar number in the 2014–2016 period,, using a rigid enforcement policy that has been implemented since 2010. The severity of the campaign is highly conspicuous when we consider that during this period house demolitions in the Negev more than twice surpassed the number of demolitions in the entire occupied West Bank, which is under military administration and has a far larger rebellious population![100]

An important historical dimension of the conflict relates to the 1948 war—the Palestinian *Nakba* and the Israeli War of Independence. During the

course of the war, most Arabs living in the Negev were driven out, mostly to the Gaza Strip, Sinai, the West Bank, and Jordan. Only 11,000 Bedouins remained in Israel or were allowed to return. As explained earlier, in the early 1950s they were forcefully concentrated into the *siyaj* region and placed under military-government rule until 1966.[101]

In the early 1970s the state requested that the Bedouins file land claims, but soon after it halted the process of title settlement. The claimed lands cover almost 1.5 million *dunum*s, that is, about 13% of the Negev, mainly around the region of Beersheba, and are currently associated with tens of thousands of claimants. Following the registration of claims, 521,000 *dunum*s were disqualified, because they encompassed an area already fully registered in the central and mountainous Negev. This happened because the Bedouins were removed from the area and were not exposed to the registration project, which occurred in the late 1960s. To date, this mass disqualification remains a serious bone of contention, spawning the Goldberg Commission—which the government appointed in 2008 to submit recommendations on Bedouin settlement—to allow all disqualified claims to be fully heard.[102] Thus far the government and courts have ignored this recommendation.

The remaining 971,000 *dunum*s claimed by the Bedouins are based on the indigenous land system, which has existed in the Negev for generations and predates 1948. In contrast, Israel views the entire Negev as state land and, as noted, attempted to urbanize the Bedouins and largely rejected recognition of most historical localities. These circumstances led to a deep and prolonged conflict and to the state's repeated failure to reach a compromise with the vast majority of Bedouin landholders.[103]

Meanwhile, as part of the government's struggle against the Bedouins, the state reestablished the land settlement proceedings (based on a Torrens land registration system introduced by the British) that had been frozen for thirty-five years. In recent years it has filed hundreds of counterclaims—based mainly on the DND—through which it has won more than 200 lawsuits against the Bedouins, losing not a single case. As a result, the state has registered more than 40,000 *dunum*s in its name.[104] Most of the counterclaims were heard in the absence of the Bedouin plaintiffs, because the indigenous communities consider the state legal system that presides over land claims illegitimate and continue to practice their traditional law on landownership.

Although the state uses several justifications for denying Bedouin land rights, the DND is its most potent pretext. As we have seen, this doctrine rests on two planks—legal and historical-geographic. The first claims that the Bedouins never acquired landownership and therefore are trespassers on their ancestors' lands. This is the case in 'Araqib and the other unrecognized Bedouin villages in the Negev. The state further argues that it is doing nothing more than protecting the public interest by scrupulously applying the land laws it inherited from its British and Ottoman predecessors. According to Israeli interpretation of these laws, unauthorized possession of *mawat* (dead) land is trespass, however long the land has been held. The state claims that the Negev lands were unsettled and uncultivated before the British Mandate and hence should all be classified as *mawat*. Further, it claims that the Bedouins were nomadic tribes who did not engage in cultivation, nor did they register the land before the last permissible date in 1921; therefore they have no ownership rights to the "dead" Negev desert. This position has considerable power of legitimation, because it absolves Israel from responsibility for the act of dispossession and places the state as simply safeguarding public property, as defined by previous legal regimes. The DND has also been diffused into other arenas of public policy, such as urban and regional planning, education, infrastructure, and development.

As detailed in Chapter 4, the DND was articulated in 1975 by a special report written by a Ministry of Justice team[105] and was confirmed by the Supreme Court precedent set in *al-Hawashlah v. the State of Israel* (1984).[106] As Supreme Court Justice Eliyahu Halima ruled:

> The Negev situation in 1870 was explored by the scholar Palmer. . . . He found wilderness, ancient ruins and nomadic Bedouins, who did not particularly cultivate the land, did not plough it, and were not occupied by agriculture at all. . . . If we add to that the nomadic nature of the Bedouins, and the fact that this area is usually arid due to lack of rain during most of the year, the conclusion of the lower court fits this reality and the objective situation that characterized the place. . . . The state managed to prove . . . [that this] element that typifies *mawat* land, and the land under discussion . . . should therefore be regarded as land of this category.[107]

Israel claims continuity of land laws it inherited from British and Ottoman rulers. Articulation of this claim can be found in an article by Havatzelet Yahel, then head of the Civil Department in the State Attorney's office for the

Southern District and a key figure in the legal struggle over Bedouin lands. She noted that "the State of Israel not only followed previous attempts and reforms carried out by previous legislators to settle land ownerships, but also adopted the existing Ottoman and British land laws regarding those issues."[108]

This approach was restated in 2011 in the official position submitted by the State of Israel to the UN special reporter on indigenous people.

> Israel's position [is] that Bedouin people do not have customary rights to lands in the Negev given that the land laws of the State of Israel, as developed from the Ottoman and British laws that preceded them, do not recognize Bedouin custom as a source of private land rights.[109]

However, as we will see in Part II, Israel introduced significant changes to the previous law. This was not achieved by new legislation but rather by a radical and far-reaching yet unacknowledged reinterpretation of Ottoman and Mandatory land law in general and *mawat* laws in particular.

The second plank of the DND is historical-geographic. It provides the scholarly foundation to the claim that the Negev lands were deserted and hence should be classified as *mawat*. Before the British Mandate period, the argument goes, Negev lands were empty, unassigned, uncultivated, unsettled, and unregistered. Relying on nineteenth-century maps and current scholarly expert opinions, the state claims that the Negev, including the Beersheba Valley and the northern Negev, had no Bedouin permanent settlement in 1858, after which date no settlement could be legal without formal state approval. The only Arab settlements existing before the crucial date of 1921, it claims, were several towns built or planned by the Ottomans: Beersheba, Muharraqa, Kofakha, 'Asluj, A'Uja, and Khalasa.[110]

Moreover, the state argues that no systematic Bedouin agriculture existed before the British Mandate. The Bedouins currently living in the region, it claims, are nomadic pastoralist tribes supported by raids on villages of neighboring regions. The tribes have no functioning customary land system, and traditional landownership was never recognized by the Ottoman or British regimes. In addition, Israel maintains that the Bedouins never enjoyed any legal autonomy. More recently, the state has rejected the argument that the Bedouins are an indigenous group entitled to special rights and protections as such.

In the pages that follow, we unpack and debunk most of these arguments, showing that the DND lacks sufficient legal, geographic, and historical

grounding and that it contravenes current norms of international and comparative law. Our exploration travels through analysis of the Ottoman, British, and Israeli legal and spatial systems. Consequently, the following chapters raise serious questions about the legality, legitimacy, and wisdom of the pervasive dispossession of the Bedouins under the Israeli regime.

II CRITICAL LEGAL HISTORY OF THE DEAD NEGEV DOCTRINE

One of the central claims raised by the state in the *al-'Uqbi* trial and in all land disputes in the Negev is that Israel does not dispossess the Bedouins but merely continues to apply the Ottoman and British law that remained valid under Israeli law. In this part we therefore examine the relevant Ottoman (Chapter 2), British (Chapter 3), and Israeli (Chapter 4) legal frameworks that govern Bedouin land possession.[1] This matter is particularly pertinent for the definition of *mawat* and *miri* lands, which have been the main bone of contention between the indigenous Bedouin communities and the state during the land conflict and its litigation. We critically analyze the Israeli construction of the Dead Negev Doctrine and demonstrate how it reinterprets Ottoman and British legislation. Based on this legal-historical research, we demonstrate that the state's claims of legal continuity from the Ottoman and Mandatory regimes that preceded Israel are unsupported. Likewise, we demonstrate that Israel's assertion that the Bedouins lacked land rights cannot be sustained.

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2 THE LAND REGIME OF THE LATE OTTOMAN PERIOD

2.1 HISTORICAL SETTING

The Arab provinces, including Palestine, came under Ottoman control in 1516–1517 and remained so until almost the end of World War I.[1] During these four centuries the area went through several transformations, and Ottoman policy and governance methods changed throughout the years. It is important to note that under the Ottomans different segments of Palestine belonged to several administrative units and that the area never existed as one administrative unit. Palestine's final borders crystallized only under the British Mandate.

In this chapter we aim to capture the state of affairs in the Negev/Naqab under the Ottomans in the late nineteenth and early twentieth centuries, trying to trace the changing Ottoman policies and practices in the region. In doing so, we contribute to the insufficient scholarly body of knowledge on Ottoman "Palestine" in general and to research on southern Palestine in particular.[2] More specifically, we seek to understand the land regime that existed during the late Ottoman period in the region. We focus on the 1858 Ottoman Land Code (OLC), a milestone of Ottoman legislation. The OLC plays a major role in the Dead Negev Doctrine (DND) and, more broadly, has continued to play a role in most post-Ottoman dominions in Europe and the Middle East as well as in the customary Bedouin legal system.

Until the mid-nineteenth century, the relationships between the Ottoman center and its provinces were ordered and administered mainly through in-

termediary leaders and notables. The intermediaries took over and performed certain duties, such as tax collection and soldiers' recruitment. These notables represented the local population and negotiated with government officials. It suffices to stress here that by the mid-nineteenth century the Ottoman government wanted to undermine these intermediaries and establish a rather centralized and direct rule over its subjects in the different provinces. This major reform in Ottoman administration and rule is known as the Tanzimat (reorganization), which reformed a number of administrative fields, such as local and regional representation, tax collection, the land system, settlement and sedentarization of tribes, and additional areas, which we explore in this chapter.

As part of the agrarian empire, land served as a central resource for both Ottoman society and state. During the nineteenth century, the empire was losing territories, such as the Balkans and the regions surrounding the Black Sea, and thus its major source of income. Consequently, the Ottoman state sought to strengthen its hold over the remaining areas and improve tax collection and military conscription. It is in this context that the government codified and reorganized new land laws—most relevant here are the Mecelle (the Ottoman civil code, enacted between 1869 and 1876 and entered into force in 1877), the 1858 OLC, and the 1859 Tabu Act.[3]

Although scholars have long interpreted the Tanzimat reforms in the context of secularization, modernization, and Westernization, recent scholars stress the local and Islamic roots of the reforms, including those of the OLC.[4] The Ottoman landholding system followed mainly the Islamic tradition, especially regarding conceptions of property rights and individual ownership. Conquered lands were treated as the property of the entire Muslim *umma* (people), and therefore the *rakaba* (a form of sovereignty, or ultimate ownership) was vested with the empire—or, more specifically, with the sultan, who represented the empire's body—on behalf of all Muslims.[5] Furthermore, the OLC codified legal reforms that began as early as 1840 and codified additional long-established landed property relations practices.[6] For instance, as Attila Aytekin argues, as a result of rural and peasant pressure to protect their rights, the OLC—especially the provisions regarding *miri* land—codified existing local land practices.[7]

According to Huri İslamoğlu, more than the OLC's contents, the major revolutionary step in this land reform was the transformation it introduced to the system of land registration and surveying.[8] An additional important step was that under the OLC individual ownership, rather than communal ownership,

in most categories of land became the norm. The government sought to establish a recognizable individual landowner and thereby strengthen reliability on direct individual taxation, as opposed to previous lump-sum taxation over the entire village or community. Thus, argues İslamoğlu, more than substantive ownership rights, land categories served mainly as tax categories.

However, a serious gap existed between the law on the books (i.e., the text of the OLC and, in conjunction with the Tabu Act of 1859, the formal requirement of land registration) and the law in action and the implementation of these requirements on the ground. The OLC continued to accommodate local customs and was applied in a flexible manner. Its implementation and effect differed between regions. Its effects on the remote regions at the empire's periphery, such as "Palestine," fell short of those on the imperial center and the large cities. Moreover, landholders in the provinces understood the connection between land registration, taxation, and potential conscription and hence often avoided it.[9] In Iraq and Palestine, as well as in other frontiers areas, custom continued to apply alongside and in place of the OLC.[10] Registration also required substantive state resources, such as land registries and surveyors, which were rarely available. As a result, most land remained unregistered by the Ottoman government, although local systems did exist, such as in records or books managed by regional or local leaders and in the *sijil* of the Sharia courts.

Thus, despite the enactment—beginning in 1858 and ending in 1913—of Ottoman legislation ostensibly compelling registration of land transactions and land rights, the legal consequences of the lack of registration are not clear. As mentioned, land registration was a long-term Ottoman project that continued, with humble achievements, until the collapse of the empire. In many cases it was the Ottoman government and not individuals who initiated survey and registration.[11] Such steps were not undertaken in Palestine. However, scholars are practically unanimous in their assessment that registration attempts were not successful and that land rights continued to exist based on a bricolage of new and old legal orders and customary practices. Even in cases where registration was possible, it was declarative rather than constitutive.[12]

Land scholars Frederic Goadby and Moses Doukhan wrote in 1935, "There was no Cadastral Survey in Palestine prior to the [British] Occupation. The Ottoman Law of the year A.H. 1331 (1913) concerning Cadastral Survey has not been made applicable here, and by Sec. 68 of the Land Settlement Ordi-

nance 1928, has been declared to have no effect in Palestine."[13] Furthermore, although the Ottomans attempted to install a land registration system, "in practice it has not worked effectively and may be described rather as an aspiration."[14] It is not surprising, therefore, that most scholars estimate that by the end of Ottoman rule in Palestine, only about 5% of the land was registered in accordance with the Tabu Act.[15]

2.2 EMPIRE-TRIBAL RELATIONS

In his *Moveable Empire: Ottoman Nomads, Migrants, and Refugees*, Reşat Kasaba argues that the Ottoman initiated their first significant push toward nomadic sedentarization in the last two decades of the seventeenth century. The peak of Ottoman settlement and sedentarization efforts, combined with censuses and surveys of land and people, was in the mid-nineteenth century. These policies aimed to improve security, tax collection, and conscription and, more generally, to buttress state control over its subjects. As part of this move, the Ottoman state sought to tighten its control over areas and populations, which until then were only loosely defined and controlled.[16] The nomads and seminomads were aware of their special status under the Ottoman Empire, often using their mobility as a weapon against state intrusion, and thus at times required tax and other exemptions.[17]

The Ottoman Empire maintained a distinctive policy toward nomadic and seminomadic communities. Imperial regulations and laws addressed nomadic and seminomadic mobility and taxation issues in different ways from regulations for the sedentary population. Nevertheless, raids on settled villages and the threat to their crops made Ottoman control a necessity. Between the 1830s and 1850s the Ottomans conducted large military campaigns against many nomadic and moving groups, including tribes.[18] Ottoman-tribal relationships were enmeshed in civilizational discourses of tribal primitivism and savagery. Such feelings and thoughts have been best described and analyzed by Selim Deringil and Ussama Makdisi.

Deringil argues that nomadic societies became an important source and target of mobilization in the Ottoman "project of modernity." Late-nineteenth-century Ottoman reforms and practices, particularly in the periphery and over tribal societies, shared a lot in common with European colonialism and orientalism.[19] Makdisi looked more particularly at the representation of the Arabs

by the Ottomans as part of their own version of orientalism. He argues that the nineteenth century saw a shift in the imperial paradigm toward a view suffused with nationalist modernization ideology but rooted in a discourse of progress. According to this new paradigm, the advanced imperial center had to reform and discipline the backward peripheries of its multiethnic and multireligious empire.[20] Tribal communities were a perfect fit for "modernization" projects and social reengineering, and the Negev Bedouin tribes of southern Palestine were no exception. In addition to other geopolitical reasons, such as the opening of the Suez Canal in 1869, this modernization triggered Ottoman interest in reforming this area of the empire.

2.3 SOUTHERN PALESTINE DURING THE OTTOMAN REFORM PERIOD

Several scholars have shown that up to the beginning of the twentieth century, the Ottoman regime had loosely ruled the Negev Bedouins, who enjoyed broad autonomy. As a result, until the end of the nineteenth century the Bedouins governed their life in accordance with their own customs and laws, including land law. The Ottomans never seriously attempted to enforce their own formal laws in the region, and some scholars even argue that Ottoman rule was practically absent in the region until the establishment of modern Beersheba and the creation of its administrative *kaza* (subdistrict) in 1901.[21]

Instead, it was Bedouin autonomous rule on the ground, not Ottoman land laws, that governed property relations. Bedouin law shaped the spatial-legal arrangements that determined the division of land and the nature of property.[22] According to Clinton Bailey, Bedouin law arose in the desert under conditions beyond the rulers' reach.[23] The self-governance of the Bedouin community has been well described by Yasemin Avci, who notes that

> the difficulties of the Ottoman government in controlling the Bedouins are described in detail in innumerable archival documents, dating back to the 1840s. . . . The Bedouin community, as a social and political organization, had all the attributes which the state claimed for itself, namely "loyalties and allegiances, a code of conduct, a system of arbitration and justice." Therefore, the Bedouins obviated any effective government.[24]

The diary of early Zionist activist Dr. Yizhak Levi, who visited the Negev in 1902, provides another glimpse into Bedouin autonomy and relations. Report-

ing to Theodor Herzl on his visit, Levi explained that Sheikh Salim Abu-Rabi'a asked for an audience with Herzl to propose a major deal to create a Jewish territory in the Negev.

> Sheikh Salim Abu-Rabi'a . . . presented himself as the prince of the Thullam tribes, and told me he commands 10,000 armed men. . . . The Sheikh added: according to the information I received, you are one of the managers of Jewish settlement in the land of Israel. Send to us Jews to Beersheba. I will give them land—as much as they require. I have great difficulties with the government. We can make a coalition and become strong together. You, the Jews, are smart, and have great influence in high places, and we, the Bedouins are war heroes. We must unite, and no power will be able to subdue us! [25]

Another testimony to Bedouin autonomy, particularly with regard to land rights, is provided by Zionist Yosef Weitz, one of the heads of the Jewish National Fund and later the first director of the Israel Land Administration.[26] Weitz recognized the existence of a functioning Bedouin land system. In his diary, he wrote:

> During the Ottoman period, there was no registration of Negev lands. The ownership relied on tradition, which was written in "*Dafater*"—that is, notebooks kept by the Sheikhs and Muchtars (appointed tribe or locality heads). Every legal action in the land was written in the *Dafater* and the Bedouins treated it with trust and respect.[27]

Toward the end of the nineteenth century, the Ottoman government began to show an increasing interest in settling the Bedouin tribes and tightening its rule over them. The adjacent Egyptian border and the presence of Britain in Egypt since 1882 increased the importance of the region. The Ottomans began to conduct military campaigns against the Bedouins, in conjunction with plans to demarcate tribal areas and, as Ottoman archival evidence shows, to register Bedouin-possessed lands.[28] However, despite occasional efforts by Ottoman rulers to convince the Bedouins to register their lands, the issue of formal landownership did not arise as significant. Akram Bey, governor of Jerusalem, wrote to Istanbul in 1908:

> I tried to convince the Bedouins that registering *their* lands will work in their favor and benefit. I gave them enough reasons for this, but they are reticent to formally register *their* lands. It appears they are worried about further taxation and compulsory conscription.[29]

The Ottoman registration initiative remained a long-term goal. By the end of the Ottoman period, only about 5% of the land in Palestine was registered under the new system, whereas most if not all Bedouin lands remained unregistered.[30] The most notable Ottoman achievement in southern Palestine concerning the Bedouins was the establishment of the new town of Beersheba, which also served as the capital of a new *kaza* for the Bedouins, thus separating them from the Gaza *kaza*.[31]

2.4 A NEW BEDOUIN *KAZA*

The establishment of Beersheba (Bir al-Sabia') by the Ottomans was an important and unusual step undertaken by the empire. The building of a new town from the ground up and the making of this city as the center of regional power resulted from Ottoman settlement and urbanization policies and visions and attests that the empire under the Tanzimat reforms had the power to implement them. Building Beersheba was part of a broader Ottoman policy toward the Arab provinces in the empire, which gained a higher status under Abdul Hamid II, who sought to strengthen the empire's Islamic foundation and thereby tighten its social solidarity and power against external and internal threats.[32] The specific site of Beersheba was chosen because of the presence of water wells, the fact that the area served as a crossroads for tribes and their commerce, and its position at the borders between the Tarabin, 'Azazma, and Tayaha tribal confederation areas.

The details of the city project were designed in Jerusalem. The *mutasarrif* (governor of Jerusalem), his staff, and the Jerusalem administrative council drafted the different policies and plans needed to build and develop the new town and *kaza*. They also coordinated with Istanbul on all other issues, such as the Beersheba administrative apparatus, its land status, and budgetary questions. The sultan's imperial edict, Irade-i Saniyye, to build the new *kaza* was issued in June 1899. At that time the Ottomans estimated that the Bedouins of the five main tribal confederations—the Tayaha, 'Azazma, Tarabin, Jbarat, and Hanajrah—numbered between 70,000 and 80,000 people.[33] In recognizing Bedouin land rights over their lands, the Ottoman government purchased 2,000 (Ottoman) *dunum*s (each Ottoman *dunum* is about 919 square meters) from the 'Azazma confederation and embarked on building government and public buildings. The 2,000 *dunum*s were assigned to the municipality, and it

started to market 1-*dunum* plots for individuals desiring to live in the town. For the Bedouins, these city lands were to be allocated free of charge as a way to encourage their settlement.[34] (See Appendix 3.)

The Ottomans also established an administrative council, as required by the 1871 Provincial Law. The council had some important, though limited, jurisdiction over infrastructural projects, budget, tax collection, and land registration. The government made several exceptions regarding the Administrative Council. First, instead of four members, the council of Beersheba included five members, each member representing one of the five major Bedouin tribal confederations.[35] Second, according to the 1871 law, councils were split into an administrative body and a judicial body.[36] In 1903 the Administrative Council was authorized to sit as a Court of First Instance (*bidayet mahkeme-si*), which served mainly as a tribal court in land cases, ruling according to Bedouin custom.[37]

2.5 NEGEV BEDOUIN LAND REGIME DURING THE LATE OTTOMAN ERA

The Ottoman did establish a land registry that operated mainly in Gaza, but that system continued to be governed by local indigenous laws and practices, as described by Gideon Kressel, Joseph Ben-David, and Khalil Abu-Rabi'a.

> After the establishment of Beersheba, the official Ottoman institutions recognized the special autonomous arrangements of Bedouin society. This recognition brought about the establishment of tribal courts (*machkamat al-asha'ir*) in Beersheba. This court was manned by *Sheikhs*, representatives of most large tribes—33 in number. In normal meetings, for example in sessions dealing with land ownership, there was a panel of three: two were advocating on each side, and the third decided (*mariachi*) on the conflict, with his decision being final. . . . From the evidence we glean three main facts: The Bedouins began to trade with the lands under their control; the *Sheikhs* functioned as Tabu officials, as they issued traditional sales documents (*sanad*s); and the regime did not have a direct interest in the Bedouin lands.[38]

The features of the Bedouin land system developed with the stabilization of Bedouin confederational territories. These confederations can be likened to supertribes loosely based on common origins, common territories, and joint interests. The confederation (*qabilah* [pl. *qaba'il*] in Arabic) provided a form

of territorial and legal governance and was also a source of identity. As detailed by Salman Abu-Sitta, in 1891 the major confederations signed a border agreement sanctioned by the Ottomans, which led to the demarcation of permanent confederational boundaries.[39]

The confederations agreed to impose their (traditional) rule only within the prescribed bounded territory and laid the foundation for the rapid development of a stable land system. The agreement covered approximately 5 million *dunum*s of the settled, pastoral, and cultivated parts of the Negev and divided its space among the Bedouin confederations. The agreement confirms the right to *tassaruf* (usufruct) for the Bedouins in their confederation space and prohibits any members of one confederation from settling or purchasing land beyond its boundaries without agreement of the neighboring confederation. From all accounts, the agreement was honored by the confederations and tribes until 1948. The agreement also allowed each confederation to govern the division and management of space within its boundaries, which led to the stabilization of residential, grazing, and cultivation areas (*dira*) used by each tribe and to the development of a privatizing land system, which drew on the use and ownership rights endowed to each confederation.[40] (See Appendixes 1 and 2.)

The traditional patterns of ownership were the heart of the Bedouin land system, and the key categories developed in Bedouin culture, such as *ḥajr*, the basic form of ownership, were considered to be inherited from ancient times. Land boundaries were marked by stones (*ḥijar*) or by resilient vegetation. Such lands were acquired either by occupying the lands, sometimes by force, or by cultivating empty unpossessed lands, a practice encouraged by Islamic tradition, as expressed in the Ottoman Mecelle. *Ḥajr* was considered the highest form of landownership, often possessed by the most elite tribes, otherwise known as "real" or "original" Bedouins. The *ḥajr* boundaries never required formal documentation and passed through the generations by verbal tradition; later, they were recorded by the sheikhs, when division and privatization took place. In most cases, especially when these lands were not disputed, the *ḥajr* lands became tribal property and were divided up by the extended families for cultivation, residence, and grazing. They were later divided by the heirs, most commonly the sons of the landowners, in equal portions.[41]

In his famous book *Bedouin Love, Law, and Legend*, 'Aref al-'Aref, the governor of the Beersheba District during the British Mandate, described the

working of the Bedouin land system and the role of tribal land courts, which developed an elaborate system of justice, including appeals and punishments.

> A Bedouins who trespasses . . . or one who seeks to expand his land at the expense of his neighbor is being fined severely. A trespasser that does not pay the fine can be prosecuted in front of the tribal land court (*ahl al-diyar*). The judges there are charged with settling the dispute . . . or pass it on to the tribal "greats" (elderlies) that are well versed with the land boundaries. . . . A neighbor's witness account is more valid than the account of a partner or seller. . . . The fee for the judgment (*rizqa*) is paid to the judges ahead of time. If the sides did not accept the judgment, they may appeal to the land judges and bring witnesses that were present during the boundary making act. . . . Then the judges provide their final verdict.[42]

Given the general orientation of the Ottoman economy, and the empire's efforts to modernize and revitalize the region's economy, it is not surprising that Bedouin lands turned gradually into tradable and transferable properties. In the early years of the twentieth century, there was evidence of a lively internal trade in land, based on the traditional ownership patterns and within confederational boundaries. One common transaction was the sale of relatively small plots of land to fellahin (permanent farmers) or immigrants, who became incorporated into Bedouin tribes as sharecroppers and laborers. During the same period, land began to be purchased by external investors, mainly from Gaza and the Mt. Hebron area, who could see the potential of purchasing the vast land resources available in the Negev. Jewish individuals and organizations also started to purchase lands from the Bedouins in the early twentieth century.[43] Most of these purchases were documented by the sheikhs and in the state land registries. With the land market expanding and including non-Bedouins, documentation alongside the oral system began to take root in the Bedouin customary system. It was based on the basic *sanad* document, which outlines in writing the details of the seller and buyer, the price, the boundaries, and a set of conditions and penalties. The *sanad* typically was sanctioned by the signatures of several sheikhs, who were guarantors for honoring the agreement.

In the nineteenth century the *sanad* was mainly used to formalize purchases by non-Bedouins, but toward the end of that century it became popular also for documenting sales and processes of inheritance among Bedouin Arabs of the south, especially those known as coming from fellahin backgrounds, who were incorporated into Bedouin society. Several other key documents and

practices were developed during this period, including the *rahen* (mortgaged land) and *sheraka* (partnerships, often for land crops).[44] For example, a document from 1883 that we discovered in our research on the Karkur region, which abuts the al-'Uqbi land to the south, confirms that a particular piece of land was owned by Mahmud al-Wheidi, of the Tarabin confederation, although the land was located in 'Azazma territory. The document is signed by seventeen sheikhs—seven from the 'Azazma, five from the Tarabin, and five from the neighboring Tayaha confederation.[45]

The Ottoman and British (and to some extent even the early Israeli) regimes respected the Bedouin internal land system.[46] *Sanad* sales and ownership documents became legitimate proof of property rights (see Appendixes 9–12). Such rights would have most probably been translated into *miri*, *matruke*, and *mulk* land types if Bedouin land had been registered formally during previous regimes, as attested to by the large number of registrations that did take place.[47] This form of state consent to the internal management of the active Bedouin land system, a "permission" to possess, use, and cultivate land, can be viewed as fulfilling the consent requirements enshrined in the OLC for reviving *mawat* land and transforming it into *miri* land.[48] Further, the Ottomans' purchase of the Beersheba lands from the Bedouins testifies to the recognition of land rights.

In conclusion, even after the establishment of Beersheba, landed property relations and rights in the region, as in several other Ottoman areas, continued to be administered mainly in accordance with Bedouin customary law. By World War I the property system in future Palestine was being transformed under the Ottoman Empire, and property rights were being organized and recognized through complex and integrated webs of state and social laws and practices. Because of the ambiguity regarding the duty to register and given the inability or unwillingness of the Ottomans to implement these laws, most of the land was not formally registered at all. Furthermore, the Ottoman regime implemented arrangements that continued to allow the acquisition of rights without registration and even without governmental intervention, as was the case before the land reform of the mid-nineteenth century. Even in cases where registration was possible, the legal establishment of title usually did not depend on it; that is, the registration served only as a declarative proceeding, not as a constitutive one.[49]

2.6 ORIGINS OF THE DEAD NEGEV DOCTRINE: LEGAL CONTINUITY AND JUDICIAL DISCONTINUITY

With their occupation of Palestine, the British tried to maintain the status quo and declared that all Ottoman laws in force would continue to apply. Yet, at the same time, the British enacted a number of significant statutes and amendments to Ottoman legislation to suit British imperial interests. Later, in 1948 the newly established Israeli state enacted a statute proclaiming that all Mandate-era laws would remain in force, subject to legal modifications resulting from either the state's establishment or subsequent legislation.[50] Only those Ottoman requirements that traversed the British Mandate legal regime into the Israeli period were binding under Israeli law. Thus British interpretations and alterations of Ottoman law and land registration requirements are crucial to understanding what mixture of Ottoman and Mandatory requirements became Israeli law.[51]

For instance, Section 54 of the 1928 British Mandate Land (Settlement of Title) Ordinance allowed the settlement officer to register previously unregistered land. Section 54 applied only to the registration of *matruke* and *miri* lands, not to *mahlul* and *mawat* lands.[52] Because we argue later in this chapter that, in accordance with Ottoman law and practice, revived *mawat* land became *miri*, it follows that Section 54 applies to it.[53] It is clear, therefore, that during the Mandate period formal Ottoman registration was not required for title settlement of possessed, inhabited, and cultivated lands. This was the case at least after 1928, and this observation remains valid to the present day.[54] (See Appendix 5 for an example of land registration by a Bedouin family as *miri*.)

The 1858 OLC and related land legislation formed the cornerstone of both Mandatory and Israeli land regimes until the entry into force of the Israeli Land Act (1969) in 1970. Even after the enactment of the Israeli Land Act, the OLC continued to be relevant in cases where applicants claimed rights based on British or Ottoman legislation, such as in cases of adverse possession of unregistered land.[55] Conflicting definitions and interpretations of Ottoman and British additions and alterations of *mawat* and *miri* law stand at the heart of current legal struggles between Israel and the Bedouins, as is apparent in the *al-'Uqbi* case. In this chapter and in Chapter 3, we examine first Ottoman and then British law relevant to the current land dispute. In Chapter 4 we show how the Israeli courts applied and interpreted these legal provisions.

2.7 OTTOMAN LAND CATEGORIES

The OLC defined five land categories, each containing a different set of rights and duties.[56] Three of the categories—*mulk*, *mawqufa*, and *matruke* land—are less significant for our argument here, so we treat them only in brief. *Mulk* land was fully owned land. It was found mainly in the centers of towns and villages and was rare in the area that became Israel/Palestine. *Mawqufa* land was endowed for religious, community, and trust purposes. *Matruke* land was allocated for public purposes and consisted of two major subtypes: (1) general public use, such as roads and beaches; and (2) public use belonging to a specific community, such as shared farming, wells, or grazing lands belonging to a particular village. We return to the *matruke* category later.[57]

Miri and *mawat* land are the Ottoman land categories most relevant to the DND.

Miri land was the most common type of land in the empire. It was the cultivable land and the source of tax revenues in both settled and/or cultivated areas.[58] This land category follows an earlier Islamic tradition of considering the conquered land as belonging to the entire Muslim *umma*, and its formal title was held by the ruler. The definition of *miri* land contains two main components, each including different sticks of the bundle of the full property right: the *rakaba* and the *tassaruf*. The *rakaba* (neck) was vested in the sultan, bestowing upon him the power and duty to hold the destiny of this land in terms of sovereignty and its safeguarding for all Muslims. On the other hand, the *tassaruf* (use or usufruct) part belonged in perpetuity to the land possessor or cultivator, subject to certain conditions, and included a large portion of the possessory and usage sticks of the bundle of property rights.[59]

Article 78 of the OLC defined for the first time the process of acquiring *tassaruf* rights to *miri* land and their scope, including transfer, inheritance, and termination. Continuous cultivation and possession of unassigned *miri* land for ten years gave rise to *tassaruf* right to the land and thereby provided a simple prescriptive method to acquire property rights. Such a prescriptive possessor had the right, though not the duty, to register gratuitously his land as *miri* land assigned to him.[60] This arrangement should be understood in the context of one of the Ottoman's major aims in enacting the OLC, namely, expanding the cultivated land of the empire and thus its tax base, as well as encouraging permanent settlement.[61]

2.8 *MAWAT* LAND AND THE DEAD NEGEV DOCTRINE

Mawat land was the fifth category of the OLC (*mawat* is Arabic; in Ottoman Turkish the word is *mevat*). This category requires special consideration because the Israeli government and judiciary turned it into a central component of the DND. *Mawat* was the most common type of land in areas that were distant, empty, and unsettled. As in *miri* lands, the OLC set out a variety of arrangements that encouraged its cultivation and enabled possessors who "revived" or "opened" *mawat* land to gain immediate property rights.[62]

The OLC addressed *mawat* land in two main articles, 6 and 103; each provided different complementary definitions of the category, resulting in an expanded, overlapping, and not fully uniform legal definition.

Section 6 defined *mawat* as

> Dead (*Mawat*) land is waste (*Khali*) land which is not in the possession of anybody, and, not having been left or assigned to the inhabitants, is distant from town or village so that the loud voice of a person from the extreme inhabited spot cannot be heard, that is about a mile and a half to the extreme inhabited spot, or a distance of about half an hour.[63]

Section 103, on the other hand, defined *mawat* land as follows:

> Empty (khali) places, such as Otlak, Pernalik, kiraj, Tashlik (stony place), and Kuhi (hill), which are not in the possession of anybody by Tabu, and which *ab antique* are not assigned to the inhabitants of towns and villages, so that the loud voice of a person cannot be heard from the extreme inhabited point, are Arazi Mevat.[64]

Section 103 of the OLC expanded on the scope of *mawat* land.[65] It stated that anyone who opened up such lands and turned them into cultivable lands with the permission of the official could get a title to them gratuitously. If an individual had done so without permission, he would be required to pay the value of the land before revival in order to transfer the property right (as *miri*) to his name.[66] In addition, Articles 1270–1280 of the Mecelle also addressed *mawat* land. These articles expanded the definition of *mawat* land and the process of its legal "revivification" (equivalent to "enlivening" or "revival"), adding to the overlapping nature of the definition of *mawat* land.[67] Thus, and contrary to the current Israeli position, the norms governing *mawat* land were not uniform and unequivocal.

For example, the OLC provides three points to measure the distance from

which *mawat* land begins: "town," "village," and "inhabited area." Further, although Article 6 provides the "loud voice," "the 30-minute walk," and the "estimate of 1.5 miles" criteria, Article 103 of the OLC and Article 1270 of the Mecelle refers only to the voice criterion as the way to measure the distance to where *mawat* land begins. The OLC or the Mecelle do not include any clarifications of the different terms or categories, nor do they provide any guidelines in cases of conflicts between these distance measurement points or factors.

Justice Richard C. Tute, renowned scholar and president of the Jerusalem Land Court, opined that all inhabited places can form a measurement point, not just a village or a town. Similarly, scholars such as Wilhelm Padel and Louis Steeg, in their book on Ottoman land law, measured *mawat* land as the point from which a loud voice cannot be heard at the edge of a place of "habitation" and "endroits habités."[68]

In addition, Article 1270 of the Mecelle defines *mawat* land as far from all places of habitation and even "remote from civilization."[69] Because Ottoman land law allocated significant property rights to cultivators of *mawat* land immediately—in order to provide an incentive for cultivation in the empire's remote areas—it was logical that this inducement applied only to lands significantly distant from *any inhabited place*, including Bedouin encampments, and not just modern villages or towns (composed of stone houses).

Such flexible, overlapping, or at times vague legal terminology characterizes many premodern laws and corresponds with the then-existing Ottoman property system. However, as we will see in Chapter 4, 150 years later, the Israeli state and judiciary imposed a flat and seemingly indubitable interpretation of these open and multifaceted stipulations.

Another element concerning the Ottoman definition of the point of measuring *mawat* land played a crucial role in the Israeli construction of the DND: the temporal element. The Israeli government and courts stated that only towns and villages that already existed at the time of the enactment of the OLC in 1858 qualified as measurement points to distinguish between land that is far and therefore *mawat* and land that is near and therefore *miri* or other non-*mawat* land. However, neither Ottoman nor British law included a provision that imposed such a requirement, which negates the logic of legal interpretation and particularly the purpose of the Ottoman *mawat* legislation. The absence of a temporal condition in the definition of *mawat* land made sense in the Ottoman context, as the government did not seek to freeze

specific spatiotemporal situations but on the contrary sought to encourage and reward cultivation of new and remote land. Over time, new settlements would be established and the *mawat* area open for immediate revival would be rescinded. It therefore made no sense to restrict the measuring point only to settlements that already existed at the time of the OLC's enactment. Indeed, Justice Tute asserted clearly that the "inhabited place" could include not only localities established before 1858 but also new localities. [70]

Another component of the DND discussed in the *al-ʿUqbi* case is the question of *mawat* land revival. The state claimed that "revival" requires a high standard of actual cultivation, including the making of absolute and permanent changes to it, which the claimants failed to prove.[71] However, Ottoman law offered a wider range of activities that qualified as revival. According to Section 1275 of the Mecelle, "reviving" land included plowing, sowing, tree planting, irrigation, or the opening of water passages or canals.[72] Article 1276 of the Mecelle determined that if a person built walls around *mawat* land or surrounded it by a dam to protect it from flooding, that land was considered "revived."[73] *Mawat* land used with permission for the construction of wells, canals, and pipes or the plantation of a tree turned it into *mulk* land and even included the surrounding area (Articles 1280, 1281, 1286, and 1289 of the Mecelle).[74]

Thus the Ottoman legal system recognized a number of ways to revive *mawat* land and acquire title to it. These revival methods were, and ought to be, defined within the agrarian context of the mid-nineteenth century and the agricultural methods available during that period. As we will see in Chapter 4, however, Israel adopted an anachronistic approach, which resulted in restricting the range of methods recognized as *mawat* revival and consequently limiting the possibility of Bedouins and other landholders of acquiring the land they had possessed and cultivated for generations.

Article 103 of the OLC distinguished between authorized and unauthorized revivification of *mawat* land. If the reviver received prior permission and turned the land into an active field, he would obtain possession free of charge. Those who revived *mawat* land without asking permission were required to pay the registration fees according to the land's precultivation value, and then they acquired the rights to the land as *miri* land.[75] The value of precultivated *mawat* land, particularly in "remote" areas such as the Negev, was negligible.

From a modern perspective the landholding system in the region during the Ottoman period might appear unregulated and unclear. However, in the context of cohesive oral communities, such as the Bedouin tribes, in which long-term intimate relations tie the community members together, informal property arrangements developed as alternatives to a formalized registration system. These informal orderings were quite clear to the participants at the time. The Ottoman rules concerning land acquisition, such as Sections 78 and 103 of the OLC and the relevant Mecelle clauses, accommodated and even regularized these informal communal arrangements. Likewise, the Ottomans often imposed tax payments as lump sums on specific communities and collectives (villages, tribes). This observation is particularly apt for the Negev Bedouins, because they developed a system of "justice without government" and used communally accepted methods to establish land rights and demarcate the boundaries of their property on individual, family, tribal, and confederation levels.[76]

Furthermore, the Ottoman land categories themselves were more dynamic and fluid than represented by the DND, which portrays them as static lines and rigid categories of property rights. Not every land that lay more than 1.5 miles from a settlement or inhabited area was *mawat*. As explained by Moses Doukhan, a leading Mandate and Israeli land expert and lawyer:

> Land that is a greater distance from a town or village than the distance prescribed in the statute and is not cultivated is not necessarily *Mawat* land. It might be summer pastureland or winter pastureland, or woods, forests, and a field of trees (for wood chopping). . . . The land can also be of *Miri* category that was abandoned by its owners, or *Miri Mahlul*, and can also be *Matruke*.[77]

In addition, once *mawat* land turned into *miri* as a result of revivification, it remained *miri* forever. If its cultivation halted for more than three years with no justified excuse, it turned into "*Miri Mahlul*," under which the *tassaruf* (usufruct) right would revert to the treasury. However, as the OLC stipulates, *mahlul* land would be auctioned for reallocation to the public for cultivation, and when allocated, it turned back into *miri*.[78]

Similar to other settler societies, where the legal system simultaneously facilitated dispossession of the indigenous population and denied this very dispossession, Israeli court rulings chose to represent the DND as an objective, formal, and necessary continuation of Ottoman and British *mawat* law.[79] Con-

trary to the state's hegemonic arguments, however, *mawat* laws, both Ottoman and Mandatory, were far from clear and harmonious. In sum, the Ottoman *mawat* provisions offer an expansive interpretive space that could accommodate the various conditions across the Ottoman Empire—a space almost totally silenced in the Israeli legal discourse and unconvincingly read with such clarity and certainty more than 150 years later. The land system was to change yet again, during the following, and eventful, British Mandate period.

3 THE LAND REGIME OF THE BRITISH MANDATE PERIOD

British forces began to occupy what later became Israel/Palestine from the Ottomans in late 1917 and ruled the area until 1948. The British divided the area into several districts and placed it under the administration of the military, known as the Occupied Enemy Territory Administration. In 1920 a civil regime replaced the military administration. Then, in July 1922 the League of Nations granted Britain the Mandate for Palestine, which took force in December.[1]

Although the British transformed the country's land regime during their thirty-year rule, the historiography of Mandate land policy so far has been relatively scant.[2] The study of the history of Mandate Palestine until recent years has been conflict-centered, focusing on military, political, diplomatic, and elite history, and the legal history of the period has not yet been studied in depth.[3] Because of its centrality in the conflict, land is one of the main fields studied in the history of the conflict. However, scholars either narrow down their study to a history of land acquisition by Jewish individuals or organs of the Zionist movement or focus on Mandate government policies as facilitating and leading to Palestinian land loss.[4] Other scholarly work does not examine British laws within a colonial framework but adopts the British discourse of inheriting an inefficient or chaotic Ottoman legal system that needed administrative reform and modernization.[5] Some scholars view the British authorities as attempting to fulfill their dual obligations, incompatible at times, to the Palestinian Arab and Jewish communities in Palestine.[6]

Martin Bunton, Alexandre Kedar, and Geremy Forman were among the first scholars to present a serious critique of the colonial foundation of the British law and to move beyond the dual-obligation paradigm. Kedar and Forman, taking two study cases of land disputes in Palestine, analyzed the legal arena and the realm of land tenure as a site of colonial-indigenous confrontation over land rights. Looking into the law as a colonial tool of control and as an anticolonial tool of resistance, Kedar and Forman demonstrated the power and colonial dynamics in the attempt by British and Jewish organizations to appropriate indigenous lands. Bunton's *Colonial Land Policies in Palestine, 1917–1936* (2007) is a profound critical study of the British land law and discourse. Bunton focuses on the British reconstruction of Ottoman law during the Mandate, and his work blurs the distinction between old and inefficient Ottoman law and new and modern British law.[7]

The British devised their Palestine policies—in particular, their land policy—against the backdrop of enduring and conflicting legacies of three major epistemes: (1) the tradition of British colonial ordering, know-how, and practices; (2) the long-term property regime and social practices developed in the region during 400 years of Ottoman rule; and (3) the context of the League of Nations Mandate system and the dual obligation it imposed on Britain to, on the one hand, facilitate the establishment of a Jewish national home in Palestine and encourage "close settlement by Jews on the land, including State lands and waste lands not required for public purposes," and, on the other hand, to safeguard the rights of all other inhabitants of Palestine.[8] Throughout the Mandate years and until 1948, these factors represented, reflected, and shaped a number of conflicting political and cultural views and practices.[9]

Early on, the British expressed their disdain of the Ottoman system, in particular, its land regime, considering it an archaic and primitive obstacle to British order and its civilizing mission. They also faced several challenges during the early post–World War I years, including the need to reestablish the property rights and tax collection frameworks, which were disrupted during the war and the regime transition periods. Consequently, even though the British declared that they would maintain the legal status quo in Palestine, starting in 1920 they nevertheless introduced a number of far-reaching modifications to the local land law and policies.[10] As Martin

Bunton remarked in relation to the status of Ottoman land laws during the Mandate period:

> For Ottoman law in Palestine to become "Ottoman Law in force," during the British mandate, it had to be discovered, translated, drafted, pleaded, interpreted, and taught. . . . A great deal of discretion was left to the British legal administrators to align the rules relating to property rights in mandate Palestine with the administrative necessities of the colonial state.[11]

Therefore, as Forman and Kedar argue, land law in

> Mandate Palestine must be seen as encompassing the overall conglomeration of Ottoman laws, imported legal concepts and Mandate legislation that functioned as a unified corpus of law during the period. For example, the functional meanings of the legal land categories of *Mawat* and *Matruke* during the Mandate . . . were based on Western concepts of land use and colonial exigencies.[12]

Furthermore, in continuation of the Balfour Declaration's promise to promote the "establishment in Palestine of a national home for the Jewish people,"[13] as stated in Article 6 of the Mandate for Palestine (1922), the British government was required to encourage close Jewish settlement, including settlement on waste and state land.[14] It thus became imperative to locate waste and state lands.[15] Although these two were different legal and physical categories, they emerged under the British Mandate as a single new British Mandate category of "state lands." It is important to stress that British "state land" differed from the Ottoman concept of "public land" (which encompassed categories such as *matruke*, *mawat*, and *miri*). As Haim Gerber's noted, "The fundamental tenet of the Ottoman agrarian law was that unoccupied land (called *Mawat*, or dead land) was not considered state land; it was land free for the taking."[16]

The British rulers changed this from the outset of their Mandate for Palestine. They sought to identify "state lands" and register them in their name, considering them part of state domain and largely out of public or individual reach.[17] However, British Mandate administrators quickly discovered that most of what they thought would qualify as state land was occupied by Arabs and could not be allocated for Jewish settlement.[18] State land was also to be used for public projects, as a source of income through lease, and to maneuver other political considerations, such as the resettlement of landless Palestinian tenants, especially in the 1930s and 1940s.[19]

3.1 CHANGE IN THE *MAWAT* RULES

According to the testimony of British officials, the Mandate authorities feared unauthorized seizure of empty land in Palestine during the transition from Ottoman to British rule. The British introduced certain legal arrangements to prevent the acquisition of rights in seized land and to stabilize the land regime during the postwar era. As early as November 1918, the British closed the land registry offices and prohibited land transactions.[20] In 1920 they enacted the Mahlul Land Ordinance, which was intended to prevent individuals from seizing control of uncultivated *miri* land. In August 1920 the government nominated the Abramson Commission to "inquire into the conditions of Land Settlement in Palestine" and to ascertain "the area and nature of the various kinds of lands which are at the disposal of the Government." In particular, the government referred to the lack of records of *mahlul* and *mawat* lands and urged the commission to "consider and report upon what steps should be taken to obtain an accurate record of these areas."[21] The Abramson Commission submitted the "Abramson Report" on May 31, 1921, which we discuss later in the chapter. On February 16, 1921, the British enacted the Mewat Land Ordinance, which serves as a keystone of the Dead Negev Doctrine (DND). This short ordinance repealed the last part of Section 103 of the Ottoman Land Code (OLC), prescribing in its stead a two-component provision, the first component being prospective and future oriented and the second serving as a grandfather clause. The first part of the ordinance stated:

> (a) Any person who, without obtaining the consent of the Administration, breaks up or cultivates any wasteland shall obtain no right to a title-deed for such land, and, further, shall be liable to be prosecuted for trespass.[22]

This amendment was highly significant and undermined the century-long Ottoman agrarian legal regime in Palestine. As we saw in Chapter 2, during the Ottoman period, revival of *mawat* land was encouraged and, with or without official authorization, resulted in an immediate valuable property right. After 1921 the revival of *mawat* land without consent of the authorities constituted trespass. Significantly, although of little consequence during the Mandate period, the ordinance had powerful repercussions in the Israeli era. Section (a) was drafted in the present tense and made future unauthorized revival an il-

legal trespass. That is, the ordinance distinguished, as statutes involving property rights customarily do, between vested property rights, acquired before the legislation, and changes that occurred after the statute took force. The sanction of trespass applied only prospectively, with respect to individuals who would work *mawat* land in the future (after February 16, 1921) without authorization, that is, only after the introduction of the change in the rules regarding the acquisition of rights to *mawat* land.

Section (b), on the other hand, constituted a grandfather clause and applied to already revived *mawat* lands.

> (b) Any person who has already cultivated such waste land without obtaining authorisation shall notify the Registrar of the land registry within two months of the publication of this ordinance and apply for a title-deed.[23]

Section (b) did not clarify what would be the legal consequences of a failure to notify the registrar of past (pre-1921) *mawat* revival. As we analyze in detail in Chapter 4, Israel's interpretation turned this minor and technical clause of a colonial ordinance, which appeared to have become redundant in later years of the British Mandate, into a cornerstone of the DND and the process of dispossessing the region's indigenous population. It would suffice to explain briefly here that, according to the Israeli interpretation of the Mewat Land Ordinance, failure to give notice under Section (b) resulted in retroactive expropriation of land rights that were perfected under *mawat* law before the ordinance was even enacted.[24] Critically, such expropriation *is not written* in the Mewat Land Ordinance, and it relies solely on Israeli unexplained interpretation. Moreover, it is highly unlikely that Section (b) intended to confiscate all acquired property rights to *mawat* land because of a lack of registration within the prescribed two-month period. Indeed, we later show that the British never exercised such expropriation, shedding serious doubt on Israel's claim for legal continuity.

If we place the enactment of the Mewat Land Ordinance in its historical context—the end of World War I and the beginning of British rule, even before the Mandate was given—we can assume that the ordinance primarily had an administrative ordering objective: to organize and register the existing rights regarding land and simultaneously to prevent new seizure of *mawat* land in the future. Section (b) was thus intended to ensure that every person who perfected rights before the ordinance took effect would come under

the new spatial-legal order and register his already existing right. As we have shown, Ottoman law granted a valuable legal right even to those who revived land without governmental authorization. Section (b) aimed to formalize the status of a "person who *has already* cultivated such waste land" and has done it "without obtaining authorization." A person who fell into this category had to notify the registrar of the land registry within two months of the publication of the ordinance and apply for a title deed. Although the ordinance did not indicate what the consequences would be of failing to notify the registrar, it seems highly unlikely that this section intended to confiscate property rights to *mawat* land for failure to register within a two-month period.

The lack of sanction under Section (b) left the door wide open for interpretation of what happens to a person who revived unregistered land before February 16, 1921. Usually, lack of registration of vested rights entailed fines but not an annihilation of property rights. In this context, it is important to mention again that by 1928, seven years after the enactment of the Mewat Land Ordinance, less than 5% of all the land in the Land of Israel/Palestine was registered.[25]

This raises significant and troubling questions on the use of Section (b) as the main grounds for Israeli extensive dispossession of the Bedouins in the Negev. It is hardly conceivable that the British intended to dispossess people who revived unpossessed and unregistered land before 1921, nor had they ever practiced such dispossession.

In this context it should be emphasized that, as Moses Doukhan has pointed out, even after enactment of the Mewat Land Ordinance,

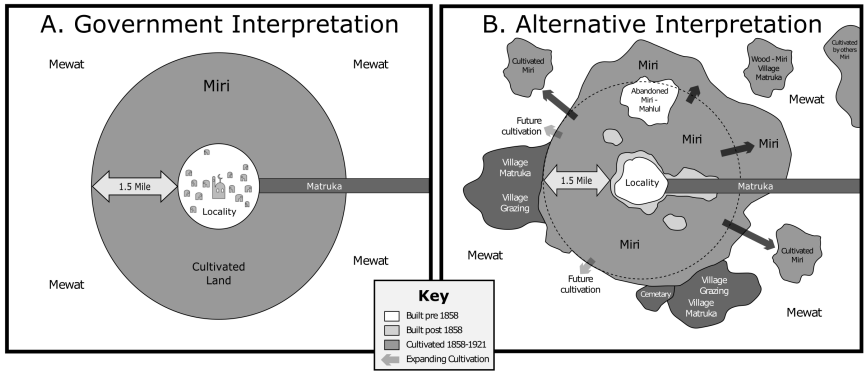
> in practice, the Mandatory government adopted an easier method and gave registration certificates to persons who proved that they had revived *Mawat* land, also if they did not give notice within the two-month period. Many inhabitants used the said statute, proving to the authorities that they had worked the land, and many thousands of dunums of land were transferred to them and registered in their names.[26]

Indeed, the British government's chief secretary, Ronald Storrs, reported in 1924 that the Mewat Land Ordinance "has only once been put into operation by the Palestinian Administration, in relation to a piece of land of 198 dunums which was needed for an aerodrome in the neighborhood of Haifa and which belonged to a wealthy Syrian landowner."[27]

In 1934 the Mandatory authorities published an updated compilation of all the relevant Mandatory legislation regarding the Land of Israel/Palestine as of the end of 1933. The compilation, referred to as the Drayton Collection, did not include the second part—Section (b)—of the Mewat Land Ordinance (which required registration in 1921), although it had not been officially repealed. The absence of this section in the compilation of laws, which the legal system used as the updated text of Mandatory legislation, strengthens our claim that the British authorities in all probability never applied the second part of the Mewat Land Ordinance—the requirement of registration in 1921—as grounds for denial of property rights for Arab inhabitants of Palestine.[28]

Furthermore, close analysis of the Mewat Land Ordinance shows that it was less encompassing than stated in some Mandatory cases and later claimed in Israeli law. It is important to note that the ordinance did not change the definitions of *mawat* land as set in Ottoman law.[29] As its title attests, the ordinance applied only to *mawat* land; it did not apply to land that was not *mawat* in 1921, such as cultivated, possessed, or inhabited land. As we have seen, under Ottoman law *mawat* land was distant waste land that was never cultivated. Revived *mawat* land became *miri* land, and under Ottoman law, even if it was no longer cultivated, it did not revert to *mawat*.[30] In other words, the ordinance applied only to land that was *mawat* in 1921.

Further, according to the Abramson Report (1921), there were 2,845,389 *dunum*s cultivated by the Bedouins in the Beersheba Subdistrict (today's Negev), and these lands should have been considered *miri* already in 1921.[31] The Abramson Report recommended registering this land without fees and considering the rest of the fallow land in the region as *mawat*. The Abramson Commission recommended that uncultivated and unregistered lands lying at a distance of more than 1.5 miles from the outer houses of places or villages be registered as *mawat* and that a demarcation commission for this purpose be established. It is noteworthy here that even an official British commission referred to all cultivated lands as *miri*, even if the land lay beyond the distance of 1.5 miles from the edge of a locality, village, or town. This is consistent with the OLC but is routinely overlooked by Israeli dominant interpretations and court rulings. Map 4 illustrates the provisions of the OLC, which enabled cultivated land to be classified as *miri*, wherever it lay (Map 4B), in comparison with the more common restrictive interpretation of Israeli authorities (Map 4A).[32]



Map 4. Interpretations of the Ottoman Land Code: (A) government (dispossessive) interpretation; (B) alternative interpretation. Source: Ottoman Land Code and the authors.

Another issue that is related to the definition of *mawat* land is the nature of the authorization by the *mamur* (land officer, as stated in Article 103 of the OLC) or the consent of the administration (as required by the 1921 Mewat Land Ordinance). Authorization was given in a variety of ways, not necessarily through formal land registration or formal written consent.[33]

To sum up, British authorities recognized that the Bedouins cultivated land in the Negev and that such cultivation meant that the land should be considered *miri*, or transformed into this land type, to which they acquired the *tassaruf* (use or usufruct) rights.[34] Only uncultivated land would be considered *mawat*. As we show, this is indeed the view that emerges from the analysis of the relevant Mandatory case law.

3.1.1 Mandate Court Rulings on *Mawat* Land

The Israeli government invokes several British Mandate court decisions as legal justifications of the DND. However, a thorough survey of relevant British case law, discussed in this section, shows that the British courts dealt with the Mewat Land Ordinance in a different manner and in only a few cases, none of which originated from the Negev.[35] The unequivocal Israeli claim that Israel merely continues to apply the law as it existed during the pre-Israeli period is belied by our analysis of the Mandatory cases. Furthermore, the facts of these cases demonstrate that the Mandate authorities continued to register cultivated *mawat* land long after 1921.

In *Ghannameh v. The Attorney General*, decided in 1927, the Mandatory Land Court ruled that land should be registered in the name of a woman who cultivated *mawat* land that was revived without permission from the authorities, conditioning it upon payment of the value of the land before revival. The woman appealed to the Supreme Court, contending that the land should be registered in her name without any payment.[36] The Supreme Court noted the vagueness of the wording of the grandfather clause (Section (b)) of the Mewat Land Ordinance.[37] In this case the British Mandatory Land Registry Department did not resist the registration itself, and the Supreme Court decided not to interfere with this position. Consequently, the Supreme Court denied the appeal and confirmed the lower court's decision.[38]

In *Debbas v. The Attorney General* (1943) the question before the court involved the authority of the settlement officer to register cultivated *mawat* land in the Acre Subdistrict. The Supreme Court pointed out that, although much of the land was "in character *Mawat*," there was evidence that many sections of the land had been cultivated for a long time. For this reason the authorities thought that the "Defendants [the cultivator] had, at any rate, strong moral claims to this land" and therefore proposed a compromise that would enable registration of the cultivated land in the name of those who worked it.[39] The land settlement officer refused, claiming that, after the enactment of the Mewat Land Ordinance, he had no authority to transfer the land to the cultivator, even in exchange for payment of the prerevival value of the land. The Supreme Court rejected this position and ruled that, because the government agreed to the registration, the officer was compelled to make the registration.[40] In dicta the Court held that, were it not for the consent, the settlement officer would not have the power to record the land in the name of the individuals who cultivated it.[41]

Three other cases heard by the Supreme Court, involving primarily revival of *mawat* land, stemmed from attempts in 1912 by the Ottoman authorities to revive dunes south of Jaffa and prevent sand erosion. Toward this end, the authorities encouraged residents of Jaffa and neighboring areas to plant fruit and eucalyptus trees on the dunes.[42] In *Dajani v. Colony of Rishon le Zion* (1926) members of the Dajani family contended that they had revived an area of sand dunes by planting trees. In the judgment—which was not published but appears in the literature and is mentioned in Mandatory and Israeli rulings–Justice John Seymour Blake-Reed held that "cultivation" for the purposes of revival of *mawat* land must be effective and ongoing and must result in a per-

manent and definite change in the quality of the land.[43] In the justice's words, "The wilderness must be made to blossom."[44]

Justice Blake-Reed's strict approach to revival, which deviated from Ottoman provisions on revival, was essentially followed by the Court in *Krikorian v. The Attorney General* (1942).[45] It is important to stress that, although the land was not registered in 1921, as prescribed by the Mewat Land Ordinance, the Court in *Krikorian* approved the decision of the settlement officer to examine in 1936 the nature and scope of cultivation and did not nullify the possessor's rights to the land merely for lack of registration in 1921.

Near the end of the Mandate period, the Mandatory Court returned to an interpretation that was closer to the spirit of the Ottoman law and limited the strict revival standards set in *Dajani*. In *Habbab v. Government of Palestine* (1947) the Court dealt again with the decision of the settlement officer in a dispute regarding the sand dunes south of Jaffa.[46] The main questions were, At what point in time did the land stop being *mawat* and become *miri*, and how enduring was this transformation? The Court emphasized that the sand dunes were originally *mawat* but had been cultivated and became *miri* before their formal registration. Under Section 1051 of the Ottoman Mecelle, revival of *mawat* land required that the land be made suitable for cultivation. The Court noted that Sections 1275 and 1276 of the Mecelle prescribe ways for land revival, including sowing and planting, plowing, irrigation, making irrigation channels or conduits, constructing a wall enclosing the land or increasing the height of an existing wall, and digging trenches to protect the land from flooding.[47] The appellants admitted that originally the land was *mawat*. The Court focused therefore on two main points: (1) whether a person who revives *mawat* land acquires an immediate right to receive a title deed (*kushan*) on the land as his *miri* land; and (2) if such an immediate right to receive a *kushan* exists, whether it remains in force even if, after the revival but before obtaining the *kushan*, the reviver neglects the land and it becomes uncultivated once again.[48]

In *Habbab*, Bernard (Dov) Joseph, the appellants' attorney,[49] argued that the settlement officer "misdirected himself by interpreting too slavishly" the decision of Justice Blake-Reed in *Dajani*. The Court agreed. It adopted Joseph's position that

> the settlement officer went too far when he stated . . . that he [the settlement officer] would not consider the cultivation of cereals and vegetables in pockets of

> good land with the sand dunes to be effective revival, unless it was accompanied by real reclamation work to fix the sand and render such pockets permanently cultivatable.[50]

In such a case the revival must take place concomitantly with the *kushan*'s request.

On the other hand, the Mandatory Supreme Court held that in a case of revival based on permanent, or at least lasting, changes and betterments, such as digging irrigation channels or planting trees, the revival can serve even years later as grounds for receiving a *kushan*. The Court added that the settlement officer needed to consider also Section 1273 of the Mecelle, which deals with "pockets of *Mawat*" that are surrounded by revived land. The section states that land of this kind also becomes *miri*. The Court remanded the matter to the settlement officer for hearing, together with an instruction to examine which parts of the land were revived in 1936, the year that the appellants requested registration of the land.[51]

Finally, in *Abu Hana v. The Attorney General* (1935), the village of Tantura filed an appeal against the decision of the Land Court in Haifa. *Abu Hana* concerned the relationship between *mawat* and *matruke* land, not *miri* land. The villagers contended that "from time immemorial" they had *matruke* rights to graze their animals and "gather reeds and rushes for their mat making," claiming they had an *ab antiquo* right. The state argued that the land was *mawat* ("unassigned State Domain").[52]

A majority opinion rejected the holding of the lower court that the land was undefined and, because it was never cultivated, should be classified as *mawat*. The majority justices held that it was unnecessary to assign *matruke* land by deed of grant, by dedication, or by registration in the land registry; in many cases, land was used and treated like *matruke* without need for any formal action. Even when land was registered in the name of the government, rights of a village to *matruke* land could be proven by long-term use; however, the village could not rely on this holding to claim a right to land greater than it needed. Therefore the justices sent the matter back to the lower Land Court to determine how much land used by the village was *matruke* and how much the village reasonably needed. The minority judge disagreed with the last point and thought that the village acquired the land through long use and had a *matruke* right to all the land and that this should not be limited to present village needs.[53]

To sum up, our review of the Mandatory Supreme Court rulings show that the legislation regarding *mawat* land was somewhat ambiguous. However, it is clear that the Mandatory law on *mawat* land does not comport with the DND. Quite the opposite: Analysis of the principal Mandatory judgments indicates that the position taken by the authorities (see, e.g., the facts in the *Ghannameh*, *Krikorian*, and *Habbab* cases) and by the Mandatory Supreme Court (e.g., in the *Debbas* and *Habbab* cases) was that a person who revived *mawat* land and missed the two-month period of registration was allowed to apply for its registration years later, even if he did not notify the authorities within the two-month period prescribed in the Mewat Land Ordinance.

Regarding the nature of the cultivation, the Mandatory Supreme Court set at the beginning higher cultivation standards for reviving *mawat* land; these standards were changed later in the *Habbab* case to lenient cultivation standards of *ordinary cultivation*, which had to continue until a request was made to register the land as *miri*. The period to request registration of revived *mawat* land did not end in 1921 but continued until the end of the Mandate. Finally, the judgment in *Abu Hana* held that members of a rural community have a collective *matruke* right to land that it had used over time for grazing and other livelihood purposes. This right, the Court held, could be acquired through long-term use, even if the land had been formally registered in the name of the state and the villagers had no formal permit or land grant.

Furthermore, even if the Mandatory case law would have adopted an interpretation limiting the rights of *mawat* landholders, Israel, as a new regime claiming to be democratic, should have provided at least a transition period and mechanisms allowing cultivators to register their rights. Such a transition was particularly significant because the Bedouins in the Beersheba region usually did not register their land rights. Instead, as we show in the next section, the Bedouins enjoyed meaningful autonomy and administered their property relations according to an assemblage of local custom and Ottoman and British laws and rules.

3.1.2 Bedouin Autonomy and Customary Law Under the British Mandate

In *al-'Uqbi et al. v. State of Israel* the plaintiffs argued that until 1948, and in a limited way even later, Negev Bedouins enjoyed extensive legal and cultural

autonomy, which included the sanctioning of their traditional landownership system. That not a single *dunum* was taken from the Bedouins by force of the Mewat Land Ordinance proves that it had no relevance in the Negev.[54] The Israeli government argued that the al-ʻUqbi family failed to prove any allocation of the land or authorization to cultivate it and that internal agreements provided by them did not amount to legal allocation. Consequently, even inheritance or purchase did not grant them title.[55]

Judge Dovrat accepted the state's argument and ruled that the claimants failed to prove that they enjoyed a legal autonomy and that, according to their customary law, the land was duly allocated to them and possessed by them.[56] Moreover, the issue of autonomy had been resolved in the 1984 *al-Hawashlah* precedent, which ruled that "if the Ottoman legislator (and Mandate legislators that enacted the *Mawat* Ordinance 1921) did not see it necessary to specify special exemptions for the Negev . . . it is not the role of this court to provide concessions of the type asked by the appellants." [57]

However, it was not accidental that the Mandate case law on *mawat* land dealt with disputes arising from the central and northern regions of Palestine. As we will see, the Mandatory authorities exempted Bedouin law and customs from the requirements of the Mewat Land Ordinance and from other requirements of Mandatory law. The authorities gave the Bedouins in the Negev an appreciable amount of autonomy, in particular by giving legal force to Bedouin law and custom in the Negev.

Even before the two-month period for registration under the Mewat Land Ordinance had expired, the British secretary of state for the colonies, Winston Churchill, issued a special statement on March 29, 1921, that the Negev would continue to be subject to traditional Bedouin law (see Appendix 4). The summary of a meeting held on that date states:

> The Secretary of State for the Colonies reaffirmed the assurances already given in Beersheba by the High Commissioner to the *Sheikhs* that the special rights and customs of the Bedouin tribes of Beersheba will not be interfered with.[58]

In the *al-ʻUqbi* case the state denied that the Bedouins enjoyed legal autonomy recognized by previous regimes, noting that the quotation ascribed to Colonial Secretary Churchill was not legally binding.[59] Judge Dovrat referred to

the promise made by Churchill as "a statement [made] by a political person and this does not create legal validity or alter the substance of legislation." Had Churchill intended to do so, he would have expressed his intent by way of explicit legislation. In addition, Churchill's statement that the "special rights and customs" of the Bedouins would not be affected was unclear.[60]

Yet the Palestine Order in Council ratified Churchill's policy in 1922.[61] This order, which was both superior and posterior to the Mewat Land Ordinance, led to the formal reestablishment of Bedouin tribal courts in the Negev in 1924.[62] Thus, even after the Mewat Land Ordinance was enacted in 1921, the British continued to recognize customary Bedouin law.

The Mandatory approach can be reconstructed by analysis of documents, policy lines, and legal opinions. This approach differs greatly from the position taken by Israel and Israeli courts. In addition to land disputes adjudicated by Bedouin land judges and by the tribal court in Beersheba, dozens of disputes between Negev residents were heard by the Land Court in Beersheba, and some of them were appealed before the Supreme Court. The very fact that the Mandatory courts examined dozens of disputes over unregistered lands in the Negev indicates that the courts recognized Bedouin land law and rights in the region. The courts, as we will see, also based their opinion on customary Bedouin property documents, such as the traditional *sanad*s of *baya'* and *rahen* (instruments of ownership and mortgage, respectively), which served as definitive proof of land rights.

Furthermore, even the Israeli government recognized to some extent the validity of the traditional Bedouin land system. One example of this recognition is the decision of the military government in 1949 to appoint a tribal court in the 'Araqib area, on which representatives of three tribes would sit (among the representatives was Sheikh al-'Uqbi), and to refer to the court any land disputes between Bedouins, which were decided according to traditional law.[63]

Mandatory case law recognized the power of Bedouin tribal courts to rule in land matters according to their local custom. In *Ghandour v. Abou Ghaban* (1930), for example, a claim was raised against the jurisdiction of the tribal court and the power of tribal custom in relation to ownership rights. The Mandatory Supreme Court ruled that the tribal court was empowered to adjudicate in land matters, provided that the matter was brought before it by an

authorized official.[64] Overruling a contrary decision by the Land Court, the Supreme Court held:

> In view of the absence of title deeds to land in the Beersheba area and the necessity for the production of a title deed under article 24 of the Magistrates Law, a case such as this appears to be one of those for which the application of tribal custom under article 45 of the Palestine Order in Council is specially intended.[65]

Furthermore, the Mandatory courts were aware of the nonenforcement of registration of land and of nonapplication of the registration requirement in the Negev and gave force to customary Bedouin land law and to Bedouin property documents. For example, in *Farhan v. Ali Kirret* (1936), the Supreme Court relied on a Bedouin *sanad* of 1915 in deciding a land dispute in the Negev.[66] Similarly, in *Kirret v. Ghannam el-Saneh* (1939), the Supreme Court decided a land dispute by relying on traditional documents and oral testimonies.[67] In *Abu Hassan v. Irfan* (1944), the Mandatory Supreme Court recognized the traditional pledge laws, holding that "the custom prevailing in Beersheba is that mortgage-deeds are written in one copy and are kept with the mortgagees."[68] Similarly, in *El Baik v. Gharbeih* (1942), a case involving a land dispute in Beersheba, the Supreme Court noted that "the law as to the compulsory registration of sales has not been strictly enforced in the Beersheba District."[69]

In sum, to the best of our knowledge, the Mandatory system of law did not order registration of cultivated land as *mawat*; and it did not require registration even when the land lay beyond the mile and a half distance and even when many years after the ostensible prescribed registration period had passed (in 1921). Furthermore, our research shows that the Mandatory courts never applied the Mewat Land Ordinance in the Beersheba Subdistrict (today referred to as the Negev) and, even more so, never rejected private or tribal ownership of land or ordered that land area be registered as state land, based on the 1921 ordinance.

In addition, recognition of customary Bedouin land law in the Negev was consistently followed by the administrative authorities, the foremost being the high commissioner. Nonapplication of the Mewat Land Ordinance in the Negev and the nonregistration of Negev land in the name of the state did not result from neglect or from little interest in the matter, as argued by Israel and recently also by Ruth Kark and Seth Frantzman.[70] Rather, it was a matter of a

consistent policy of the judicial, legislative, and executive authorities to accord broad legal and cultural autonomy to the Bedouin tribes.

3.2 ESTABLISHMENT OF THE REGISTRATION AND LAND SETTLEMENT SYSTEM

The milestone of British property transformation occurred in 1928 with the enactment of the Land (Settlement of Title) Ordinance (hereafter called the Land Settlement Ordinance).[71] This ordinance was one of the most significant and long-term changes that the British made to the land regime in Palestine. The British enacted the Land Settlement Ordinance because they were not satisfied with the Ottoman method. In addition, they responded to pressures by the Zionist movement to advance a land settlement process that would clarify the status of rights in the land, make it easier to locate state land and buy land from Arabs, increase certainty in property ownership with respect to land acquisitions, and meet the obligations set out in Article 6 of the Mandate for Palestine.

The Land Settlement Ordinance established a comprehensive survey and land settlement procedure in the Land of Israel/Palestine. It was based on the Australian model known as the Torrens system.[72] This method called for the keeping of state-administered books that register rights to land. The rights are recorded by block and parcel and are based on land surveys, precise mapping, and field visits by the recording officials. The legal power of the settlement of land rights by the Torrens method relies on precise maps and the finality of the registration. After the land settlement procedure was completed in a particular area, it was possible to challenge the registration only on limited grounds. The ordinance, with a few amendments, continued to be the principal law ordering land settlement in Israel. In 1969 Israel approved a new version of the ordinance. The revised law maintains most of the original provisions, and it is the legal-procedural framework for the dispute between the al-ʻUqbi heirs and the State of Israel.[73]

Registration according to the Land Settlement Ordinance has to be initiated by the government in defined areas that ought to undergo the process of survey, mapping, and title settlement. By the end of the British Mandate, the British authorities had managed to settle and register the title for 5.5 million *dunum*s (5,500 square kilometers; 1,000 *dunum*s = 1 square kilometer) of Mandate Pal-

estine's 26 million *dunum*s, about 5 million *dunum*s of which fell within what became Israel.[74] The land settlement carried out by the British regularly granted *miri* rights for cultivated land to the land possessor based on the status of the land at the time of the settlement of title.[75] The British began the process selectively, mostly in Jewish areas or in areas where land disputes between Jews and Arabs existed.[76]

Thus the Bedouins in the Negev had little access to the governmental land registration apparatuses. Also, the maps that were made for each subdistrict and that clarified ownership of the agricultural land were not made for agriculturalists in the Beersheba Subdistrict. As a result, the agricultural taxation (tithe) in the Negev differed from the taxation applied in the rest of the country.[77] Nevertheless, some land registration took place, especially when the Bedouins sold land to Jews.[78]

The British government had a relatively clear position regarding the lands possessed and cultivated by the Bedouins; it seems safe to assume that, had the land title settlement process reached the Negev, those lands would have been registered under Bedouin land rights. First, the Negev was not treated by the British as one area of waste space and *mawat* land. As Ruth Kark reports, "At the end of 1920 . . . it became clear that all land in the Negev belonged to Bedouin tribes . . . *inasmuch as here the Mawat land law and the 'Mahlul' regulation never came into use*."[79] Similarly, the Mandatory government noted in its 1930 report to the League of Nations that waste land is found only in the dune area on the coastal plain and in the desert area southeast of Beersheba. Regarding some land southeast of Beersheba, the report mentioned that the Bedouins had grazing rights (an "easement" in legal terminology; *matruke* rights in the terminology of Ottoman law) to that land. Thus the Mandatory government clearly maintained that the areas northwest of Beersheba, which included the area of the claims of many Bedouins, among them the al-'Uqbi family, were not waste land or dead land.[80]

The area cultivated by the Bedouins in the early twentieth century was estimated at between 2 million and 3.5 million *dunum*s and got larger as the Bedouin agriculturist lifestyle increased. According to the 1931 British census of the Beersheba area, 89.3% of Negev Bedouins mentioned that they relied on farming as their main source of livelihood.[81] The census report classified more than 75% of Bedouin households as landowners who worked their land

directly and with the tacit consent (sufferance) of government authorities. The summary report of the 1931 census states, in Section 298:

> The number of earning land-owners is 7,869, and that of tenants is 2,508. . . . The *landowners* tend, on the whole, to *cultivate their lands directly*. A land-owner in Beersheba is a land-owner on sufferance. . . . In the strict sense most of the land may be described as *Mawat* not having been assigned or disposed by deed. Nevertheless, the "privileges" of the nomads have been confirmed from time to time, and *it is, undoubtedly part of the "customary" law*, as opposed to formal law, *to recognize the nomadic traditional cultivation in this area as normal assignment*.[82]

A similar picture appears in a document from 1937, in which the Mandatory government replies to a request of the Jewish Agency, headed by David Ben-Gurion, to allow Jews to settle in the Negev. The Jewish Agency grounded its request on the ostensible large amount of *mawat* land found there. However, the Mandatory government's response clearly suggests otherwise.

> The cultivable land in the Beersheba sub-district is regarded as belonging to the Bedouin tribes by virtue of possession from time immemorial. . . . In the past the lands have been occupied entirely as tribal land, but in recent years the practice of allotting tribal holdings has come into existence, thus enabling sales to be made to Jewish interests.[83]

The recognition of Bedouin ownership of the cultivated land continued in the 1940s. The Village Statistics report, prepared by the Mandatory government in 1945, stated that the Beersheba Subdistrict covered 12.5 million *dunum*s (12,500 square kilometers), of which more than 1.9 million *dunum*s (15.39%) belonged to Arabs and 65,000 *dunum*s (0.52%) belonged to Jews. The Survey of Palestine made by the British in 1946 for the United Nations stated that "it is not safe to assume that all the empty lands south of Beersheba [i.e., in the most arid parts] or east of Hebron, for instance, are *Mawat*."[84] It further stated:

> Some 12,577 square kilometers lie in the deserts of Beersheba. It is possible that there may be private claims to over 2000 square kilometers which are cultivated from time to time. The remainder may be considered to be either *Mawat* or empty *Miri*.[85]

To summarize this section: The British authorities recognized the uniqueness of the Negev and by legislation and policy enabled the traditional tribal land system to continue to function. It appears, therefore, that the only factor

that prevented registration of Bedouin land in the land registry was the slowness in completing land settlement and the end of the Mandate. State formal laws were not implemented as a matter of policy, and instead a combination of customary and state law and practices were blended into a common practice and system in the Beersheba Subdistrict.

The Israeli legal apparatus professes legal continuity, that is, proceeding with policies and laws enacted by previous governments. However, as we show in the next section, contrary to Israel's claim, Jewish land purchases from the Bedouins before 1948 attest to the recognition by Jewish organizations of Bedouin landownership in the pre-1948 Negev (see Appendix 6).

3.3 REGISTRATION AND SALE OF LAND TO JEWISH PURCHASERS

British recognition of Bedouin customary landownership also appears in the ability of the Bedouins to record the land, throughout the Mandatory period, in the land registry. Most Bedouins registered their land transactions with the sheikhs, to whom they provided the relevant documents. During the Mandatory period, recording in the land registry was more common, especially when the circumstances forced the Bedouins to do so. This procedure took no account of the putative "determining date" of the Mewat Land Ordinance or of whether the land had been cultivated in 1858, as later retroactively dictated by the DND. Registration of Bedouin land depended almost solely on the land possessory and ownership arrangements practiced among the Bedouins—primarily working of the land for more than ten years, the prescriptive period for *miri* land under Ottoman law.

Recognition of Bedouin ownership is apparent from the Jewish purchase of previously unregistered Bedouin land well after the enactment of the Mewat Land Ordinance in 1921. Several scholars have dealt with this phenomenon. For example, in their research on Jewish settlement in the Negev, Ruth Kark and Chanina Porat describe numerous sales of Bedouin land to Jewish institutions and to individual Jews, which the authorities recorded in the land registry. These transactions involved more than 100,000 *dunum*s, 65,000 of which were registered in the name of the Jewish National Fund by the time the British Mandate ended.[86]

Registration by the authorities was quite common. Mandate officials routinely approved and registered the land in the name of Jewish purchasers.

Inherent in the registration was the authorities' recognition of the Bedouin seller's right to register their ownership in the land registry and to transfer their right to third parties. Had the British officials thought that the land was state land, and not Bedouin owned, they would not have recorded the land in the name of the buyer unless the state—the British Mandate—had formally waived its rights to the land. In other words, *the registration indicated British recognition of Bedouin ownership*, which constituted a valid source of property ownership to start the property transaction that ended in registration of the rights in the name of the Jewish owners. Parenthetically, one of the state's arguments against the al-'Uqbi family is that, even if family members had inherited the land from their ancestors, the transfer could not correct the fundamental defect in the original ownership right.[87] This argument was never raised by the Jews who bought land during the Mandate period, nor did the State of Israel ever raise it, to the best of our knowledge, against those buyers—Jewish institutions and individual Jews.

How could the Bedouins transfer land to Jews if they had no rights to the land? The state argued in the *al-'Uqbi* case that "certain clerks cared nothing about the land" and that the registration did not constitute recognition of the rights of the Bedouin sellers.[88] However, given the great number of land sales in the Negev that were registered, this seems highly unreasonable. Rather, it shows that the authorities that preceded Israel consistently recognized the landownership rights of the Bedouins.

In her book *Jewish Frontier Settlement in the Negev*, Ruth Kark describes sales of land in various areas of the Negev, from Madbaḥ in the east (between Beersheba and Dimona), to 'Asluj (the Revivim area), to the southern coastal plain near Rafah. Kark deals at length with "Arab landowners" in the Negev and describes the traditional landownership as functioning and clearly marked. "There is little ownership and it is partitioned into small parcels," Kark notes, adding a reservation that "there is no lawful registration" of the land.[89] Kark also displays the landownership system on a few maps. We see, therefore, that Kark's research (contrary to her testimony in court) clearly shows that the Bedouins' land around Beersheba was not *mawat* land.[90]

In addition, Hiram Danin, a senior official at the Jewish National Fund and the Israel Land Administration for many years, says that the registration of Arab land was allowed, also after the Mewat Land Ordinance, because the Mandatory authorities treated the land as cultivated, possessed, or settled and thus owned by the possessor. The registration was based on mapping the traditional owner-

ship, having neighbors sign, and recording the Arab property in the land registry as the first step before selling the property to Jews. Danin indicates the method.

> I completed purchase of about 400 dunums of land north of the military cemetery, which was recorded in the land registry in the name of Hachsharat Hayishuv [Palestine Land Development Company]. . . . When all the maps of the a-Zur land were ready, the work began to get the Bedouin owners and the neighbors to sign the maps and the necessary documents. . . . When the maps and documents were signed by the owners, the neighbors, and the notable persons, they were filed with the land registry office to be recorded, and a considerable time later the government land-department administration gave an order *to record the land in the name of the Bedouin owners*, and a special officer came from Jerusalem to register the land in English.[91]

Documents that we found in the Central Zionist Archives and in the archives of Kibbutz Mishmar Hanegev record aspects and the stages of land purchases by Jews from the Bedouins and registration of the transactions in the Mandatory land registry office. These documents testify to the Mandatory authorities' recognition of Bedouin ownership. For example, in a meeting called by the chairman of the Jewish National Fund, Menachem Ussishkin, in 1925, major officials in the Zionist movement who dealt with Jewish settlement and purchase of land discussed buying land in the Negev.[92] Yehoshua Hankin reported that it was possible to buy half a million *dunum*s in the Negev and suggested that 50,000 *dunum*s be purchased annually. On the question of who owned the land, Hankin answered, "Tribes. But we have to buy the land from each and every one, there has to be a *kushan* for each and every one who possesses the land." Dr. Thon (apparently, the reference is to Dr. Yehoshua Tahun) added details on the status of the land in the area.

> The only [province] that can be used for large and unified settlement is the Negev. On the one hand, it has *Seer* land, owners of 18,000 dunums already have *kushan*s and it is not too difficult; for all the other land, it is necessary to arrange their registration, to register the owners possessing the land now, and afterwards the transfer to us will be arranged. Since this will proceed very slowly, later there will surely be things to be done with the government, which is now organizing the cadastre [public record of land].[93]

We see that the heads of Zionist settlement and the Yishuv's land experts thought that the Bedouins owned the land. The Jewish desire to purchase the

land led to registration of land in the name of the Bedouins and later in the name of Zionist land-purchase companies and individual Jews. For example, a registration certificate from 1938 indicates a sale of 16 *dunum*s in al-Qalta (west of Beersheba) from Muhammad and Ahmad, the sons of Muhammad a-Sufi, to Efroim and Chil Schwartz. The "Section or Neighborhood" box is marked Najmat a-Sufi Tarabin tribe; the "Class of Land" box lists the land as *miri*, and the land is described as arable land.[94]

A document dated 1939 and bearing the title "List of Contracts in Beersheba Matters," which we found in the Central Zionist Archives, details many transactions in which individual Jews and Jewish land-purchase companies bought land from the Bedouins. The transactions involved enormous areas of land. One contract that we found was between Sheikh Hemed Ben Hamdan al-Sana and Sheikh Muhammad Mustafa abu-Dalal, the sellers, and Hachsharat Hayishuv (Palestine Land Development Company), the buyer, for the purchase of 15,000–20,000 *dunum*s of land in Qelshe Khabira and al-Hadir. Similar land-purchase contracts were signed with other Bedouins regarding land in al-Shaqib (5,000 *dunum*s on the al-Sir border), Madsus, Madbaḥ (7,000 to 10,000 *dunum*s), al-Zarnuq (400 *dunum*s), Hazali (8,077 *dunum*s), and ʾAsluj (12,882 *dunum*s).[95]

More generally, the frequency of Jewish purchases of land from the Bedouins and the ease with which the Bedouins registered their land during the Mandatory period strengthen some of our arguments regarding the main elements of the Mandatory land regime in the Negev—the regime that the Israeli state contends it is continuing and applying.

Much of the purchased land was used to build Jewish settlements in the Negev just before the founding of the state, including, among others, the land of Revivim, Hazerim, Nir Yitzhak, Dorot, Negba, Beʾeri, Mishmar Hanegev, Shoval, and Ruhama.

The archives for Kibbutz Mishmar Hanegev contain the names of the Arab landowners from whom 2,150 *dunum*s were bought and used to build the kibbutz.[96] The British would not have allowed an entire settlement to be built on land it thought belonged to it without giving its approval. Furthermore, it is hard to justify the contention that purchase of land from the Bedouins was lawful while claiming that the Bedouins were squatters lacking any rights to the land. The double standard is especially evident in the case of Kibbutz Mishmar Hanegev, which purchased land adjacent to ʿAraqib in 1926, a sale

that was deemed lawful and was recognized, whereas the inhabitants of ʻAraqib, who bought land from the al-ʻUqbi family several years earlier, were deemed squatters and subject to frequent demolition of their houses.[97]

In his research Michael Fischbach shows that, in addition to the sale of land to Jews, 64,000 *dunum*s of land in the Beersheba District were registered in the name of Arab owners during the Mandatory period, illustrating again the legal validity of Bedouin landownership, which formed the basis for these registrations.[98]

Yosef Weitz—a Zionist leader and a high-ranking officer of the Jewish National Fund during the 1940s and 1950s and the first director of the Israel Land Administration—noted Bedouin landownership and the need to buy land for Jewish settlement. In a discussion he had in 1948 with Prime Minister David Ben-Gurion on development of the Bedouin areas, Weitz asserted, "If we carry out a development program in the Negev, they will be troublesome. *The land is divided up and is private*, though there is no cadastre [public record of the land]. How can we rid ourselves of them? Make an agreement now regarding the land?"[99]

Weitz also served as chairman of the Select Committee to Examine the Question of Ownership of Bedouin Land in the Negev, which was created by the Israeli minister of justice. The committee submitted its recommendations in October 1952. Weitz served on the committee together with the prime minister's adviser on Arab affairs, Yehoshua Palmon, and Binyamin Fishman, of the Registration and Land Settlement Department. The secret report submitted to the minister of justice stated that it was known that the Bedouins refrained from registering their land during the Ottoman and Mandatory periods to evade the military draft.[100] As a result, with the British conquest, almost all the Bedouin land in the Negev was not registered. "Nevertheless, the Bedouins viewed all the land they cultivated as belonging to them. Although they did not have registration certificates, the authorities, both Turkish and British, recognize this fact."[101] The committee also found that

> as is well known, during the time of the Mandate government, a great amount of land was recorded in the name of Bedouins, based on evidence that they had worked these areas for the prescriptive period, and a significant portion of these lands were transferred, following their registration, to the Jewish National Fund, to other Jewish companies, and also to private Jews. So that in this matter, there are hundreds of precedents, and we are of the opinion that the government of

> Israel cannot, and does not have to, ignore them. . . . It is not inconceivable that the Bedouins have strong proof also for other large areas of land, such as receipts for payment of the verko and tithe taxes, which served as proof of cultivation of other extensive land areas.[102]

Having reached these findings, the committee concluded that "rights of the Bedouins in the lands they proved they cultivated for a long period of time (the prescriptive period) should be recognized."[103]

Another important testimony of Bedouin ownership of their land is offered by Sasson Bar-Zvi, the former military governor of the *siyaj* region and a researcher and writer. In a document dated July 11, 1966, that he prepared for the commanding officer, the military governor explains the situation.

> The land in the Negev . . . was not registered in the land-registry books (Tabu) by the Mandatory government. The Bedouins, who did not register their land, did not suffer especially from the non-registration of the land because *the authorities recognized the Bedouins and their rights to the land*, which was reflected in registration of the land in the tax-payment books (*Dafater habal*) and consent of the government to recognize the transfer of land from one Bedouin to another as a lawful sale and, with their consent, to record the land in the land-registry books in the name of the purchaser. . . . The Bedouins possessed land because of (A) inheritance; (B) purchase, by certificate of sale; (C) lien; (D) possession. In this method, broad expanses of land of a tribe or tribal group were registered.[104]

Thus, as shown, the British legislative, executive, and judicial authorities acknowledged Bedouins' rights to the land they cultivated (2–3.5 million *dunum*s in the northern Negev). They supported Bedouin legal autonomy, exempted the Negev from the application of the Mewat Land Ordinance, and recognized and registered land transactions made by the Bedouins, in which they sold their land to others, much of it to Jews. Therefore it seems clear that the British did not consider that land as belonging to the state. Key Israeli actors recognized this approach, mainly during the period immediately following the establishment of the State of Israel. Later, however, as we show in the next chapter, their position changed and Israel adopted the view that the Bedouins lacked ownership rights to the land they had possessed, subdivided, bequeathed, inherited, sold, and managed for generations. We investigate this profound transformation of Bedouin legal geography in Chapter 4.

4 FORMULATING THE DEAD NEGEV DOCTRINE DURING THE ISRAELI PERIOD

By the end of the Mandate period, 75,000–90,000 Bedouins, belonging to ninety-five different tribes grouped into eight tribal confederations (qaba'il), lived in the Negev.[1] As in most parts of the country, the 1948 war was a decisive turning point for the land regime in the Negev. About 80% of the Bedouins who lived in the pre-1948 Beersheba Subdistrict, especially in the western Negev, fled or were expelled and—critically—were not allowed to return after the war. As a result, they lost their property, their settlements were destroyed, and their land was handed over to Jewish agricultural and urban settlements that were built in the area. Following the 1948 war, the 13,000–14,000 Bedouins who remained in Israel were placed under the control of the military government and in the early 1950s were forcefully displaced and/or concentrated in the *siyaj* (the Arabic word for "fence") area—a 1 million *dunum* zone east and north of Beersheba.[2] The current legal land dispute discussed in this book relates exclusively to land claims filed by Bedouins who remained in the state and became Israeli citizens. The Israeli government appropriated and nationalized all refugee property and allocated it mainly for Jewish development.

Only in the late 1960s did the process of land settlement in the Negev gradually begin, with wide-scale registration of land in the name of the state. The registration covered extensive areas, primarily in the Mount Negev region, which before 1948 had been held by Bedouins from the 'Azazma confederation.[3] Because the Bedouin possessors of these areas had already been

displaced to the *siyaj* region, the land settlement process was implemented without objection and generally without the Bedouins' knowledge.

During the course of the land settlement, broad swaths of Negev land were registered under the state's name, pursuant to the Land Acquisition (Validation of Acts and Compensation) Act of 5713/1953 (hereafter, Land Acquisition Act) and the Absentee Property Act of 5710/1950.[4] Other sections were registered in the state's name on the grounds that the land was *mawat* and therefore state land.[5] These areas included land possessed by the Bedouins *in the past*. During that period, land settlement generally did not apply to land in the *siyaj* region.

This changed in the late 1960s, when Israel decided to implement land settlement in areas under Bedouin possession as well. As described by the Goldberg Commission, "The direct confrontation over the Negev lands has been expressed through the adoption, on May 2, 1971, of a procedure for land settlement in the Northern Negev."[6] Between 1971 and 1979 the land settlement officer received 3,220 claims alleging rights to an estimated 770,000–1,500,000 *dunum*s of land in the Negev.[7] The final amount of Bedouin claims recognized by the state was 778,856 *dunum*s.[8]

The claims dealt with landownership status in 1948, and the claimed area ran from the northern border of the Negev (modern-day Arad in the Rahat area to the Netivot area [formerly Wadi Shariya]) to the southern border (today the areas east of Dimona to Revivim). The *siyaj* region—the area to which the Bedouins who remained in Israel after the 1948 war were moved—formed the principal part of this section. Claims fell into one of three primary categories: (1) land possessed at the time of filing the claims (estimated by the Goldberg Commission to total approximately 387,000 *dunum*s); (2) claims by groups consisting mainly of internally displaced persons, to land held in the past but no longer in their possession; and (3) claims by groups consisting of those who claim land currently possessed by others.[9]

After the claims were filed, land settlement was practically frozen for thirty-five years. This was a significant exception to the procedure prescribed in the Land Settlement Ordinance that required the state to publish a schedule of claims within a reasonable amount of time and to hear claims and publish a report of rights according to a particular timeline.[10] This is not the place to discuss the severe consequences of the postponement, other than to mention that it greatly harms the Bedouin land claimants, who at present have trouble find-

ing evidence, especially live witnesses from the community for the relevant period. The postponement not only was a technical and bureaucratic delay but also became part of the state's built-in advantage in land settlement cases.

4.1 SETTING THE DOCTRINE'S PREMISES: THE ALBECK COMMITTEE REPORT (1975) AND ITS ENDURING RAMIFICATIONS

During the filing of Bedouin land claims, the government appointed a committee, headed by Plia Albeck, to propose policy guidelines concerning the claims. The committee submitted its report in October 1975 under the title *Summary Report of the Team of Experts on Land Settlement in the Siyaj and the Northern Negev* (the Albeck Report). The report received the force of a government decision on August 15, 1976. The team was headed by the director of the Civil Department of the State Attorney's Office, attorney Plia Albeck, known for her prominent role in legalizing land expropriation, largely used for Israeli settlement in the occupied Palestinian territories. Albeck outlined the government's policy on Bedouin land and essentially shaped the conceptions that have guided this policy to the present day.

The opening sentences of the Albeck Report contain much of the major components of government action in structuring the Bedouins as a group lacking land rights. According to the report, in the *siyaj* area there are "scattered" some 30,000 "Bedouins of the Negev," who are moving "more and more *from the original way of life of Bedouins as nomads* to a life of permanency in places in which they settle and farm their land. In recent years, the Bedouins have consequently moved *from the historical way of living in tents—to settlement in permanent structures*."[11]

These sentences create a contrast between the "original way of life" of the Bedouins as nomads and their transition to a "life of permanency." The tent, which was the "historical way of living," serves as decisive proof of the Bedouin nomadic lifestyle. According to this narrative, only "in recent years" did the Bedouins make a transition to permanent settlement, which was symbolized by "permanent structures," and only after they moved to this permanent manner of settlement did the Bedouins begin to engage in agricultural cultivation. The report further states that in 1965 it was decided "to concentrate all the Bedouins" in a few "small towns for Bedouins" in the *siyaj* area.[12] A short while

later, after other areas of the Negev had undergone land settlement, the land settlement process also began in the northern Negev, including the *siyaj* area.

This historical-geographic narrative intertwines with the legal narrative, whereby all the *siyaj* lands were state owned because they were *mawat* land.[13] The Albeck Report adopted the position that

> all lands in the *siyaj* area were far from any built-up areas when the Ottoman Land Code was enacted, and therefore belong to the *Mawat* class of land—that, under the Mewat Land Ordinance of 1921, cannot be acquired if not registered in 1921 or immediately thereafter, or were explicitly granted by the state. . . . The Bedouins cannot acquire any rights to them, not even pursuant to long-term possession and cultivation, and, therefore, all of the lands are state lands.[14]

The Albeck Report also notes that the state's position was accepted by the District Court in Beersheba in the first two court cases involving this matter. One of the cases, the report states, was appealed to the Supreme Court, which had not yet heard the appeal. Although the report does not mention details of the appeal, the case almost certainly was *al-Hawashlah v. State of Israel*, which was decided in 1984. The judgment in that case, given by Justice Avraham Halima, became a cornerstone of the Dead Negev Doctrine (DND).[15] We will return to this key judgment, which hovers over the *al-'Uqbi* case and over the entire Negev land conflict, in Section 4.3.

After firmly holding that the Bedouins have no legal right to the land, a narrow crack of "compassion" appears in the Albeck Report.

> Despite the state's claim that the lands are *Mawat*, from an early stage it was clear to everyone involved that such a claim is inhumane and one must assume that the Supreme Court, too, would not approve off . . . the removal of the Bedouins from the entire *siyaj* area without receiving any compensation in the land-settlement framework.[16]

Therefore the Albeck Committee decided to grant the Bedouins compensation in exchange for their evacuation from the lands over which they claimed ownership rights. The main compensation was calculated as a percentage of the value of the land and was to be paid in cash. Bedouins who could prove ownership of more than 100 *dunum*s were offered the option of receiving a small part of the compensation in land rather than monetary compensation; for claims involving more than 400 *dunum*s, the claimant could also receive

farmland as compensation. In general, compensation in land amounted to only 20% of the total land claim recognized by the state.[17]

The land settlement discourse of the Albeck Committee, which became government policy, provided legal support for the geopolitical decision to congregate the Bedouins in permanent townships. The committee's report did not leave the Bedouins much space in the Negev where they could lawfully remain, limiting them to the Bedouin towns where they could obtain a small number of parcels of land and farmland by way of temporary seasonal leases.[18] The report firmly held that "compensation will only be given to persons who vacate the land or who vacated it in the past, and no longer inhabit or possess any place in the *siyaj* area, excluding lands granted them in towns earmarked for Bedouins or on sites earmarked for Bedouin agricultural cultivation."[19] As noted decades later by the Goldberg Commission, the Albeck Committee proposals "served as a basis for all government proposals thereafter concerning settlement of the land problem."[20]

In continuation of this policy, from 1978 to 2008, settlement agreements involving 150,000 *dunum*s of land were signed. The fate of another 220,000 *dunum*s was determined in court. Thus in 2006 it was estimated that, of the 1.5 million *dunum*s involved in the original claims, 620,000 *dunum*s remained in dispute. Two-thirds of the disputed unregistered lands (more than 400,000 *dunum*s) continue to be held, settled, and worked by Bedouins in the *siyaj* area.[21] The 'Azazma tribe's claim to 220,000 *dunum*s on Mount Negev was summarily dismissed because, at the time land settlement was declared, these lands were already registered in the state's name.

4.2 FORMULATION OF THE *MAWAT* DOCTRINE IN SUPREME COURT CASE LAW

The Albeck Committee's legal argument relied in part on Supreme Court case law from the early 1960s regarding land settlement in Arab areas in the Galilee.[22] At that time, the Supreme Court formulated the *mawat* doctrine in a way that expanded the classification of *mawat* land, making it difficult for claimants to prove ownership of the land and making it easy for the state to prove that the land belonged to the state. The leading judgment given on this matter, *State of Israel v. Badran* (1962), established much of the doctrine—mistaken in our opinion—that later was applied in the Negev and continues to be applied.[23]

Badran raised the question of registration of land near the village of B'inah, in the northern Galilee region. The court classified it as "*Mawat* land, which was developed and cultivated before the Mewat Land Ordinance came into force, and is still in the possession of and cultivated by descendants of the original developers."[24] In a brief judgment, Justice Zvi Berinson shaped the Israeli *mawat* doctrine in the form of a series of practically insurmountable hurdles. As we show later, this prevented those who possessed land distant from villages or towns from proving and securing their rights to the land, even if they had "revived" it and cultivated it for generations. The state contended that the land was *mawat*, whereas the cultivators of the land contended it was *miri* and that, under Section 78 of the Ottoman Land Code (OLC), they were entitled to record it in their name. Thus the primary question before the court was, What type of land is this?

As we have explained, Section 6 of the OLC classified land that was a certain distance from the edge of any inhabited area as *mawat*. In calculating the distance, the OLC offered three possibilities: (1) the distance from which it is impossible to hear the loud voice of a person standing in the inhabited area, (2) a mile and a half, and (3) the distance a person can walk in half an hour.[25] The court chose the second option: "In the contest between distance by measurement and distance by hearing, distance by measurement wins and is the determining factor."[26] Effectively, Supreme Court judgments established a consistent rule, without providing appropriate legal reasoning, whereby all land that was located a distance of more than 1.5 miles from a place of settlement and that was not registered in 1921 is prima facie *mawat* land and therefore belongs to the state.[27]

As noted, however, under the OLC, nothing prevented land located more than a mile and half from an inhabited area from being classified as *miri* or *matruke*.[28] Moses Doukhan remarks that "land that is at a greater distance from a town or village than the distance prescribed . . . is not necessarily *Mawat* land. . . . The land can also be [abandoned] *Miri*, or *Miri Mahlul*, and can also be *Matruke*."[29] This distinction is critical in the Bedouins' case, in part because Section 54 of the Land Settlement Ordinance of 1928 explicitly states that, in registering rights in the framework of land settlement, cultivated land can be recorded in the name of the unregistered possessors and cultivators, provided that the land is not *mawat* or *miri-mahlul*.[30] Under Ottoman law, revived lands still under cultivation are not *mawat* or *mahlul*. The Mandatory courts held the same.[31] In other words, possessors of land who prove that the

land is not *mawat* are not required to register the land under the Mewat Land Ordinance of 1921; therefore Section 54 of the Land Settlement Ordinance of 1921 enables registration of the land in the name of the possessor.

Another major question involves the characteristics of the place from which the distance is measured for the purposes of determining whether or not the land is *mawat*. It was proved that the land in contention was more than a mile and a half from the village of B'inah, but the people who worked the land claimed that it lay near Arab al-Sawa'ed. The court rejected this argument.

> Arab al-Sawa'ed *is neither a town nor a village and its existence before the enactment of the Ottoman Land Code has not been proven*. . . . The tribe inhabiting the area amounts to no more than seven families living in permanent buildings that were built in Mandate times and are scattered over a large expanse of land, so they cannot be viewed as a built-up town or village from which one can measure the distance to the land under discussion. Furthermore, before the buildings were erected, the tribe lived in Ishmaelite tents [dwellings made of animal hides/hair], but *none testified that they lived there and that it constituted a permanent settlement in ancient times, that is, prior to publication of the Ottoman Land Code, which is the determining date in this matter*.[32]

In his brief judgment Justice Berinson made two dramatic interpretive decisions that effectively blocked the Bedouins from gaining land they had worked for generations. First, he held that only a "town or village"—and not every place of settlement—is a legitimate place to measure the distance for determining the land type. This firm position contradicts the ambiguity on this point in Ottoman and Mandatory law. The Ottoman and British authorities took into account the special characteristics of Bedouin communities and enabled them to acquire land rights in accordance with those characteristics. As we have seen, Ottoman law did not define "settlement" in a uniform and unambiguous way and treated both the outskirts of a "town or village" and the outskirts of a "place of settlement" as points from which the distance could be measured.[33] The Abramson Committee, which the British established in 1921 to locate state land, adopted the approach that *mawat* land begins from the point at which a man's voice can be heard from the edge of a "*place* or village."[34] In addition, the British Land Settlement Ordinance of 1928 and its Israeli version (1969) define "village" to include "any village lands within or abutting on a municipal area or *tribal area*, or any part of any such lands."[35]

Second, Justice Berinson held that only a "permanent settlement" that existed before 1858 would be considered for purposes of measuring distance. This holding contradicts the understanding of Judge Richard C. Tute, president of the Lands Court in Jerusalem and an expert on the OLC, whereby "place of settlement" includes not only existing towns and villages but also new settlements.[36] The demand that a "settlement" existed before 1858 for the land in and around it to not be classified as *mawat* was new; it did not appear in any law or, to the best of our knowledge, in any Mandatory court ruling.[37] Setting this date as a condition for recognition of a "settlement" reduced the number of places from which it was legitimate to measure the 1.5-mile distance, significantly diminishing the amount of land that could be considered *miri* and greatly expanding the amount of land in the *mawat* class.

Furthermore, in the Land Settlement Ordinance of 1928, the Mandatory legislator included "tribal area" in the definition of "village." The Israeli court ignored the open definition of place of settlement in these two major legislative enactments, which form the foundation of the land settlement now being carried out in the Negev. It is no surprise that Justice Berinson did not explain the reasoning behind his interpretive decisions but presented them as formal application of existing law. This ruling quickly became a leading precedent.[38]

Burden of proof under the Israeli approach also created severe problems for the possessors of land. Section 28 of the Land Settlement Ordinance states:

> (1) The rights of the Government to land of the category of *Miri* or *Mulk* which are required by law to be registered shall be investigated and settled: the rights of the Government to land of any other category shall be investigated and settled only if any claimant puts forward a claim which is in conflict with such right.
>
> (2) . . .
>
> (3) All rights to land in any settlement area which are not established by any claimant and registered in accordance with the settlement shall belong absolutely to the Government.[39]

The Israeli court interpreted this section to impose a heavy burden of proof on claimants of rights to *mawat* land. For example, an Israeli court held that the possessor had the burden of proving that the land in dispute was situated less than 1.5 miles from the village.[40] In addition, evidence that an adjacent parcel was recognized as *miri* was not sufficient to convince the court that the parcel in question did not have to be classified as *mawat*.[41]

Another hardship the Israeli doctrine posed for land possessors results from the already discussed rigid interpretation of the putative obligation to register revived *mawat* land in the prescribed two-month period in 1921 and the associated harsh sanction attached to failure to register.[42] However, as shown, until the end of the Mandatory period, the British issued registration certificates to many people who revived land before the ordinance was enacted, even if they did not give notice within the prescribed two-month period. The authorities also did not rigidly apply the requirement that revival be done before 1921.

Contrary to the approach held by the British authorities who enacted the Mewat Land Ordinance, the Israeli court gave the law a stringent interpretation, requiring registration also by people who revived land before the ordinance came into force. The court's interpretation of the Mewat Land Ordinance "trapped" those who did not register within the two-month period between February and April 1921 and those who cultivated land beyond the 1.5-mile range, turning them into trespassers, regardless of how long they had possessed the land. In his opinion in *Badran*, Justice Berinson wrote:

> The 1921 ordinance instituted a fundamental change. It stated that, from the day of publication of the ordinance and henceforth, a person who revives and cultivates dead land without first obtaining government authorization does not acquire any right to receive a *kushan* for it, and is liable to be charged with trespass. Regarding revival without authorization of the authorities that preceded publication of the ordinance, a possibility was offered to establish a statutory right to receive a *kushan* for the land by giving appropriate notice to the registrar of lands within two months from the day of publication of the ordinance. The respondents never claimed that they or their predecessors ever received permission to revive the land or that they gave notice of the revival within the two months prescribed in the statute. . . . Continued cultivation of the land after this date was trespass.[43]

We think, as noted, that the judge erred when he joined the two sections of the Mewat Land Ordinance and applied to unregistered pre-1921 cultivators the trespass sanction designed for those reviving the land after 1921. As we saw in Section 3.1, the ordinance's wording does not prohibit possession of land by individuals who worked it before 1921 and does not mention penalty sanctions for people who delayed registering the land. Such an interpretation of the ordinance would eliminate the impossible demand that *Badran* intro-

duced and that *al-Hawashlah* later applied to the Negev. Furthermore, as we saw in Chapter 2, the Ottoman administration delegated administrative authority to Bedouin clans and tribes, including the authority to partition the land and create a property-ownership system of descent, partition, sale, and purchase. Therefore, even if we assume that the land is *mawat*, the Ottoman delegation of authority can be viewed as the required "authorization."

And what is to be done with people who worked land and did not register it? The Israeli court left an ostensible—but only ostensible—"opening" for land possessors to show that they were not trespassers. This resulted from novel statutory interpretation that the possessors

> had to prove that from the very beginning, when their fathers or the fathers of their fathers began to possess and cultivate it, it was suitable for cultivation and was not the neglected land mentioned in the beginning of Section 103 (mountaintops, places with rocky ground and boulders, and so forth).[44]

And what date did the justice intend when he held that it was necessary to prove "from the very beginning" that the land was not *mawat*? He did not specify. However, if we take into account the demand that the settlement be a town or village that existed before enactment of the OLC, it seems that, with the exception of unusual cases, present-day claimants must prove the land type before 1858. It goes without saying that this demand is almost impossible to meet, given the lack of maps, documents, photos, and living witnesses from the mid-nineteenth century. The Bedouins, whose culture is primarily oral, certainly cannot meet this demand.[45] As Steve Wexler explains:

> If the burden of proof is imposed on a certain side or social category, when it comes to the making of decisions, it turns out that rarely, if ever, can the burden of proof be met. What a surprise! This is the way law works: it is more likely to reach the conclusions it starts out assuming.[46]

We think that, if the Supreme Court had adopted in *Badran* an interpretation with appropriate weight to principles of human rights, equality, and property and to the historical particularity, it would have interpreted the Mewat Land Ordinance differently. A proper interpretation would have given appropriate weight to the ties of possessors of land and would have distinguished between veteran possessors who revived the land before 1921 and new possessors, whose possession began after the two-month registration period. Only new

possessors might not have their perfected rights recognized. Such an interpretive approach did exist in the Israeli legal system in that period, as demonstrated by the landmark *Kol Ha'am* Supreme Court decision, decided in the early days of the state, which enshrined the freedom of expression as a fundamental right.[47] The Supreme Court established, without explanation, an unprecedented and problematic rule when better interpretations were available. The Court's interpretation did not take into account the transformation that Israel underwent in 1948, when it changed from a state whose legislators and legal interpreters served a colonial system to a state that was to operate as a democracy, committed to fundamental human values and acting to "foster the development of the country for the benefit of all its inhabitants," in the wording of the Declaration of Independence.

The Court's interpretation in *Badran* has been, to the present day, a virtually insurmountable barrier for the Negev Bedouins regarding the substantive law and the laws of evidence. All the Bedouin settlements established after 1858 (the year in which the OLC was enacted) are not recognized, and they, along with all the land area within a 1.5-mile radius of them, are classified as *mawat*. Every place of settlement that became a "village or town" after 1858, even a place that met Western standards of a settlement, is automatically considered as sitting on *mawat* land and the Bedouins in those settlements are almost certainly deemed as trespassing on state land.

Although the judgment in *Badran* related to land settlement in the Galilee, the doctrine it produced was quickly exported to the Negev. It inspired Israel Land Administration officials on the Land Settlement Committee in the Negev, who contended, in official hearings on the future of land in the Negev, that it was worthwhile for the state to examine the application of the doctrine to the Negev Bedouins in a "test case," basing its claim on the land being classified as *mawat* and thus defeating the Bedouins claim of possession and cultivation.[48]

4.3 CONSTRUCTION AND APPLICATION OF THE DEAD NEGEV DOCTRINE: THE *AL-HAWASHLAH* CASE (1984)

The state's test case succeeded, with the Supreme Court responding to the initiative more favorably than the state's attorneys might have expected. *Al-Hawashlah v. State of Israel*, handed down by the Supreme Court in 1984, became the main ruling addressing Bedouin land rights.[49] Although the judgment

involves a specific controversy, it is interpreted to cover the entire "Negev" and therefore brought an end, at least until recently, to the Bedouin ability to tell their story and protect their land.[50]

The case began in a land settlement process in 1969.[51] The District Court, in the decision by Court President Shlomo Elkayam, accepted the state's position that the land was *mawat* and that it must be registered in the state's name. The Bedouins appealed, and years later the Supreme Court, in an opinion written by Justice Halima, ruled in favor of the state. The principal move by Justice Halima in the case was application of the *mawat* doctrine to the Bedouins in the Negev.[52] The doctrinal-legal basis did not require much development, because its elements had been firmly established in Israeli rulings in land disputes in the Galilee in the 1960s, particularly in *Badran*. The significant novelty of Halima's judgment was in the geographic-historical aspect and in giving Supreme Court sanction to the state's position that the Negev was wasteland and that the Bedouins were nomads who did not engage in agriculture and did not live in settlements; therefore their land was dead land and thus, under the *mawat* doctrine, state land. Such an attitude closely resembles the *terra nullius* approach.[53]

As Justice Halima explained, "the main axis" in the discussion and in the legal controversy was the question of classification of the land—whether it was *mawat*, as the state contended, or "an unregistered right that passed to them from generation to generation . . . land which initially was fit for cultivation and was not of the class of neglected land," according to the appellants.[54] Relying primarily on *Badran* and other case law from the Galilee, the Supreme Court held that the land was indeed *mawat*. Justice Halima emphasized two elements in classifying the land as *mawat*: "(1) the distance of the land from the (nearest) settlement, and (2) its being located in a desolate place, not having previously been allocated to any person, and not in the possession of any person."[55]

Regarding the first element, the Court emphasized that the land in dispute lies in the Seer area, more than a mile and a half from the modern city of Dimona, which is the closest settled place to the parcels in dispute. Beersheba, which the justice considered "the closest settlement in the relevant period," is located even farther away.[56] The appellants contended that the Kurnub settlement was closer to the parcels, but the Court rejected this contention, in language used in the Albeck Committee report: "After all, Kurnub was not a settlement in the sense of the relevant sections; it had only a police station and a Bedouin tent next to it, but nothing else."[57]

Appellants also contended that "in the mid-nineteenth century their ancestors lived in the Bedouin village Seer, which lies between Kurnub and Aru'ar, no more than a mile and a half from the lands under discussion." The Court rejected this contention as well. It held that descriptions from the nineteenth century, by "those who crossed the length and breadth of the Negev [and thus] saw it in the middle of the previous century," showed "that in the relevant area there was no village and no cultivation, and other than a Bedouin encampment and wild vegetation that was visible on the ground, this area was all barren desert."[58]

As shown, in both the Ottoman and the Mandatory periods, the consideration of what was or was not a "settlement" was ambiguous. The Ottoman and Mandate authorities took into account the special character of Bedouin settlements, and the Bedouins were allowed to acquire land rights despite that character.[59] However, to the court in *al-Hawashlah*, a Bedouin tent did not meet the definition of a "settlement." As in the courts of other settler societies, the indigenous settlement pattern did not gain legal recognition in the Israeli court. A Bedouin tent and the tribal areas around it, which bustled with life, were treated the same as wasteland, unsettled and uncultivated, a modern Israeli embodiment of the colonial *terra nullius* doctrine. As in the Albeck Committee report, the judgment of Justice Halima in *al-Hawashlah* constructed the Bedouins as a nomadic group having no rights to land.

Regarding the second element, the Court did mention that "we all accept that not all land that is a mile and a half from the closest settlement is *Mawat*. In each case it must be proved . . . that the said land lies also in a desolate place, that was not in the possession of any person, and was not allocated to anyone."[60] But Justice Halima had no doubt that the land in dispute was desolate and that "the area involved herein had no village and no cultivation."[61] Here, too, in a manner similar to the Albeck Committee report, the Court found a close connection between the desolate character of the land and "the nomadic character of the Bedouin tribes."[62]

Justice Halima approved the approach taken by the District Court, which used knowledge perceived as scientific and based its findings "both on testimonies given before it and on research studies carried out in the past by various researchers."[63] Justice Halima noted that "most of the witnesses who appeared before the court of first instance on behalf of the appellants were young, and had insufficient knowledge of what occurred in the past, and certainly did not

know details regarding what took place in the area in 1858."[64] Although some of the witnesses were elderly and supported the appellants' position, the Supreme Court validated the District Court's position, preferring "the objective description of the situation on the ground, as provided by the expert witnesses who testified on behalf of the state."[65] Some of this knowledge was presented in the testimonies of a few former members of the Israeli establishment, who testified that the lack of water in the area "did not enable the inhabitants to revive the land in the area, and they preferred the nomadic life and grazing of their flock over organized and profitable cultivation of land; and for this reason the land in the area remained desolate."[66]

Justice Halima also relied on the writings of the British traveler Edward Palmer.

> The situation in the Negev in 1870 was researched by the scholar Palmer . . . who . . . found wilderness, ancient ruins, and nomadic Bedouins, who did not particularly cultivate the land, did not plow it and did not engage at all in agriculture. . . . If we add to all this the nomadic nature of the Bedouin tribes and the fact that the area is generally arid due to lack of rain most of the year, the conclusion of the court of first instance conforms to the reality and to the objective situation that characterizes the place.[67]

With the Court having held that the land was *mawat*, the burden of proving rights to the land, an extremely heavy burden, passed to the individuals in possession. Here too the Court followed the rule in *Badran*, holding that as long as *mawat* land was involved, the appellants had to prove that they were authorized to hold the land. Because they did not have such authorization from the Ottoman authorities, the last opportunity they had to prove their ownership rights was in 1921, pursuant to the Mewat Land Ordinance, which prescribed a two-month period to enable any person who revives *mawat* land to give notice of such to the authorities and apply for a title deed. Those who did not give notice "missed the opportunity that was never to return."[68]

. . .

In structuring his judgment, Justice Halima received significant aid; the head of the Civil Department of the State Attorney's Office, Plia Albeck, represented the state.[69] As noted, Albeck played a major role in shaping the DND, partly because of her role as head of the committee that outlined the government's policy on Bedouin land (as we saw in Section 4.1) and partly because of her

actions in shaping the relevant legal doctrine. In a lecture he gave a year after the judgment was rendered, Justice Halima described Albeck as

> the natural mother of the judgment [in *al-Hawashlah*] . . . in which hundreds of parcels of land were saved and registered in the name of the state thanks to her defense. . . . We hope that these two elements will jointly spur increased protection of Negev land by completing land settlement in this area as soon as possible.[70]

The Albeck Committee report and the *al-Hawashlah* judgment formed the foundation of the Israeli authorities' attitude toward the status of Bedouin land in the Negev. While professing to apply pre–State of Israel law, Israel changed the definition of *mawat* land and the legal-geographic border distinguishing *mawat* land from other classes of land, which better suited the Bedouins, such as *miri* and *matruke*. Where Ottoman or Mandatory law was vague or unclear (e.g., regarding the definition and existence of a place of settlement from which it could be determined that a given parcel of land was not *mawat*), the Israeli doctrine chose an interpretation that stood in tension with the language of Ottoman statutes and British statutes and with accepted British interpretation. The same was true regarding revival of *mawat* land, which converted it into *miri* land: The Israeli doctrine in fact veers from the previous law, even though Israel contends it merely applies it.

The Albeck Report and the *al-Hawashlah* judgment established an approach that came to dominate legal, political, and public discourse in Israel. The judgment also adopted the geographic-historical narrative offered in the Albeck Committee report, whereby the Negev was wilderness and the Bedouins were nomads who did not cultivate the land and did not live in settlements, giving these scientific "truths" judicial sanction. In Part III we show the weaknesses and flaws of the scientific basis of these approaches, but first we describe the effects of the Albeck Report and the *al-Hawashlah* judgment on the legal and public debate.

4.4 EFFECTS OF THE DEAD NEGEV DOCTRINE

After filing its counterclaims in the 1970s and submitting the Albeck Committee report, in 1975 the state froze land settlement in the Negev. In 2002, given the legal standstill and the expanding unrecognized-villages problem, the Southern District of the Attorney General's Office instigated renewal of the procedure after almost thirty years of freeze. The action, called the Livni-

Sharon Initiative, after Prime Minister Ariel Sharon and Tzipi Livni, a minister without portfolio and later a senior minister (including foreign and justice portfolios), became a government plan in 2003.[71] The renewal of land settlement in Bedouin areas was assigned to a special unit in the Southern District of the Attorney General's Office, working together with the Bedouin Development Administration[72] and other government offices.

The unit worked energetically at its task.[73] By May 2008 the state had filed approximately 450 counterclaims to the settlement officer in the Negev, 223 of which were transferred to the Beersheba District Court. By this time the state had been victorious in about eighty claims involving some 50,000 *dunum*s.[74] In a lecture he gave in January 2011, Ilan Yeshurun (then deputy director of the Bedouin Development Administration) said that the state had won close to 200 land settlement cases (a 100% success rate!) involving close to 70,000 *dunum*s of land.[75]

In all these claims the state's case was built on the DND. Researchers all agree that the judgment in *al-Hawashlah* became the main precedent in classifying Negev land as *mawat*.[76] Moreover, the Goldberg Commission, which thoroughly investigated the issue, viewed the ruling as "a given" and treated it as a principal barrier to recognition of Bedouin landownership rights.[77] Similarly, the head of the Civil Department in the Southern District of the Attorney General's Office, Attorney Havatzelet Yahel, who for years had been responsible for Bedouin land settlement cases in the Negev, relied heavily on the precedent in *al-Hawashlah* to argue that the Bedouins had no land rights in the area.[78] Yahel adopted this approach in two articles that she published in 2006.[79] The same is true of Haim Sandberg's book on Israel lands.[80] The Israel Land Administration followed soon thereafter, adopting the approach in a 2007 report on the Bedouins and in a short publicity film that it produced.[81] The periodical *Land*, published by the Land Policy and Land Use Research Institute of the Jewish National Fund, dedicated a whole issue to the question of Bedouin land, with most of the writers expressing a similar approach.[82]

The DND is regularly adopted by the courts, the Beersheba District Court in particular. Most of the cases are heard and decided ex parte or with weak objection and partial representation (if at all) on the part of the Bedouins. Few Bedouins view going to court as a source of salvation or a process in which they have a real chance to prove their rights. Most Bedouins, particularly those

living in unrecognized villages, do not consider the courts' rulings as legitimate and continue to manage their land affairs according to customary Bedouin law. As the head of the Regional Council of the Unrecognized Villages, Ibrahim Waqili stated in March 2011 that Bedouin society views the legal system's activity in land matters as "an ongoing and cruel, collective dispossession of our historical and human rights to live in peace on land bequeathed to us by our forefathers."[83]

The *al-ʻUqbi* case serves as a microcosm of the legal-spatial conflict between the state and the Bedouins in the Negev and as an illustration of our general argument. In no other case has the DND been seriously contested as in *al-Uqbi*.

4.4.1 The *al-ʻUqbi* Case and the Debate over the Dead Negev Doctrine

After Israel was established in 1948, the al-ʻUqbi tribe members who remained in Israel continued to live on their historical land. At the end of 1951 the military governor of the area, Lt. Col. Michael Hanegbi, ordered them to vacate temporarily their land for a period of six months, presumably because of military exercises.[84] However, at the end of the period and ever since, the authorities have refused to let them return.[85]

In the early 1970s Israel proclaimed settlement of title in a region that included the al-ʻUqbi land. In 1972–1973 Suleiman al-ʻUqbi, sheikh of the al-ʻUqbi tribe, claimed eight parcels in the settlement process, totaling 1,251 *dunum*s in the ʻAraqib and Zehilika areas, near the city of Beersheba.[86] The claims lay dormant until 2005, when Suleiman's son Nuri, born in ʻAraqib in 1942, actively relaunched them.[87] Because the state disputed the claims, the settlement officer transferred the dispute to the Beersheba District Court,[88] with the vice president, Judge Sarah Dovrat, presiding.[89] On March 15, 2012, almost three years after the actual trial began, Judge Dovrat delivered her decision in favor of the state.[90] The al-ʻUqbi family appealed, and when we were in the final stages of writing this book, the Supreme Court delivered its opinion, which we discuss in some detail in the Conclusion in Section C.1.

In addition to the al-ʻUqbi family's legal representation (Michael Sfard Law Office and attorney Raduan Abu-ʻArara) and the legal team for the state (headed by Havatzelet Yahel and including Ye'ari Roash and Nira Gilad), expert witnesses played an important role in the case.[91] Much of the legal struggle waged

in court before Judge Dovrat focused on the conflicting positions of two geography professors who submitted professional expert opinions: Professor Ruth Kark, of the Hebrew University in Jerusalem; and one of the authors of this book, Professor Oren Yiftachel, of the Ben-Gurion University of the Negev.[92] For clarity purposes, we refer to this confrontation after reviewing the case.

In addition, parties disagreed on several major issues. These included controversy regarding the facts at the base of the case and the reliability of the two major expert witnesses, the interpretation of *mawat* rules, the question of burden of proof, whether or not the Bedouins were indigenous people, and whether or not the land expropriation according to the Land Acquisition Act should stand.

4.4.2 The al-'Uqbi Family's Arguments

The al-'Uqbi family challenged the *al-Hawashlah* precedent and the DND head on in the District Court and more so in their appeal. They requested that the Supreme Court correct the injustice done to them by this thirty-year-old doctrine, which conditions current land rights on the character of the land a century and a half prior and serves as the major instrument for dispossessing Bedouin tribes of their historical lands.[93] In addition, no Bedouins lived in a European-style house or village during that period. To require, generations later, evidence establishing the condition of land, habitation, and settlement in the disputed area during the mid-nineteenth century was unfair and did not constitute a legitimate demand but rather a closed gate.

The al-'Uqbi family disputed the categorization of the land as *mawat*, arguing that the evidence they provided clearly proved that they and their ancestors cultivated and inhabited the land. Because the land served agricultural and housing purposes, it belonged to the *miri* and not the *mawat* category.[94] Many of the nineteenth-century travelers on which the state relied crossed the area during the summer, when the fields looked desolate. Therefore the fact that they did not mention cultivation does not prove that the land was indeed uncultivated.[95]

Moreover, the state erred in its legal interpretation of what constituted *mawat* land regarding (1) the time set to determine whether the land was *mawat*, which should not be "ancient times" or 1858 but the beginning of the twentieth century at the earliest or, more correctly, the time of conducting

the land settlement survey; and (2) the interpretation of "settlement" in a way that incorrectly and unfairly excludes Bedouin encampments.

Regarding the first point, the al-'Uqbi family claimed that the latest date at which to examine whether the land is *mawat* or *miri* is not the enactment of the OLC in 1858, as claimed by the state, but 1921, and more likely 1948 and even the time of conducting the land settlement survey.[96] In addition, basic legal logic requires that the status of the land (in this case whether it is *miri* or *mawat*) should not be forever fixed to the date of the statute's enactment but examined at the time of the settlement process.[97]

Regarding the second point, during the course of the nineteenth century, at the latest, the al-'Uqbi family claimed that the tribe became settled, living in 'Araqib and Zehilika in permanent settlements on or near the claimed land.[98] These localities should then qualify as "inhabited places" for the purposes of defining the land as *miri*—in which the Bedouins gained prescriptive rights—and not as *mawat*. What is more, the al-'Uqbi family claimed that the Bedouins enjoyed autonomy under previous regimes and that neither the OLC nor the British Mewat Land Ordinance applied to them.[99]

The al-'Uqbi family further claimed that the state's position that the Bedouins did not have "even a shred of a right to any clod of earth" in the Negev and that all the Negev is state land was "extremely radical."[100] In "a puzzling way," the state never applied this position to the thousands of *dunum*s in the Negev that were acquired and registered by Jews.[101] This registration supports the notion that both the Mandate government and Zionist organizations recognized Bedouin landownership. Simultaneously, it estops the state from arguing that Bedouin sellers did not own the land while concurrently sanctioning ownership of the same or comparable land when in the hands of Jewish buyers.[102]

The al-'Uqbi family raised a new argument, claiming the Bedouins were an indigenous group. This status had legal ramifications, including the need to adopt favorable rules of evidence and interpretation.[103] Finally, contrary to the state's position, the taking of the land according to the Land Acquisition Act was invalid for two main reasons. First, the confiscation certificate had several flaws and therefore was void from the start.[104] Second, and alternatively, because nothing was done by the state with the land for decades following confiscation, the expropriation should have been annulled retroactively.

4.4.3 The State's Arguments

The state argued that, contrary to the plaintiffs' contention, it took the land in conformance with the Land Acquisition Act, therefore sufficing for registry in the state's name.[105] In addition, because the al-'Uqbi family failed to prove the source of their ownership, the basic property rule of *nemo at quod non habet* (no one gives what he doesn't have) applied, thereby annulling any title granted to the family by inheritance or purchase.[106]

Relying fully on the DND, the state devoted most of its efforts to the task of convincing the Court that the land was state-owned even before the expropriation in 1954. This point was essential in determining whether the al-'Uqbi family qualified for compensation. Even more significantly, establishing that the land never belonged to the family entailed the added advantage of legitimation, an aspect that the 1954 expropriation lacked. The state argued, therefore, that it owned the land as unregistered *mawat*. The plots fulfilled the two cumulative conditions for classification as *mawat*, according to the OLC and the Israeli legal precedents from the Galilee[107] and later from the Negev:[108] (1) They were located at a distance greater than 1.5 miles from any settlement existing since "ancient times," and (2) they were situated in a desolate place without being allocated to anyone.

Regarding the first condition, the state also argued that

> the position of the plaintiffs [the al-'Uqbi family] is clearly contrary to the rules of law established by the Supreme Court, which explicitly held that a tent encampment, temporary residence, isolated dwelling or distant structures that do not constitute a contiguous area do not suffice to classify it as a settlement (*Suad* 5; *al-Hawashlah* 148; *Badran* 1720). Therefore, the state proved that the claims are far from a place of settlement, at a distance much greater than the "mile and a half" required by law. This being the case, the first condition of proving that the land is *mawat*, was met.[109]

As for the second condition, the plaintiffs failed to prove that "from ancient times the land had been cultivated, and was not desolate."[110] In 1858 (the determining date), the plots fulfilled both conditions and therefore were classified as *mawat*.[111] To acquire rights to *mawat* land, one had to "revive" it; however, the al-'Uqbi family failed to prove that they met the high standard of cultivation needed for revival.[112] Furthermore, unauthorized revival could not

transform *mawat* land into *miri* land.[113] Because the al-'Uqbi family failed to register the land in 1921, they forever lost the chance to do so.[114]

The state also rejected the plaintiffs' argument that the parties had equal evidentiary onuses, claiming that the al-'Uqbi family failed to meet the burden of proof.[115] The evidence they provided did not substantiate cultivation, nor did it substantiate the existence of permanent settlements on the land. The land was not *miri*, and the plaintiffs failed to prove otherwise. In addition, only a possessor could claim prescriptive rights to *miri* land, but the claimants had not possessed the land since 1951. The reason for the lack of possession (the removal of the claimants by the state) was irrelevant.

Finally, contrary to the plaintiffs' contention, the state claimed that the Bedouins did not enjoy legal autonomy, that all the laws applied to the Negev,[116] and that the Bedouins were not entitled to indigenous rights.[117] As such, the state concluded that the land should be registered in the name of the Bedouin Development Authority or of the State of Israel itself.[118]

4.4.4 The Decision of the District Court

On March 15, 2012, Judge Dovrat delivered her decision.[119] She ruled in favor of the state, accepting virtually all its arguments. The judge also preferred the expert opinion of Professor Kark to that of Professor Yiftachel. She ruled that the land was fully expropriated and its ownership transferred to the Bedouin Development Authority in accordance with the Land Acquisition Act and the precedents set by the Supreme Court.[120] She also decided, without any explanation, that the burden of proof lay on the al-'Uqbi family.[121] To lift this burden, the al-'Uqbi family had to offer "firm and consecutive evidentiary support regarding all the claimed plots," evidence that Judge Dovrat did not see.[122] Furthermore, she decided that the category of land should be determined according to the "factual situation that actually existed in the area *in 1858*."[123]

Relying on the *al-Hawashlah* precedent, Judge Dovrat concluded that the plaintiffs failed to show that both prescribed conditions did not apply to them: They did not demonstrate that a permanent settlement existed in the area before 1858, nor did they prove intensive cultivation even in 1945.[124] Although the *al-Hawashlah* case did not rule so explicitly, she interpreted that precedent as "setting a sweeping conclusion according to which the Negev area was found to be desolated and uncultivated."[125] Furthermore, according to Judge Dovrat,

the plaintiffs had to prove not only land revival before 1921 but also continuous cultivation until filing the claim.[126] Finally, she ruled that the claimants did not prove that the land was allocated to them, possessed by them, or conformed to the *miri* category.[127] The judge also ruled that the land expropriation was lawful and that the claimants failed to prove ownership of the plots.[128]

As noted, a central bone of contention had to do with the historical geography of the area and the conflicting positions of two geography professors who submitted professional expert opinions. We now move to analyze this dispute.

4.4.5 Knowledge, Power, and the Dead Negev Doctrine

As we have seen in our debate over *terra nullius*, the rise of Aboriginal title jurisprudence in common law jurisdictions has generated heated academic debates.[129] Several academic disciplines, such as anthropology, history, and political theory, are particularly involved in the process, in the form of expert opinions delivered in courts and within the pertinent academic disciplines, where these issues are researched and debated.[130] As Paul McHugh reports, in many such cases academic disagreements occasionally "went beyond polite academic debate to become very public and acrimonious, Australia's History Wars most notoriously."[131] Experts "became drawn into the adversarialism of courtroom contest, pitted against one another, each being wheeled in by one side as weaponry to neutralize the expert on the other. . . . Cross-examination often became a gladiatorial exercise to the discredit the other side's expert."[132]

The entry of indigenous claims into Anglo-settler jurisprudence and the consequent meeting between law and history transformed the past into a "politicized space," generating major historiographic disputes over methodologies, substance, and the nature and purpose of historical research.[133] "Crossover, crisscross, and crossfire between these disciplines have been constant. Lawyers become historians and historians become advocates."[134] In Australia the controversy following *Mabo v. Queensland (No. 2)* escalated with the publication of additional works by historian Henry Reynolds, which culminated in his *Question of Genocide in Australia's History: An Indelible Stain?* (2001).[135] The controversy did not remain in academic circles. For instance, conservative Australian prime minister John Howard condemned the " 'black armband' approach to Australian national history."[136] Such controversies have also taken place in New Zealand and Canada.[137]

Similar skirmishes are taking place in the context of the State of Israel–Bedouin struggles. In Israel, history, geography, and law are the major academic disciplines involved. Similar to the Anglo-settler controversies but as a new phenomenon in Israel, the land dispute between the Negev Bedouins and the state has recently generated a heated academic debate as well as a clash between academics in and out of the courts. Expert witnesses, including academic researchers, have frequently assisted the state and provided academic support to the DND. This involvement is not new. For instance, in the precedent-setting *al-Hawashlah* case (1984), the state used several people described as experts on Bedouin issues to validate the DND.[138] However, until recently, experts on behalf of the state faced neither serious cross-examination nor challenges by other academic experts on behalf of the Bedouins, because the Bedouins were too disempowered to organize legal and professional teams to combat the state. This has no doubt assisted the state in winning a great number of cases. Novel in Israel is that recently a small number of Bedouin claimants have begun to bolster their claims with expert reports and the assistance of academic experts, including the present authors.

In recent years a prominent expert witness on behalf of the state has been Ruth Kark, the renowned historical geographer of the Hebrew University of Jerusalem. She has submitted expert opinions supporting the DND in a number of key cases, including *al-ʻUqbi*. Her reports provide an important academic foundation to the historical and geographic claims advanced by the state. Hence her central role in bolstering the DND merits special scrutiny. [139]

In the *al-ʻUqbi* case Kark faced a strong rebuttal in the form of expert opinions written by one of us (Yiftachel) with the assistance of the other two. The *al-ʻUqbi* case pitted two legal and academic groups against each other within and outside the court. The state legal team was led by attorney Havatzelet Yahel from the Southern District of the Attorney General's Office; at the time, Yahel was also a doctoral student supervised by the expert witness Professor Ruth Kark. Assisting Kark were several academics, including another of her recent Ph.D. students, Dr. Seth Frantzman. The legal team working for the al-ʻUqbi family was led by attorney Michael Sfard, and the major expert witness was, as noted, Oren Yiftachel with contributions on legal and historical issues by Alexandre Kedar and Ahmad Amara (i.e., the three authors of this book). The expert opinions submitted to the Court (in two rounds)

stretched over 100 pages of text and included dozens of new historical and geographic documents, revealed for the first time in Israeli courts.

The al-ʻUqbi family vehemently criticized Kark's expert opinion and her methodology. They stressed that she systematically omitted a large number of sources mentioning Bedouin cultivation, settlement, and property in the Negev as well as sources referring to the al-ʻUqbi tribe. In the sources she did refer to, Kark skipped segments explicitly mentioning Bedouin cultivation and the al-ʻUqbi tribe, without providing a satisfactory explanation for these omissions. Kark never seriously surveyed the sites in question or met or interviewed local Bedouins—an essential source in the case of communities with oral history traditions such as the Bedouins.[140] The al-ʻUqbi family denounced Kark's indiscreet faith in (selected) nineteenth-century travel literature and maps, which were tainted by Christian and orientalist perspectives.[141] On top of that, Kark's expert opinion and testimony contradicted some of her academic writings. Although the claimants recognized that a scholar could change her mind, in such cases she should have clearly disclosed this transformation in an academic setting and not put it in writing for the first time in a legal expert opinion without even disclosing her change of opinion.[142]

The state argued, on the other hand, that Kark's expert opinion should be preferred over Yiftachel's because of her personal and professional credibility. Kark is a leading expert in historical geography and has published more than 20 books and 150 articles in this field. After a thorough examination of dozens of historical documents and more than 150 maps, she reached the conclusion that no permanent settlement existed in the disputed land or its vicinity and that therefore the land fitted the *mawat* category. In response to the al-ʻUqbi family's criticism, the state argued that an expert was entitled to change her opinion and thus so was Kark.[143]

The state, in language reminiscent of the criticism against Henry Reynolds in Australia,[144] continued that, contrary to Kark, Yiftachel is not an expert in historical geography and that his expert opinion and his oral testimony were flawed. His methodology was deficient and his findings contained many inaccuracies. He relied on sources he did not fully read, failed to disclose findings that did not support his position, and quoted selectively from some of the sources.[145] In addition, they accused Yiftachel of not differentiating between his political views and his historical conclusions.[146]

In her judgment, Judge Dovrat clearly preferred Kark's expert opinion to Yiftachel's. Although Judge Dovrat summarized the plaintiffs' claims that Kark's opinion contained many flaws, she did not answer most of these claims, nor did she mention her own criticism of Kark's testimony.[147] In contrast, the judge remarked that she felt uneasy during Yiftachel's cross-examination when he relied on sources that he had not read directly, relying instead on sources quoting them. In her judgment, Judge Dovrat refrained from referring to most of the new historical and geographic documents submitted by Yiftachel, preferring instead to concentrate on legal and procedural aspects of the case. Judge Dovrat hence decided that she preferred Kark's "detailed and thorough opinion" to Yiftachel's testimony and therefore determined that no permanent settlement or cultivation existed in the disputed land during the relevant period.[148]

For us, Kark's role is a structural rather than a personal matter. Hence our critique here aims at raising questions regarding the nature of the DND and its impact on Bedouin land rights. We are not dealing here with the merits of Kark's scholarly work, for which she has gained academic respect. The more general phenomenon we wish to highlight is the mobilization of intellectuals and experts to "normalize" and legitimize contested state narratives under the guise of "scientific truth." Our argument is that such mobilization is vital for such doctrines to continue and function in the face of contestation and resistance.

The variegated links between power, knowledge, and dispossession have of course been a subject of much analysis in the social sciences and philosophy. Scholars such as Antonio Gramsci, Michel Foucault, and Arundhati Roy, to name but a few, have analyzed the power, economic, and political systems that strengthen the tendency of intellectuals to support hegemonic discourses, often on behalf of the state or social elites, while at the same time representing themselves as "independent" and "objective" experts.[149] Gramsci argues that in such a process, "organic intellectuals" (who represent their own class) tend to legitimize the existing power structure in what he aptly termed a "passive revolution." Thus

> the relationship between the intellectuals and the world of production . . . is, in varying degrees, "mediated" by the whole fabric of society . . . of which the intellectuals are, precisely, the "functionaries" . . . the "spontaneous" consent given by the great masses of the population to the general direction imposed on social life by dominant fundamental group [i.e., through their intellectuals, who act as their agents or deputies].[150]

Further, as Roy writes, this constructed "consent" affects not only the intellectuals who openly support the centers of power but also much wider circles that are silenced in this power-knowledge structure. Most intellectuals (scholars, teachers, professionals) sense the "spirit of power," particularly the heavy costs associated with disrupting its logic, and remain silent or at best feeble in their critique.[151] This enables the processes of exploitation and dispossession to continue unabated and unchallenged by public opinion and by other leading intellectuals. At the same time, and as we have seen in the controversies surrounding the *Mabo v. Queensland (No. 2)* decision, intellectuals also play a critical role in resisting and challenging the status quo and its inherent truth and belief systems.[152]

Our survey of scholarly literature on the Negev Bedouins presented in Section 1.1 indicates that, until recently, scholars have only rarely challenged the state position on history, law, land, and planning issues. This general silence reinforces the sweeping denial of Bedouin Arab rights to lands they have used and inhabited for centuries.

Given this context, it appears that Kark's involvement in the Negev land cases falls into the pattern of knowledge-power relations. Her academic prestige has been mobilized by the centers of power to deny indigenous claims to lands of the most marginalized and impoverished group in Israel/Palestine, giving such dispossession the aura of academic legitimacy. The case at hand is more complicated than a simple utilization of scholarly knowledge, because it also involves the transformation (some might say distortion) of knowledge in the name of dispossessing power. Careful analysis of Kark's work reveals considerable gaps between the scientific findings outlined in her publications and the knowledge and interpretation she submitted in her expert opinions in the *al-'Uqbi* case.

A case in point is her position on the existence of nineteenth-century Bedouin agriculture. In her scholarly writings, Kark generally agrees with the academic literature on the existence of widespread Bedouin farming in the Negev. Her writings also support the onset of a Bedouin seminomadic lifestyle with permanent patterns of settlement and the existence of an indigenous landownership system. However, in the main, these findings did not find their way into the expert opinions she submitted to the Court. In the courtroom Kark backs the DND, which, as noted, denies the existence of systematic Bedouin cultivation, settlement, or indigenous land rights before the British Mandate period.

For example, in her 1974 book *Frontier Jewish Settlement in the Negev*, republished with a new introduction and mapping in 2002, Kark points to the existence of widespread Arab-Bedouin agriculture, which was a central element of the Bedouin lifestyle, defined as seminomadic. Kark adds that the cultivated areas were continuous and that only in southern Negev areas did cultivation begin in patches.

> In 1928 there existed in the Negev 1.5 million dunum of cultivated land . . . [and] in 1934–5 some 2.109,234 dunums were cultivated. If we consider that the Bedouins cultivate their land on alternative years . . . we have an overall cultivated area of some 3.5 million dunums. . . . The cultivated area reach[ed] the northern edge of the Beersheba District; and in the south to Kurnob [i.e., today's Nitzana-Revivim-Dimona line]; south of this line, there are no areas of continuous cultivation but rather sections of cultivated valleys. Barley constitutes eighty percent of the Bedouin cultivation area, followed by wheat, dura, watermelons and lentils.[153]

As regards Bedouin landownership, Kark provides many details on the process of Jewish land purchases from what she terms "the Arab landowners," including the names, contacts, deals, and registration process.[154] From the details provided for the land purchase campaign, it is clear that the Bedouins are the landowners in the region. For example, in the 2002 edition of Kark's book, there is a detailed map showing the purchasing efforts of Jews in the Seer lands, southeast of Beersheba, where large parts of the map are marked "under Arab ownership."[155] Against this, it should be remembered, Kark noted in her submission to the Court that the *entire Negev* was *mawat* land, wholly belonging to the state.[156]

Kark also describes in her 2002 book the emergence of an organized and well-documented Bedouin land system during the Ottoman period. She reports on the registration of Bedouin property by local sheikhs in *dafater* (notebooks) managed by these Bedouin notables, which were respected by officials and the local populations.

Moreover, Kark notes that the Mandate government was not allowed to register all Negev lands in its name, meaning much of the land was obviously not *mawat*.

> At the end of 1920 . . . it became clear that all the Negev land belonged to the Bedouin tribes. . . . The government was not allowed to register the lands under its name, because here the Land Law [the Ottoman Land Code] and the "*Mahlul*"

> regulations were never implemented here. The government . . . did wish to allow until then . . . only the acquisition of lands that were cultivated for at least ten years, and even these purchases were allowed only under the condition that the Bedouins be compensated for their land claims. [157]

Another example is an article published in 2012 by Kark and Frantzman, in which they analyze British policy in the Negev, including the massive registration of Jewish National Fund and Jewish individual lands, all purchased from local Bedouins and registered as *miri*.[158] Kark and Frantzman also describe the distribution of these lands south, east, and northwest of Beersheba, that is, in the territories of all major Bedouin tribes, from which these lands were purchased. It is clear that if all Negev land was *mawat*, Jewish bodies and individuals would not need to purchase the land from the Bedouins, who would not have been considered owners by the British rulers. Kark and Frantzman bring further evidence against the DND. They note that at least some of the purchased Bedouin land was *miri*; they quote the recommendations of the district subcommissioner in 1945 to register uncultivated land in the name of local sheikhs and detail a purchasing process of land from the ʻAzazma tribe in a mostly arid region southwest of Beersheba.[159] It is plain to see that these details contradict Kark's support in the courtroom of the DND—that is, the classification of all Negev land as *mawat*. Thus, even after submitting her expert opinion to the courts, Kark continued to support in her academic writing evidence that undermined this expert opinion.[160]

Yet, despite the clear substantive evidence outlined in Kark's publications, as corroborated by other studies of Bedouin history, her expert opinion presented a different picture. In her written submission to the Court, Kark the expert, as opposed to Professor Kark the scholar, routinely skipped over most parts in previous studies that described Bedouin cultivation, settlement, and land rights as well as parts that mentioned the al-ʻUqbi tribe.

For example, the books and articles by Seetzen, Tristram, Robinson, Hull, Musil, Avci, al-Aref, Braslavsky, Bailey, Meir, and Amiran—all quoted extensively by Kark in her expert opinion reports—include long passages describing Bedouin agriculture, settlement, and land system and referring to the existence of the al-ʻUqbi tribe in the Negev. Yet Kark chose to omit all of these from her three lengthy opinions she submitted to the Court. Here are two examples of Kark's selective quotations.

In her submission to the Court, Kark quoted a lengthy passage from the traveler William Thomson, who crossed the Negev in the 1830s.[161] She reported that Thomson did not see any Arab settlement or farming, but at some stage simply plants a " . . . " in the middle of the quotation. Yet in the original text one finds the following sentence, omitted by Kark: "The land around is not at all what we call in America 'virgin land.' The land has been ploughed for thousands of years, probably in the same manner it is ploughed today."[162] Thus Kark also omitted the report about Bedouin farming practices, as well as Thomson's report about Bedouin wheat harvests appearing in the book. [163]

Kark reported widely on the writings of Dr. Henry Tristram in the mid-nineteenth century[164] but skipped his description of Bedouin farming around Beersheba: "What separates the Beersheba area from the desert is the growing of crops by Arabs in large, unfenced, fields. . . . The fertile low valleys around Beersheba are ploughed . . . and are sewn by wheat and barley."[165]

In addition, Kark admitted in court that she did not conduct a professional field study of the sites to which the Bedouin claim past cultivation and settlement. She did not study the land for any geographic evidence of human settlement and cultivation.[166] Most geographers commonly accept that such field surveys, with proper geographic examination, are necessary to professionally analyze a site's history and subsequently the rights of its inhabitants. Typically, in the approach adopted in the preparation of the expert opinion, Professor Kark the scholar is at odds with Ruth Kark the expert witness. This is obvious from the (newly written) introduction to her 2002 book, where she declares:

> I attached great importance to my work beyond the archives and printed materials . . . such as field work including an examination of the settlements themselves and their sites on the land. . . . In addition, my research work included interviews with the Negev kibbutz members and with key personalities that helped purchase land in the region.[167]

In studying the rights of an indigenous group such as the Bedouins, who relied for centuries on oral traditions, scholars must acknowledge the great importance of oral evidence, memories, and tribal stories. Yet Kark never interviewed members of the al-'Uqbi tribe or their neighbors or explored the oral traditions of any Bedouin in the Negev.

Furthermore, in her expert opinion submitted in the *al-'Uqbi* case, Kark presented a quite different picture from the one she presented in her academic writings.[168] In the documents and opinions presented to the Court, Prof. Kark argued that until the Mandate period there was no organized Bedouin agriculture in the Negev, that the tribes were "nomadic" (not "seminomadic") and lived without permanent settlements, and that the Bedouins lacked an organized rights-based property system.[169]

These contradictions surfaced sharply in her cross-examination in the courtroom, when she had to admit to "changing her opinion" regarding the findings of her previous publications from the Court's protocols.[170] Several examples are telling, beginning with her cross-examination on the question of the Bedouins' traditional land registration system, described in her earlier book:

Her Honor, Judge Dovrat: The question is, Are you retreating from what is written [in your book] or are you approving?

Prof. Kark: I am sort of retreating. I think there were *sanedim*[171] internal agreements, but not official legal [land registration] notebooks. . . . I write clearly that the Negev lands were considered *Mawat*.

Her Honor, Judge Dovrat: We are not debating *Mawat* at the moment. We are now in a very focused subject. Because, as attorney Sfard said earlier: History did not change. The facts did not change. We cannot influence the Ottoman period today. And nothing will help. So the question is whether you agree with what is written there [in your book] or you agree with what is written in your expert opinion regarding the whole subject of land registration [Tabu]?

Prof. Kark: As regards official ownership, I don't agree . . .

Her Honor, Judge Dovrat: Do you agree with what is written in your book?

Attorney Sfard [on behalf of the al-'Uqbi family]: You write [in your book] that during the Ottoman period, there was no registration and ownership relied on traditional methods written in the sheikhs' notebooks (*Dafater*). You wrote this. And if you don't agree with this, please tell the court that you think differently now.

Prof. Kark: I do think differently.[172]

Later that day, Attorney Sfard asked Kark about the accuracy of other parts of her research on Negev landownership.

Attorney Sfard: I refer to page 59 in your book, where you describe a conversation between Herbert Samuel [the British high commissioner], Dr. Simon and Dr. Rupin [high-level JNF representatives], to check possibilities of facilitating

> Jewish land purchases in the Negev. . . . I am reading from the third line. "From the conversation it became clear that the entire Negev land belongs to Bedouin tribes and without new legal regulations the government cannot register the lands on its name because here the [Ottoman] land law and the Mahlul Ordinance were never applied." Do you stand behind this statement today?
>
> **Prof. Kark**: No.[173]

A final example from many that occurred in the courtroom is taken from the third day of Kark's cross-examination, when she was interrogated on the meaning of Jewish land purchase from Bedouin owners.

> **Attorney Sfard**: You remember that one of the questions I asked you in the first day of examination was whether all Negev lands were *Mawat*.
>
> **Prof. Kark**: From a legal viewpoint, they are.
>
> **Attorney Sfard**: Hence, there is no chance or possibility of registering any of these lands in the name of individual?
>
> **Prof. Kark**: In principle, you are right.
>
> **Attorney Sfard**: . . . Do you know that many such lands were registered as a result of acquisition?
>
> **Prof. Kark**: This is true, that if they were legally *Mawat* there was no justification in registering them, but they were still registered in some manner . . .
>
> **Attorney Sfard**: How much land was registered until the establishment of the state of Israel?
>
> **Prof. Kark**: Around 100,000 *dunum*s.
>
> **Attorney Sfard**: These 100,000 *dunum*s were purchased . . . from whom?
>
> **Prof. Kark**: From Bedouins and effendis . . .
>
> **Attorney Sfard**: This squarely contradicts your thesis that all Negev lands were *Mawat* and the authorities did not recognize Bedouin ownership . . .
>
> **Prof. Kark**: I will be happy to hear your explanation; I don't have an explanation to this.[174]

All of this exchange disappeared from the text of the final decision of the Court. Judge Dovrat accepted this "expert opinion," omitting from the ruling her own criticism about these obvious flaws and thus confirming the complex and co-constitutive relations between power and knowledge.

As a renowned expert on analyzing professional discourses, Bent Flyvbjerg explains:

> The relationship between knowledge and power is commutative: not only is knowledge power, but more importantly, power is knowledge. Power determines

> what counts as knowledge, what kind of interpretation attains authority as the dominant interpretation. Power procures the knowledge which supports its purposes, while it ignores or suppresses that knowledge which does not serve it.[175]

Finally, the DND has served as a central starting point of departure for governmental commissions and committees, most recently the Goldberg Commission, the Prawer Task Force, and the bill regulating Bedouin landownership and settlement, which we discuss in Part V.[176] In the next part, Part III, we begin the task of unpacking the DND, by first moving to examine critically the geographic-historical assumptions underlying it.

III REEXAMINATION OF THE LEGAL GEOGRAPHY OF THE NEGEV

We began this book with a discussion of the land claim filed in the 1970s by Suleiman Muhammad al-ʻUqbi to lands in the ʻAraqib and Zehilika areas. The state responded by articulating and using to great effect what we term the Dead Negev Doctrine (DND), claiming that the entire region is *mawat* (dead) state lands. We articulated eight major components of the DND and argued that they can be grouped into two mutually reinforcing planks: a legal plank and a historical-geographic plank.[1] In this part we closely examine the major components of the historical-geographic plank, which claims that until 1921 Bedouins did not cultivate the Negev land in any systematic manner (reviewed in Chapter 5) and that at least until 1921 the Bedouins were nomadic and did not have permanent settlements or localities (reviewed in Chapter 6).

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5 HISTORICAL GEOGRAPHY OF THE NEGEV: BEDOUIN AGRICULTURE

As we have seen, the Dead Negev Doctrine (DND) rejects the notion that meaningful Negev Bedouin agriculture existed before the British Mandate period. In its ruling in *al-Hawashlah v. The State of Israel*, the Israeli Supreme Court relied on the writings of Edward Palmer, who explored "the Negev situation in 1870" and "found wilderness, ancient ruins and nomadic Bedouins, who did not particularly cultivate the land, did not plough it, and were not occupied by agriculture at all."[1] In the *al-ʻUqbi* case the state argued similarly that the al-ʻUqbi, like the rest of the Negev Bedouins, did not cultivate the land in 1858.[2] The state touted the notion that the lack of water in the area made land cultivation nearly impossible and further argued that ample evidence confirmed that the Bedouins despised land cultivation.[3] In support, Ruth Kark testified that

> writings of Europeans travelers who passed through the Land of Israel in the second half of the 19th century show that the Bedouins . . . gained a livelihood primarily from raising camels, sheep and goats, which require seasonal nomadic movement and raids on settled peasantry areas. Some of the sources describe minor, non-continuous and chance cultivation of land in the Negev, but such areas are distant from the claimed land at hand. Based on the analyzed material, I conclude that this agricultural activity conducted in remote lands was accidental, unplanned and unintended, without intensive treatment or work of the land all year long. The sources show that organized growing of agricultural crops, to a limited extent, began in this area only during the Mandate period and thereafter.[4]

The al-ʻUqbi family argued contrariwise, stating that they did prove that they had lived on the land and had cultivated it for generations.[5]

Justice Sarah Dovrat reviewed the claims and testimonies that the Bedouins cultivated the land in the area and stressed (erroneously) that even the aerial photo interpreter for the plaintiffs found that in most plots only a small area was cultivated.[6] She also repeated Kark's disbelief that the 144 members of the al-ʻUqbi tribe (including children), enumerated in the Mandate statistics, could possess and cultivate 19,000 *dunum*s.[7] She concluded that the claimants failed to prove cultivation even in 1945.[8]

However a thorough study reveals a different picture, however—one that has been absent from mainstream legal and geographic discourses in Israel. Our study demonstrates that the human geography of the northern Negev, including the Beersheba Valley, has been characterized, at least since the nineteenth century, by widespread agriculture in addition to traditional pastoralism. Ample evidence shows that Bedouin agricultural settlement in general and agricultural settlement among the al-ʻUqbi tribe in ʻAraqib in particular has existed for centuries. For generations most northern Negev tribes inhabited residential areas near their permanent cultivation areas, in a spatial unit they termed a *dira* (pl. *diyar*), in most of the Negev or in *bilad* or *bilad ʻamri* (lands or inhabited lands) in more western areas. The Bedouins transferred the land from one generation to the next, establishing an agricultural setting based on dry farming sprinkled with clusters of tents; later, during the twentieth century, increasingly they constructed mud (*baika*) and stone (*ḥajar*) homes.

It is worth noting that, although Israeli courts and sometimes even the academic literature consider the Negev one region, it is more appropriate to treat it as a number of distinct zones. Most scholars divide the Negev into several parts, according to level of precipitation, topography, and the type of land. For our purposes we differentiate between the zones of the northern and northwestern Negev, which are the relevant areas for exploring the land claim in ʻAraqib—12 kilometers north of old Beersheba—and Zehilika, the second site of the al-ʻUqbi claims, 22 kilometers northwest of Beersheba. Contrary to the state's and the Supreme Court's depictions, these areas receive 250–400 millimeters of rain annually and contain fertile loess lands.[9]

Plenty of evidence indicates that the area was inhabited for centuries by Bedouin tribes and that Bedouin dwellers of the desert edge and *fallahin* from

nearby villages often intermingled in the shared region. It is unclear when Bedouin Arabs began settling in the Negev (which was not demarcated as a distinct region until the early twentieth century). The literature advances several theses about their arrival. Some scholars note that the Bedouins had been in the Negev since "time immemorial,"[10] whereas others assert that they arrived with Prophet Muhammad's armies in the seventh century.[11] Additional tribes from Sinai and Transjordan settled in the Negev over the course of the last 300 years and were later joined by impoverished immigrants from neighboring countries, particularly Egypt and the coastal regions of Rafah and Gaza. It is reasonable to assume that several of the tribes who lived in the region known today as the Negev left later on, and that earlier tribes assimilated into new tribes often seamlessly. [12]

The comprehensive census conducted by the Ottomans in Palestine in 1596 is a detailed and systematic source that reveals some of the history of Bedouin cultivation in the region. The census was based on the pattern of tax collection in the empire's various regions and was analyzed by Wolf-Dieter Hütteroth and Kamal Abdulfattah in their important book *Historical Geography of Palestine, Transjordan, and Southern Syria in the Late 16th Century*.[13] Tax payment records detail some of the Bedouin cultivation and their crops—wheat, barley, and maize. However, the Ottoman records show that much of Bedouin agriculture was conducted in what were called *mazra'at*, large areas of crops, without clearly defined villages, cultivated by the Bedouins on the desert's northern edge. Bedouin tribes were called *jama'at* or *'urban* or, at times, *badu*.

The sedentarization process and transition to life based on permanent agriculture had therefore already begun in the sixteenth century. Hütteroth and Abdulfattah show that the residential location of their cultivators was not clear but that the existence of cultivation indicates a permanent possession and long-term commitment to tribal lands.

> From the type of taxes levied on the 'urban jama'at, we assume there must have been stages of development between a traditional Bedouin and an agricultural way of life. . . . There are some which pay taxes for wheat and other field crops in exactly the same way as to the villages. . . . For the purposes of registration they were too widely scattered to be attributed to particular villages. . . . The mazra'at were usually small arable areas, dispersed amongst the hills.[14]

The sixteenth-century Ottoman census marks the existence of "more than a hundred" *mazra'at* in southern Mount Hebron, which overlaps with parts of the northern Negev.[15] In the census summaries the names of six Bedouin tribes are mentioned, five of which can be identified today in the Mount Hebron region and in the Negev.[16]

It is important to note that the southernmost area surveyed by the census, the edge of the Ottoman-controlled area, was, according to census maps, demarcated by a line straggling between Hebron and Rafah, that is, along the northern edge of the Bedouin region. Hence most of the Bedouin tribes who lived farther south were not surveyed or mentioned in the census.

Hütteroth and Abdulfattah also note that in the years after the census, on the heels of decentralization processes in the Ottoman Empire, demographic changes took place in the southern coastal plain, including Bedouin raids and invasions into fellahin villages, at times causing their abandonment. This led to the resettlement of several Bedouin tribes in the more fertile northern Negev areas and consequently their move to a more agricultural lifestyle.

It is in this period that scholars begin to identify a "seminomadic" lifestyle, which combines agriculture, pastoralism, and a permanent living *dira* (defined tribal area) for each tribe.[17] Overall, the Ottoman 1596 census clearly illustrates the existence of Bedouin agriculture for hundreds of years. The combination of grazing and agriculture anchored the Bedouins in specific living spaces, and there began the gradual establishment of a land division and allocation system, which exists to this day. As we will see in the next section, many of the travelers who visited this region documented this move to a more sedentary lifestyle.

5.1 TRAVELERS' ACCOUNTS

The diaries and reports of Western travelers who toured the Holy Land since the end of the eighteenth century serve as an important source for understanding the historical geography of the Negev. In the *al-'Uqbi* case, the state and the judge relied on reports that failed to mention cultivation as evidence that no Bedouin cultivation existed during that period. Nuri al-'Uqbi, on the other hand, challenged the decision to register their tribe's land in the state's name the

> land on which he was born, that his father built upon it the family house, his grandfather cultivated and his great-great father lived in—and this according to

> the travel diaries written a hundred and fifty years ago by the British orientalist Palmer, or the French rhetorician and bible researcher Victor Guérin who did not even traverse the claimed land.[18]

The al-ʿUqbi family argued further that orientalist conceptions and a religious outlook tainted the accounts of these travelers, who neither noticed nor searched for cultivation.[19] Although most of these travelers were driven by religious motives to explore the lands and although only a few of them were scientists, their eyewitness accounts still provide substantive, if partial and often biased, descriptions of the geography of the Negev during previous centuries. Travelers crossing through the Beersheba Valley during winter, spring, and early summer often noticed active agriculture.[20] Even though we did not find direct evidence regarding the specific plots in question before Judge Dovrat, many sources report on cultivation in the general area north and northwest of Beersheba.

For example, Edward Robinson, who passed through the area near Laqqiya (12 kilometers northeast of Beersheba and 10 kilometers east of ʿAraqib) in 1839, identified several wheat storage areas organized in a *nattur*, a special site designed and organized for such storage: "[We] went off to the left towards the N. [north] to a place where the Bedawin have their magazines of grain, called Nattur al-Luqqiyah."[21]

In his 1854 diary the Dutch traveler Carel van de Velde also noted seeing cultivation.

> Our course now lay north-north-east by the still remnant foundations of the city of Beer Sheba, which had last year been used as threshing floors, in consequence of which some part of the grains of corn that had been left had sprung up of themselves.[22]

The Reverend W. M. Thomson, who visited the Negev during 1856 and passed through the area of the Jbarat tribe, some 15 kilometers north of ʾAraqib, noted that the area was "monotonous—wheat, wheat, a very ocean of wheat."[23] Thomson went on to describe the area as "no less fertile than the very best of the Mississippi Valley." He similarly described the areas immediately north of ʿAraqib, such as Wadi Sheriʾa (Wadi Gaza) and Wadi Grar, about 6 kilometers northwest of the al-ʿUqbi lands in Zehilika, and reported seeing broad fields of crops there.

Edward Hull, who traveled the Negev in 1883, delivered another important testimony. Hull was different from most travelers in that he was a qualified researcher who headed a delegation of British geologists. This is how Hull described the Tal Abu-Hureira, in Wadi Sheri'a, about 25 kilometers northwest of Beersheba and 6 kilometers south of the al-'Uqbi family's land claims in Zehilika:

> We therefore pressed for another day's march to Tel Abu Hareireh. . . . The country we traversed consisted of an undulating plain, over the sides and hollows of which was spread a deep covering of loam of a very fertile nature. . . . The district is extensively cultivated by the Terabi'n Arabs, and by little parties of *fallahin*. . . . The extent of the ground here cultivated, as well as all the way to Gaza, is immense, and the crops of wheat, barley, and maize must vastly exceed the requirements of the population. In fact, large quantities of agricultural produce raised in this part of Palestine are annually exported from Jaffa and other towns.[24]

The French scholar Father Jaussen compared the barren areas of southern Palestine (i.e., the southern Negev) to the Gaza and Beersheba regions.

> The south of Palestine . . . is neither the beautiful plains of Gaza, neither those of Bir as-Saba', which were always cultivated by the inhabitants of the plain or by the villagers living close by. . . . I attract the attention on the plowing fields that spread more or less, with some interruptions of hills and dry plains. . . . The farmable land is, for a good reason, strongly appreciated by Bedouins, it is their strength, their source of livelihood; they sometimes know to claim it with energy.[25]

Several other scholars, such as Edward Wilton, Ulrich Seetzen, and Max von Oppenheim, also reported, sometimes in detail, the existence of agriculture in the nineteenth-century Negev. [26]

Yet other travelers, such as Victor Guérin, who passed through the Negev in 1863, and Edward Palmer, quoted by Justice Avraham Halima in the historic *al-Hawashlah* ruling, who passed through the Negev in 1868, reported the existence of only grazing lands and scattered ruins (*khirbat*).[27] However, examination of the routes of their excursions reveals that both crossed the region in areas east of Beersheba. As is well known, these areas are dry and receive less precipitation and hence are more difficult for crop production. In such zones Bedouins needed greater land areas to support their basic needs and thus resided in lower densities.[28]

In addition, the mapping delegation of the Palestine Exploration Fund visited the region between 1871 and 1877. Both the state and Judge Dovrat relied heavily on its report as evidence that no Bedouin cultivation existed in the nineteenth century.[29] In their notes (memoirs) accompanying the maps, the delegation reported the existence of only a small amount of cultivation, mainly corn and tobacco, on the route connecting Beersheba and Dahariyya.[30]

Czech scholar Alois Musil conducted several trips and even prepared a map of the northern Negev in 1902. Musil laments the existence of many deserted and ruined localities in the northern Negev, but he also reports meeting the al-'Uqbi tribe in their locality at Zehilika.[31] Musil expresses his sorrow upon seeing the ruined landscape, especially with the knowledge that the area had prospered in the past.[32]

Importantly, the fact that the minority of travelers did not see Bedouin cultivation or localities is not equivalent counterevidence to other scholars' observations of cultivation. Failing to mention cultivation can arise from a variety of causes, such as travel in areas remote from cultivated fields, lack of understanding of the seasonal or the biannual and triennial nature of cultivation patterns, or travel during a drought. "Not seeing" Bedouin agriculture does not negate the possibility that, in nearby areas or in other years, cultivation did exist. On the other hand, the positive observation that cultivated fields did exist cannot be contested, thereby refuting the state's argument that the entire Negev was composed of *mawat* lands.

In summary, most travelers' and explorers' eyewitness accounts point to the most important geographic evidence that has thus far been overlooked in the Israeli courts: that systematic, broad acre farming did exist in at least considerable parts of the northern and northwestern Negev before British rule. Needless to say, this was rather patchy and extensive (rather than intensive) farming, suitable for the region's climatic conditions and relatively low rainfall. Other accounts can only point to the fact that in certain areas (such as the eastern and southern Negev) and in specific seasons (summers or droughts), the land appears uncultivated. Nevertheless, from the traveler accounts, which are reinforced by Zionist reports outlined in the next section, one can conclude that in the northern Negev and Beersheba Valley systematic and permanent agriculture did exist and produced crops aplenty for local and international markets. Therefore these lands cannot be considered empty, distant, unpossessed, and uncultivated *mawat* lands.

5.2 THE NEGEV IN EARLY ZIONIST ACCOUNTS

During the late nineteenth century, several Zionist explorers arrived in the Negev and began studying the region's landscape and population. Similar to the European travelers, they found considerable settlement and cultivation, although in a manner that differed from European or northern norms. This is reflected in the description published by one of the earliest Zionist travelers in the Negev, Zalman David Levontin, an early member of the Hibat Zion organization, which encouraged Jews to settle in the Land of Israel. Levontin was interested in settling the Negev and visited the region a few times. He reported on several meetings with the Bedouins in 1882, in the region of Wadi Jarrar/Grar, just 3 or 4 kilometers north of 'Araqib and 4 or 5 kilometers southeast of Zehilika.

> We walked four to five hours from Gaza surrounded by fields and Bedouin dwellings, and reached Nahal Grar as evening fell. . . . Both sides of the Wadi were filled with row after row of Bedouin tents accommodating shepherds. No trees in sight and all the valley is sown with wheat and barley.[33]

Later, Levontin recounts his meeting with a Bedouin sheikh (*rai's*).

> "How many is your tribe numbered?" I asked the *rai's*.
> "More than 100 families," answered the *rai's*.
> "Do you have plenty of livestock?"
> "Numbering thousands," answered the *rai's* proudly.
> "And land for sowing, do you have plenty?"
> "God possesses the entire earth and we plough and sow for our needs."
> "And for more than your needs you shall not sow?" asked my colleague.
> "There are plenty among us who sow and sell their crops to Gaza traders . . . but I do not see much benefit in this."[34]

Menachem Scheinkin, one of the leaders of the Zionist movement in Tel Aviv in the early twentieth century, conducted a trip to the Negev, probably around 1912 or 1913. Scheinkin reported on widespread agriculture but also noted the "primitive methods" of their Bedouin farmers.

> On Saturday night as darkness fell we left our camping place and began walking northeast on the Beersheba road. Here and there are Arab neighborhoods, a sort of combination of houses, huts and tents . . . [and] a good, wide road for carts passing through fields of barley and corn, which brought us to the hills of Beersheba. . . . At night the regional clerk invited me for a meal. . . . We talked about

> the city's development . . . surrounded by plenty of fertile lands. . . . Local Arabs cultivate only part of the surrounding lands . . . superficially and poorly.[35]

Mordechai Yigal, one of the leaders of the Hashomer organization, composed another testimony. The Palestine Land Development Company (PLDC) (Hachsharat Hayishuv) sent Yigal to the area. He reports, "The residents are Bedouins, of whom a small portion lives as shepherds. . . . The majority are half-farmers (*fallahin*), who own both livestock and land."[36]

After this initial short report, the PLDC conducted the first comprehensive survey of the Negev, supervised by Dr. Ya'aqov Tahun, who was the company's manager and, before that, the director and a board member of the Land of Israel branch at the World Zionist Organization. In this important and historic report, published in 1920, the company's surveyors detail the names of ninety-two tribes (*'asha'ir*), their neighboring tribes, their farming areas, and their patterns of landownership and cultivation. The survey also lists the number of houses, tents, and other notable possessions of each tribe and the areas of ownership and cultivation (see Appendix 7).[37]

The PLDC survey conclusions were clear: Significant parts of Beersheba Valley and the northwestern Negev, as well as other parts of the region less intensively, were settled, cultivated, and belonged to Bedouin owners. The report notes that in the Beersheba region, 2.66 million *dunum*s, of which 35% was cultivated, belonged to the Bedouins. The survey also shows that in the northern Negev about half of the land was cultivated. The tribes detailed in the report were incorporated into tribal confederations (*qabai'l*), as follows:

- The 'Azazma confederation owned 770,000 *dunum*s, of which 140,000 (20%) were cultivated.
- The Tayaha owned 1.12 million *dunum*s, of which 640,000 (57%) were cultivated; the Bane 'Uqba, meaning the al-'Uqbi tribe, are included in that, owning 26,000 *dunum*s, 10,000 (38%) of which were cultivated.
- The Jbarat owned 66,000 *dunum*s, of which 38,000 (57%) were cultivated.
- The Tarabin owned 778,750 *dunum*s, of which 272,000 (35%) were cultivated.[38]

The PLDC survey also reported that the Tayaha have ruled southern Palestine for several centuries. The Tayaha confederation grew barley, wheat, and dura

as well as watermelons, which provided food for the camels. In the chapter dealing with living conditions, the PLDC reported that the Tayaha are mainly "land cultivators, en route to becoming *fallahin* (farmers). . . . They live on their land, and leave it only for shepherding."[39]

Another valuable source related to the Zionist movement is the Abramson Report.[40] The Abramson Commission was established by the British high commissioner Herbert Samuel in 1920 with the aim of clarifying the landownership situation in Palestine. The committee focused on *mahlul* and *mawat* lands, which it claimed could be registered as state lands, thereby creating the geographic foundation for a Jewish national home. A leading member of the Abramson Commission was Haim Margalit Kalvariski, who worked as a land purchaser on behalf of the Palestine Jewish Colonization Association (a leading Jewish association). Another member was Faidi al-'Alami, a former member of the Ottoman parliament.

The Abramson Report was submitted to the British government in July 1921. It mapped the location and size of agricultural lands in Palestine. The report found that 2.8 million *dunum*s in the Beersheba region were owned and cultivated by the Bedouins and that most plots were cultivated only once every two years.[41]

In sum, early documentation from Zionist sources, which includes the first comprehensive report on Bedouin human geography in the Negev, clearly demonstrates that farming was a widely accepted way of life in the late Ottoman period. Because of climatic constraints and soil type, it was only natural that in the northern and northwestern Negev the percentage of cultivated land was higher. Even if the land was not cultivated, it was possessed and used by the tribes for their various needs, including grazing, paths, and cemeteries. It is within this region where the vast majority of Bedouin-claimed lands are located.

The findings conveyed in the Abramson Report run counter to the position widely accepted by the Israeli public and scholars and consequently by the state and the courts. As such, this material debunks a central component of the DND, which claims that the region was mostly empty, unpossessed, barren, and thinly inhabited by constantly moving nomads. Our challenge receives further reinforcement by the academic writings of the last few decades, to which we now turn.

5.3 THE NEGEV IN SCHOLARLY LITERATURE

A variety of scholars have analyzed the human geography of the Negev during the late Ottoman period. Most of them note the existence of widespread agriculture in the Beersheba Valley and northern Negev, adding weight to our claim regarding the pervasiveness of Bedouin cultivation, habitation, and property rights. For example, the Turkish historian Yasemin Avci outlines the main reasons for the establishment of Beersheba in its current location by referring to the conditions in the region in the late nineteenth century: "More importantly, there was an abundant supply of water drawn mainly from seven wells, and the surrounding country had already been under cultivation."[42]

Clinton Bailey, a leading anthropologist in the study of Bedouin culture and tradition, also notes in his analysis of the Negev history that "The mid-19th century Bedouins . . . cultivated black goats and were engaged in agriculture, especially in the North-Western Negev. This is the reason they are classified as 'semi-nomadic.' "[43]

Other scholars of the historical geography of Israel/Palestine describe the development of Arab agriculture in the Negev. In a constitutive article from 1953, David Amiran, one of the founders of Israeli geography, analyzes the cultivation from the northern Negev to Kurnub and the Negev craters

> The interesting point is that the Beduin [*sic*] element takes part in the process of settlement. . . . Considerable and increasing sections of the Beduin population have turned semi-nomadic during recent centuries, first by growing cereals . . . then by using houses for storing their harvest, and eventually by occupying houses themselves, seasonally at first and at last permanently. . . . All Beduin engage in some sort of agriculture.[44]

Geographer David Grossman, who pioneered the study of Arab village development in nineteenth-century Palestine, concluded that Bedouin existence during the late Ottoman period was based on a "dual economy" of livestock and agriculture. Such an economic structure provided "subsistence insurance" for the Bedouins in case of drought or harm to their livestock. As Grossman shows, the widening Bedouin occupation in agriculture paralleled their sedentarization and the appearance of dozens of small inhabited localities in the northern Negev. Many such localities were established in *khirba*s (sites of either minor villages or ruins or abandoned villages), in caves, or in tent clusters, which functioned as permanent or seasonal localities. With regard to seasonal

localities, the tribe would return to the same places, often by anchoring their tent stakes in the same exact spots. In what follows we demonstrate how this pattern of farming was linked to the Bedouin landownership system and to the emergence of localities, all bearing property rights according to local law.[45]

Avinoam Meir, a renowned geographer who has studied Bedouin spatial culture for several decades, describes the development of Bedouin agriculture in the nineteenth century as a deep-rooted process.

> It is therefore quite plausible that land cultivation among more northerly tribes in the Negev in the middle of the 19th century was considerably more widespread. . . . Land cultivation at the time of the Ottoman Land Law was thus already familiar among Negev Bedouins. . . . Due to ecological circumstances, this practice was neither an exception nor an agricultural anomaly in their nature, but rather the common reality in the northern Negev.[46]

The processes of cultivation and sedentarization described by Meir took place over several generations and were accompanied by the gradual establishment of land and settlement systems. As mentioned, we can trace the beginning of this process to the sixteenth century.

However, let us turn to the human geography of the Negev during the British Mandate period, which appears to reinforce the reliance of the Bedouins on farming and associated permanent settlement. In large parts of the Negev the Bedouins indeed had continuous possession, because they cultivated, grazed, and inhabited significant parts of the region. Thus Eliyahu Epstein noted in 1939 that in the northern Negev between 2.1 and 3.5 million *dunum*s were cultivated ("primitively") for crops. Given the harsh climatic conditions and mediocre soil quality, some of the fields were cultivated only once every two years; however, the minimal amount of cultivation, according to Epstein's survey, was 2.1 million *dunum*s, an area that covers most of the northern Negev.[47]

Similarly, in 1938 the archaeologist George Kirk, who led some of the first archaeological surveys of the area, pointed out that even in Wadi Mashah, southeast of Beersheba, there were large "patches" of cultivated fields. Kirk noted that, as he moved eastward toward the Arava Valley, cultivation declined and later disappeared and that the lands were mainly used for grazing.[48] Likewise, the Goldberg Commission noted that most sources estimated the amount of land cultivated by the Bedouins as 2 million *dunum*s.[49]

Maps from the Mandate period also note large areas in the Beersheba Valley as "cultivated" and, at times, as "cultivated in patches," including the areas inhabited by the al-ʻUqbi tribe. These maps were prepared using aerial photographs. They show cultivated areas as long as 30 kilometers south and east of Beersheba, thereby reinforcing the conclusions of most leading scholars.[50] As we will see in the next section, a similar picture arises from an examination of the *al-ʻUqbi* case.

5.4 AL-ʻUQBI—HISTORICAL GEOGRAPHY

We do not have precise information regarding the date that the al-ʻUqbi tribe settled in the Negev, but their presence extends back hundreds of years, if not more. A few traditions appear in ʾAref al-ʾAref's well-known book *The History of Beersheba and Its Tribes*. One tradition attributes to the al-ʻUqbi ties to the Midians, who were related to Moses; another mentions tribal members being a vanguard corps in the army of Muhammad that arrived in the Land of Israel/Palestine in the seventh century and were originally from ʻAqaba.[51] Al-ʾAref and Y. Braslavsky described the places where the al-ʻUqbi tribe settled in ʻAraqib and Zehilika.[52] Notable historian and anthropologist Clinton Bailey dates al-ʻUqbi settlement in areas north of Beersheba as no later than the end of the eighteenth century.[53]

The well-known German researcher and traveler Ulrich Seetzen described his meeting with the al-ʻUqbi tribe during his research journey in the Negev in 1807, while completing a survey of the area. Seetzen describes an impressive meeting with a tent settlement that was the largest he saw in the Negev, where the tribe lived at the time.

> At three o'clock in the afternoon, we got to the *dawar* [apparently *dira* or *diyar*] of Atiya, a branch of the Uqba, where Ziban was staying. This *dawar* was larger than all the others I saw before or after, and included seventy tents. . . . There were three hospitality tents, and a special hospitality compartment in each tent, which the Bedouins called "*al-shig*."[54]

The researchers Alois Musil[55] and Max von Oppenheim[56] report on meetings with the al-ʻUqbi tribe at their settlements in Zehilika and ʻAraqib. According to al-ʾAref and Braslavsky, the al-ʻUqbi had a high and respected status among the tribes in the northern Negev, a result of their long-term presence in the area.[57]

One of the testimonies indicating continuous tribal presence in the area is the gravestone of the plaintiffs' grandfather, Haj Muhammad al-'Uqbi, in the al-Sheikh Saleh Cemetery.[58] The inscription on the gravestone includes the names of seven generations, which were, according to family history, members of the local community: "Haj Muhammad—Ben [son of] Salem—Ben Salim—Ben Amer—Ben Salim—Ben Salman—Ben Saed Alquraishi—al-'Uqbi."

Geographically, the claimed land is part of the historical region of the al-'Uqbi tribe. As customary among Bedouin landowners (who belong to most of the large and powerful tribes), the tribe had two *diyar*: a large one in 'Araqib and another in Zehilika, next to the present-day moshav Talme Bilu. The two settlements, in the two *diyar*, were included in the official British lists of places of settlement in the country that were published in the official gazette from time to time.[59] The settlement in Zehilika was destroyed in the 1948 war, and most of its residents were driven away to Gaza.

Evidence from the first half of the twentieth century reveals that the al-'Uqbi owned, worked, and possessed a great amount of land, including the disputed plots. The important report prepared by the PLDC in 1920 placed the figure at approximately 26,250 *dunum*s, with 10,000 of them under cultivation.[60] The report contains a description of the al-'Uqbi tribe, referred to as "Bani 'Uqbana" or "Arab 'Uqbana." The name of the tribe's sheikh is given as Muhammad al-'Uqbi, and the tribe is said to have owned 60 camels and horses and 100 houses (including tents, of course). The report also mentions that land was used to raise wheat, sorghum, and barley. The area of the tribe is described as situated between the areas of the Shalahin (part of the 'Alamat tribe) in the north, Ramadhin in the east, al-Huzayil in the south, and Abu-Ziban in the west. These descriptions correspond closely to the oral history of the tribe relayed in interviews with residents of 'Araqib, particularly with members of the al-'Uqbi tribe.[61] (See Figures 2–6 for evidence of al-Uqbi settlement on their ancestral lands.)

In addition, in researching the property rights of the al-'Uqbi tribe and of the Bedouins in general, we analyzed aerial photographs, which are important in determining the geographic ownership status on the ground. We found a series of British aerial photographs, taken in January 1945, that covers all the parcels in 'Araqib claimed by the heirs of Suleiman al-'Uqbi. The photographs, as well as the testimony by an aerial photography decipherer (the claimant's expert witness) who analyzed the photos, lead us to conclude that, in this

period, intensive cultivation of most of the parcels in ʻAraqib took place and that more than 80% of the two large plots of land (claimed as ʻAraqib 1 and ʻAraqib 2) was under cultivation, as was almost the entire two parcels in Zehilika.[62] The other plots of land were cultivated to a lesser extent, because of steep slopes and the existence of army installations. The photographs show especially intensive cultivation along the banks of the creeks flowing into Grar Stream (Wadi ʻAraqib) and less intensive cultivation of parcels farther from the stream, which were divided in a manner characteristic of field crops, such as barley and sorghum.[63] In general, according to the aerial photographs, almost all cultivable land in the al-ʻUqbi *diyar* was cultivated in 1945. Needless to say, the cultivation was conducted with permission of the British authorities, who duly taxed the al-ʻUqbi harvest on a yearly basis.

Furthermore, Israeli archives contain documents dating from the period of the military government that indicate that Sheikh Suleiman Haj Muhammad al-ʻUqbi paid taxes to Israel on ʻAraqib-grown crops in 1950.[64] Another document indicates that there is a school on the land.[65] Some certificates in the archives classify the land as *miri*.[66] Part of the land is even classified as *mulk*

Figure 2. Ruins of Suliman al-ʻUqbi's house in ʻAraqib. Source: photograph by Ariel Crane.

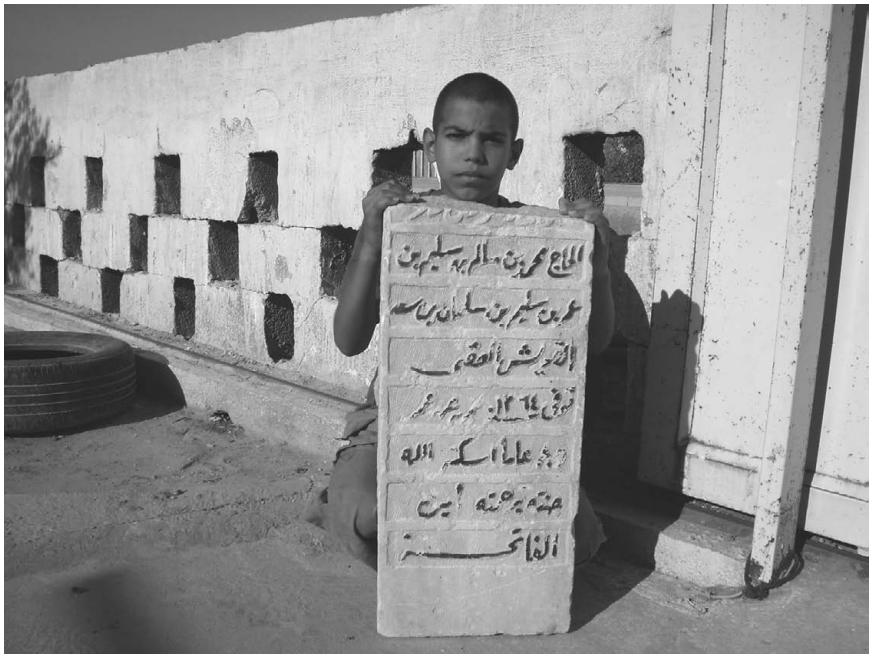

Figure 3. Tombstone of Haj Muhammad al-'Uqbi found in a ruined cemetery near claimed land. Source: photograph by Oren Yiftachel.

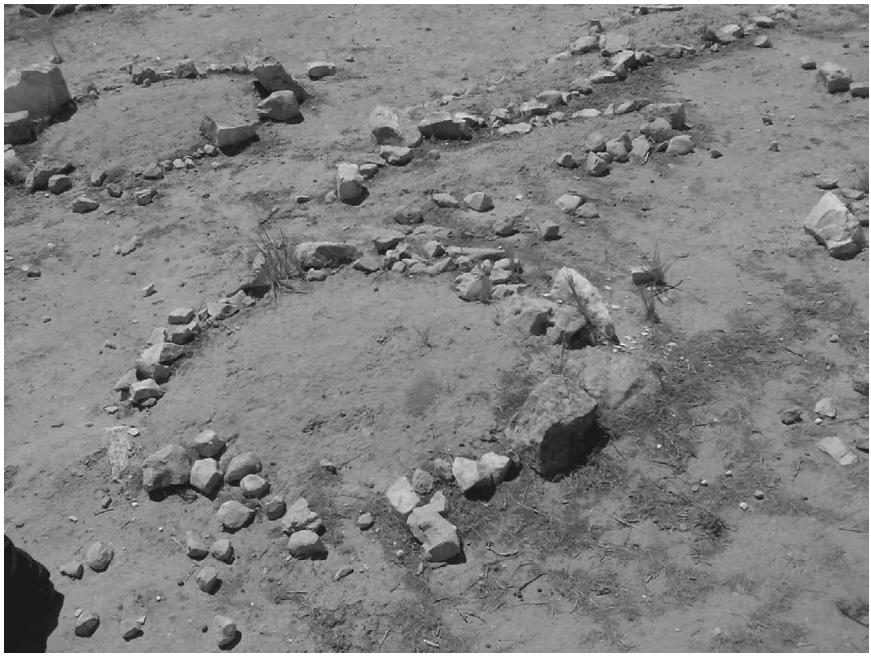

Figure 4. The al-'Uqbi family's traditional cemetery in 'Araqib. Source: photograph by Oren Yiftachel.

Figure 5. Remnants of al-ʻUqbi *baikat* (mud houses) in Zehilika. Source: photograph by Oren Yiftachel.

Figure 6. Remnants of al-ʻUqbi houses in Zehilika. Source: photograph by Oren Yiftachel.

land belonging to the al-ʻUqbi tribe.[67] According to documents regarding the expropriation of al-ʻUqbi land for use by the state's development authority, which were taken pursuant to the Land Acquisition (Validation of Acts and Compensation) Act of 5713/1953, all the land in the plots now claimed in court in ʻAraqib 1 and Zehilika are classified as *miri*.[68] Thus a cross-check of military-government documents with expropriation documents indicates that in the 1950s the State of Israel acknowledged land belonging to the al-ʻUqbi family as *miri*, not *mawat*.

Hence, in contrast to the legal and geographic narrative recounted by the Israeli state and judiciary, firm and varied evidence shows that, for generations preceding the establishment of the State of Israel, Bedouins inhabited and farmed large parts of the northern Negev and Beersheba Valley, where the al-ʻUqbi land is situated, in a systematic and organized manner. The evidence dates back to the sixteenth-century Ottoman census, although cultivation may have started earlier. Bedouin agriculture gradually became a leading source of income, as the community turned to a seminomadic lifestyle, based on permanent settlement around the farmland, in combination with livestock. Some tribes were fully sedentarized by 1948.

In summary, organized and systematic agriculture was an important factor in the life of the Bedouins from the mid-nineteenth century until 1948. Under Ottoman and British rule, expansive areas in the northern and northwestern Negev, where the vast majority of Bedouins lived, were under cultivation and as such cannot be considered "dead" *mawat* lands. These lands were assigned, farmed, grazed, used, and legitimately possessed during these periods—a factor that has direct consequences on the acquisition of property rights. We next proceed to a discussion of the development of the al-ʻUqbi customary land system.

5.5 THE LAND SYSTEM AND THE AL-ʻUQBI

Al-ʻUqbi tribe members testified that they owned and possessed land according to customary Bedouin, Ottoman, and British laws. The plaintiffs submitted to the District Court various documents pertaining to their internal property system and its acceptance by the authorities. These documents included agreements on leasing, selling, mortgaging, and dividing the land; British reports on payment of agricultural taxes from ʻAraqib in which the name of Nuri's grandfather is mentioned in relation to five different places as the "known owner";

and receipts attesting to land cultivation.[69] In addition, some nontribe members testified that they had purchased land from the al-ʻUqbi family.

Indeed, the autonomous property regime of the al-ʻUqbi tribe is reflected in documents indicating institutionalization of the land system with respect to partitioning of the land and local cultivation. The earliest land document involving the area that we discovered is an 1883 bill of agreement (*sanad*), signed by seventeen sheikhs, regarding cultivation of farmland in the area of Khirbet Karkur, on the southern boundary of ʻAraqib.[70] Written testimonies on land sales made by tribe members exist from the first decade of the twentieth century. For example, a *sanad* from 1909 involves the sale of land from Haj Muhammad (the paternal grandfather of the claimants) to the nearby al-Turi tribe; this land is a few kilometers north of the parcels that are the subject of the litigation.[71] A *sanad* from 1911 indicates that Muhammad Salam al-ʻUqbi sold a parcel close to the claimed parcels to his neighbor Muhammad Salmeh al-Mu'rbe.[72]

The *sanad* documents regarding the parcels claimed by the heirs of Suleiman al-ʻUqbi illustrate the traditional land system. Each *sanad* details the borders, conditions, price, and notable personages or witnesses who signed the document.[73] Two of the *sanad*s contain a demand, under certain conditions, to register the land in the land registry in Gaza. This demand supports our contention involving British recognition and the *possibility* of registering cultivated Bedouin land, meaning that the land obviously was not *mawat*.[74]

Other documents indicate an organized traditional land system regarding allocation and settlement of ownership of al-ʻUqbi land. For example, a document from 1930 distributes ʻAraqib land to the five sons of Haj Muhammad al-ʻUqbi.[75] This document represents the *jaddiya* method—transfer of land by inheritance from generation to generation, a customary practice among Arabs in the Land of Israel/Palestine. According to this method, the land is divided (by *qura*, a kind of lottery) and each of the recipients is required to work his plot. Other certificates testify to the function of the traditional land system: a bill of sale,[76] permissions for construction and building of dams,[77] an agreement to cultivate and maintain land, and a *rahen* (mortgage) for leasing land to neighbors from the al-Turi tribe in exchange for one-third of the crop.[78] We found evidence that neighbors to the west of the al-ʻUqbi tribe, in areas where the Jewish National Fund bought land in the 1920s, practiced a traditional land system like that of the al-ʻUqbi tribe: The land was divided into clear

cultivation and residential tribal plots, which could be partitioned and sold in accordance with traditional law.[79]

We also located copies of receipts of tithe tax payments that the al-ʻUqbi family paid to the British government between 1922 and 1946 for the crops it grew in ʻAraqib and Zehilika (see Appendixes 13–14).[80] These receipts explicitly mention the al-ʻUqbi family (Bani Uqba). These receipts show that the land was cultivated and that the British officials who issued the receipts accepted the land arrangement and approved cultivation of the land. As noted, under the Ottoman Land Code, land that was cultivated with government authorization was considered or became *miri*.[81]

Other solid evidence on the historical functioning of the land system in the ʻAraqib area is found in the archives of Kibbutz Mishmar Hanegev, which lies 3–5 kilometers west of the contested parcels in ʻAraqib. The archives contain a map drawn by the licensed surveyor Yosef Dubinsky in 1926. The map shows the boundary lines of the parcels and the names of the Bedouin owners from whom the land for the kibbutz was purchased.[82] A letter dated March 3, 1944, from attorney Yoav Zuckerman to the Jewish National Fund specifies the names of all the landowners from whom he bought land in the Negev, including land on which Kibbutz Mishmar Hanegev sits, a total of 4,764 *dunum*s. These details about the Arab owners from whom Jewish entities and individuals bought land strengthen the claim of recognition of Bedouin ownership and the legitimacy of Bedouin ownership in the years before the State of Israel was established.

Accordingly, the Bedouins in the Negev had legal autonomy that overlapped the first years of Israeli statehood. The autonomy is evident from the way the military government dealt with the Bedouin tribes in general and the al-ʻUqbi tribe in particular. An example is an order of the Negev military governor addressed to the officers in charge of Bedouin affairs. The order states that "until conditions are ripe to restore the tribes' court, you are to appoint for each tribe a legal committee composed of three elders and respected members of the tribe which . . . will hear and adjudicate in civil and social matters of the tribe."[83] A response to the military governor from Sheikhs Salman al-Huzayil, Suleiman al-ʻUqbi, and Hassan Abu-Abdun states that they had decided to establish a joint tribal court for their three tribes. In the body of the letter the military governor added a note, dated August 1, 1949: "Approve the matter."[84]

Evacuation of the al-ʻUqbi tribe from ʻAraqib did not stop the Bedouins from considering the al-ʻUqbi tribe as the rightful landowners. We see this from affidavits signed by the Abu-Freih and al-Huzayil families, who leased land in ʻAraqib and recognized in their statements the ownership of the al-ʻUqbi tribe.[85]

. . .

In sum, we have seen that systematic agriculture served as an important factor in the life of the Negev Bedouins from the mid-nineteenth century until 1948. We have seen also that the al-ʻUqbi tribe owned, possessed, and cultivated a large amount of land (approximately 26,000 *dunum*s). The authorities recognized the Bedouin customary legal system and traditional land regime as late as the early Israeli period. The al-ʻUqbi tribe, like many other Bedouin tribes, traded its land, selling it to other Bedouins, non-Bedouin Arabs, and private and public Jewish purchasers. Having rejected the state's contention that the Bedouins in general and the al-ʻUqbi in particular did not cultivate the land, nor had any rights in it, in the next chapter we examine the contention that there were no Bedouin settlements in the Negev either in 1858 or in 1921.

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6 BEDOUIN TERRITORY AND SETTLEMENT

The Dead Negev Doctrine (DND) holds that the Bedouins were nomadic with no permanent settlements and that their residential areas did not constitute a legitimate locality. Attorney Havatzelet Yahel adopted this view in articles she published, and so did the Israel Land Administration.[1] This approach also appears in the *al-'Uqbi* case. Professor Ruth Kark's opinion firmly states that "there was no permanent settlement in the claimed land, or even one close to it" and that "Beersheba, the first permanent settlement in the area, was established in 1900."[2] Likewise, in its closing statement the state held that "a tent encampment, temporary residence, isolated dwellings, or distant buildings that are not contiguous are insufficient to constitute a village."[3] In her decision Justice Sarah Dovrat ruled likewise that the al-'Uqbi family did not demonstrate that a permanent settlement existed in the area before 1858.[4]

Most travelers, researchers, and mapmakers of that period did not report on clearly delineated villages in the Negev (which was not the case with agriculture), at least not until the beginning of the twentieth century. For example, British memoirs and attached maps—which were the product of comprehensive surveys and mapping of the Land of Israel/Palestine in the 1870s and which were published in 1883 as maps of the Palestine Exploration Fund—do not mention the names of Bedouin villages, except for a list of *khirbat*, which are mostly marked as ruins.[5] Although these maps reach only the city of Beersheba and hence cover only part of Bedouin territory, the absence of localities on the maps poses a challenge to the Bedouin claim that the land they hold is

not *mawat*. The lack of Bedouin localities is indeed a weighty argument, and we now give it the serious consideration it deserves.

Our main argument is that, although most of the maps from the Ottoman period do not mention Bedouin localities, they did exist and were usually marked on the maps according to the names of Bedouin confederations and tribes. The internal division of land into farming localities and settlement areas between the various tribes generally did not appear on the maps, but it existed on the ground and began to appear in later maps from the 1890s. Based on the partitioning of the land among the tribes, tens of thousands of Bedouins lived in villages that developed gradually over many generations, before the British Mandate was established. Presumably, the cultural outlooks and aims of the mapmakers, along with the objective difficulties entailed in marking invisible borders between tribes and the location of hundreds of small villages, led them to frequently ignore Bedouin-settled areas and to prefer the relatively easy task of marking an entire tribal area by giving it a name that extended to geographic areas without clear boundaries.

To support our argument that Bedouin localities and villages did exist, we refer to the many testimonies on Bedouin agriculture, which required, as does all agriculture, the establishment of nearby settlements.[6] However, the style of Bedouin settlement differed from areas farther north: The Bedouins lived in small settlements, primarily in tent encampments, to which occasional *bayka*s (mud structures) and, later, primarily in the twentieth century, stone structures were added. As a result, it was hard for travelers and mapmakers to interpret what they saw as settlements, because these settlements differed greatly from "regular" villages in the northern part of the country or in Europe. They functioned, however, just like permanent places of settlement.

6.1 SEMINOMADISM

These settlements developed as part of the Bedouin "seminomadic" way of life, which changed over the past hundred years to one of permanent settlement. Many researchers—among them Tuvia Ashkenazi, Khalil and Aref Abu-Rabi'a, Yaakov Habakkuk, Avinoam Meir, and Yosef Ben-David—have identified this process, which is directly linked to division and cultivation of the land.[7] As far back as the 1950s, anthropologist Tuvia Ashkenazi wrote that nineteenth-century Bedouins should be categorized as seminomads and not as nomads,

the description often given to them. The main difference is that, unlike nomads, a seminomadic community dwelled in a permanent location inside the tribe's *dira* or *balad* (i.e., inside the area that the tribe owned and controlled) and maintained a (gradually decreasing) livestock economy. Ashkenazi states that the Bedouins in the Negev

> are the ones who abandoned the long-distance nomadic life, attached themselves to the land and *settled on it*, but did not stop raising sheep, goats, and cattle. . . . The Bedouins in the Negev . . . migrate only inside a limited space within the settlement and most raise sheep and goats. . . . In certain areas, the Bedouins—the semi-nomads—purchased parcels of land and cultivated them.[8]

Yaakov Habakkuk, an anthropologist who for many years studied the Bedouin household, adds:

> The semi-nomadic Bedouins, unlike the nomadic Bedouins, dwells with his family in a specific place, generally *in the place in which his tribe dwells. There he cultivates his parcel of land*, and only for a short period of time, lasting a few months—he, or another member of his family, takes the flock and goes wandering, following the annual wild grass and the water. It should be emphasized that, whereas the nomadic Bedouins moves about with his entire family, the semi-nomadic Bedouins leaves some of his family in his permanent dwelling place.[9]

The size of the Bedouin population during the Ottoman period strengthens our argument. According to the research of Clinton Bailey and David Grossman, among others, and to publications issued by the Ottoman government, 32,000 Bedouins were living in the Negev in 1880; in 1914, there were 55,000.[10] It is likely that a population of tens of thousands of people established dozens, even hundreds, of settlements, which required sowing, tending crops, harvesting, security arrangements, and so forth.

In addition, we know that under traditional Bedouin law most of the land was not open or public but was divided into *diyar* or *bilad*, which marked defined and inviolable tribal areas. The tribes owned and held possession of these lands and allocated them among the various families. In this way they created permanent settlements.

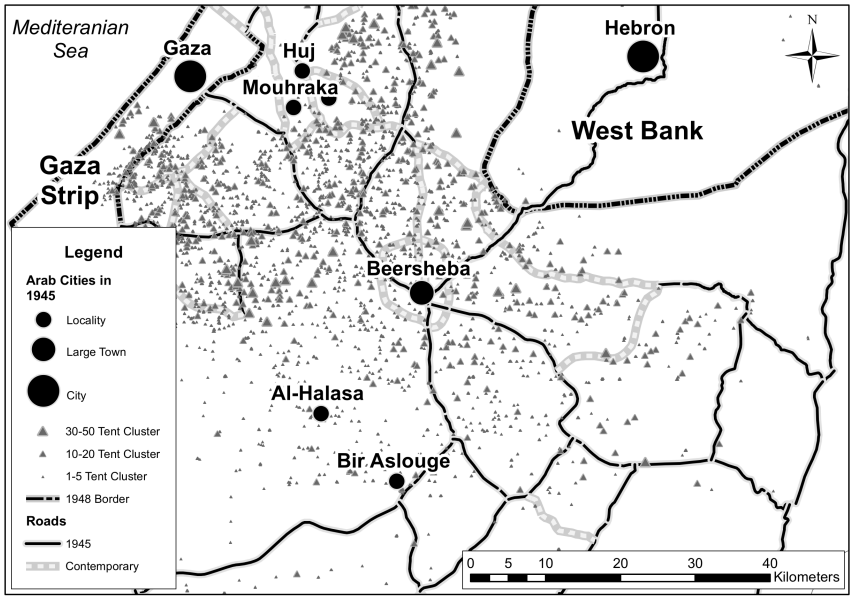
6.2 BEDOUIN SETTLEMENTS

The Bedouins established localities that matched the cultivation and division methods of tribal land. In the second half of the nineteenth century, Bedouin localities consisted of two main types: (1) clusters of tents inside the permanent tribal place of abode, the *dira*, and (2) *'izbah*, a modest seasonal living place near the tribe's agricultural lands. Several of the tribe's members stayed permanently in their *diyar* throughout the year.

Most of the researchers, travelers, and mapmakers reporting on the area were Christians who maintained Western conceptions of localities and villages as consisting of a cluster of stone buildings, built relatively densely, with a clear external border. Bedouin encampments just did not impress them as houses and villages. Yet Negev researchers show that during the nineteenth century there were settlements of a different type on the desert frontiers; these included tent clusters, relatively distant from one another, with generous spaces allocated between tents to maintain privacy. Beyond the permanent core of the cluster, tents were erected in several locations, according to the season. Tents, termed in Arabic *bait a-sha'ar* (home of hair or wool), were widely used to construct permanent abodes for Bedouins performing their agricultural duties while others in the tribe performed the pastoral tasks of grazing.[11] Indeed, aerial photographs and explorers' reports from the early years of the British Mandate illustrate the way in which tents were organized as clusters that functioned as villages (see Map 5 and Appendix 8).[12]

In addition to tents, during the nineteenth century the Bedouins began building mud homes, structures, and shacks. Toward the end of the Ottoman period and more so during British rule, the Bedouins, especially the sheikh, began to build stone houses in the same areas. These settlements functioned as geographic centers for familial, economic, and managerial matters for their communities.[13]

Because tens of thousands of Bedouins lived in the northern Negev and because the fabric of their society included permanent land division, it seems as though the lack of Bedouin villages on maps and in travelers' reports is derived mainly from the perceptions and methods adopted by the travelers and mapmakers. It appears as though these Westerners, lacking an internal understanding of Bedouin settlements, were unaware of the spatiality of Bedouin life and its transformation into a seminomadic agricultural lifestyle. Because



Map 5. Distribution of tents in the Negev, 1945. Source: Israel State Archives, Map 5941/1.

of this deficiency, most nineteenth- and early-twentieth-century travelers interpreted the existence of tent clusters as a "natural" part of a nomadic society, not as permanent localities within a stable tribal territory. This cultural blindness persists among Israeli officials and the judiciary, who as we have seen, maintain that tents, by virtue of their existence, indicate a nomadic lifestyle. This conclusion is reached without inquiry and investigation of the Bedouins themselves or of their human geography during the last two centuries. [14]

6.3 MAPPING

Maps played a major role in colonial domination, conceptually transforming native space into vacant land.[15] Similarly, nineteenth-century Negev maps reflect a European interpretation, not a precise description of the landscape and the Bedouin lifestyles that functioned within that space. Beyond the limited and orientalist Western gaze, it is important to note that these maps were drawn using relatively primitive means, without aerial photographs or more advanced twentieth- and twenty-first-century mapping methods. Most of the

surveyors covered the mapped areas on horse or on foot or observed them from elevated spots on the landscape. Therefore the maps reflect only what the surveyors saw and the limitations of their tools and human abilities.

Ruth Kark's expert opinions, submitted to the Supreme Court in the *al-'Uqbi* case, present a contemporary expression of the DND.[16] Her reports are based, among other things, on an article she co-published in 2010 that surveys dozens of Negev maps prepared before 1948. The article, like Kark's expert opinion, puts great faith in the maps prepared by the Palestine Exploration Fund (PEF) delegation, published around 1880.[17] The authors claim that the PEF map marks "all ruined and permanent settlements as well as isolated houses outside villages and agricultural plantation areas."[18] This led them to conclude that no significant spatial entity existed in the surveyed area if it did not appear on the PEF map. In ruling that the al-'Uqbi tribe's land was *mawat*, Judge Dovrat lent much credence to Kark's reliance on historical maps, especially the PEF's findings (or lack thereof).[19]

However, detailed professional examination reveals serious problems with the PEF mapping. For example, we overlaid the PEF map with contemporary and reliable maps from the Israeli Antiquities Authority[20] and found that just in the small area of 'Araqib and its immediate vicinity alone there are six major omissions in the PEF maps: two wells, two cemeteries, and two *khirbat* (village ruins).[21] As part of a further examination, we overlaid the PEF maps showing all *khirbat* in the Beersheba District onto the Survey of Palestine maps, which were prepared by the Mandate government for the Anglo-American fact-finding delegation and were based on 1945 aerial photographs. The examination shows that the PEF map missed 225 of the 503 (45%) *khirbat* that existed south of Fallujah (now Kiryat Gat) in 1880.[22] The examination of the PEF map's accuracy is not aimed at criticizing the major cartographic achievement of drawing these maps but rather is meant to highlight the uncertainty in exclusive reliance on them as evidence of lack of Bedouin settlement in the nineteenth century. In other words, the PEF maps, as well as other maps drawn by travelers of that period, cannot form a trustworthy basis for the denial of Bedouin settlement in the Negev.

Notably, during the late nineteenth century some scholars marked Bedouin settlements on their maps. For example, the German American scholar Gottlieb Schumacher marked the settlement areas of several tribes on his 1886 map,[23] and in 1895 the German scholar Hans Fischer noted a large number of

Bedouin settlements on his map, among them Zehilika, one of the two areas where the al-'Uqbi land claims lie.[24]

Furthermore, a large number of localities appear in the old maps under the term *khirba*," which denotes in Arabic the ruins of a historical village, an existing minor locality, or both. The state, according to Kark, completely denied the possibility that a *khirba* could be an inhabited locality.[25] This runs counter to the observation of several historical geographers who show that during the late Ottoman period *khirbat* functioned as small inhabited places. For example, geographer David Grossman describes how, in the wide area he terms "desert frontier," many types of settlements were created in the said period, in which populations lived in camps, tents, caves, and *khirbat*. He describes a fairly common process where people settling in *khirbat* turned them into new and thriving localities that did not appear on maps for decades. [26]

This settlement pattern is also supported by Wolf-Dieter Hütteroth and Kamal Abdelfattah, who note the existence of "over 2000" *khirbat* in sixteenth-century Palestine, many of which formed loci of habitation, often close to cultivation areas.[27] In this vein, it suffices to scan the map of contemporary Bedouin localities to note that many large settlements have geographic cores called *khirbat*.[28]

Geographer Avinoam Meir summarized the gradual development of Bedouin localities.

> Many Bedouin settlements may have been dispersed throughout the northern Negev . . . their number reflecting, at the very least, the number of tribes and sub-tribes that existed at the time. According to Braslavski (1946) and al-'Aref (1937), during the British Mandate there were seventy to 100 tribal units, which were split into an even larger number of sub-tribes. Even if fewer during the 19th century . . . [the number of Bedouins present] must have been quite notable. It is therefore plausible that . . . there could possibly have been *at least* several dozen such settlements, even if the population size of each was quite small.[29]

This statement is supported by the work of anthropologist Emanuel Marx, who shows how the long process of sedentarization produces a residential core of a Bedouin locality, usually inhabited by the sheikh. This core becomes the permanent feature around which clusters of tents later developed into more permanent localities, bounded by the permanent land division and directly linked to nearby cultivation and grazing areas.[30]

An important window onto the organization of Bedouin space before the establishment of Israel was opened by reviewing a special tents map that we located in the Central Zionist Archives. The map was drawn by the British on the basis of aerial photos taken in 1945. Analysis of the map illuminates a repeated pattern of small clusters composed of tents and larger clusters every 4–5 kilometers.[31] By overlapping the tents map with other sources and maps, we found that the larger clusters (twenty tents or more) usually included stone or mud houses as well as farming storage structures, whereas the smaller clusters had only residential tents and were built on the edge of farming areas.[32]

These were not the villages typical of the rest of Palestine, which the Israeli courts adopted as their ideal settlement type. Yet, from historical, geographic, and social perspectives, they functioned as permanent settlements.[33]

These sources show that Bedouin residential clusters within tribal areas functioned like "localities" and "villages," because permanent places of habitation were situated within inherited and well-bounded lands. In this context, it is unreasonable to project the image of a northern Palestine or European village and the associated definition of "locality" onto nineteenth-century Bedouin residential spaces.

Moreover, during the twentieth century, the Bedouins began to consolidate their settlements and began to build stone homes in large numbers. For example, the UN Ad-Hoc Committee for Palestine published a comprehensive document in 1946 that reported 8,722 tents and 3,389 Arab buildings in the Beersheba District. We must also remember that the Beersheba District was smaller in 1946 than it is today and that the Gaza District was twice as large. These buildings and tents accommodated a population of 70,000–90,000 people in various localities within largely cultivated areas.[34]

Although some of the nineteenth-century maps do not show the existence of Bedouin localities, our analysis highlights the pitfalls of such maps, which simply ignored the permanent settlement pattern that came to typify Bedouin space. Most important, the famous PEF map, which has been used extensively in Israeli courts to "prove" that the land was void of settlement, has been shown to be seriously flawed. Clearly, such permanent Bedouin living localities, which hosted tens of thousands of people, should be considered "inhabited places" for the purpose of analyzing land classification and property rights during the Ottoman period.

6.4 THE AL-ʿUQBI SETTLEMENTS

In their land claims the al-ʿUqbi family maintains that during the nineteenth century Bedouin tribes, including the al-ʿUqbi, lived in settlements, although these did not conform to the European village model.[35] The disputed plots and adjacent areas served as their dwellings and source of livelihood for generations.[36] Kark's exclusive reliance on nineteenth-century travel literature and maps is selective and flawed.[37] Testimonies of eleven Bedouin witnesses affirm that the land belonged to the al-ʿUqbi family, serving agricultural and housing purposes, constituted the site of the tribal court, and contained a well, a dam, water reservoirs, and a cemetery. An official Israeli aerial photograph from 1949 reveals an active village conforming to the typical Bedouin settlement pattern. It included a stone house and four tent clusters, each consisting of ten to thirty tents.[38]

Further, the expert opinion and the surveyor's testimony revealed more than a hundred different sites in ʿAraqib connected to settlement, including houses, dams, cemeteries, wells, and water containers (see Appendix 15).[39] The al-ʿUqbi family also produced physical evidence that the village existed in the mid-nineteenth century. For example, according to the writing on his gravestone, Sheikh Haj' Muhammad al-ʿUqbi, Nuri's grandfather, died in 1945 at the age of 89, which means that he was born in 1856. The cemetery in which Sheikh Haj' Muhammad al-ʿUqbi was buried and its original location on the lands that the al-ʿUqbi family is claiming were recorded in the 1950s by the Negev military commander (who was writing about the need to move the cemetery to carry out infrastructure work on a new road).[40]

The state argued, however, that there is proof that in 1858, the putatively decisive legal date, no settlement or agriculture existed on the disputed land.[41] The presence of undated graves and wells did not substantiate the existence of permanent settlements because the Bedouin buried their dead in unsettled areas. The claimants failed to prove that they encamped in the same place in each season, and tents did not constitute a settlement.[42]

Furthermore, Kark concluded that no permanent settlement existed on the claimed plots in the nineteenth century and at the beginning of the twentieth century.

> Critical examination of a variety of primary sources, including certificates from the period, travelers' accounts, and historical maps, clearly indicate that there

> was no permanent settlement in the area of the claim itself or even close to it. The sources show that, at a wide radius around each section of claimed land, only ruins existed.[43]

The state argued, therefore, that

> it was not proved that the tribe lived in a permanent place that has not changed. Quite the opposite. . . . It was a nomadic framework and a tribe that moved in its wanderings from the Arad area to Zehilika (it is not known when). That is, at best, the plaintiffs pointed out that the spatial area of the Negev and also the area in and around the claims were used by the tribe for grazing and parking in certain periods, this and no more.[44]

Judge Dovrat reviewed and rejected the plaintiffs' arguments and testimonies that a developed Bedouin settlement existed in 'Araqib. Instead, she relied on Kark's expert opinion and ruled that Bedouin encampments were not settlements: "A settlement, is as its name indicates, it is not a settlement when occasion arises, nor a settlement only during part of the year." The thesis advanced by the plaintiffs—that the Bedouins should be conceived "as semi-nomads, returning cyclically to the same place and therefore their departure from the place does not constitute abandonment"—contradicts the *al-Hawashlah* ruling that seasonal habitation does not create a settlement. Judge Dovrat ruled, therefore, that no settlement existed in 1858, the determining date.[45]

As we have seen, there is evidence aplenty of Bedouin presence in the Negev over many generations.[46] Specific to the al-'Uqbi family, the evidence shows that in the two *diyar* there were small settlements, centering around a small number of stone houses, around which were tents, storage sheds, dams, and structures for livestock. The aerial photos testify to the typical agricultural-rural pattern of Bedouin settlement in the northern Negev: dispersion of small residential areas, extensive, nonirrigated farming (at least in the winter), and structures for tending livestock (see Appendix 16).[47]

Superimposition of the layout of the British 1945 tents map in the 'Araqib area onto the aerial photos from that period demonstrates that, in many instances, stone houses and mud structures stood in the center of the groups of tents.[48] The space was organized into groups of small settlements where the inhabitants lived on the edge of the agricultural and grazing areas, in accordance with the partition of the land among the different families.

In research excursions in ʻAraqib and Zehilika, we found clear remnants of five stone houses in which Bani ʻUqba lived, and another twenty elements connected to settlement, such as houses, dams, three cemeteries, wells, and water cisterns. These are testament to the settled, agricultural, and community-based fabric of life that had developed in the area before the evacuation in the early 1950s.[49] In Zehilika, the tribe's second and smaller *dira*, we found remains of the house that belonged to Suleiman al-ʻUqbi's uncle, Ibrahim, as well as remnants of cemeteries, wells, mud structures, and dams.[50]

Over the years, landless Bedouin families and immigrant workers, who tilled the land for the landowners and in many cases gradually bought small plots of land from them, became a part of the al-ʻUqbi tribe. Tribe members estimate that in 1948 a few hundred people lived on al-ʻUqbi land in ʻAraqib and Zehilika and that more than half of them became refugees.[51]

After the 1948 war, on July 19, 1949, the military government ordered the entire al-ʻUqbi tribe to gather, within several days, in "the original settlement of the tribe," an area classified as ʻAraqib 2, which lies in the heart of the *dira* in ʻAraqib. This order is evidence of continuous settlement in this area even following the founding of the state. An aerial photograph dated October 2, 1949, shows an active village on ʻAraqib 2 land. The photo discloses a stone building, four groups of tents (ten to thirty tents in each group, apparently according to clan), a cemetery, a grain-storage facility, a dam and large pool of water, and a few other structures, such as pens and stables.[52] Official documents—such as a notice to register for the first elections in 1949, a receipt of payment of various taxes, notices from and correspondence with the military government, school records, and correspondence with the government—confirm ʻAraqib as the official address of Suleiman al-ʻUqbi. The sheikh lived in his house, located in ʻAraqib 2, together with his wife and four children, until the tribe was uprooted in 1951 (see Appendixes 17 and 18).[53]

An internal memorandum of the military government indicates the reasons for the tribe's removal: the perceived security danger posed by the location of the tribe in the event of a future war with Arab armies and the tribe's settlement on tens of thousands of *dunum*s of fertile land. The tribe was also accused of smuggling, which ʻAraqib's location made easier. Negev military governor Michael Hanegbi stated in a letter that the new location of the Bedouin next to the Jordanian border might lead to security problems, but he nevertheless

supported moving the tribe to its new location, beside the present-day town of Hura (see Appendixes 19–21).[54]

The forced evacuation and the attempts made by members of the tribe to return to their village were recorded in additional documents. For example, a letter signed by Captain Abraham Shemesh describes the "temporary" allocation of land to a village in the Hura area "until they are returned" to ʻAraqib.[55] At a meeting on November 8, 1951, that was attended by military government officers and Bedouin sheikhs, Sheikh al-ʻUqbi described the circumstances under which the tribe was transferred and the tribe's desire to return to its original land—a struggle that has continued to the present day. The minutes of the meeting record the Sheikh's comments.

> I handed [our land] over to Israel and, together with the other tribes, surrendered to [the state]. For the sake of our land, our lives, and the lives of our tribes, [we need] an addition of land [?] and ammunition for self-defense. [And] protection of our general property. . . . We were given an order to move from our land, where we were born, as were our fathers and forefathers. And we planted trees, built dams and so forth. . . . We signed, against our will, because we could never object to the transfer and we left property worth thousands in plow and so forth. . . . Under the war conditions, we abandoned the Arabs and joined Israel, so Israel must protect us more than its people. . . . We request the governors to safeguard our land from which we were moved even if at this moment the government needs it.[56]

In another document from the same period, Sheikh al-ʻUqbi requests to return to his land in accordance with the ostensible promise made to him and to two other tribes' sheikhs.

> The government forced us to move from the northern to the eastern area, with conditions, and so we moved. . . . We submitted this request to protect our land like all the rest of the tribes. . . . We request that we be returned to our place and that you have mercy on us because our future depends on you . . . and if not we shall move to the northern area as soon as possible; this is based on your oral promise, and we did as you wished.[57]

In 1954, without the knowledge of the tribe, the state expropriated the land pursuant to the Land Acquisition Act.[58] Four years later, ten sheikhs, among them Sheikh al-ʻUqbi, with growing awareness that their land was being permanently taken from them, wrote to the Minister of Justice.

> We were transferred by government order from our land at the end of the War of Independence, and to this day, we live on land that does not belong to us. The land from which we were transferred belonged to us for many generations, which we worked with the sweat of our brow, and in certain sections we even built houses and planted vineyards; all this has been destroyed and has gone to waste. . . . We tried from time to time . . . to demand land settlement but we are always told that the offices responsible for the procedure have not been given any instructions regarding it. . . . We are also told that our problem is hard and complicated because the previous governments never carried out land settlement in the Negev. . . . It will soon be ten years since they took our land, and if land settlement is not done immediately, they can also say that the prescriptive period has run out on our rights [to the land] and there is nothing more that can be done. We cannot be abandoned. The problem has to be solved immediately, and we are willing to cooperate and help in finding the right way to do so. We can't be left to remain tenant farmers of the state forever. . . . We are being deprived. . . . We again request that your honor raise this matter before the government for discussion.[59]

Several years later, in June 1966, eighteen sheikhs, including Sheikh al-'Uqbi, requested that the prime minister return the tribes to their original lands, which remained empty. The letter mentions a government promise to do so.

> In 1948, we submitted a written request to the honorable military governor in Beersheba, in which we expressed our desire to receive [government authority over us]. One of the conditions we set forth in our request was that we live on our land and cultivate it along with other residents of the country. At the time, the government approved our aforesaid request, and based on that we agreed to remain in our Israeli state. Unfortunately, it later became clear to us not only that our aforementioned desire was not realized, but also that the total opposite took place. . . . [The Bedouins] became refugees in the country and their land was expropriated. On this, esteemed Prime Minister, we submit our request . . . that the government officially recognize the Bedouin right of ownership over their land as was the custom under the Turkish government and afterwards . . . that the government not establish Bedouin villages in the Negev before it solves the land problem, and, in any event, does not build these villages without the full consent of the Bedouins themselves. . . . The Bedouins will not forgo, under any circumstances whatsoever, their rights to their land.[60]

. . .

In sum, the evidence produced in Part III clearly demonstrates that at least since the mid-nineteenth century, many of the Negev Bedouins, including the

al-'Uqbi tribe, became settled within a seminomadic lifestyle, with part of the community residing in permanent settlements, enjoying a developed land system, and cultivating large parts of their lands. Having undermined two major components of the DND—the legal and the geographic—in Part IV we present a complementary discussion regarding Bedouin indigeneity. As shown in Chapters 7 and 8, the indigenous status of the Bedouins carries significant ramifications for their legal geography, including land and planning rights.

IV BEDOUIN INDIGENEITY: INTERNATIONAL, COMPARATIVE, AND ISRAELI PERSPECTIVES

In the preceding chapters we addressed mainly the legal history, historical geography, and sociolegalities of the Negev region during the last century and a half. We now expand our spatial and analytical scale and examine the land dispute between Israel and the Bedouins from international and comparative legal perspectives. We do so not only because this analysis places the issue in a broader framework but also because it has powerful legal ramifications. As we will see, international law has a normative force in general and in national Israeli law in particular. In addition, Israeli officials, legislators, and judges often look at comparative models as sources of inspiration and decision making.

In Chapter 7 we address the conflicting positions of Israel and the Bedouins and demonstrate that, contrary to Israel's position, the Negev Bedouins correspond to current international standard characterizations and experiences of indigenous peoples. In Chapter 8 we address the content of international norms concerning indigenous rights to land and demonstrate that recently these powerful norms have been gradually attaining the status of customary international law. Furthermore, according to domestic Israeli law, customary international law is legally binding.

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7 THE BEDOUINS AS AN INDIGENOUS COMMUNITY

The Bedouins fit current international legal understandings and norms regarding their indigeneity, as we will show in this chapter. Yet the Israeli state and a group of Israeli scholars led by Ruth Kark deny the indigeneity of the Bedouins and cling to anachronistic concepts and definitions concerning indigenous peoples. As we demonstrate, the current characterization of indigenous peoples discarded an earlier approach, which limited "indigenous peoples" only to those "first/original inhabitants" who experienced European colonial subjugation. The four major contemporary criteria to identify indigeneity are (1) a strong emphasis on *self-identification*, (2) the existence of a *distinct identity and customs*, (3) a powerful and long-term *attachment to a particular territory* but *not* necessarily *precolonial* or from "time immemorial," and (4) a *history of subjugation, dispossession*, and marginalization. Tribal social structures are a usual, though not necessary, characteristic of indigenous peoples. We conclude that, contrary to the dominant Israeli position, the Negev Bedouins can and do fit the current characterization of indigenous peoples.

7.1 BEDOUIN INDIGENEITY: CONFLICTING APPROACHES

The al-ʿUqbi family argued in court that the Bedouins are an indigenous people and that during the relevant period they were seminomadic tribes, with their own customary property regime.[1] Conversely, the state contested the Bedouins' indigeneity claim for and reliance on indigenous rights.[2] Judge Sarah Dovrat

adopted the state's position and did not engage with the claims concerning indigeneity, stating that these issues ought to be addressed by the legislature.[3] Furthermore, as we show in Section 7.3, both the formal Israeli position and the position of a group of scholars headed by Kark argue against the Bedouins as an indigenous community. We examine the Israeli denial and the Bedouins' claims for indigeneity through a discussion of the international understanding of the term *indigenous peoples*.

7.2 INTERNATIONAL UNDERSTANDINGS OF INDIGENOUS PEOPLES

The subject of indigeneity requires a thorough discussion that surpasses the scope of this book. Nevertheless, it is worth placing the question of Bedouin land rights in a comparative and international frame, because it involves moral and significant positive legal dimensions.

7.2.1 A Contested Term

UN documents estimate that 370 million people in some 90 countries belong to indigenous groups.[4] Most of them have suffered discrimination and dispossession under colonial regimes and upon the founding of modern states.[5] During that era, many indigenous groups were deprived of their traditional lands, sources of sustenance, and natural resources. Often they were evicted from all or part of their historical territories and settlements. As we saw in Chapter 1, during most of this period, national and international laws served as prime tools in the subjugation and dispossession of indigenous peoples.

However, since the late nineteenth century, international bodies and powerful states and empires have begun to address the need to protect indigenous peoples. At the Berlin Conference, convened in 1884–1885 by the Great Powers (Great Britain, France, Germany, and Portugal) to settle their territorial claims in Africa, participants addressed the issue of indigenous peoples. In Article 6 of the General Act of the conference, the Great Powers stated their commitment to the "protection of indigenous populations" of Africa, intending mainly to distinguish them by race from Europeans.[6] In Article 22 of the Covenant of the League of Nations (1920), members took upon themselves a "sacred trust of civilization," to use their Eurocentric terminology, to promote the development and well-being of "indigenous peoples" in the "colonies

and territories" under their control.[7] Although such statements were saturated with Eurocentric prejudices, they nevertheless served as milestones in the long, convoluted, and ongoing road to indigenous empowerment. With the evolution of international and national human rights discourses after World War II, indigenous peoples started to transform from objects to subjects of international law.[8]

Because of the immense diversity of indigenous peoples, there is no consensus on the definition of the term *indigenous peoples*,[9] which has consequently become a "contested term."[10] As Benedict Kingsbury noted, "It is impossible at present to formulate a single globally viable definition."[11] Thus in 2008 Victoria Tauli-Corpuz, former chair of the UN Permanent Forum on Indigenous Issues and current UN Special Rapporteur on the rights of indigenous peoples, wrote, "The definition of indigenous peoples" is among "the most controversial issues in the evolution of instruments and policies on indigenous peoples and their rights."[12] Particularly controversial is the question of whether the term encompasses only "indigenous" groups in *settler* colonial societies (e.g., the Americas and Australia) or also includes "indigenous" groups who have a different history (e.g., Asia and Africa).

The term *indigenous* originates from the Latin *indigena*, which is composed of *indi* (within) and *gen* or *genere* (root). It denotes a person "born in," "native of," or "aborigine" in contrast to "foreign" or "brought in." The term has evolved in several phases. During the first phase, the "colonial phase," the term *indigenous* applied to all non-Westerners residing in colonial territories. The second phase took place during the decolonization period, when "indigenous" was reserved exclusively for those deemed "first people" on the land. Finally, the modern understanding of the complexity of indigenous identities has led many communities to the view that it would be wise not to offer a formal definition.[13]

Indigenous identity is shaped by a mutual and ongoing interaction of forces from above and below. Using legal, military, and cultural means, the conquering power (the colonial empire or the modern state) forged, for certain local groups, a distinctive and subordinate local identity that differentiated them from the dominant state identity. Simultaneously, drawing on their customs and their struggles for safeguarding their rights and identity, these marginalized local groups developed their indigeneity from below. Thus indigeneity is not an objective legal definition but rather a tool in the arsenal of dispossessed

groups seeking to overcome their ongoing conquest. Several scholars have called the political use of such identity "strategic essentialism," a conscious adoption of seemingly immutable categories for political purposes.[14] This situation creates shifting and interdependent identities of both the dominant and the subjected groups.[15]

Certain factors induce communities to self-identify with the indigenous concept. These are present in most current working definitions and include "'conquest,' 'settlements,' 'subjugation,' 'domination' and 'colonization.'"[16] Because of the specificity and heterogeneity of indigenous experiences, a growing consensus favors indigenous peoples' self-definitions.

7.2.2 Emphasizing Self-Definition

Over the past decades the concept of indigenous populations has expanded. Simultaneously, among indigenous groups and governments participating in international forums, a consensus emerged to reject attempts to formulate an official definition in favor of self-definition as a prime criterion.[17]

The two major relevant international bodies, the International Labor Organization (ILO), by means of Convention 169, and the United Nations, by means of its Declaration on the Rights of Indigenous Peoples (UNDRIP), also embrace this approach. The ILO approach emphasizes self-identification and self-determination, whereas the UNDRIP avoids altogether a definition and relies on self-determination.[18]

In 1957 the ILO adopted Convention 107 on the protection and integration of indigenous populations and tribal and semitribal populations in independent countries.[19] Convention 107 adopted a broad yet patronizing definition of indigenous populations.[20] In 1989 the ILO adopted Convention 169, which concerned indigenous and tribal peoples. Although Convention 169 retained the essence of Convention 107, this time it was less patronizing.[21] It applies to:

(a) *tribal peoples* in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

(b) peoples in independent countries who are regarded as *indigenous* on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest

> or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.[22]

The ILO considered, then, that some tribal peoples—such as tribes in Africa and South America who have lived in the country for as long as the peoples who rule them—did not neatly fit into the "indigenous" model but occupied similar historical and political positions. As Erica Daes points out, the distinction between the terms *indigenous* and *tribal* "is of no practical consequence, since the Convention guarantees both categories . . . exactly the same rights."[23] Clearly, the Bedouins fit both parts of this definition: They have been characterized as "tribal" and they simultaneously "inhabited the country, or a geographical region to which the country belongs, at the time of . . . the establishment of present state boundaries."

Convention 169 also reflects the growing emphasis on self-identification. Article 1.2 prescribes that "*self-identification* as indigenous or tribal shall be regarded as a *fundamental criterion* for determining the groups to which the provisions of this Convention apply."[24]

In 1982 the UN established the Working Group on Indigenous Populations (WGIP), which led the efforts that culminated in the adoption of the UNDRIP (2007). The UNDRIP purposely refrains from defining indigenous peoples, prescribing that indigenous peoples have the right to define who and what is indigenous.[25]

Although no *official* definition exists today, for practical considerations international organizations have developed *working* definitions of indigenous peoples.

7.2.3 Shaping International Working Definitions

Initially, in the international context, the concept of indigenous peoples was promoted by and included mainly indigenous peoples subdued by European colonization.[26] This excluded many communities that conceived of themselves as indigenous but did not experience European *settler* colonization. This constrictive interpretation allowed governments with other histories to endorse indigenous peoples' rights while simultaneously claiming that emerging international definitions did not apply to their state, because the state did not include any indigenous population or, alternatively, because all

or most of the population was indigenous to the land.[27] China's 1995 statement to the United Nations is indicative of what came to be known as the "Asian Controversy."[28]

> The Chinese Government believes that the question of indigenous peoples is the product of European countries' recent pursuit of colonial policies in other parts of the world. Because of these policies, many indigenous peoples were dispossessed of their ancestral homes and lands. . . . The various nationalities in China have all lived for aeons on Chinese territory. Although there is no indigenous peoples' question in China, the Chinese Government and people have every sympathy with indigenous peoples' historical woes.[29]

Likewise, the government of India argued that the concept of indigenous peoples could not apply to India "because, after centuries of migration, absorption and differentiation, it is impossible to say who came first . . . [and because] three to four hundred million people [in the country] are distinct in some way from other categories of people in India."[30]

Other Asian governments expressed similar views. "Indonesia is a nation which has no indigenous peoples, or . . . all Indonesians are equally indigenous." Or, "All Bangladeshis are indigenous people who existed in the territory prior to British colonization and are now, fortunately, liberated."[31]

Similarly, several African countries objected to the expansion of the concept beyond "settlement colonies." A 2006 press release from Botswana's presidential office stressed that "all Black Africans are of African origin. . . . We did not emigrate from elsewhere to Africa, we have always belonged here."[32]

Yet Asian and African communities increasingly identify themselves as indigenous.[33] Indigenous peoples from around the world attend WGIP's annual sessions. Among those attending are "semi-nomadic pastoralists and herders from deserts and grasslands from North and North East Africa, as well as from Southwest Asian countries and the Middle East" and community representatives from states denying the existence of indigenous communities within their borders.[34]

By 1982 Sweden, Norway, and Finland acknowledged that the Sami were indigenous, thereby establishing a precedent for recognizing groups as indigenous, even in states where the majority population was itself "indigenous" or very old.[35] Gradually, the concept of indigenous peoples expanded to include indigenous and tribal peoples who were not colonized at all by European states

or who were colonized in the past but are currently living in states dominated by groups considered native to the land as well.[36]

7.2.4 Working Definitions

Although no formal definition exists, attempts have been made to establish a working definition of "indigenous peoples" for two main reasons: (1) to assess the scope and application of international legal instruments such as the UNDRIP and (2) to prevent situations in which certain states "while supporting UNDRIP in principle, claim that it is not applicable in their territory."[37]

Two major approaches exist in this debate. The first approach is epitomized by the working definition offered by UN special rapporteur José Martínez Cobo, who limited the definition to those communities that had a history of subjugation under European settler colonialism. The second approach, which is increasingly dominant, is wider and more flexible. It includes "indigenous peoples" from regions such as those in Asia and Africa who do not conform to the European settler colonial model.

According to the widely cited, yet controversial and dated definition suggested by Cobo in 1986, indigenous peoples are[38]

> those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.[39]

In 1998 Cobo stated that in "post-colonial Africa and Asia autochthonous groups/minorities/ethnic groups/peoples . . . cannot . . . claim for themselves, unilaterally and exclusively the 'indigenous' status."[40] Cobo even excluded groups in the Russian Federation, the Nordic states, Malaysia, and Taiwan, "contrary to the views of the state government in each of these cases."[41]

Cobo's constricted definition has been subject to severe criticisms.[42] Douglas Sanders calls it "the most significant attempt to date to exclude part of the South from United Nations work on indigenous issues."[43] Benedict Kingsbury notes that, by requiring "historical continuity with pre-invasion and pre-colonial societies," Cobo opted for a "limited, and controversial" definition.[44]

This "blue/salt water colonization" definition focuses on the oppression of indigenous territories and peoples by European settlers and therefore excludes Asian and African communities.[45]

However, several scholars, including Patrick Thornberry, Franke Wilmer, Gerald Alfred and Ted Gurr, have supported Cobo's "colonial-settler" "prior occupancy" conception of indigeneity, according to which indigenous peoples are those "natives," "aboriginals," and first inhabitants of a land who have been subsequently subdued by European settlers.[46] Even James Anaya, the previous UN special rapporteur on the rights of indigenous peoples, adopted in 2004 a similar, though more nuanced, position in his *Indigenous Peoples in International Law*.[47]

Writing in 1998, Kingsbury noted that in *ordinary language* the term *indigenous* "connotes priority in time, if not immemorial occupancy."[48] However, over the last twenty years "international usage" of the concept "has undergone a semantic evolution that brought it far beyond its original meaning."[49] The term *indigenous peoples* evolved out of its original denotation to become a distinct and separate international law term.[50] Adherence to its original denotation thus constitutes antiquated and inaccurate usage of the current legal term.

Let us pause for a minute and note that the recent debate over the characteristics of indigeneity does not greatly influence the definition of the Negev Bedouins as an indigenous group. This is mainly because the Bedouins also fit the earlier, stricter, definition of Cobo, who applied the term mainly to groups colonized by European settler societies. As we have seen, the Bedouins clearly existed as a self-identified and self-ruling community with strong attachment to the Negev region for centuries before the land was taken over by the new Israeli settler state, in which the Bedouins became a marginalized and oppressed group.

Furthermore, the more expansive definition suggested by recent scholars is highly applicable not only to the Bedouins currently inhabiting the Negev but also to those who were expelled or fled into the Gaza Strip, Jordan, and the West Bank during the 1948 war and its aftermath. These last-mentioned groups, which maintain a tribal culture and close links with their brethren in the Negev, can thus still be classified in recent documents such as the UNDRIP as indigenous, despite their forced transfer from their traditional territory.

In line with Kingsbury's approach, a substantial group of scholars argue that contemporary designations of indigenous peoples "are considerably wider than the exclusive question of primordialism."[51] Although the settler/colonial/temporal priority criterion usually works in settler states, it is not always a

clear-cut benchmark. Often it is practically impossible to determine the exact chronology and priority of different groups who reside in a territory, especially in the case of oral communities.[52] This complicates the understanding of who is indigenous/aborigine and who is conqueror/settler.[53]

Jeremy Waldron, for instance, demonstrates the dynamics of key concepts such as "first occupancy" and "prior occupancy" and shows how historical contingencies led to shifting statuses of colonizers and colonized.[54] As Danilo Geiger convincingly demonstrates, in several cases communities conceived as indigenous "are not the original inhabitants of the contested area, but in fact comparatively late arrivals who on their turn displaced or mingled with the truly 'Aboriginal' populations of the area."[55] The status of the Maoris, who immigrated to New Zealand 600 years ago, conquering it from its Polynesian inhabitants, raises the issue of who qualifies as the "prior occupant."[56] Similar cases are the Scandinavian Sami,[57] the Inuit communities,[58] and, as Geiger suggests, the "*Jumma*," the "indigenous inhabitants of the Chittagong Hill Tracts [in Bangladesh]." Although they arrived in the region only "during or after the 19th century," it would make sense to define them as "indigenous vis-à-vis the Bengali settlers who arrived in dramatic numbers . . . in the late 1970s and early 1980s to transform the demography of the area."[59]

In Africa the term *indigenous peoples* does not exclusively mean first habitants of a given land or country. It applies to a number of African communities whose cultural identities face extinction as a result of prejudiced views of their livelihoods and ancestral ways of occupying and using lands. Similar to other continents, self-identification serves as the main criterion for deciding who is indigenous in Africa. Many African communities self-identify as indigenous, including the "Pygmies" and Mbororo in Central Africa; the Hadzabe, Akie, Ogiek, Yaaku, Segwer, Massai, Samburu, Tukana, Barabaig, Pokot, Orma, Rendille, and Karmajong in eastern Africa; and the San, Nama, and Himba in southern Africa.[60] Like the Negev Bedouins, several of these communities are pastoralists and seminomadic.[61]

The Mbororo in Cameroon arrived from elsewhere but claim indigeneity. The Massai apparently arrived at their current location, known today as Massailand, during the fifteenth century, or even later. Similarly, the Himba reached their current locations probably in the fourteenth century. However, as Albert Barume convincingly maintains, this does not make them less indigenous than other groups who claim to be the "first peoples" on their land.[62]

Indeed, for "many indigenous peoples around the world, one set of oppressors was replaced by another when the Caucasian colonizers left." Often communities "qualify as 'indigenous' for virtue of being exposed at present to various forms of 'internal colonization.' "[63] Geiger suggests, therefore, referring to the descendants of long-established hegemonic groups as *nonindigenous native communities* in order to differentiate them from the subjugated indigenous communities that should be the only groups denominated as *indigenous*.

This nuanced and contextual understanding contrasts with the Israeli state's essentialist position toward the Bedouins and that of scholars associated with it.

7.2.5 Current Understandings

Instead of looking for prior occupancy and a history of settler colonialism, current scholarly and international approaches stress the subjugation of autonomous cultural groups by the modern state. For instance, the International Work Group for Indigenous Affairs (IWGIA) offers the following definition of indigenous peoples:

> The disadvantaged descendants of those peoples that inhabited a territory prior to the formation of a state. The term indigenous may be defined as a characteristic relating the identity of a particular people to a particular area and distinguishing them culturally from other people or peoples.[64]

A report by experts on indigenous populations and communities of the African Commission on Human and Peoples' Rights (ACHPR) (2005) states:

> Almost all African states host a rich variety of different ethnic groups . . . indigenous to Africa. However, some are in a structurally subordinate position to the dominating groups and the State, leading to marginalization and discrimination. It is this situation that the *indigenous* concept, in its modern analytical form and the international legal framework attached to it, addresses.[65]

In 2010 the ACHPR together with IWGIA issued an advisory opinion on the UNDRIP. According to it, the concept of indigenous people "embodies the following constitutive elements":

a) Self-identification;
b) A special attachment to and use of their traditional land whereby their ancestral land and territory have a fundamental importance for their collective physical and cultural survival as peoples;

c) A state of subjugation, marginalization, dispossession, exclusion, or discrimination because these peoples have different cultures, ways of life or mode of production than the national hegemonic and dominant model. Moreover, *in Africa, the term indigenous population does not mean "first inhabitants"* in reference to aboriginality as opposed to non-African communities or those having come from elsewhere.[66]

A similar approach was adopted in the Asian context.[67] Kingsbury suggested adopting a "constructivist" approach and offered a characterization that includes four "essential requirements" for a community to qualify as an indigenous people: (1) "self-identification as a distinct ethnic group"; (2) "historical experience of, or contingent vulnerability to severe disruption, dislocation or exploitation"; (3) "long connection with the region"; and (4) "the wish to retain a distinct identity."[68]

To these four elements Kingsbury added additional criteria that he considered "strong indicia," which nevertheless necessitate flexibility in their application. These include "non-dominance in the state or region" and "close cultural affinity with a particular territory." Kingsbury stressed that "it is not necessary for the group to have been associated with the particular land or territory for countless generations; groups have often moved, joined with other groups, or been forcibly relocated." Furthermore, some groups were displaced and live currently in urban areas. To require them to prove attachment to a specific territory in such circumstances would "render injustice."[69]

According to Barume, who writes in the African context, five traits characterize indigenous peoples: (1) self-identification, (2) nondominance, (3) "history of particular subjugation, marginalization, dispossession, exclusion, or discrimination"; (4) "land rights prior to colonization or occupation by other African groups"; and (5) "a land based culture and willingness to preserve it."[70]

Offering a somewhat different approach, Geiger deplores the political correctness that deprived us of the use of the term *tribal*. He argues, "Indigenous peoples are essentially tribal societies, in other words, kinship-based non-state societies that have traditionally lacked steep social hierarchies and are but loosely connected with the dominant society."[71]

The International Law Association (ILA), one of the leading legal organizations in international law, whose opinions help shape international jurisprudence, has tasked its Committee on the Rights of Indigenous Peoples with assessing "whether certain prescriptions in UNDRIP have already reached the

status of customary international law."[72] The Committee and the ILA stress that "indigenous peoples" is a "contested term."[73] According to the ILA, the characteristics of indigenous peoples include:

1. Self-identification.
2. Historical continuity with precolonial and/or presettler societies.
3. Special relationship with ancestral lands.
4. Distinctiveness, such as distinct language, beliefs, and customary law.
5. Nondominance in the current society.
6. Perpetuation and perseverance to maintain and reproduce their ancestral environments, social and legal systems, and culture.

The ILA clearly states that "it should not be maintained that, in all cases, all the criteria" listed by it "must be indispensably met by a community to be considered indigenous."[74] Furthermore, the ILA stresses that only indigenous peoples' self-identification and their special relationship with their ancestral lands are essential criteria "to be considered as an indigenous people."[75]

In short, although current international discourse refrains from formally defining indigenous peoples, there are some common, though not exclusive, characteristic threads. These include (1) a strong emphasis on self-identification, (2) the existence of a distinct identity and customs, (3) a strong and long-term attachment to a particular territory, and (4) a lack of domination and a history of subjugation, dispossession, and marginalization.[76] To these we can add several nonexclusive characteristics, such as tribal social structures. We now return to the question of whether the Bedouins of the Negev can be considered an indigenous people according to current international understandings.

7.3 THE BEDOUINS AS AN INDIGENOUS PEOPLE

Like many other indigenous and tribal peoples, Negev Bedouin identities are multifaceted and dynamic. As we have seen, the Bedouin Arabs of the Negev are part of a tribal society that has inhabited for generations the region making up today's states of Saudi Arabia, Jordan, Egypt, Israel, and the West Bank and the Gaza Strip. After 1922, with the demarcation of the borders of Mandate Palestine, the Bedouins became geographically and gradually also socially associated with the Palestinian Arab entity, even though the political borders remained loose. After 1948 those Bedouins remaining in Israel became Israeli

citizens and part of the Palestinian Arab Israeli minority, whereas the rest became refugees in nearby countries and the West Bank and the Gaza Strip. Although the Negev Bedouins stress their particular history, geography, and culture, their struggle over their indigenous rights is simultaneously a segment of a larger Palestinian journey to anchor this nation's native and national rights in the region.[77]

To further complicate the story, one should remember that the Israeli state argues that Jews, especially Israeli Jews, consider themselves and should be considered by others as indigenous to the Land of Israel and display strong, often spiritual and cultural connections to this disputed territory. As we show in what follows, Israel denies Bedouin indigeneity partly because of its claimed Jewish priority in the land.

We should also clarify that we do not endorse essentialist definitions, nor do we claim that indigenous identities are immutable or uncontested. Like many other identities, these are at least in part constructed and *relational*. Our approach, inspired by critical identity theories developed by scholars such as Benedict Anderson, Ernesto Laclau, Chantal Mouffe, and Iris Young,[78] demonstrates that identities are constructed and reconstructed within specific historical and social contexts. To paraphrase Molière's observation, indigenous peoples become aware of or construct their "indigenous" identity years or millennia after living on the land.[79] Indeed, as Barume recently remarked:

> No community was born indigenous. Certain events prompted some communities to use the term "indigenous peoples" as a way to claim specific denied rights. Had those events never occurred anywhere, the concept of "indigenous peoples," as currently understood in international rights law, wouldn't have existed. There would be Maori, Aborigines, Mayas, Yanomami, Batwa, San, Massai, Ogiek, Saami, Sengwer and others, but they would not need to self-identity as indigenous peoples, as a way to seek justice.[80]

It is not surprising, therefore, that similar to other indigenous communities around the world, the Bedouins adopted the discourse of indigeneity in the context of contemporary developments in international indigenous human rights and in conjunction with their struggle for recognition and protection of their land against the recent Israeli measures detailed in Chapters 4 and 9.

As review articles demonstrate, most scholars currently conceive of the Bedouins as an indigenous group.[81] However, this is not a consensual ap-

proach. Interestingly, the major challenges come from two opposite directions: from some Palestinians and from Zionists.

Some nationalist Palestinian scholars and activists reject the exclusive assignment of the term *indigenous people* to the Bedouins because it implies "a potential separation of the Bedouins from the rest of the Palestinian people" and might undermine the Palestinians', or the Israeli Palestinian citizens', claim to indigeneity. Some Bedouins have expressed unease over their identification with the term, because they associate it with primitive characteristics. Thus there have been recent attempts "to situate Bedouin history within the history of the Palestinian people, rather than on a discrete trajectory of nomadism to modernity."[82] A sophisticated approach along this line is the one advanced by Mansour Nasasra and colleagues in their *Naqab Bedouin and Colonialism: New Perspectives* (2014). The authors argue that their

> aim is not to present the Naqab Bedouins as purely "indigenous" (frozen in time), or as solely Palestinian nationalists; their identity, claim-making, and frames of agency are . . . multiple, ambiguous and complex. Rather, our call for investigating the link between Naqab Bedouin studies and wider critical Palestine studies stems from an understanding that both contexts are settler-colonialist in nature.[83]

On the other hand, both the formal Israeli position and the position of a group of scholars headed by Ruth Kark, whom we call the deniers, is that the Bedouins are not an indigenous community.[84] The State of Israel denies Bedouin indigeneity not only in court proceedings, as we saw in Section 7.1, but also in national and international arenas.[85] Ehud Prawer, a leading figure in drafting state Bedouin policy, argued:

> The attempt to claim that the Bedouins are an Indigenous group in the Negev is very problematic. Not only is it historically inaccurate, but it also creates an unnecessary antagonism, and transforms the Jewish People in the region into invaders, which contradicts the fact that we have returned to our own homeland.[86]

Similarly, Benny Begin, the minister in charge of Bedouin affairs in 2012 and 2013, declared:

> I have heard claims that the Bedouins are allegedly an indigenous group. . . . I wish to remind the audience that the People of Israel [*Am Yisrael*] and the State of Israel are the sovereign in the Negev. It is correct that the Bedouins have an attachment

> to the land, which is well taken into consideration by us. However . . . the People of Israel resides in its historical land in the Negev, a fact that was never contested, neither will it be.[87]

As we show in what follows, the scholars whom we call deniers argue that the Bedouins do not conform to what they claim are indigenous definitions and/or characteristics. This group's most prominent spokesperson is Ruth Kark. As seen, Kark is an active and influential repeat player who issues serial expert opinions, by state invitation, in cases of Bedouin landownership adjudicated in Israeli courts. In her expert opinion in the *al-'Uqbi* case, she stated, "According to my understanding, the indigenous concept is not appropriate for application in the context of the Negev Bedouin tribes that live today in Israel because the major characteristics that led the world nations to recognize indigenous groups are missing in their case."[88] However, as we demonstrate, this position relies on an outdated understanding of indigeneity.

In 2012 Kark and two co-authors, Havatzelet Yahel, the state attorney in charge of Bedouin land issues in the Southern District of the Ministry of Justice, and Seth Frantzman, an editor of the English-language Israeli daily *The Jerusalem Post*, published two articles denying the indigeneity of the Bedouins.[89] In "Fabricating Palestinian History: Are the Negev Bedouins an Indigenous People?" the authors rely mainly on the controversial and increasingly outdated colonial approach most notably advanced by Alphonso Martinez Cobo, the former special rapporteur to the UN Working Group on Indigenous Populations.[90] According to the authors, only descendants of "first" and "original inhabitants" who "lived on the land 'from time immemorial' " and experienced oppression by "colonialism or something like colonialism"[91] qualify as indigenous.[92]

Accordingly, the major thesis states:

> Although there is no official definition of indigeneity in international law, Negev Bedouins cannot be regarded as an indigenous people in the commonly accepted sense. If anything, the Bedouins have more in common with the European settlers who migrated to other lands, coming into contact with existing populations with often unfortunate results for the latter.[93]

Yahel, Kark, and Frantzman offer several arguments to substantiate their thesis.[94] The principal ones include (1) that the Bedouins are not the original inhabitants of the Negev, (2) that they were not subjected to colonial rule,

(3) that they do not hold nowadays a distinct indigenous identity, (4) that they claim private and not collective land rights, and (5) that the Bedouins in neighboring countries are not considered indigenous. As we will show, arguments 1 and 2 disregard current understandings of indigeneity. Argument 3 is factually incorrect and morally flawed. Arguments 4 and 5 are more powerful but nevertheless do not withstand serious academic scrutiny. We examine each argument in what follows.

. . .

Argument 1. Contrary to current understandings, the deniers consider the temporal element ("from time immemorial") a necessary condition for a group to qualify as an indigenous people.[95] They argue that the Bedouins originated in the Arabian Peninsula, invaded the Negev "only" in the last 200 years, and hence cannot be considered first possessors. Therefore their status is closer to that of trespassers and colonizers. The first possessors, those holding indigenous rights, are the Jews, the deniers argue.[96]

However, as we showed in detail in Section 7.2, current definitions of indigenous peoples minimize the weight accorded to priority in time and do not consider it anymore as a prerequisite for establishing indigenous status. Furthermore, although many Bedouin tribes originally arrived—or claim to have arrived—in the Negev from other areas in the Middle East, this does not preclude their indigeneity in the region. Indeed, many indigenous people have historical "stories of origin" from periods antedating their arrival in their current territory. In the African context, for instance, the Mbororo of Cameroon arrived from elsewhere but claim indigeneity. The Massai apparently arrived in their current location, known today as Massailand, during the fifteenth century, or even later. Similarly, the Himba reached their current locations probably during the fourteenth century. However, as Albert Barume convincingly maintains, "Not being the 'original inhabitants' . . . does not make the Massai or the Himba less indigenous than the 'Pygmie,' the Ad zabe or the San, which are widely recognized as the first peoples" in their regions.[97]

In addition, as shown in Chapters 5 and 6, the Negev Bedouins had strong, long, and ongoing connections to their tribal territories. Current scholarship dates the beginning of Bedouin arrival into the region to the seventh century CE and especially after the thirteenth century. The sixteenth-century Ottoman census was already reporting widespread Bedouin agriculture in the Negev.[98]

Oral Bedouin history recounts Bedouin existence in the area for hundreds of years, and by the end of the eighteenth century the Negev Bedouin community had crystallized into five major tribal confederations.[99] All this happened long before the establishment of Israel in 1948, before the British Mandate, and even before the existence of an effective Ottoman rule in the region.

We should mention here an additional subargument advanced by the deniers, which is that the Bedouins lack indigenous territorial historical continuity because tribal wars altered spatial control. Bedouin tribal wars indeed occurred until the second half of the nineteenth century, when borders between the tribes crystallized. However, this is typical of indigenous peoples and should not negate Bedouin claims.[100]

. . .

Argument 2. The deniers contend that, contrary to other indigenous peoples, the Bedouins were not subjected to foreign or colonial rule because they voluntarily immigrated to the Ottoman Empire sovereign area, whose rule was Islamic and therefore close to the Bedouin culture. We have shown, however, that for hundreds of years the Ottomans did not de facto rule the Negev and that the Bedouins had a culture distinctive from that of the Ottomans.[101] The last Bedouin tribes arrived in the region in the eighteenth century, when the territory stood under effective Bedouin customary law except in rare cases of Ottoman punitive expeditions, which took place especially after the establishment of modern Beersheba in 1900 and through which the Ottomans attempted to impose their colonial rule over the Bedouins. Yet Bedouin relative autonomy continued during the Mandate period. In addition, as we showed in Section 7.2, current understandings of the terms *indigenous* and *tribal peoples* focus on relationships of subjugation, marginalization, and dominance and do not require anymore a history of *colonial* subjugation.

. . .

Argument 3. Bedouin culture has changed and become urban, and therefore little remains today from its indigenous authentic desert identity. As we will show, however, the issue of "authentic" indigenous identity has long served as a tool of the dominant society to retain indigenous peoples in their marginal position or to argue that, because they are not "authentic," they do not deserve indigenous rights. As Nicholas Buchanan and Eve Darian-Smith remarked recently, "Historically, images of authenticity imposed by colonial societies have reinforced

the idea that Native peoples were 'Noble Savages,' autochthonous and not of the contemporary world." Accordingly, "Americans expect authentic Indians to remain unchanging, although no one expects Americans to look and behave like pilgrims."[102] In fact, authentic indigenous identities are "far from static or stable." Often they crystallize during legal proceedings: "While rhetorically portraying authenticity as preexisting . . . law in fact helps to fashion the very category of the authentically 'indigenous.'"[103] Indeed, as Justice Claire L'Heureux-Dubé stated in the consequential Canadian *R. v. Van der Peet* case (1996), "The 'dynamic right' approach . . . recognizes that distinctive Aboriginal culture is not a reality of the past, preserved and exhibited in a museum, but a characteristic that has evolved with the natives as they have changed, modernized and flourished over time, along with the rest of Canadian society."[104] In cases of "voluntary migration to cities," as is the case of some Bedouins, the "prevailing sentiment of legal experts and commentators" is that "indigeneity is, so to speak, something 'that you take with you' when you relocate."[105]

In any event, after five decades during which Israel endeavored, largely forcefully, to urbanize the Bedouins and annihilate their distinct identity, Israel should be the last to claim that the Bedouins are too "urban" and not sufficiently "authentic."[106] As Agriculture Minister Moshe Dayan stated clearly as early as 1963:

> We should transform the Bedouins into an urban proletariat—in industry, services, construction and agriculture. 88% of the Israeli populations are not farmers, let the Bedouins be like them. . . . This would be a revolution, but it may be fixed within two generations . . . with government direction. . . . This phenomenon of the Bedouins will disappear.[107]

Finally, despite these efforts, most Bedouins did not become fully urban; many of them continue to live in unrecognized nonurban villages, and most continue to hold many of their cultural characteristics, such as customary law, tribal identities, and agriculture.

. . .

Argument 4. The Bedouins demand private ownership, whereas indigenous peoples normally claim collective property rights. This argument is meaningful, because most indigenous claims are indeed collective. However, Bedouin private ownership should not disqualify their indigeneity, and this is for two major reasons.

First, although characteristic of many indigenous peoples, this indicator is not considered a prerequisite and usually does not even figure as a criterion for indigeneity. There are several examples of recognized indigenous peoples who have been holding land for generations in ways that resemble Western private property ownership. Not all indigenous people embraced collective property regimes. Some North American Indians had a variety of property structures, including private ownership.[108] Early settlers described the ways that Australian Aborigines allocated and bequeathed land among individuals.[109]

In the historic *Mabo v. Queensland* (No. 2) case, Judge Martin Moynihan "found that there was apparently no concept of public or general community ownership among the people of Murray Island, all the land on Murray Island being regarded as belonging to individuals or groups."[110] Furthermore, in the definition offered by Judge Gerard Brennan in *Mabo*, he stated that "the term 'native title' conveniently describes the interests and rights of indigenous inhabitants in land, whether communal, group *or individual*."[111] The Australian Native Title Act (1993) provides that "the expression 'native title' or 'native title rights and interests' means the communal, group or *individual* rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land and waters."[112] In New Zealand land rights that were not extinguished in the past were transformed into freehold titles during the land reforms of the nineteenth and twentieth centuries.[113]

According to Charles Kingsley Meek, in precolonial Africa "the normal unit of land ownership is the extended family, or kindred."[114] Furthermore, although indigenous peoples often have nominal "group title to the land," individuals have strong subsidiary property rights to the land. As Kwamena Bentsi-Enchill remarks, this "group title" "is a sort of umbrella beneath which are the particular, distinct and exclusive interests of sub-groups and individuals in a portion of such land occupied by them or allotted to them."[115] Such rights can be likened to the regular landholding pattern in Israel, in which public entities own the ultimate title and individuals hold subsidiary rights of use and possession.[116]

Second, the central point of honoring indigenous land rights is to recognize them as the indigenous group understood them before its subjugation to the modern state and to respect their evolution after that. With the transformation in the economic value, negotiability, and commodification of the land, many indigenous peoples gradually adapted and engaged in internal privatiza-

tion processes.[117] The issue came to the fore not long ago in the famous ruling of the Inter-American Court of Human Rights in the Nicaraguan *Awas Tingni* case.[118] Thus, although the Bedouins gradually privatized their property system, partly in response to outside influences, this should not preclude their indigeneity.

Taking indigenous rights seriously entails a dynamic approach, which does not lock indigenous groups into premodern epochs, concepts, and relations regarding land. The claim that indigenous peoples have only collective rights, therefore, is not only unsubstantiated empirically but also reveals an orientalist gaze, which seeks to freeze indigenous identity as an antiquarian exhibit while ignoring the dynamics of an autonomous and developing community as well as the interaction with and impact of Western property and political regimes.

. . .

Argument 5. The Bedouins who live in neighboring countries never claimed that they are indigenous, nor were they recognized there as such, and this raises serious doubts as to the indigeneity of Israeli Bedouins. Even though the description is generally accurate, as we show in what follows, this argument also suffers from crucial flaws.

The study of Bedouins living in other parts of the Middle East is beyond the scope of this book. However, we refer briefly to the emerging discourse on this issue. The debate over indigeneity developed in the Middle East only recently. The construction of postcolonial identity included a myth of national unity, which at first suppressed subnational ethnic identities. Simultaneously, colonialism left enduring traces in postcolonial Middle Eastern states, which contributed to the persistence of indigenous groups' marginalization.[119] In some countries, such as Saudi Arabia, Jordan, and the Gulf States, the Bedouins are a dominant or ruling group and therefore do not match the "nondominant" criterion of indigenous peoples. Further, although many Bedouins in the Middle East may be marginalized and oppressed, they might view the regime ruling them not as foreign but as representing an inclusive "Arab" identity to which they belong.

Kark, Yahel, and Frantzman correctly criticize the authors of the yearly *Indigenous World* for including only Bedouins from the Negev and the Palestinian Authority in their list of world indigenous peoples.[120] In fact, we do find meaningful considerations of the Bedouins as indigenous and tribal people in Jordan,

Syria, Egypt, and Morocco, even in studies comparing the indigenous Bedouins in Israel and Jordan.[121] Yet the scarcity of references to the Bedouins as indigenous peoples in some countries does not disqualify them from being so. The response to the deniers' justified criticism of the omission should be to include additional groups from the Middle East as indigenous peoples, not to exclude the Negev Bedouins.

As we have seen, nondominance is a key element in determining indigenous status. Bedouin history under Israeli rule is that of impingement and dispossession, which characterizes indigenous peoples. As 'Atiya al-Assam, the head of the Regional Council of the Unrecognized Villages, recently stated:

> To my regret, the history of Bedouins in Israel is a history of dispossession, injury and obliviousness. Most Bedouins were uprooted from their respective lands and villages during the 1948 War and were neglected for over 60 years—without any development, water or infrastructures. To this very day, a threat of eviction is looming upon many of the villages by the Prawer law. Moreover, during 2012 alone, the state has demolished more than 1,200 houses of Bedouin citizens. What other group has "gained" such a treatment by the state? Only the Bedouins![122]

Similarly, the Negev Coexistence Forum for Civil Equality, one of the leading groups working with the Bedouins, said:

> As other indigenous communities, the Bedouins continued to use traditional tools for demarcating boundaries and . . . did not use . . . western methods of land registry and ownership.
>
> The Bedouins preserved their language (Bedouin dialect of Arabic), religion (Islam integrated with Bedouin religious tradition) and social, cultural, economic and political characteristics. They are ethnically distinguished from the Jewish majority, and socially distinguished from the Palestinian minority that lives in Israel.[123]

As we have demonstrated, the Bedouins had and continue to have a strong customary legal system, including powerful property rules.[124]

International bodies have increasingly noted the marginal and nondominant position of the Negev Bedouins.[125] Most NGOs working with or within the Bedouin community refer to the Bedouins as an indigenous people.[126] Similarly, the Bedouins self-identify as an indigenous group, as evinced by their recent activity in the global indigenous network and its hub, the UN Permanent Forum on Indigenous Issues.[127] Negev Bedouins have taken part in six worldwide conferences of indigenous groups since 2005.[128]

Bedouins' self-identification as an indigenous people—a key criterion—is widely recognized by highly qualified external observers. For example, Rodolfo Stavenhagen, former UN special rapporteur on the rights of indigenous peoples, stated in an expert opinion submitted to an Israeli court:

> Bedouins fall under the definition of indigenous peoples. The emerging international law of indigenous peoples, including its human rights provisions, certainly applies to the Bedouin population, and should be so considered by government authorities and legal experts.[129]

Other researchers and experts agree. For example, Ken Coates mentions the Bedouins in the Negev as an indigenous people;[130] Ismael Abu-Saad discusses at length the characteristics of the Bedouins as an indigenous society in the Negev;[131] Talia Berman examines various aspects of the supply of services to the Bedouins as an indigenous society;[132] and Alexandre Kedar and Alean al-Krenawi and John R. Graham analyze social relations among indigenous societies, especially noting the Bedouins of the Negev.[133] A special report of a delegation of experts on behalf of Habitat, headed by Miloon Kothari, former special rapporteur to the UN on the right to housing, also designated the Bedouins as an indigenous group, entitled to special rights and affirmative action.[134] Hence most scholars who have researched the subject agree that the Bedouins in the Negev constitute an indigenous community.

The IWGIA has recognized the Bedouins of the Negev as an indigenous people since the 2002–2003 edition of their yearly *Indigenous World*.[135] Furthermore, in an exchange with the Israeli government from August 2011, James Anaya, at the time the UN special rapporteur on the rights of indigenous peoples, rejected Israel's position that the Bedouins are not indigenous.

> The Special Rapporteur acknowledges the position of the State of Israel that it does not accept the classification of its Bedouin citizens as an indigenous people. . . . The Special Rapporteur notes, however, the longstanding presence of Bedouin people throughout a geographic region that includes Israel, and observes that in many respects, *the Bedouin people share in the characteristics of indigenous peoples worldwide*, including a connection to lands and the maintenance of cultural traditions that are distinct from those of majority populations. . . . Thus, *the Special Rapporteur considers that the concerns expressed by members of the Bedouin people are of relevance to his mandate* and fall within the ambit of concern of the princi-

ples contained in international instruments such as the United Nations Declaration on the Rights of Indigenous Peoples.[136]

Anaya's report also clarified that it is improper to leave the decision on whether a certain group is an indigenous group to the subjective determination of the relevant countries.[137]

. . .

To sum up, notwithstanding their particularities, the Negev Bedouins fit many of the key characteristics and current understanding of what constitutes an indigenous group and therefore can and should be considered an indigenous people. They fit the prevailing four major criteria. They (1) self-identify as a separate indigenous community, (2) preserve a distinct identity and customs and possess a long history of societal self-rule, (3) display a powerful and long-term attachment to their land and historical territories, and (4) have a history and a present of subjugation, dispossession, and marginalization. They also continue to hold powerful tribal social structures. As shown, most scholars and relevant international organizations, such as UN bodies specializing in indigenous peoples, recognize them as such.

Having demonstrated that the Bedouins can and should be considered an indigenous community, we turn in Chapter 8 to an examination of what this status entails according to the relevant international legal instruments pertaining to indigenous peoples.

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8 INTERNATIONAL LAW, INDIGENOUS LAND RIGHTS, AND ISRAEL

In this chapter we examine the content of international legal norms concerning indigenous rights to land and their applicability to the Bedouin case. This is an important question, because the *al-'Uqbi* lawyers argued that, although the UN Declaration on the Rights of Indigenous Peoples (UNDRIP; 2007) has no legal force in itself, its overwhelming adoption can serve as evidence of an emerging *customary international norm* and therefore has a direct effect on Israeli law.[1] Alternatively, if the rights are grounded in *international treaty law*, then the presumption of equivalence of laws applies.[2]

Along this line, we show that in recent years significant parts of these norms may have reached the status of customary international law. Finally, we argue that according to Israeli law, customary international law is directly enforceable in domestic law with no need for incorporating legislation (unless it contradicts an explicit Israeli statute). Therefore customary international law concerning indigenous peoples' land rights directly applies to the Bedouins as part of internal Israeli law. The international norms reviewed here are increasingly adopted by state legal actors, such as governments, parliaments, and particularly courts, as well as by regional institutions, such as the Inter-American Court of Human Rights and the African Court on Human and Peoples' Rights.[3]

International institutions had begun to address the plight of indigenous peoples already in the 1920s and 1930s, but attitudes of cultural superiority have persisted for a long time, as evidenced by the statements of the International

Labor Organization (ILO), epitomized in its Indigenous and Tribal Populations Convention No. 107 (1957), and the Organization of American States (OAS).[4] However, orientations and policies began to move slowly away from "assimilation and integration of indigenous 'objects' toward indigenous peoples becoming 'subjects' " of international law and policies.[5]

Since the 1990s, international law on indigenous peoples, in conjunction with supranational and national law, has gained great momentum.[6] Increasingly, international human rights law recognizes indigenous peoples as "possessing the 'rights to have rights.' "[7] They become active players in the international human rights movement. In the process they help to transform international law from "a tool of imperial power and conquest" into an instrument assisting indigenous peoples in their claims against states.[8] Despite these ongoing developments, the process is far from complete; states with indigenous peoples still do not fully comply with emerging international norms. In many cases a large gap exists between the law on the books and the law in action. Indeed, some indigenous and other scholars and activists present a skeptical view of the international human rights promise for indigenous peoples.[9] Yet the legal and moral aspects of these fledging norms are important and warrant discussion, given their great relevance to the land dispute between the Bedouins and Israel.[10]

As we saw in Chapter 7, in 1971 the UN Economic and Social Council appointed José Martínez Cobo as a special rapporteur to study the patterns of discrimination against indigenous peoples around the globe. Cobo offered a narrow definition of indigeneity, but his reports strongly affected international awareness and understanding of indigenous claims.[11] Since then, international, regional, and supranational institutions have begun to promote the recognition and protection of indigenous peoples' rights. Simultaneously, indigenous peoples have started to participate in the United Nations and other relevant institutions, including some established specifically to address their needs, such as the World Council of Indigenous Peoples (WCIP), established in the mid-1970s; the International Indian Treaty Council (IITC), founded in 1974; the UN Working Group on Indigenous Populations (WGIP), created in 1982; and the UN Permanent Forum on Indigenous Issues (UNPFII), created in 2000.

In 1989 the ILO retreated from its earlier assimilationist approach in Convention 107 (1957) in favor of a more egalitarian attitude in Convention 169. Together with the UNDRIP, adopted almost two decades later in 2007, these

two documents are the major international instruments that define and protect indigenous peoples' land rights.[12]

Although only twenty states ratified ILO Convention 169,[13] some courts applied it in states that did not ratify it, confirming its expanding normative power.[14] Notwithstanding the growing import of Convention 169 and its marking of and contribution to the transformation of international norms regarding indigenous rights, the adoption of the UNDRIP in 2007 is a major stepping-stone in international norms. The UNDRIP is the latest and most encompassing international instrument, and therefore our discussion will focus on this groundbreaking document while looking also at Convention 169.[15]

8.1 UNDRIP AND ILO CONVENTION 169

Since its establishment in 1982, the WGIP has played a central role in drafting and advancing a UN declaration on indigenous rights. This took a long time, and the process encountered several major objections, including that existing human rights instruments sufficed to include indigenous people and protect their rights.[16]

Notwithstanding these reservations, in September 2007, twenty-five years after the WGIP's establishment, the UN General Assembly adopted the UNDRIP. The vote was 144 in favor and 4 against, with 11 countries abstaining.[17] Israel did not take part in the vote because it took place on the Jewish New Year. The four countries that voted against adoption—the United States, Australia, New Zealand, and Canada—later announced that they adhered (some with reservations) to the declaration.[18] The overwhelming adoption of the UNDRIP "epitomized the change of attitude of the international legal community vis-à-vis indigenous peoples."[19]

We focus mainly on UNDRIP's regulation of indigenous peoples' rights to land, territories, and resources, which, together with the right to self-determination, are "the most explicit and comprehensive in international law."[20] Although both issues are intertwined, we first address the stipulations concerning self-determination and autonomy and then discuss land and territory. In doing so, we rely on various sources, particularly reports and resolutions of the International Law Association (ILA), which, as we have seen, is a leading and highly influential international law organization.

The UNDRIP recognizes the rights of indigenous peoples to fully participate

in decisions affecting their land and territories. Article 4 recognizes indigenous peoples' right to autonomy and self-government, which includes their ability to influence state legal and decision-making processes and state recognition of indigenous political, legal, and customary institutions. Article 18 decrees that indigenous peoples can do so "through representatives chosen by themselves."[21] Article 19 asserts, "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them." The ILA views indigenous rights to autonomy and self-determination as part of customary international law. As we will see in Chapter 9, Israel infringes on these rights because it devises its policies and laws without obtaining the Bedouins' full and informed consent from community-elected representatives, such as the Regional Council of the Unrecognized Villages (RCUV).

As to stipulations directly affecting land rights, ILO Convention 169 and even more so the UNDRIP contain powerful provisions preventing or limiting indigenous removal and recognizing indigenous rights to their ancestral lands, territories, and resources. According to Convention 169, indigenous peoples have the right not to be removed from their lands or territories. Any necessary relocation should be made only with free, prior, and informed consent of the concerned people. Indigenous peoples have the right to return to their lands as soon as the reason for their displacement is no longer valid. The UNDRIP is even clearer in relation to removals. Article 8(2) prescribes, "States shall provide effective mechanisms for prevention of, and redress for . . . (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources; and (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights." Article 10 states unequivocally that "indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return."[22]

Although the future tense used in this article might suggest that it applies only prospectively, according to the ILA's interpretation, "evolving international law . . . suggests that indigenous peoples continue to have rights to their lands . . . from which they have been removed in the past, providing that lands

are not yet in the ownership of third parties who acquired their title through good faith processes."[23] As we have seen, the al-'Uqbi tribe, whose land claim we have analyzed in detail, suffered from both forced removal and land confiscation. As of 2016, the vast majority of the tribe's previous land holdings were unused, placing them squarely within the restitutive logic of the UNDRIP.

According to the ILA, the UNDRIP gives indigenous peoples "the right of veto"[24] with "respect to measure of relocation . . . from their lands or territories" and the taking of their "lands, territories and resources."[25] Article 28 grants a right to lands of equal quality and legal status to those that the indigenous people previously possessed and that were "confiscated without their free, prior and informed consent." According to the ILA, "The form of reparation to be pursued is *restitutio in integrum* except when it is objectively unfeasible,"[26] because the lands' return is the only way to restore the indigenous people's "ability to survive as a distinct people."[27] In addition, nonmaterial reparations are crucial for the restoration of indigenous world order, including "the recognition of wrongs by the state," "disclosure of truth," and "guarantee of non-repetition."[28] The terms set forth in Article 28 have been confirmed in many international instruments and in "huge state practice" and have been "affirmed and reiterated in the relevant case law" by regional courts in Europe, the Americas, and Africa and the "courts of Argentina, Australia, Belize, Botswana, Brazil, Cambodia, Colombia, India, Japan, Malaysia, New Zealand, South Africa and the United States."[29] Thus significant authorities argue that there is an international duty to provide reparation for unfair and illegal taking of land in the past. The obligation is to return the land itself; alternatively, land or cash could be provided as compensation, but only if there is an impediment to returning the land.[30]

In addition to prohibiting and providing redress for removal, several clauses in Convention 169 and the UNDRIP address the scope of indigenous peoples' rights to land, territories, and resources. Immediately following a first chapter devoted to general policy, the second chapter of Convention 169 addresses land, attesting to its crucial role for indigenous peoples. For instance, Article 14(1) prescribes that "the rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized."[31]

Likewise, UNDRIP Article 26(1) states that "indigenous peoples have the right to the lands, territories and resources which they have traditionally

owned, occupied or otherwise used or acquired."[32] According to Article 26(2), "Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired." The ILA observed in 2010 that this article is "confirmed in, and reflects, a vast range of other international instruments . . . and, in many cases, domestic law."[33] Therefore the rights enumerated in this article "*can be reasonably considered as being part of customary international law*, as evidenced by extensive and consistent state practice as well as *opinion juris*, especially in Latin America, but also in former Anglo-Commonwealth colonies."[34] By 2012, in the ILA's *Final Report*, the certainty had increased: "Indigenous peoples' land rights . . . have attained the status of customary international law."[35] In its *Final Report* the ILA commends and lists the growing number of statutes and cases that "almost on a daily basis" recognize indigenous land rights.[36] At a minimum, international customary land rights of indigenous peoples include

> (1) A prohibition to deprive indigenous peoples of the ownership of their lands or their rights to use it in their traditional ways. . . . No indigenous communities may be relocated from their lands without their free, prior and informed consent *and* appropriate compensation.
> (2) An obligation to create the conditions to allow indigenous peoples to properly enjoy their land rights. . . .
> (3) An obligation to return to indigenous peoples the lands taken from them.[37]

The extent of control of land that indigenous groups must have in order to have rights to that land is among the most contentious issues regarding Article 26(2). For instance, is periodic use enough? Does land possession suffice to recognize the right to underground resources inaccessible to the indigenous people, such as minerals, gas, and oil? It seems that "international law is increasingly supporting . . . positive answers to these questions."[38] Thus, according to Article 26 of the UNDRIP and Article 13(2) of Convention 169, indigenous peoples have the right not only to the land they directly cultivate but also to the total environments of the areas that they occupy or use.[39]

Article 26(3) prescribes that "states shall give legal recognition and protection" to indigenous lands, territories, and resources.[40] Again, as we show in Chapters 4 and 9, Israel does not abide by these customary international legal norms.

8.1.1 Process Rights

Some observers believe that the most important development of human rights law pertaining to indigenous peoples' relations to land has been the development of "process rights," such as the right to consultation and participation, which includes the right to land demarcation.[41] Accordingly, states have to "undertake impact assessments, in cooperation with indigenous peoples, to determine the social, spiritual, cultural and environmental impact on them of planned development activities."[42] The outcomes of these surveys would serve as fundamental criteria in the implementation of such activities.

Furthermore, if states propose measures that might have "a substantial impact on the land and lives of indigenous peoples," they have to obtain prior and informed consent from the group concerned, which amounts to "a full right of veto in favor of indigenous peoples."[43] Article 30(1) of the UNDRIP prohibits military activities on indigenous lands, subject to authorized exceptions in special circumstances, and Article 32(1) states that indigenous peoples have the right to determine and develop priorities and strategies for the development and use of their lands.

Article 27 of the UNDRIP prescribes that "states shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process," while giving "due recognition to indigenous peoples' laws, traditions, customs and land tenure systems" in order "to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used." According to the ILA, some evidence suggests the evolution of customary law in this field.[44] Indigenous peoples also have the right that their own customary procedures of land transfer will be respected.[45]

Some scholars argue that the scope and power granted by international law to indigenous land rights is equal to that recognized for nonindigenous landholders.

> ILO Convention No. 169 and the UNDRIP make clear that in case of an exclusive occupation, indigenous peoples' rights to the land amount to full ownership rights. . . . Indigenous peoples must—on the basis of the fundamental principle of non-discrimination—not be placed in a worse condition than holders of derivative, state-defined ownership rights.[46]

Accordingly, although the right of property is never considered absolute and even though public interests can trump it, "indigenous land rights may only be infringed under the same conditions that apply to non-indigenous land rights."[47]

According to Jernej Letnar Černič, states owe a "tripartite obligation" to "respect, protect, and fulfill indigenous human rights."[48] The *obligation to respect* indigenous land rights compels states to refrain from interfering with indigenous land rights. This obligation also includes refraining from interfering with indigenous land systems. The *obligation to protect* "requires the state to adopt protective measures to secure the observance of indigenous land rights."[49] James Anaya argues that this obligation includes "an ambitious program of legal and policy reform, institutional action and reparations for past wrongs."[50] Finally, the *obligation to fulfill* requires states to "take active measures to ensure the availability, accessibility, and affordability of indigenous land."[51]

8.2 ADDITIONAL INTERNATIONAL LAW INSTRUMENTS

In addition to the UNDRIP and ILO Convention 169, indigenous peoples' rights are encompassed and protected by many international legal instruments.[52] Three areas of international law often serve indigenous groups in their claims: human rights, minority rights, and self-determination.[53] Indigenous peoples have increasingly relied on the "principles of the 1966 Covenants, especially those of self-determination, minority rights . . . equality, non-discrimination, but wrapped them in the distinctive notion of indigeneity."[54] They have also relied "on the progressive interpretation of these norms by international courts and human rights treaty bodies to further their cause."[55] Among the relevant human rights instruments are the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).[56]

Article 27 of the ICCPR is seen today "as the most prominent protection provided by international law to land rights of indigenous peoples." This results from the close relation between land and indigenous culture and identity.[57] General Recommendation 23 of the Committee on the Elimination of Racial Discrimination (CERD) requires states "to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal

lands, territories and resources."[58] Section 5 of the ICERD, which guaranties that everyone shall enjoy the right of property alone or with others, has served as a tool in the protection of nomadic and seminomadic peoples.[59] The rationale is that if governments fail to respect the land rights of nomadic and seminomadic communities, "this might constitute racial discrimination."[60]

Indigenous claims may also invoke

> the law of the sea; the law of treaties; the law of diplomatic protection; rules pertaining to title to territory; international environmental law; procedural doctrines such as those relating to estoppel, acquiescence, good faith, abuse of rights and laches; and a host of other principles and rules of general international law.[61]

Several international law instruments apply to indigenous peoples in specific situations, for instance, the body of laws covering wars, humanitarian international and criminal laws, most notably the Fourth Geneva Convention (1949), and Protocols I and II of the Geneva Conventions (1977) relating to the protection of victims of international and noninternational armed conflicts.[62]

Additional instruments offer protections against displacement, an issue too often experienced by indigenous peoples, including the Negev Bedouins. Article 12 of the ICCPR protects the right to movement and choice of residence. General Comment 7 of the Committee on Economic, Social, and Cultural Rights interprets Article 11(1) of the ICESCR as prohibiting the practice of forced evictions and creating a positive obligation upon states to protect against such evictions.[63] Similarly, the CERD has recommended that state parties "study all possible alternatives with a view to avoiding displacement."[64] The UN Human Rights Commission has noted the shattering consequences that forced relocation causes for those displaced and considers them "a gross violation of human rights"[65] that can only be "carried out under exceptional circumstances,"[66] *regardless* of whether those being displaced *hold legal title to the land* under national law.[67]

Principle 9 of the UN's Guiding Principles on Internal Displacement declares, "States are under a particular obligation to protect against the displacement of indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands."[68] The Guiding Principles require states to "allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes."[69]

In those limited, exceptional cases where eviction is considered objectively justified, "it should be carried out in strict compliance with the relevant provisions of international human rights law and in accordance with general principles of reasonableness and proportionality."[70] Evictions should not result in homelessness, and states must "ensure that adequate alternative housing, resettlement or access to productive land . . . is available."[71] States should provide displaced people with just compensation or reparation.[72] Compensation should be used only when restitution is not feasible or with the informed consent of the injured party.[73] Moreover, these international documents enshrine principles of consultation and participation.[74]

Most indigenous peoples also constitute minorities, and therefore they enjoy the protection offered to both categories.[75] However, indigenous peoples have particular unjust histories and are "characterized by their strong cultural bond to their lands."[76] John Borrows call this relationship "a landed citizenship."[77] The leading international instrument is the UN Declaration on the Rights of Persons Belonging to National, Ethnic, Religious, and Linguistic Minorities, which came into force in 1992.[78]

Several "soft law" instruments offer protection to indigenous peoples. A leading instrument is the World Bank's OP/BP 4.10 directive on indigenous peoples.[79] In projects affecting indigenous peoples' ties to "land, forests, water, wildlife and other natural resources," special attention should be devoted to the "customary rights of the Indigenous Peoples, both individual and collective, pertaining to lands or territories that they traditionally owned, or customarily used or occupied."[80]

In addition, at the regional level several instruments, including the Charter of the Organization of American States, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, and the African Charter on Human and Peoples' Rights, offer protections relevant to indigenous peoples.

Furthermore, although the adoption of the UNDRIP in 2007 was the major development in the last decade, other meaningful developments took place. These include the establishment in the United Nations of ongoing mechanisms to directly address "the situation and concerns of indigenous peoples; the interpretation of general standards in a manner favorable to indigenous claims by international bodies; and the development of strong regional stan-

dards on indigenous rights."[81] Currently, four major UN mechanisms specifically address the conditions of indigenous peoples:

A. *The UN Special Rapporteur on the Rights of Indigenous Peoples* (currently Victoria Tauli-Corpuz), is in charge of examining ways of overcoming existing obstacles to the full and effective protection of indigenous peoples' rights.

B. Sixteen independent experts, half of them nominated by governments and half nominated directly by indigenous organizations representing different regions, staff the *UN Permanent Forum on Indigenous Issues*. The Permanent Forum, established in 2000, is mandated to discuss economic, social, cultural, health, human rights and similar indigenous issues. The equal representation of governments and indigenous people in this forum "is a novelty in a system that has thus far been the exclusive domain of state governments."[82]

C. The *Expert Mechanisms on the Rights of Indigenous Peoples* consists of five experts appointed by the Human Rights Council, and mandated by it to provide thematic advice on the rights of indigenous peoples.

D. Additionally, the UN *Inter-Agency Support Group on Indigenous Issues* coordinates different UN agencies and organizations.[83]

We next assess the status of the international norms that address indigenous land and process rights. We first offer a short comparative overview (in Section 8.3) and then examine whether the norms concerning indigenous communities reviewed in Sections 8.1 and 8.2 have a binding power in international law (Section 8.4) and in Israeli law (Section 8.5).

8.3 COMPARATIVE OVERVIEW

A short comparative legal perspective on land rights of indigenous peoples is needed for two major reasons. First, to establish the existence of customary international law, one has to prove both state practice and *opinio juris*.[84] Second, in an increasingly interconnected legal world, Israeli legislators, politicians, administrators, and judges should look to and draw inspiration from transformations that are taking place not only in the high confines of international law jurisprudence but also on the ground in various states across the globe that

have gradually recognized the need to respect and protect indigenous land rights. These processes manifest themselves in regional and national legal orders, as we show in what follows.

In a recent review article, Černič notes that "indigenous land rights have been backed by a number of national legal orders in Europe, Africa, the Americas, and Asia."[85] Similarly, Jérémie Gilbert states that "the doctrine of indigenous title is gradually becoming a global phenomenon."[86] Kristin Carpenter and Angela Riley also refer to transformations that are taking place in nation states, which are beginning to apply human "rights norms derived from international and indigenous sources in their own judicial decisions, constitutions and other activities."[87] Further, the UNDRIP has influenced domestic legislation in various countries, such as Bolivia, which incorporated the UNDRIP into its domestic legislation,[88] and Japan, which relied on the UNDRIP when it recognized the Ainu as an indigenous people.[89]

We begin our condensed overview with the former British settler colonies, mainly the United States, Canada, Australia, and New Zealand, with which Israel shares at least two important traits: (1) It is a settler society that expanded under British rule (1917–1948); and (2) similar to these jurisdictions, common law and additional British legalities still enjoy a persistent influence on Israel's legal system.[90] As Paul McHugh demonstrates in regard to these countries, during the last quarter of the twentieth century, "a transformative court-based jurisprudence burst into prominence and controversy. . . . Judicial recognition of common law Aboriginal title . . . gave tribal peoples unprecedented and immense legal leverage."[91] The process began with the Canadian Supreme Court's decision in *Calder* (1973), continued with the U.S. Supreme Court's decision in *Martinez* (1978), and carried on through several New Zealand cases, beginning with *Te Weehi* (1986) (in the lower instance), followed by the Māsori Council cases heard in the Court of Appeal (1987–90), and reaching the pinnacle in the famous *Mabo v. Queensland (No. 2)* in Australia. Although the Supreme Court of Canada and the High Court of Australia were key players in these developments, additional jurisdictions also played a role.[92] These include the national courts in New Zealand, the United States, and, to a lesser degree, Malaysia, Belize, South Africa, and Botswana.[93]

In the consequential *Mabo v. Queensland* (No. 2) (1992) the Australian Supreme Court repudiated the doctrine of *terra nullius*, ruling that "by any civilized standard, such a law is unjust," and went on to explain that "the nation as

a whole must remain diminished unless and until there is an acknowledgment of, and retreat from, those past injustices."[94] The *Mabo* decision was reaffirmed in subsequent cases and led to the legislation of the Native Title Act (1993), which set rules on recognition and protection of native title.[95] Since *Mabo*, Aboriginal title has been recognized in 141 cases over a total area of 20.5% of Australia.[96]

The leading approach today in the Anglo-settler countries recognizes that the arrival of the common law did not extinguish indigenous land titles and that indigenous rights derive from their customary laws.[97] Courts in South Africa, Malaysia, Botswana, and Belize display a comparable approach.[98]

Before continuing our overview of transformations taking place in substantive laws in other jurisdictions, we would like to remain for a moment in the former British settler societies and examine their rules of procedures and evidence concerning indigenous land rights. Indeed, although definite progress in substantive law concerning indigenous land rights is taking place in settler societies, one should pay close attention to procedural and evidentiary rules, which often serve as gatekeepers of the legal system.[99] As we have seen, in the Israeli case the burden of proof rests on the Bedouin claimants, and we consider this an important component of the DND.

We have argued that intricate legal tools and conventions serve as central instruments in defining and altering laws concerning native land rights.[100] These rules, embedded with a heavy dose of professional, technical, and seemingly scientific language and methods, conceal violent restructuring with an air of inevitability and neutrality. As part of this process, rules of evidence, such as admissibility and weight,[101] presumptions,[102] and burdens of proof,[103] play a major role in dispossessing indigenous peoples.

Usually, indigenous peoples face compounded difficulties because of their oral traditions, which clash with the tendency of common law courts to prefer written documents when adjudicating historical disputes, particularly those pertaining to issues beyond living memory.[104] Indeed, much of the case of the al-'Uqbi family and of the Negev Bedouins in general revolves around issues of evidence and the claimants' failed attempts to overcome what are in practice insurmountable burdens of proof and other stringent and culturally skewed rules. Thus, without altering these rules of engagement—adapting them to the specific situations of indigenous peoples—much of the substantive advances remain dead letters and empty promises.[105]

As McHugh notes, following *Mabo* (1992) and *Wik* (1996), Australian courts began to retreat from "the boldness of those cases. . . . It was on the key question of proof that this restrictiveness now focused."[106] Aboriginal peoples are expected to prove not only presovereignty Aboriginal custom authorizing possession and use of the land but also current possession and use similar to that of the presovereignty period—and continuity between the two.[107] Recently, however, Chief Justice Robert S. French suggested reversing this approach, adopting instead a presumption of continuity and requiring heavy evidence of its interruption in order to refute the presumption.[108] Australian courts also usually give preference to written evidence over the oral histories of indigenous peoples.[109]

In New Zealand, Māoris must prove custom or usage pertaining to the claimed land in 1840, the date of British assertion of sovereignty.[110] Unlike Australia, though similar to Canada, once title has been established, it is presumed to have continued unless proved extinguished.[111]

Current U.S. jurisprudence displays a tendency to ease the burden of proof and type of evidence needed to assert Indian title. Claimants have to prove "not so much physical occupation as control of territory."[112] Any Indian land use can give rise to indigenous title. As early as *Mitchel v. United States* (1835), the Supreme Court displayed a culturally sensitive approach.

> Indian occupation should be considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites, and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected.[113]

This approach also applies to "tribes described as 'nomadic' " and title extends to "seasonal or hunting areas over which the Indians had control even though those areas were only used intermittently."[114] To acquire title, Indians do not have to prove occupation before British or American assertion of sovereignty, and it suffices to prove occupation "for a long time."[115] This time is not very long, however, and U.S. courts have held that 58 years and even 30 years suffice.[116]

Furthermore, even though the U.S. Supreme Court granted Congress an unlimited plenary power to extinguish Indian title, it also devised a canon of constructions according to which ambiguities in statutes and treatises should be construed in favor of the Indians. Although this canon has not always been

observed, it has had an impact.[117] As we have seen, Israeli courts adopted the contrary interpretive position.

In *Delgamuukw v. British Columbia* the Canadian Supreme Court ruled that an indigenous group claiming Aboriginal title must prove that it had occupied the land before Crown sovereignty, that there was continuity between the presovereignty occupation and its current occupation of the land, and that the group's occupation when sovereignty was established was exclusive on the land.[118] Occupation, however, can be established through various means, "ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources."[119]

Simultaneously, the Canadian Supreme Court recognized indigenous evidentiary impediments and instructed lower courts to admit and give proper weight to Aboriginal oral histories.[120] In *Delgamuukw*, for instance, Chief Justice Antonio Lamer stated that "the laws of evidence must be adapted in order that this type of evidence [oral histories] can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents."[121] Indigenous peoples can introduce evidence regarding physical presence, use of the land, and relevant Aboriginal law.[122]

In the recent *Tsilhqot'in Nation vs. British Columbia* (2014), Chief Justice Beverley McLachlin, deciding for a unanimous court, ruled that where Aboriginal title has been asserted, Section 35 of the Constitution Act "requires the Crown to consult with the group asserting title."[123] The *Tsilhqot'in* court accepted the assessment of the Court of Appeal, according to which

> the occupation of traditional territories by First Nations prior to the assertion of Crown sovereignty was not an occupation based on a Torrens system, or, indeed, on any precise boundaries. . . . [Therefore] requir[ing] proof of Aboriginal title precisely mirroring the claim would be too exacting.[124]

The *Tsilhqot'in* court emphasized that this type of cases requires

> decisions based on the best evidence that emerges, not [on] what a lawyer may have envisaged when drafting the initial claim. What is at stake is nothing less than justice for the Aboriginal group and its descendants, and the reconciliation between the group and broader society. A technical approach to pleadings would serve neither goal.[125]

To establish whether a seminomadic indigenous community acquired title to the land, the Court set particular criteria, according to which Aboriginal occupation must be sufficient, continuous, and exclusive.[126] The Supreme Court accepted the trial court's conclusion that the Tsilhqot'in Nation proved exclusive and regular use of their territory and therefore had title "not only to village sites and areas maintained for the harvesting of roots and berries, but to larger territories which their ancestors used regularly and exclusively for hunting, fishing and other activities."[127] The Supreme Court cautioned against "forcing [Aboriginal] ancestral practices into the square boxes of common law concepts, thus frustrating the goal of faithfully translating pre-sovereignty Aboriginal interests into equivalent modern legal rights."[128]

Thus, although in the *Tsilhqot'in* case the amount of land claimed was extensive, the land itself was harsh. Therefore, although the Aboriginal group numbered only about 400 people, their claim should be judged in view of the "carrying capacity of the land in determining whether regular use of definite tracts of land is made out."[129] Furthermore:

> Cultivated fields, constructed dwelling houses, invested labour, and a consistent presence on parts of the land may be sufficient, but are not essential to establish occupation. The notion of occupation must also reflect the way of life of the Aboriginal people, including those who were nomadic or semi-nomadic.[130]

The Court emphasized that "a culturally sensitive approach" was required, one that was based on "the dual perspectives of the Aboriginal group in question—its laws, practices, size, technological ability and the character of the land claimed—and the common law notion of possession as a basis for title."[131] Further, "nomadic and semi-nomadic groups could establish title to land" so long as they proved physical possession of it.[132] In addition, treaties made with other groups "may show intention and capacity to control the land."[133] What a difference from the *al-'Uqbi* decision![134]

Having completed this detour, we can return to our comparative overview. In the Americas several regional legal instruments and procedures are applied in ways that enhance indigenous land rights and other rights. Twenty-five countries have ratified the American Convention on Human Rights, which has been construed to affect indigenous peoples and their land rights.[135] Twenty countries have ratified ILO Convention 169,[136] among them the five countries with the largest indigenous populations by number and percentage of popula-

tion, and their national courts have applied the convention to protect indigenous peoples' rights.[137] The Inter-American Court of Human Rights (IACHPR) and the Inter-American Commission on Human Rights (IACHR) act as key regional and global players in indigenous land and natural resource rights issues.

The IACHPR's groundbreaking ruling in *Awas Tingni v. Nicaragua* (2001) rejected Nicaragua's claim that the Awas Tingni community did not have land rights for lack of title deeds.[138] The Court ruled that the right of property enshrined in the American Convention on Human Rights encompasses indigenous customary land rights.[139] It found that Nicaragua had "violated the right to property protected by article 21" of the Convention.[140] Consequently, Nicaragua had a positive duty to demarcate and recognize the group's land tenure.[141] Nicaragua abided by the decision and in 2008 granted the Awas Tingni title to 74,000 hectares of their ancestral lands.[142] Following this decision, the IACHPR and the IACHR continued the development of indigenous land rights.[143] For instance, in *Saramaka v. Suriname* (2007), which involved the Maroon community, who were not indigenous to the region but "established themselves there as fugitives from slavery,"[144] the IACHPR ruled that Suriname violated the Maroons' right to property, as recognized in the American Convention on Human Rights.[145]

Several Latin American constitutions, such as those of Paraguay, Mexico, Brazil, Nicaragua, Ecuador, Peru, Colombia, Bolivia, and Guatemala, recognize and protect their indigenous peoples' special status, history, lands, and general rights.[146] Practically all Latin American countries have enacted laws recognizing indigenous peoples' right to land, territories, and resources.[147] Bolivia has incorporated the UNDRIP in full as their National Law on Indigenous Peoples' Rights.[148]

Latin American national courts provide a wealth of jurisprudence in relation to indigenous land rights.[149] In Peru the Constitutional Court halted oil exploration activities because they potentially interfered with indigenous territorial rights.[150] Recent cases in Argentina and Brazil display protection of indigenous land rights.[151] In *Aurelio Cal v. Attorney General of Belize* (2007),[152] the chief justice of the Belize Supreme Court ruled that "both customary international law and general principles of international law would require that Belize respects the rights of its indigenous people to their lands and resources."[153] The Court construed the constitutional guarantee of "life, liberty, [and] security of the person" as granting protections for indigenous peoples' lands and

ways of life.[154] Finally, the Court relied on the UNDRIP, ruling that "embodying as it does, general principles of international law relating to indigenous peoples and their lands and resources, [the Declaration] is of such force that the . . . Government of Belize, will not disregard it."[155] The chief justice also invoked and relied on contemporary decisions from other common law jurisdictions.[156] Following the Court's decision, the Belize government embarked on an ongoing process of implementing it.[157]

Unlike the situation in the Americas, in Asia no strong regional legal mechanisms exist to protect indigenous land rights. Many indigenous peoples in the region face discrimination and violations of human rights.[158] However, some constitutions, such as those of India, Malaysia, the Philippines, and Nepal, recognize indigenous rights. Several Asian countries have enacted special statutes to address indigenous communities and their land rights, including Cambodia, Nepal, Taiwan, India, the Philippines, and some Malayan states.[159]

Asian national courts play a meaningful role in confirming indigenous forest and land rights. In Japan several court decisions have recognized the Ainu's right based on international indigenous rights standards.[160] In the Philippines, in *Cruz v. Secretary of Environment and Natural Resources* (2000), Supreme Court justice Santiago Kapunan grounded the recognition of indigenous rights in an "emergent international law," including the UNDRIP (at the time only a draft), and in comparative law.[161] Relying on decisions of common law courts, the Malaysian Supreme Court ruled in *Adong bin Kuwau & Ors. v. Kerajaan Negeri Johor and Anor*,[162] that the claimants, a native group, held common law rights "to live on their land as their forefathers had lived and this would mean that even future generations of the aboriginal people would be entitled to this right of their forefathers."[163] Several years later, in the path-breaking *Sagong Tasi v. Negeri Kerajaan Selangor* (2002) decision, the Malaysian Federal Court (Malaysia's highest court) recognized the "existence of Orang Asli's native title over their traditional lands."[164] In *Madeli bin Salleh* (2007) the Malaysian Federal Court held that common law customary land rights of the Orang Asli to *miri* land could coexist with governmental allocation of permits and licenses. Citing *Calder* and *Mabo*, the Court stated that "the proposition of law as enunciated in these two cases reflected the common-law position with regard to native titles throughout the commonwealth."[165]

In Africa the African Commission on Human and Peoples' Rights[166] and the African Court on Human and Peoples' Rights (AFCHPR)[167] have been

playing a key role in indigenous land rights in recent years. In February 2010 the AFCHPR affirmed the Commission's report and recognition of the Endorois' customary rights to lands from which they were expelled by the Kenyan government. According to the Court, their eviction violated Article 14 of the African Charter (which protects the right to property), and Kenya had to recognize immediately the "rights of ownership to the Endorois and [r]estitute Endorois ancestral land." The Court also decided that for indigenous peoples like the Endorois, traditional land possession "has the equivalent effect as that of a state-granted full property title . . . [and] entitles indigenous people to demand official recognition and registration of property title."[168] Thus, as in Latin America, the regional court interpreted the right to property to include indigenous customary ownership.[169]

Several African constitutions recognize individual and collective indigenous property rights, even though in some cases they do not use the term *indigenous* literally but instead use terms such as *pastoralists* or *hunter-gatherer* communities.[170] Several African states, such as South Africa and the Republic of Congo, have enacted laws recognizing and protecting indigenous rights.[171]

Several national courts have begun recognizing African indigenous land rights. For instance, the High Court of Botswana recognized the land rights of the San hunter-gatherers.[172] The South African Constitutional Court addressed a case concerning the land and mineral rights of the indigenous Nama tribe on land allocated by the South African government to private companies.[173] The Court rejected the *terra nullius* doctrine and ruled that the community had "a right to exclusive beneficial occupation and use, akin to that held under common-law ownership."[174] The Court found that the community suffered racial discrimination, because South African law protected "(white) registered titles . . . whilst not protecting the ownership rights of tribal communities over lands they had occupied 'since time immemorial.' "[175] In reaching its decision, the Court relied on contemporary international and comparative law.[176] The Court set the primacy of customary indigenous law over common law and ruled that the power of indigenous law was not dependent on its conformity with common law.[177] Following the decision, an agreement was reached that restored 84,000 hectares of land, including the mineral rights to it, to the Nama and granted additional monetary compensation and 49% of the shares of the Alexkor mining company.[178]

However, and notwithstanding positive legal developments, the implemen-

tation gap in Africa still has to be bridged, as "indigenous land rights continue to be violated in the name of modernization and commercialization."[179]

In a number of Scandinavian states, supranational and national courts have ruled that the long-term use of ancestral land by the Sami indigenous population can take precedence over governmental ownership.[180] For instance, Section 5 of the Norwegian Finnmark Act states, "Through prolonged use of land and water areas, the Sami have collectively and individually acquired rights to land in Finnmark."[181] In the *Selbu* case (2001), the Norwegian Supreme Court began to gradually smooth the evidentiary path for Sami claiming customary land and grazing rights. In the *Svartskogen* ruling (2004) the Supreme Court found that Sami use of an area owned by the state, even though described as "use right" by the Sami because of their cultural approach, amounted in fact to exclusive possession.[182]

To sum up, regions and countries around the globe are increasingly recognizing indigenous land rights. This takes place through regional agreements and judicial rulings and through state constitutions, laws, and judicial decisions and practices. Although such transformations do not occur everywhere and although large gaps often exist between the law on the books and the law in action, today substantial and meaningful models have been created to address territorial disputes between states and indigenous communities. The overview offered here serves as strong evidence of an emergent international customary law on these crucial issues, as we show further in the next section.

8.4 STATUS OF INTERNATIONAL LEGAL INSTRUMENTS PROTECTING INDIGENOUS RIGHTS

Assessing the legal status of the major international norms governing indigenous rights, such as Convention 169 and the UNDRIP, is crucial to analyzing their impact on the land dispute between Israel and the Bedouins. In this section and the next we endeavor to show that (1) indigenous land rights and some additional rights are in a process of increasingly becoming binding international norms and (2) notwithstanding the Israeli position, as presented, for instance, in the *al-ʿUqbi* case, these norms are binding in Israel as well.

The normative sources of international law, which over the years have attained international acceptance, are the ones listed in Section 38 of the Statute of the International Court of Justice, which replicates almost verbatim a corre-

sponding clause in the statute of the Permanent Court of International Justice, which was drafted in 1920.[183]

Among the binding sources, *treaty law* (Section 38(a)) binds only parties that are signatories of the treaty. However, some treaties and even nonbinding statements and declarations, such as the Universal Declaration of Human Rights, are considered statements of existing binding customary international law. This is especially true with regard to multiparty treaties, such as the Geneva Conventions of 1949.[184] *Customary international law* (Section 38(b)) is the second primary source of international law. It is usually more difficult to ascertain.[185] It is also the oldest source.[186] International law includes norms derived from custom, or "general practice [of states] accepted as law."[187] Customary international law norms are derogable in some exceptional instances, and states "that can demonstrate a history of non-abidance—persistent objectors—are exempt from such customary law."[188]

However, recent approaches have started to undermine even the limited power of states to exempt themselves from customary international law.[189] In any event, customary law binds even states that chose not to join conventions that codify customary international law. For instance, states that did not join the International Covenant on Civil and Political Rights are nevertheless subject to its customary norms.[190]

The third source, general principles of law, is even more obscure and usually includes general legal principles such as res judicata or the duty of the injurer to compensate the injured.[191]

Proving customary international norms is a difficult endeavor, because one has to prove both existing "state practice" and *opinio juris*.[192] State practice includes national legislation, decisions of national courts, opinions of official legal advisors, and state actions, even if not mandated by law.[193] *Opinio juris* is a subjective obligation, a sense on behalf of a state that it is bound to the norm in question. Current practice infers states' acceptance of the norms by mere lack of objection or contrary practices.[194] Although there is no consensus on how to prove *opinio juris*, this does not prevent the acceptance of the binding force of customary international law.[195]

Statements and declarations made by the UN General Assembly serve as a means to identify *opinio juris*. As stated by the International Court of Justice in its advisory opinion on the legality of nuclear weapons, "General Assembly resolutions, even if they are not binding, may sometimes have normative

value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*."[196]

Overwhelming state support of the UNDRIP—including states that have a relevant interest in the issue, such as Latin American states, and the Anglo-settler states, such as the United States, Canada, and Australia, that changed their original position and decided to support the UNDRIP—strengthens the position that norms embodied in the UNDRIP represent customary international law.[197]

Furthermore, a "declaration" is "a solemn instrument resorted to only in very rare cases relating to matters of major and lasting importance where maximum compliance is expected."[198] As early as 1962, the UN Office of Legal Affairs highlighted the special status of a UN declaration.

> In the United Nations practice, a "Declaration" is a formal and solemn instrument, suitable to rare occasions when principles of great and lasting importance are being enunciated, such as the Declaration on Human Rights. . . . It cannot be made binding upon Member States, in the sense that a treaty or convention is binding upon the parties to it. . . . However, in view of [its] greater solemnity and significance, . . . it may be considered to impart . . . a strong expectation that Members of the international community will abide by it. Consequently, insofar as the expectation is gradually justified by State practice, a Declaration may by custom become recognized as laying down rules binding upon States.[199]

Evidence of the existence of a customary international norm can also be inferred from judicial decisions and the prestigious scholarly work as defined in Section 38(d) of the statute of the International Court of Justice.[200] For instance, the American Law Institute states that "substantial weight" should also be given to "judgments and opinions of international judicial and arbitral tribunals; judgments and opinions of national judicial tribunals; the writings of scholars; [and] pronouncements by states that undertake to state a rule of international law, when such pronouncements are not seriously challenged by other states."[201] Full consistency in the practice of states is not necessary to establish the existence of a customary norm. Nor must the norm exist for a long period; sometimes even a short time span is sufficient.[202]

The legal status of the norms governing indigenous peoples, and particularly the UNDRIP, is subject to disagreement. Some see the norms as merely "aspirational" or as "soft law."[203] Writing in 2010, Alexandra Xanthaki believed

that "the suggestion that indigenous rights already constitute uniform state practice seems over-ambitious."[204] A major reason for Xanthaki's position was that "the US, Canada, Australia and New Zealand—countries with substantial indigenous communities—voted against its [UNDRIP] adoption." She thought, therefore, that regrettably, "viewing the *Declaration* or substantial parts of it as customary international law may be rather premature."[205]

Since Xanthaki published her article, the United States, Canada, Australia, and New Zealand have changed their position and endorsed, with restrictions, the UNDRIP, and therefore this justification for Xanthaki's hesitation has somewhat weakened.[206] These four countries qualified their endorsements and stated that the UNDRIP, as such, is not legally binding on them. Yet they stressed that the UNDRIP contains many norms that already exist in international law or in their national law. Thus, as a close reading of the endorsement statements shows, these qualifications do not claim that the UNDRIP has no legal significance. What these statements say is that the UNDRIP *as such* is not binding, but simultaneously these four countries claim that most of their laws conform to the norms enshrined in the UNDRIP, thereby strengthening the claim that such sections codify existing international customary law and therefore are binding.[207]

Furthermore, even if one adheres to the view that the UNDRIP has only an aspirational power or that it is soft law (a position we disagree with), this position should not undervalue the potential impact of the UNDRIP on domestic law. International law in general and the UNDRIP in particular serve increasingly as a guide and a tool in the jurisprudence of courts adjudicating indigenous issues.[208] Thus, as Mauro Barelli remarks, the UNDRIP "may have significant effects on the formation of customary international law."[209] Megan Davis views the UNDRIP as existing "in an amorphous in-between state of constituting both a 'non-binding,' influential and aspirational statement of soft law but equally an instrument that reflects already binding rules of customary international law."[210]

Along this line, we became convinced on grounds we detail later that some sections of the UNDRIP codify existing customary norms, or rather, they became customary because the declaration was proclaimed in 2007.[211] Similarly, segments of Convention 169 have been interpreted as binding, even on nonsignatory states, and "its relevance goes far beyond the limited number of ratifications. [Its] central provisions . . . are nowadays to be regarded as customary international law."[212]

As early as 2001, James Anaya and Robert Williams argued that "as a matter of customary international law, states must recognize and protect indigenous peoples' right to land and natural resources."[213] More recently, Anaya and Siegfried Wiessner have stated that rights to "demarcation, ownership, development, control and the use of lands that [indigenous peoples] have traditionally owned or otherwise occupied and used" crystallized into customary international law.[214]

As recently reviewed by Xanthaki, a growing number of regional and local courts have looked at international law instruments, including Convention 169 and the UNDRIP, as powerful norms.[215] For instance, in *Police v. Abdulla* (1999) the South Australian Supreme Court referred to Convention 169, which had not been ratified by Australia, as "an indication of the direction in which the international law is proceeding."[216] In its famous *Awas Tingni* (2001) decision, the Inter-American Court on Human Rights ruled that "there is an international customary law norm which affirms the rights of indigenous peoples to their traditional lands."[217] Similarly, the Belize Supreme Court stated that "both customary international law and general principles of international law would require that Belize respect the rights of its indigenous peoples to their lands and resources."[218]

Likewise, Lorie M. Graham and Wiessner argue, "Some of the rights stated [in the UNDRIP] may already form part of customary international law, others may become *fons et origo* of later emerging customary international law." In particular, "Indigenous peoples . . . have a right to the lands they have traditionally owned or otherwise occupied and used."[219] Anaya, at the time the UN special rapporteur on the rights of indigenous peoples, stated in 2008 that the UNDRIP "can be seen as embodying to some extent general principles of international law. In addition . . . some aspects of the Declaration can also be considered as a reflection of norms of customary international law."[220]

Thus, currently, authoritative voices maintain that important segments of the UNDRIP either codify existing customary international law or have already attained this status, among them the UNDRIP articles addressing land rights. In this vein, Seth Korman argues that "the current body of law relating to customary [indigenous] land rights may reveal an emerging custom in international law, albeit one that remains vague and ill-defined."[221] Likewise, McHugh notes that the "UNDRIP was seen almost immediately

as reflective of the state of legal art (that is, as a declaration of customary international law)."[222] This has been the position of many indigenous peoples involved in its drafting. For instance, Mathew Coon Come, the grand chief of the Grand Council of the Crees during that period, referred in 1995 to the draft of the declaration and stated that "every paragraph of the Draft Declaration is based upon known instances of violations of the human rights of Indigenous peoples. . . . The Draft Declaration . . . is drafted to confirm that the international standards which apply to all peoples of the world apply to Indigenous peoples." Thus, as Megan Davis explains, this quote "illustrates how Indigenous peoples who participated in the drafting of the text viewed it as extending already existing international human rights standards . . . rather than creating new ones."[223] Katja Göcke, recently (2013) argued that "the UNDRIP is one of the most discussed texts in the history of the United Nations and has been supported by a broad majority of States. Therefore, many of the aspects laid down in the Declaration have to be considered to constitute customary international law."[224] Manuela Zips-Mairitsch[225] and Albert Barume[226] agree.

The International Law Association (ILA), which is a leading legal organization in international law,[227] has tasked its Committee on the Rights of Indigenous Peoples to assess "whether certain prescriptions in UNDRIP have already reached the status of customary international law."[228] In 2010 the Committee issued an interim report on the rights of indigenous peoples. In 2012 the Committee issued its final report, and its recommendations were adopted by the ILA general assembly in August 2012.[229] Because of the high esteem, international prominence, and authority of the ILA, the Committee's interim and final reports as well as the ILA's resolution warrant serious attention.

According to the Committee, the rules of customary international law include the right of indigenous peoples to self-determination; to autonomy and self-government; to their traditional lands and natural resources, including the right "to restitution of the ancestral territories from which they have been removed in the past," except in cases of absolute impossibility; and to reparation and redress for wrongs suffered.[230]

The Committee's report was accepted in the ILA's 2012 resolution, in which it stated that the UNDRIP "*as a whole* cannot yet be considered as a statement of existing customary international law" (Section 2; emphasis added).

However, those provisions not yet corresponding to customary international law "represent the parameters of reference for States to define the scope and content of their existing obligations—pursuant to customary and conventional international law—towards indigenous peoples" (Section 3).[231]

Most relevant to our discussion here, states must "comply—pursuant to *customary* and applicable conventional *international law*—with the obligation to recognize, respect, safeguard, promote and fulfil the rights of indigenous peoples to their traditional lands, territories and resources, which include the right to restitution of the ancestral lands, territories and resources of which they have been deprived in the past" (Section 7; emphasis added). In addition, states have the duty "to recognize and fulfill the rights of indigenous peoples to reparation and redress for wrongs they have suffered, including rights relating to lands taken or damaged without their free, prior and informed consent" (Section 10).[232] The ILA recommended that states restructure their domestic law, including "constitutional amendments, institutional and legislative reforms, judicial action, administrative rules, special policies, reparation procedures and awareness-raising activities," to fully realize indigenous peoples' human rights consistently with the norms set up by the UNDRIP (Section 11). Recently (2016), a newly formed ILA committee, the Committee on the Implementation of the Rights of Indigenous Peoples, reiterated the position that there are

> "several key provisions which correspond to existing State obligations under customary international law." These obligations concern the areas of self-determination, autonomy or self-government, cultural rights and identity, land rights as well as reparation, redress and remedies.[233]

It seems, therefore, that a strong and growing stream of scholars and practitioners consider some segments of the UNDRIP as internationally binding. Simultaneously, we should be aware that an implementation gap exists between international and national legal norms governing indigenous peoples and the actual application of these binding norms.[234]

We have seen that international norms recognize and give extended rights to indigenous land and territories and that some of these norms have arguably attained the status of customary international law. In the next section we clarify the power of these customary international laws in the internal Israeli legal system.

8.5 STATUS OF INDIGENOUS INTERNATIONAL RIGHTS IN ISRAELI LAW

International law binds states in the international sphere, and they have an obligation to ensure that their internal legal system will enable them to do so.[235] However, following the English approach, Israel differentiates between the absorption of customary international law and that of treaty international law. According to the monist approach adopted by Israel in this regard, *customary law* applies directly in internal law. On the other hand, according to the dual approach, *treaty law* is a separate set of rules that binds the state in the international legal arena but has to be absorbed into domestic Israeli law through legislation.[236]

As discussed earlier, there is disagreement over the status of the international norms governing indigenous peoples. Consequently, in this section we examine several paths. If one accepts our analysis that the UNDRIP and related norms governing indigenous rights—particularly land and procedural rights—constitute customary international law, then the consequence is that these norms form part of Israeli domestic laws and thus must be complied with by the government and the courts. If, on the other hand, one views our position on the UNDRIP as premature or too optimistic, then these norms are soft law, or, in cases of conventions to which Israel is a party, treaty law. The normative power of such norms is weaker than international customary law, but we show that nevertheless such norms have meaningful legal power in Israel.

Customary international law is an integral part of Israeli law so long as it does not contradict an explicit Knesset statute.[237] Therefore there is no need for any formal enactment of its application in Israel.[238] Yaffa Zilbershats considers the direct application of customary international law as a "basic principle" of the Israeli legal system, which conforms to the obligation that Israel took upon itself in its Declaration of Independence to abide by the principles of the UN Charter.[239] Likewise, Daphne Barak-Erez, currently an Israeli Supreme Court judge, explains, "Israeli law has adopted the British approach. . . . Norms of customary international law are applied in domestic courts except where inconsistent with domestic legislation."[240]

When a treaty (or parts of it) is declaratory of customary international law, it applies directly in internal Israeli law.[241] Therefore, as Eyal Benvenisti ex-

plains, the position of the Israeli Court "leaves but one hurdle for the claimant who invokes international human rights norms against governmental action, namely to prove the status of these norms as customary law."[242]

Because of the close links between international law and issues arising from the territories occupied by Israel after 1967, the Israeli Supreme Court has, following the occupation, "substantially increased the burden of proof concerning the existence of [an international law] custom."[243] As laid down by President Meir Shamgar in the *Abu Aita* case, customary international law

> refers to accepted behavior, which has merited that status of *binding law* . . . : general practice, which means a fixed mode of action, general and persisting . . . which has been accepted by the vast majority of those who function in the said area of law. . . . The burden of proving its existence and status . . . is borne by the party propounding its existence. . . . The views of an ordinary majority of states are not sufficient; the custom must have been accepted by an overwhelming majority at least.[244]

However, the *Abu Aita* case is relatively old—it was decided more than thirty years ago—and it is doubtful that it typifies current approaches to proving customary international law. In other cases the Israeli Supreme Court ruled that a number of actions of the government contradicted customary international law and therefore ordered the government to retract them.[245] The Court ruled that "customary international law is part of Israeli law, [but] is subject to Israeli statutes which set a contrary rule."[246] The Court also ruled that, in order to negate customary international law, a statute has to do so explicitly.[247] Therefore an Israeli judge is compelled to give precedence to an Israeli statute only when there is a direct conflict between it and a customary international norm.[248]

Thus, as we have argued, norms concerning indigenous peoples that form part of customary international law are an integral part of Israeli law. We next examine the situation in cases where international law and norms are not considered binding. Here a distinction should be made between conventions or treaties that Israeli has ratified and other international norms and principles.

Israeli courts adopted "an interpretive approach stating that statutes should be construed, as much as possible, as conforming to international customary and *treaty-based* law."[249] The Israeli Supreme Court ruled that this "presumption of compatibility" of national law with the international obligations of the state includes not only customary law but also international treaty law.[250]

Therefore several international conventions to which Israel is a party and that address directly or indirectly indigenous or minority land rights should serve as guidelines in interpreting local legislation.[251] These conventions include the ICCPR, the ICESCR, and the ICERD.[252] The Israeli Supreme Court gives substantial weight to conventions ratified by Israel and for guidance looks at the implementation of the conventions by other common law countries. For instance, in *Abed Elkader v. The State of Israel* the Israeli Supreme Court emphasized that Israel ratified the ICCPR, reviewed the jurisprudence of Great Britain, Australia, Canada, and the United States, and implemented a norm set in the convention on an Israeli case.[253]

In addition, as Yuval Shani argues, the presumption of compatibility results in the determination that any subsidiary legislation that conflicts with either customary or treaty-based international law is prima facie illegal. Furthermore, Shani argues that the presumption should also apply to the Israeli Basic Laws and therefore that they should be interpreted as much as possible in conformation with Israeli obligations to respect human rights.[254] The presumption would also guide the interpretation of laws authorizing administrative bodies, and therefore any action of the administration that infringes international human rights is prima facie ultra vires and illegal, or unreasonable. However, this interpretive presumption applies only when there is an interpretive space to do so in the internal legal text; it should be weighed against other interpretive options, and it has no force against clear contrary legislation.[255]

In addition, other authoritative statements require Israeli institutions, including the courts, to follow the rules and general doctrines of international law. For instance, according to an opinion in the *Hilo* case, an Israeli court "will interpret a local statute, except if its content requires another interpretation, according to the *doctrines of public international law*."[256] In another case, the court ruled that the "law requires to interpret a statute which can be understood this or that way, and its content does not compel another [interpretation], according to the rules of international law."[257] Furthermore, a presumption exists that Israeli law conform not only to crystallized international custom but also to the "basic principles of equality, freedom and justice, which are the heritage of all the proper and enlightened countries."[258]

As similarly articulated in the Canadian context, the UNDRIP "provides a frame of reference to interpret existing human rights obligations in relation to Indigenous Peoples." The presumption of conformity warrants the use of the

UNDRIP to interpret Canadian law, including the Constitution Act of 1982. Thus, "when an ambiguity exists or clarification is needed in domestic law . . . the presumption of conformity permits international standards such as those articulated within the UN Declaration to be used to interpret Canadian law."[259]

We therefore can assume that those parts of the UNDRIP that codify existing customary international law, as well as those parts that became customary international law and other customary norms that are relevant to indigenous peoples, are *now part of Israeli law*. Furthermore, as Shani states in a similar context, according to the presumption of interpretive equivalence, the Israeli Basic Laws should be interpreted as much as possible as intending to protect international human rights, including collective rights. Thus the term *human dignity* in the Basic Law: Human Dignity and Liberty should encompass rights standing at the core of indigenous people's dignity,[260] and most centrally, their connection to their lands and territories.[261]

. . .

We have shown in this part that the Bedouins should be considered an indigenous group protected by international law and that part of international law, including segments of the UNDRIP, is already *customary* international law and therefore applies directly in Israeli law. Other norms function as *conventional* and *soft law* and therefore should strongly influence Israeli institutions and guide their conduct toward the Bedouins.

In Part V we analyze the various contesting visions for resolving this enduring land and territorial dispute. In Chapter 9 we first examine state policies and planning and then outline alternative plans advanced by the Bedouins. In the Conclusion, we first examine the Supreme Court ruling in the *al-'Uqbi* case and then summarize the book and present an outlook for the way ahead.

V CONTESTED FUTURES

It is now time to examine possible solutions to the protracted conflict between the State of Israel and the Negev Bedouins. In this part we thus focus on land and planning initiatives as a key arena that translates state policies and indigenous claims into concrete spatial proposals. In Chapter 9 and the Conclusion we briefly describe the most significant government plans and strategies for the Bedouin region, including regional statutory plans and government special initiatives and an alternative regional plan prepared by the Negev Bedouins. We then return to the aftermath of the *al-'Uqbi* trial and to some conclusions drawn from the entire book.

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9 STATE AND BEDOUIN POLICIES AND PLANS

The Israeli government has persistently attempted to promote and force urbanization and Judaization plans that run against international norms regarding the rights of indigenous peoples. Recently, the Bedouins have staged a campaign for planning rights that have been increasingly accepted in other settler states as a foundation for long-term reconciliation and coexistence between settler and indigenous groups.

9.1 STATE POLICIES AND PLANS

9.1.1 Negotiating Land Rights in the Shadow of the Albeck Committee

The spatial conflict between the state and the Bedouins is multifaceted. However, two related axes stand out as most contested: landownership and recognition of forty-six "unrecognized" or partly recognized localities. Although the Albeck Committee (1975) constructed the Dead Negev Doctrine (DND), which denied the Bedouins land rights, it also proposed simultaneously to grant ex gratia compensation to Bedouin land claimants.[1] Thus the land settlement (registration) process, as described throughout Chapter 4, was halted by the state in the 1970s. The state hoped that, following the Bedouin defeat in the *al-Hawashlah* case, most of them would accept the monetary compensation offered, leave their ancestors' land, and settle in the region's seven Bedouin Arab towns established by the state. For nearly forty years the state urged the Bedouins to accept these compensations, flagging the success of the DND and

the low chances of the Bedouins to win back the land in court. Accordingly, the Israel Land Authority[2], whose council drafted a number of resolutions regarding the compensation, used the Albeck Report and the DND as its basis.[3] Notwithstanding small variations, the Israel Land Authority offered the Bedouins (over a four-decade period) a similar deal: registering 20% of claimed land in their name and adding (relatively meager) monetary compensation. The Israel Land Authority offers were based on total denial of Bedouin land or residential rights and on the condition that the Bedouins leave the land in question. By and large, the indigenous Bedouins refused to accept this deal, thereby remaining "unrecognized" in their forty-six localities.[4]

Hence, by 2008, only 12% of the total land claims (380 out of 3,220) had been settled, covering an area of 205,670 *dunum*s (about 18% of total claimed lands).[5] Nearly half the legally settled claims are located on lands on which the United States built a new airport for the Israeli Air Force in the early 1980s. The claims in question were settled through special legislation imposed on the Bedouins as part of the Israel-Egypt peace agreement. Therefore the total amount of mutually agreed-on land settlement is estimated to be a meager 7–8% of the claims made more than forty years ago. The number is even lower if we consider the prohibition of several southern tribes from filing their claims, as described in Chapter 4.1.

9.1.2 Planning Policies

In parallel to endless and mostly futile negotiations over land, the Israeli state has used its planning apparatuses to deny civil services to Bedouins residing on their land and to outlaw Bedouin spatial presence in all but a small number of "recognized" urban localities. In a spate of compromising policymaking during the late 1990s and early 2000s, the government partly recognized eleven Bedouin localities. Only in two of these (the smallest two) is it possible to receive a building permit; the other nine localities are still in the process of recognition. At the end of 2015, about half the Bedouin population still resided in localities lacking basic services, with a constant danger of house demolition and possible eviction.

The link between the land regime and planning is highly relevant here. As detailed throughout Chapter 4, the DND demeaned customary landowners to the status of trespassers on their ancestors' lands. This is not only a major

Figure 7. Demolition of the new village of ʿAraqib, 2010.

material and symbolic problem for indigenous-government relations but also a debilitating factor for the region's development, because under Israel's Planning and Building Act (1965), no outline plan or building permit can be issued without the consent of the landowner. Because the vast majority of Bedouin lands are also claimed by the state, residents of the Bedouin localities are unable to receive building permits and most of them cannot even apply to get such permits. This is how more than 60,000 houses and structures can be deemed illegal by the authorities.[6]

9.1.3 Spatial Plans for the Negev

We now briefly review the spatial state plans proposed for the Bedouin region. This is a critical element of state-indigenous relations and in recent years has been studied by a growing number of researchers.[7]

Overall, all government plans have the shared goal of concentrating and urbanizing the Bedouins into regulated and well-controlled urban areas. However, state policies have fluctuated somewhat over time, starting out with a complete denial of Bedouin rural life until the 1990s, followed by a period

of *incremental recognition* of several villages until 2005. This was followed by a renewed effort to concentrate and urbanize the Bedouins, as expressed in the recent metropolitan plan for Beersheba and in what has become known as the Prawer-Begin Plan, detailed later in this chapter. In parallel, a dialectical process was taking place, whereby the Bedouin communities developed greater resilience and resistance to government plans.

Table 9.1 provides a timeline detailing the main spatial plans produced by state authorities for the Bedouin region**.** Such plans have been prepared on several spatial scales: statewide (national), district (region), metropolitan, and local. The table summarizes the main goals articulated by the plans as regards the future of Bedouin space and development.

9.1.4 The Plans

The principal legislation governing development is the Planning and Building Act 1965. This law creates a three-tier system of planning institutions—local, district, and state—under the auspices of the Ministry of the Interior (at present temporarily the Ministry of Finance).

National plans set the main statewide planning principles as well as major land uses, infrastructure, settlement, development, and land-use patterns. These plans frame the more refined district plans, which provide more accurate forecasts and development capacity assessments for each locality in the region. District plans in turn set the parameters for local plans. Local plans are statutory outline plans, which necessitate building permits.[8] Local (urban and regional) outline plans routinely translate the principles of the two higher levels into local land-use and development strategies.

National Plans

As can be gleaned from Table 9.1, since the early 1950s the state's spatial planning strategy for the Bedouin region has been based on two key principles: (1) concentrating the Bedouins into limited, defined, and well-controlled areas, most preferably planned towns; and (2) Judaizing and rapidly developing the rest of the areas for a Jewish population, which takes the form of more than 100 new rural settlements. Overall, the strategy has been effective. During the period of military rule (1948–1966), the Bedouins were forcefully concentrated in a closed military zone east and north of Beersheba,

called the *sayag* (or *siyaj* in Arabic, meaning "fence"). Although it is rarely discussed, the Israeli military authorities have been significantly involved in the planning of the region in general and in Bedouin settlement, land use, and development in particular.[9] The consequences are still evident today: The Bedouins occupy only 3.5% of the Negev area but constitute more than one-fourth of the population. They reside in seven planned towns, which house about half the population, and in forty-six unrecognized or semirecognized localities.[10] The state has built, developed, or otherwise supported 110 Jewish settlements in the Beersheba District, consisting of one major city, nine development towns, and more than a hundred rural and semirural, cooperative and "communal" settlements, many on lands that were previously inhabited by the Bedouins.[11]

The Judaization thrust has gradually slowed down since about 2000, with a decline in the pace of new settlement construction and shrinking resources directed toward Jewish settlement in the Negev. Yet Judaization of the Negev remains squarely on the policy agenda and occasionally resurfaces as a national project. For example, the decade since the late 1990s has seen the state facilitate the construction of some sixty "single-family farms" as a way to bypass environmental restrictions and a national planning emphasis on urban consolidation and as a way to maintain the momentum of Jewish settlement. In 2013 the government decided to build fifteen new Jewish settlements around the town of Arad in the northeastern Negev and in the Negev mountain region.[12] Recently the Israel Defense Forces have been central to the planning of the region, having relocated major army facilities into the Negev. It is estimated that by the end of the 2010s, the military will occupy and use more than 60% of Negev lands, including a substantial amount in the Beersheba metropolitan region.[13] Let us turn now to a brief description of the first main plan for the region: the Sharon Plan.

The Sharon Plan, published in 1951, was the first and most influential national plan. This nonstatutory strategy, led by renowned architect-planner Arye Sharon, then chief government planner in the Prime Minister's Office, served as a master plan for state development for several decades. The plan focused almost entirely on the country's Jewish population with total omission of the country's past and present Arab population. Accordingly, it largely ignored the presence, needs, or even threats of the Bedouins in the Negev and treated both their settlement at the time in the closed military zone (the *siyaj*

Table 9.1. Main Negev Land-Use Plans with Key Recommendations for Bedouin Localities

Year	Regional District Plans	National/Statewide Plans	Indigenous Plans
1951		**National Plan 1: Physical Plan for Israel (Sharon Plan)** • Keeps Bedouins invisible • Uses pre-1948 Bedouin lands for Jewish towns and rural settlement	
1966		**Negev Physical Plan** • Concentrates Bedouins in siyaj region • Creates three dormitory towns • Ignores villages	
1975		**National Plan 6** • Reduces percentage of Negev Arabs • Steers Bedouin development to towns • Ignores villages	
1982	**District Plan 4** • Moves all Bedouins to seven dormitory towns		
1991		**National Plan 31** • Considers Bedouins as part of new metro region • Urbanizes Bedouins • Ignores villages	
1999			**RCUV Regional Plan for Municipal Development of Negev Bedouin Villages** • Creates regional council for Bedouin localities • Develops municipal facilities • Recognizes all unrecognized villages • Introduces the villages' historical names
2000	**District Plan 4/14** • Treats Bedouins as part of new metro region • Includes five Bedouin villages • Ignores all others		

2005		**National Plan 35** • Treats Bedouins as integral part of new metro region • Opens limited possibilities for recognition of five villages. • Ignores most villages	
2006	**District Plan 4/14/23** • Treats Bedouins as part of new metro region • Includes nine existing Bedouin villages • Recognizes two new villages • Ignores thirty-five villages		• Same RCUV Plan as in 1999
2008		**Goldberg Commission** • Recognizes villages "as much as possible" • Resolves land issue • Enters a gradual process of recognition and development	
2014			**RCUV Master Plan for Unrecognized Bedouin Villages** • Performs comprehensive survey and analysis • Fully recognizes Bedouin localities and communities on their ancestors' land • Integrates Bedouin localities into metropolitan economy through transport and employment areas • In planning, recognizes Bedouin localities as distinct type • Equalizes land allocation and development with Jewish rural sector to reach Tama 35 standards
2012–2017		**Prawer-Begin (Shamir-Ariel) Strategy** • Avoids new recognition in foreseeable future • Implements new and harsh land rules (legislation halted) • Uses economic incentives to urbanize • Provides large-scale suburban housing in towns • Plans for future Bedouin housing in towns or expands recognized localities • Recognizes a few localities as (uncertain) possibility for recognizing Bedouin localities	

region) and the areas from which they were evicted in the western Negev as empty. At one time the plan mentioned three future urban centers—Assluj, Isra, and Bir Ma'ash—which appeared to be planned for the area's Arab population.[14] The Sharon Plan is thus a stark illustration of the *terra nullius* approach, this time implemented through planning and settlement strategies.

The state also published the *Physical Master Plan for the Northern Negev* in 1966.[15] This plan sought to populate as much as possible the northern Negev region with Jews and aimed "to alleviate Bedouin nomadism in order to integrate the unstable population with high natural growth, into the realm of state administration and services."[16] The plan reinforced the urbanization strategy that suggested three future Bedouin towns as service centers with no industry or public transport connection to other cities. It was also supported by plans made by the military administration, which produced several policy documents during the early 1960s that advocated a similar relocation and urbanization strategy.[17]

At the same time, Jewish regional councils were allocated vast areas of development, natural reserves, natural resources, open spaces, and transport routes in areas inhabited by the Bedouins—testimony to the plan's lack of respect or recognition of Bedouin traditions and rights.

Following the Sharon Plan, the state produced national statutory plans in 1975, 1991, and 2005 that had important effects on Bedouin space. Invariably the plans advocated planning policies such as urbanization, formalization, spatial concentration, and clear separation of Bedouins from their traditional lands and from other groups in society.

In the late 1970s Israel reached a peace accord with Egypt, causing the relocation of major army facilities from the Sinai Peninsula to the Negev. A key facility is the Nevatim Air Force Base, located about 15 kilometers east of Beersheba, in the heart of the Bedouin settlement area. The construction of the air force base necessitated a wave of new legislation and planning initiatives. The "Peace Law" (formally, the Negev Land Acquisition Act of 1980) set the terms for evacuation and land compensation and outlined accompanying plans to establish two new Bedouin towns, Kusseifa and 'Ar'arah, to accommodate the tribes evacuated from the new airbase site.[18] In the following years two more Bedouin towns were established, Laqia and Segev Shalom (Shqaib al-Salam), with the hope of concentrating the surrounding tribal communities.[19] Consequently, since the early 1980s, state plans for the Bedouins have become sharp

and clear: All population and growth will be channeled to the seven planned towns. The plan was partly successful, with about half of the Bedouins settling in these towns until the mid-1990s.

The upshot of this urbanization-or-nothing policy was a *planning stalemate*, which lasted nearly two decades. The state invested in great efforts to coerce the Bedouins to move to the planned towns, whereas the Bedouin villagers, numbering tens of thousands, resisted and stayed on their lands.[20]

Overall, general spatial patterns emerged. Those Bedouins who lost their land to the state (mainly during the 1948–1949 *Nakba* or during the forced relocation of the 1950s) and landless Bedouins settled in the planned towns, whereas those living on ancestral lands preferred to hang on to their villages and suffer the deteriorating living conditions. A small number of landless Bedouin groups who were uprooted in the 1950s also clung to their makeshift villages, which by the 1980s had often grown to more than 1,000 residents each. The stalemate was mainly caused by the attachment the Bedouins felt to their land and the threat of uprooting and unknown urban life. It was exacerbated by the planning failure of the seven towns, in which social difficulties were rife, crime levels increased, and unemployment became the highest in the country.[21]

During the 1990s and early 2000s, the stalemate in the nonurban Bedouin areas began to worry policymakers. The concern was caused by the failure of governmental attempts to urbanize the Bedouins, the rapid growth and sprawl of the unrecognized communities, and the associated social and political tensions. In addition, civil society organizations began to work among the unrecognized communities, advocating professionally for their rights and civil equality. Between the mid-1990s and the mid-2000s, the Bedouin struggle for recognition achieved its most noticeable gains. As a result, the dominant approach to policy in this period can be described as incremental recognition. During this period, the state recognized ("established" in its language) eleven previously unrecognized communities—Tarabin al-Sann'a, Darijat, Umbatin, Qasr al-Sir, al-Sayyid, Bir Haddaj, Abu-Qrinat, Molada, Makchul, Kuchla, and Abu-Tlool (see Map 9)—signaling a major shift in state policy and providing new energy and hope for civil society and Bedouin communities.[22]

Subsequently, the state created a municipal body, called the Abu Basma Regional Council, to provide services to the newly recognized localities.[23] This yielded another achievement for the Bedouin struggle after years of suffering

from the constant threat of imminent eviction and lack of services and municipal status. Yet, unlike the Jewish regional councils, which provide a powerful spatial, economic, and political organizational framework for Jewish rural localities, the Abu Basma Regional Council has been denied any territorial continuity or appropriate budgets. As a consequence, it had great difficulty providing minimal services to its eleven localities and focused chiefly on the provision of educational facilities, with the construction of several large and modern schools. The Abu Basma Regional Council had an appointed (Jewish) mayor and never held local elections. In 2013 it was split into two new regional councils based on the geography of the Bedouin villages. The two new councils—the Qassum and Neve Midbar Regional Councils—will also be governed by Jewish appointees until local elections are held, supposedly in 2017.[24] Officially, the reason for the split was to improve service provisions, but the local Bedouins perceive it as another attempt to delay local representation, thereby prolonging state control in Bedouin areas.

Moreover, the recognition process itself has been fraught with planning difficulties. The most important element—land-use planning—was prepared by government-appointed planners, who often overlooked the indigenous land and development system. This caused long and protracted conflicts between several tribes and the state and within Bedouin communities. At the time of this writing, some 15 years after being awarded municipal status, only three villages have a valid statutory outline plan. Several others are in preparation. However, it is still virtually impossible for residents to receive a building permit. Consequently, house demolitions continue in these recognized villages, reaching new heights in 2015 and 2016, when more than 900 demolitions were registered, about 90% of which were in the unrecognized localities.[25] This violent policy continues to cause tensions and conflict and fosters mistrust between the authorities and the Bedouins. However, it is expected that in the near future some of these villages will have approved plans and will be able to issue building permits.

District and Metropolitan Plans

Although the recognition or establishment of localities in Israel requires government approval and hence must be enshrined in national plans, the district level is the most important arena for the recognition struggle. This is because

of physical proximity (the district offices are located in Beersheba) and because much of the politics and advocacy for recognition has been conducted at the district level. Within this context, three major district outline plans were prepared for the Beersheba region and approved in 1982, 2000, and 2012.

The Southern District Outline Plan 4, approved in 1982, was the first statutory outline plan to be prepared for Israel's southern region.[26] The plan deals with a wide variety of development issues and devotes only scant attention to the Bedouins. It complies with the state strategy to limit the provision of housing and services to the seven planned towns. Neither serious professional discussion nor planning solutions were offered for the unrecognized Bedouin communities beyond recommendations for continuing urbanization. The areas of most Bedouin villages are zoned as agricultural rather than residential, thereby erasing their existence from the map.

As already noted, in the 1990s the communal campaign for recognition and civil rights by the Bedouins began to gather pace. This campaign bore some results, and in 1999 the government decided to add five rural Bedouin localities to the district plan. Two of these were new rural Bedouin settlements (Tarabin al-Sann'a and Abu-Qrinat), but the other three (Umbatin, Darijat, and Qasr al-Sir) entailed the recognition of existing villages.[27] After decades of forced urbanization, the ice was broken and approval was given for the first time to Bedouin localities outside the planned towns.

The Metropolitan Plan for Beersheba 4/14, approved in 2000, did not continue the process of gradual recognition. On the contrary, it reinstated the overall strategy enshrined in national plans, particularly the focus on attracting Jewish immigrants to the region and the denial of recognition for most Bedouin villages and localities. The plan did not offer any new strategy for future recognition or development of Bedouin villages into the metropolitan economy and society. Notably, the five nonurban Bedouin localities received only minimal lands for farming or grazing, making their future character increasingly urban. The remaining areas in which villages existed were zoned largely for agriculture and afforestation, in effect erasing tens of thousands of people residing in these areas from the planning map.

The ethnocratic nature of the plan propelled Bedouin communities to appeal to the High Court of Justice, citing the plan's "neglect to consider and plan for tens of thousands of citizens residing for generations in the Bedouin villages around Beersheba."[28] In July 2001, in an unprecedented move, the

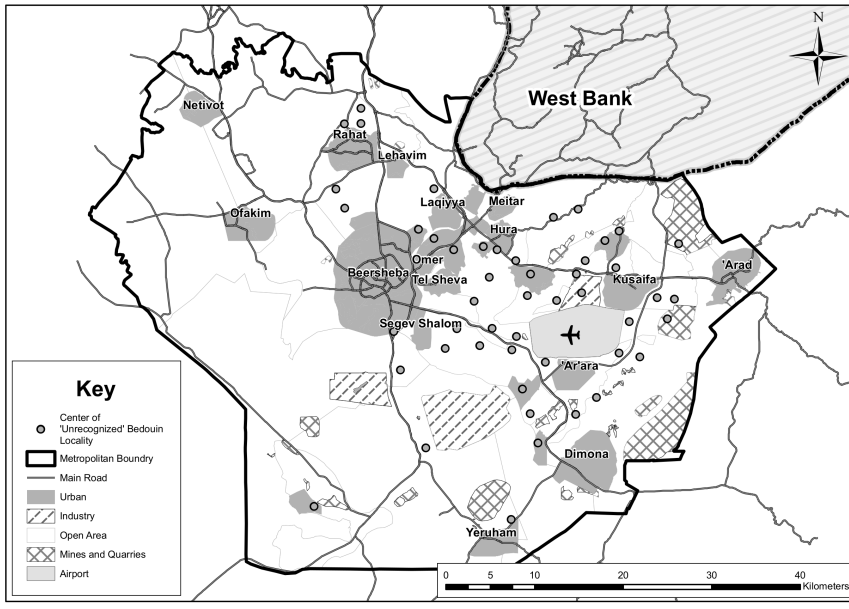
Court decided to adopt a compromise and directed the government to launch a new planning process

> in which the planners will deal, as a main issue, in formulating solutions for Bedouin settlement in the area . . . and will be required to examine rural settlement as one of the solutions for Bedouin residing outside the planned towns. . . . The planners will also examine concrete proposals for new localities, including the one submitted by the RCUV [Regional Council of the Unrecognized Villages].[29]

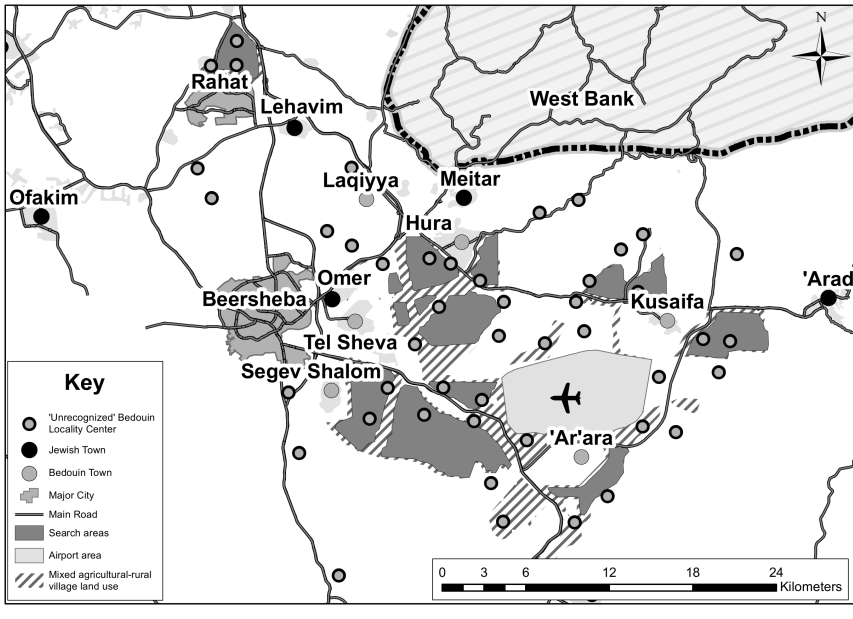
This compromise agreement provided another key achievement for the recognition campaign and typified the era, mainly during 2000–2005, when the incremental recognition approach was at its peak. Accordingly, in the early 2000s the government decided to establish and/or recognize six additional Bedouin localities. In 2006 it added recognition of two more localities, al-Fur'ah and Abu-Tlool, bringing the number of recognized Bedouin localities outside the seven planned towns to eleven. This process was advanced outside the formal planning process through district and national politics and through incremental amendments to the district plan. It was also assisted by the parallel incorporation into the metropolitan plan of seven new Jewish rural, suburban, and urban localities, and sixty Jewish single-family farms. However, the incremental recognition phase of policy soon ground to a halt.

The (New) Metropolitan Plan 4/14/23 was finally published in 2006 and received final approval in 2012.[30] Its content caused widespread disappointment among the Bedouins: Despite the High Court decision, it failed to establish or recognize a single extra Bedouin locality. Rather, the planners decided to adopt a "search area" policy, in which special—and rather restricted—tracts of land would be declared as sites of *possible* future Bedouin settlement. The plan provided no details or specification for recognition or a development process, which remained at the discretion of the district and state planners. Hence the revised plan did not substantially improve the provisions of the previous plan, and the Bedouin issue entered into a new-old deadlock, which at the time of this writing was still in place.

In Map 7 the light-gray hatched areas east of Beersheba are defined as integrated rural-agricultural use and constitute the search area for possible new Bedouin localities. At the time of this writing, no new locality had been recognized in these areas. *Hence the plan leaves the localities as unrecognized under threat of eviction.*



Map 6. Bedouin localities and main land uses proposed by the Beersheba Metropolitan Plan, 2012. Source: Southern District, Ministry of the Interior.



Map 7. Search areas" for Bedouin localities in the Beersheba Metropolitan Plan, 2012. Source: Southern District, Ministry of the Interior.

The failure of the plan to seriously address, let alone resolve, Bedouin distress, caused repeated protest and resulted in the appointment of the Goldberg Commission in 2007, as discussed later in this chapter.

The last development to date on the land-use planning front took place in late 2013, when the government, under the auspices of the Authority for the Regulation of Bedouin Settlement, appointed ten planning teams to offer land-use plans for various segments of the Bedouin region.[31] These planning teams began their work with the task of offering real planning solutions while minimizing the recognition or establishment of new Bedouin localities. The results will only become clear over the next few years and will determine whether and in what shape the Bedouin region will emerge out of the current stalemate.

The land-use planning analyzed so far is obviously not autonomous and has been strongly shaped not only by the DND but also by the recommendations of special government commissions. Among several proposals made by such commissions, two stand out as most influential—the Goldberg and Prawer Reports—to which we now turn.

9.1.5 Governmental Commissions

In parallel with its planning policies and in light of its failure to solve the Negev question in the 1980s and 1990s, the government has repeatedly appointed teams and committees and adopted various government resolutions regarding the Negev question. However, as the Goldberg Commission noted retrospectively, "Most of these committees had no serious impact on the issue they were set up to deal with, they left no mark and almost nothing changed as a result of their work."[32]

Some of these reports are nonetheless noteworthy, because they represent the elevation of the Bedouin issue into a national concern since the 1990s. One such report was delivered by a team appointed by the minister of justice, Yossi Beilin, in 1999. The report recommended recognizing and developing sixteen of the forty-six unrecognized villages, which would signal a change in the long-term denial of Bedouin rights. This change proved to be temporary. Another minister of justice, Tzipi Livni, launched a new policy in 2003 (known as the Livni-Sharon policy) that combined greater incentives for Bedouin urban development with stricter law enforcement.

In 2005 the government adopted the "Southward! Negev Development Plan 2015."[33] This plan, defined as a "national project," was strongly backed by Shimon Peres, then the minister of regional development, former prime minister, and future president. It suggested incentives and aims to relocate "economically productive" Israeli Jews from central Israel to the Negev, increasing the area's population from 535,000 to 900,000 by 2015. The state argued that the current informality of the Bedouin areas must be reorganized to allow modern development in the region.

Another important document was produced in 2006 by the National Security Council; it was co-authored by Ehud Prawer and Lirit Serphos. The report established Prawer as a key player who would return to the scene a few years later. The report stressed that Bedouin unregulated settlement prevents modern urbanization and involves what they defined as uncontrollable geographical expansion in a wide area, including major traffic lines, where they noted an increase in violence cases in ways that undermine the feeling of security. According to Prawer and Serphos, the proper approach to solving the problem lies in settling the Bedouins in the existing Bedouin townships, because, according to the National Security Council report, this would shrink the Bedouin dispersal and give it a fixed and defined size while providing reasonable services. The council report compared the Bedouins to the Israeli settlers who were evicted from the Gaza Strip a year earlier, arguing that such an operation is possible for Bedouins from unrecognized villages. This strategy would force urbanization and restrict development to the recognized towns.[34]

Simultaneously, the Israeli government started pursuing a strategy of "counterclaiming" the predominantly "frozen" Bedouin Arab land claims made since the 1970s. Under this strategy the State Attorney's Office would choose to dispute one of the dormant Bedouin land claims. Bringing the claims to court not only helps to legitimize the state's actions and policies but also exerts serious pressure on the Bedouins to accept solutions offered by the government. This policy was accompanied by intensifying house demolitions, which has reached nearly 1,000 per year—far above the figure for the entire occupied West Bank.[35] However, as already noted, these counterclaims—and many previous governmental reports—achieved little success in regulating Bedouin settlement and development and only exacerbated the conflict between the indigenous community and the Israeli state.

Against this background, in January 2005 the Israeli government, through the National Security Council, invited an international NGO, the Consensus Building Institute (CBI), to conduct a comprehensive conflict assessment and explore whether mediation might provide an effective way of resolving disputes over land and development in the Negev.[36] The CBI assembled a multicultural team of Jewish and Arab Israeli mediators and planners and conducted more than 250 stakeholder interviews to develop a new understanding of the conflict. In December 2006 the CBI submitted a final assessment report, which systematically mapped out the conflict and included recommendations for designing an effective mediated negotiation process. The CBI was ready to conduct the mediation, estimating that it would take two to three years to complete. However, the Israeli minister in charge, Meir Sheetrit, responded that he had a plan to finish the issue in six months.[37] Thus the Israeli government was not prepared to proceed. Instead, it appointed a high-level committee, headed by Eliezer Goldberg, to examine the legal and historical roots of the controversy and offer a comprehensive solution.

9.1.6 The Goldberg Commission

The Goldberg Commission was remarkable on several counts. It was headed by a high-ranking figure, former Supreme Court justice and state comptroller Eliezer Goldberg. It had Bedouin representation for the first time (two out of eight members, both known political leaders); it allowed any person to testify, and it conducted twenty-one public hearings, which were formally recorded for the first time.[38] Thus the Goldberg Commission introduced a new process that had never been used in government inquiries into key aspects of the Jewish-Palestinian conflict: open hearings and an open invitation to Palestinian Arab citizens of Israel to voice their narratives and histories. As such, the Goldberg Commission heard testimonies from 114 witnesses, many of whom were Bedouins, giving the indigenous version of history, memory, and property regime. As detailed in what follows, this was a critical factor in several key conclusions, which gave additional weight to the indigenous narrative.

In December 2008 the Goldberg Commission handed down a report that for the first time officially recognized Bedouin historical links and land rights in the Negev. Contrary to the DND's denial narrative, the Goldberg Commission did not conceive the Bedouins as trespassing on all Negev land and em-

phasized that unrecognized land possession stemmed from historical links to the land, or, in fewer cases, from their forced transfer to the area.[39]

The Goldberg Commission perceived the land dispute and the lack of trust as key issues to be addressed. It emphasized the need to find a practical solution that would go beyond the formal letter of the law, would be implementable, would renew Bedouin faith in the state and the state's intention, and would contribute to the integration of the Bedouins into Israeli society.[40] Critically, the Goldberg Commission suggested and requested the government to stop house demolitions while a solution was sought for the unrecognized localities. It recommended—against government policy—to recognize "illegal" Bedouin localities "as much as possible" with a provision of future compliance with government plans for the area.[41] The Goldberg Report also included an appendix listing all unrecognized localities, as defined by the RCUV.

The Goldberg recommendations were not equally generous on the land question. The commission had been instructed by the Israeli government to restrict any land compensation to 100,000 *dunum*s, that is, to less than 20% of the original claims.[42] Accordingly, it stressed that the recommendation to grant limited landownership (as part of the resolution of the struggle) stems from consideration of the "Bedouins' historical connection to the land, and *not in recognition of any legal right (which does not exist)*."[43] The Goldberg Commission recommended forming a professional "claims committee" that would determine on a sliding scale Bedouin landownership on about one-fifth of the claimed land. The rest of the land needed for settlement would be leased to the Bedouins in an arrangement prevalent among Jewish rural settlements.

The Goldberg Commission's recommendations faced opposition from various groups, but its planning aspects provided a rare opportunity for the government to adopt a conciliatory approach that would have enabled indigenous communities to participate in a proper and fair planning process.

9.1.7 From Goldberg to Prawer

Given the Goldberg Commission's surprising recommendation to recognize the Bedouin villages, it was not unexpected that the Israeli government did not adopt the report but rather tabled it. Critically, soon after, a rightist Likud-led coalition replaced the centrist-left government in the 2009 elections. Subsequently, the new Netanyahu government appointed a task force to work on the translation

of the Goldberg Report into specific policies and legislation. The task force was headed by Ehud Prawer, currently in the Prime Minister's Office and formerly the deputy head of the National Security Council, who, as we have seen, composed in 2006 a harsh report on the future of the Bedouin region. Unlike the Goldberg Commission, the task force did not include any Arab representatives.[44]

Further, contrary to the openness of the Goldberg Commission, the Prawer team worked in secrecy for nearly three long years before releasing its long-awaited report. During this time, the task force refused requests for meetings and consultation from a variety of Bedouin and civil organizations. The lack of consultation caused anger and widespread concern among the indigenous communities.

The content of the Prawer Report amplified community anger, because it significantly retreated from the line adopted by the Goldberg Report, particularly with regard to recognition of Bedouin rights and localities. The Prawer Report did not even mention the existence, let alone the names, of the thirty-five unrecognized localities. Instead, it condescendingly grouped them under the term "the Bedouin scatterings" (*pzurah* in Hebrew). On the land issue, the Prawer Report offered a simplified procedure to establish land rights and compensation, which totally relied on the original claims launched during the early 1970s. It offered a flat 50% compensation in land for all claims but introduced several severe conditions that reduced the estimated amount of land to be gained by the Bedouins to about 20%, with the rest offset by (modest) financial compensation. The Prawer Report included a harsh chapter (Chapter 5) on enforcement, which echoed the paper coauthored by Prawer in 2006.[45]

In January 2012 the first version of the Prawer Bill[46] was published for public input and commentary before an intended Knesset legislation.[47] The relatively harsh deal offered by the draft Prawer Report and the manner in which it was produced triggered widespread protest and a plethora of negative reactions from virtually all Bedouin communities, civil society, and legal organizations. Given this widespread opposition, the government decided to undertake what it called a "listening process," seeking to incorporate and mitigate Bedouin resistance. The process was headed by a high-profile Likud minister, Benny Begin, the son of former prime minister Menachem Begin and an experienced nationalist Zionist politician with respect for human rights. The process took four months, during which Begin met with dozens of groups and individuals.[48] Some

in the Bedouin community saw the process as an artificial ruse to ease the adoption of the Prawer Bill and thus boycotted Begin. Nevertheless, Begin conducted an extensive round of meetings, which included forty meetings with approximately 600 Bedouins, and drafted his own suggestions to amend the Prawer Bill. Yet, contrary to international law demands for full participation of indigenous peoples in devising policies concerning their land (as stated for instance in the UNDRIP, Section 18), Begin's mandate was only to suggest minor modifications to the existing draft bill, with a view to slightly improving the terms of negotiations for the Bedouins. These changes neither altered the dispossessing nature of the proposed policy nor abated the strong communal opposition.

On a rhetorical level the Begin Report returned to a more amicable language emphasizing equal citizenship, Bedouin historical links to the Negev, and the government will to minimize the uprooting of Bedouin villages. Simultaneously, Begin strongly rejected the use of concepts such as "transitional justice" or "indigenous rights."[49]

Although it is difficult to assess the exact amount of land and monetary compensation to be received by the Bedouins according to the Prawer-Begin recommendations, Eli Atzmon, an ex–government official and veteran on Bedouin issues, provided such an estimate.[50] He calculated that the maximum amount of land compensation possible (but highly uncertain) for the Bedouins to receive under the Prawer scheme was about 17% of the claimed land. More likely, he asserted it would be 13–15%. When divided among the 32,000 land claimants living today in the region, the amount per claim would be reduced to a meager 3 *dunum*s, that is, less than an acre. This calculation appears humiliating and stands behind the blanket refusals of all Bedouin factions and groups to enter any negotiation with the Prawer team.

It should be added that even beyond the thorny issue of ownership, the allocation of other land resources is highly unequal, with Jewish settlements in the region enjoying land resources that are six times higher in terms of land per capita than their Bedouin counterparts.[51] Large groups among the Bedouins are landless and require state allocation. Yet the Prawer Report totally ignores this stark ethnic inequality.

In January 2013 the Israeli government adopted the new version of the Prawer-Begin package, titled *Overview of the Public Listening Process Regarding the Law for Regulating Bedouin Settlement and Recommendations for Policies and Amendment to the Draft Law*.[52] The document was more conciliatory

in some details than the original Prawer document and made an effort to close some of the gaps and eliminate the alienation created during the formulation of the original Prawer strategy. These changes, however, were rather minor and did not transform the concrete threat of widespread dispossession and displacement embedded in the Prawer Bill and associated plans.[53]

Despite all this, the ensuing Knesset debates were marked by right-wing opposition to the Prawer Bill, which was described widely as too generous toward the Bedouins. After intense lobbying on both sides, the amended bill was passed on June 24, 2013, by a small majority of 43 to 40 in the first Knesset reading.[54]

9.1.8 The Prawer Bill

In June 2013 the Prawer Bill was officially published.[55] As a whole, the bill brought to the Knesset bears the harsh imprints of the 2006 National Security Council document authored by Prawer and Serphos, who was appointed in 2011 as an officer of the Prawer team. The bill is a long, heavy, and complex document (85 clauses and 46 pages) that contains hundreds of conditions and limitations, which makes it nearly incomprehensible to most of the affected community. Our analysis shows that, beyond its complexity, the bill would likely lead to extensive dispossession, removal, and criminalization of the residents of entire Bedouin communities, and hence it represents a serious retreat from the spirit and recommendations of the Goldberg Report.

The Prawer plan and subsequent bill had a positive side: Unlike all previous policies, which required the Bedouins to provide historical evidence of their land claims, the Prawer Bill accepted the mere submission of claims during the 1970s as good evidence of property rights for the claimed land. We view this as a constructive step, because it spares the parties from the need to undergo long and, in the case of the Bedouins, also insurmountable evidentiary proceedings. The bill offers a maximum compensation of 50% in kind and 50% in monetary rewards. However, analysis of its multiple conditions shows that only few Bedouins, if any, would receive the maximum compensation.[56] Another positive aspect is that landless Bedouins of the area to be settled would be entitled to receive a developed building plot subject to prescribed conditions.[57]

However, the Prawer Bill contains several major pitfalls. The bill's language is technical, obscure, and alienating and refrains from any of the empathetic statements on Bedouin civil and historical rights found in the Goldberg and

Begin documents. The maximum compensation is subject to a long list of qualifications, making it likely that most Bedouins would receive only a small portion of their land in return for relinquishing their claim. Hence the Bedouins see the bill as a grave threat to their rights, entailing for most Bedouins in the unrecognized communities a future of dispossession and displacement rather than a path to resolution of the conflict.

This complex bill includes chapters that establish and set the powers of the Authority for the Regulation of Bedouin Settlement in the Negev, part of the Prime Minister's Office, and of Compensation Committees.[58] Each Compensation Committee is to include six members, nominated by different state officials, including a representative of the Bedouin community nominated by the prime minister. These will be counseled by an aerial photos analyst, whose expert opinion will serve as the exclusive criterion to decide whether the land was "possessed" at the time of the submission of the original claim in the 1970s. The bill bestows upon the prime minister the authority to proclaim specific "Declared Regulation Areas" to which a special legal regime applies and grants him or her additional extensive powers, such as the extent of required evidence of land cultivation and formal dates to determine the existence of land rights.[59]

Chapter F of the Prawer Bill is the heart of the bill and offers an intricate and difficult compensation scheme that undermines many of the advantages set forth in its general principles. For example, for each claim the Compensation Committee will decide which areas defined as "assigned area" qualify for compensation. In each "assigned area," only "possessed land" (i.e., cultivated or inhabited by the claimant in 1979) entitles the claimant to the maximum land compensation. The decision on "possessed land" depends solely on the expert opinion of the official aerial photograph analyst.[60] The result is that claimants would not be able to challenge the official interpretation of the aerial photograph. In addition, claimants would not be able to provide alternative expert aerial interpretations to rebut the state's interpretation. This would likely legitimate seemingly technical, objective, and scientific decisions, even though they are far from being so.[61]

Further, claimants whose land is not defined as "possessed land" would be entitled to only 25% of the land in kind and the rest in money.[62] Given the massive forced dislocation of the Bedouins during the 1940s and 1950s, many Bedouins were prevented from returning to their ancestral lands and are set to lose most of it under the proposed bill.

Another notable obstacle is the condition that full compensation would be considered only if the majority of claimants (descendants of the original claimants) join the process. If a smaller number join, the maximum compensation would be only one-fourth of the claimed land.[63] Because many Bedouins would probably refrain from joining the harsh settlement process, the likely result is further dispossession using bureaucratic means.

In addition, the Prawer Bill offers maximum compensation only to those claimants who bring their claims within the first nine months after the determining date. Claimants filing their claims late but less than 21 months after the determining date would receive reduced compensation. Based on a long history of Bedouin avoidance and mistrust, it is likely that many Bedouins will do nothing within the period following the enactment of the bill and the proclamation of "settlement areas," and even if they later decided to join the process, they would be entitled to reduced in-kind compensation.[64]

Importantly, claimants are not guaranteed the location of land compensation. This will be determined by a special committee within a boundary of an "exchange area" determined by the bill and not necessarily in the location of the original lands. Needless to say, for an indigenous community strongly attached to its land, this is highly unacceptable.[65]

The monetary compensation offered by the Prawer Bill is exceedingly meager. It ranges from 10,000 NIS ($2,500) per *dunum* for land in a recognized settlement, to 5,000 NIS ($1,250) per *dunum* for flat land, to 2,000 NIS ($500) per *dunum* for steep land. The receipt of the compensation depends on vacating any land allocated to the state.[66] These rates are significantly below market value. In comparison, in 2005, with the governmental disengagement plan from Gaza, the state offered relocated Jewish settlers compensation that was calculated to be more than 2 million NIS per family, dozens of times higher than the amount the Prawer Bill offers to the Negev Bedouins.[67]

A harsh "default" clause in the bill stipulates that at the end of a prescribed period of 3–5 years, land in a "Declared Regulation Area" that is not allocated by the Compensation Committee will be automatically registered in the state's name in full ownership.[68] In other words, the bill forces the Bedouins to push their claim within a limited time through one of the state organs or else have the land nationalized.

Chapter I of the Prawer Bill grants stringent evacuation powers to the director of the Israel Land Authority and limits the authority of the courts to

interfere with these powers. These powers include the right to vacate all people and things from the entire land settlement area.[69] These harsh measures are backed by criminal sanctions.

Despite this critique, the official government rhetoric flags the Prawer Report and Bill as a historic settlement and a "generous offer" to its Bedouin citizens. Furthermore, given the prevalence of the DND stripping Bedouins from all land rights, many on the Israeli political right treat the Prawer plan as "surrendering" more than 200,000 *dunum*s of Israel's land reserve. At the same time, the Bedouins view the bill as continuing the process of dispossession, displacement, and forced urbanization by appropriating the overwhelming majority of their historic lands and displacing tens of thousands of Bedouins from the villages and localities they have occupied for generations.

9.1.9 Planning Recommendations of the Prawer-Begin Strategy

Beyond the attempt in the Prawer Bill to settle the land dispute, the overall Prawer-Begin strategy also contains important planning and development recommendations. Given the failure of the land bill (to be discussed later), the planning aspects assume greater importance. These were published on several occasions, particularly as accompanying documents to the two Prawer-related government decisions in September 2011 and February 2013. Overall, the Prawer strategy signals a notable *retreat* from the advances toward reconciliation made by the period of incremental recognition and the Goldberg Report. This retreat has caused widespread opposition and protest and has deepened the conflict in the Negev. Several key planning aspects of the Prawer-Begin strategy are worth highlighting.

- The strategy denies the existence of thirty-five unrecognized localities, accommodating 70,000 residents. Nowhere in the hundreds of pages of Prawer's reports, bills, and assessment is the location or identity of a single Bedouin village mentioned.
- In general, the villages and communities are treated as *pzurah* (scatterings), a random pattern of residential clusters. Accordingly, the strategy attempts to relocate the "dispersal" into existing towns. As a second priority, it attempts to bring new development adjacent to existing (semi)recognized villages. Only as a third priority is future planning for the "establishment" (and not "recognition") of new Bedouin localities considered.

- On the rare occasion of establishing a new Bedouin village, the new community will depend on a set of conditions (size, "carrying capacity," and "municipal viability") that are never applied when new, and often tiny, Jewish settlements are built.
- In all future development, the Prawer-Begin strategy asserts that new residential land will be divided into residential blocks and that development will proceed in a manner similar to other suburban developments, with little regard for Bedouin way of life and culture. The location of future localities and Bedouin land has been kept secret. The Prawer Task Force has repeatedly refused calls to present a map of future Bedouin settlement or land allocation.

In planning terms the Begin Report promised that the government would make an effort to recognize Bedouin villages "as much as possible," thereby echoing the Goldberg Report. However, the circumstances were quite different, because a new district plan was already in force in 2013 that called for evacuating tens of thousands of Bedouins who found themselves in areas where development was disallowed by the new plan.[70]

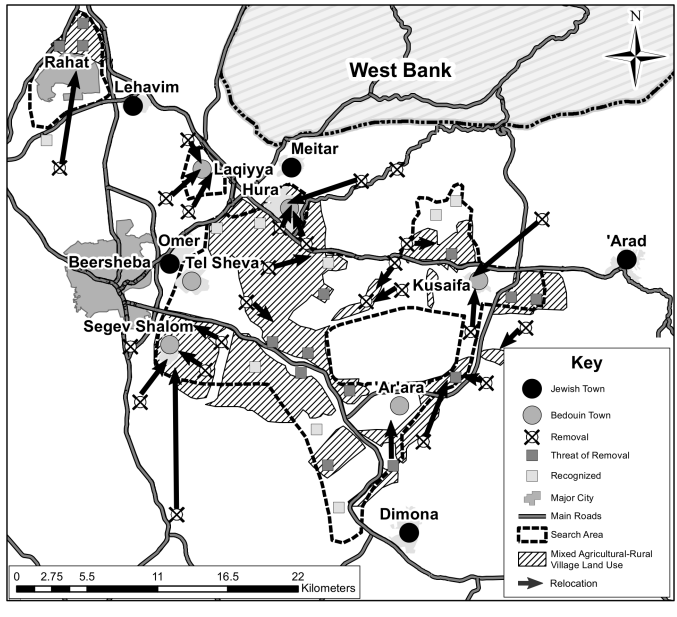
The secrecy of the Prawer strategy angered many involved in the process, and in 2013 a more specific map of the understanding between the government and the Prawer Task Force was leaked to the press and later confirmed by the authorities.[71] The map shows the areas for possible future Bedouin land allocation and reveals that it had shrunk by a third from the previous limited provision. Under the District Plan of 2011, 210,000 *dunum*s were earmarked for possible Bedouin settlements and use, whereas under the new strategy, only 146,000 *dunum*s were earmarked for that purpose.[72] The remaining 70,000 *dunum*s were classified as "returning" to state ownership. This illustrates the false assumption that the Bedouins had "invaded" the area, when in fact most of the lands in question belonged traditionally to the Bedouin tribes and were never under state ownership.

Moreover, the Prawer-Begin plan makes no commitment to future land uses that would be permitted on the allocated lands or their association with particular (relocated) communities.[73] Hence it is unknown whether land allocated by the Prawer-Begin strategy is designated for agriculture, open space, commercial, or residential use, leaving the indigenous communities in deeper confusion.

To summarize the Prawer-Begin strategy, the RCUV prepared a map that shows the planned eviction of villages and the uncertainty of the future of most existing communities (Map 8).

The Prawer-Begin strategy has raised concerns internationally. Several government representatives, ambassadors, and think tanks have held meetings about the new policy, mostly generating criticism of the government's intentions. Most noteworthy is the UN Committee on Economic, Social, and Cultural Rights, which stated that it was "concerned that the Plan . . . foresees a land planning scheme that will be operated in a short and limited period of time, and includes an enforcement mechanism for the implementation of the planning and construction laws."[74] The UN Committee recommended that Israel ensure that the implementation of the plan would not result in the forceful eviction of Bedouins and that any possible eviction would be based on free, prior, and informed consent with those to be relocated. The UN Committee also recommended that the state officially regulate the villages, cease house demolitions, and ensure the enjoyment of the right to adequate housing.

Overall, the Prawer-Begin initiative presented more planning *threats* than opportunities for the Bedouins. It reversed the positive elements of the Gold-



Map 8. Planned removals of Bedouin localities under the Prawer-Begin-Ariel plan.

berg Commission, particularly its recommendation to recognize the villages and set in motion a fair and fast planning process. It refused to divulge any spatial details about future development or land allocation and used a secretive and elitist planning process, which mainly alienated and angered the community. As we saw in Chapter 8, such conduct contravenes the indigenous groups' rights to participate fully in processes involving their territories and future and the corresponding duty of states to negotiate in good faith with their indigenous citizens.

9.1.10 Prawer in Suspension

As noted, the Prawer Bill was introduced to the Knesset in April 2013. After a series of heated debates, a slim majority of 43 to 40 passed it in first reading. Following this limited success, an unprecedented series of Bedouin demonstrations erupted in the Negev, displaying widespread Bedouin opposition to the law. In parallel, the law was attacked as "too soft" by the Israeli far-right party Israel Our Home and by several West Bank settler and other organizations, such as Regavim. Soon after, a round of internal conflicts erupted in the Authority for the Regulation of Bedouin Settlement, causing the eventual resignation of Minister Begin in late 2013 and Ehud Prawer and their chief aide, General (Res.) Doron Almog, in spring 2014. This was followed by a government decision to transfer responsibility for the settlement of Bedouin villages from the Prime Minister's Office to the Ministry of Agriculture and Rural Development, headed by Minister Yair Shamir of Israel Our Home.[75] In July 2014 Shamir announced that he was stopping the legislation process of the Prawer Bill, after concluding that it would not benefit the goal of settling the Bedouin issue. In a special Knesset session in November 2014, Shamir announced that his ministry would continue to pursue a solution to the "Bedouin problem" through two principal means: (1) economic and infrastructure development in the recognized localities and (2) preparation of land-use plans for some of the Bedouin localities, though the exact number was not disclosed. In so doing, the government has retreated, at least temporarily, from its previous attempt to settle the land issue as a precondition for planning. Significantly, it adopted at least one of the key recommendations of Bedouin leadership: advance land-use plans for the Bedouin localities independent of the land conflict. In this way, the Bedouins should be able to exercise their civil right

to develop and use public services in their villages without being hostage to the government's strategy of coerced land registration and dispossession. The overall government strategy has therefore reverted to the pre–Goldberg era, marked by vagueness, immobility, conflicting policies, and persistent refusal to recognize any of the dozens of informal localities.

Following the elections in 2015, a new agriculture minister, Uri Ariel of the far-right Jewish Home party (Habayit Hayehudi), announced that he would push forward the Prawer Bill. The Knesset was scheduled to renew its legislation process in July 2015, but following pressure from various sides, the new minister decided to postpone the process "temporarily." At the time of this writing, the Prawer Bill was still suspended, but other aspects of the Prawer-Begin spatial strategy were being slowly implemented through planning and development channels. The unrecognized Bedouin region, needless to say, has remained seriously underdeveloped and suffers from pervasive informality, lack of basic services, and state violence. At the time of this writing, a planning solution was nowhere in sight.

9.2 SEEKING PLANNING SOLUTIONS: BEDOUIN RESISTANCE AND COUNTERPLANNING

9.2.1 Mobilization of the Indigenous

We now examine the Bedouins' own visions of their future and their translation into land-use and development plans. In this discussion we trace the central initiative of indigenous counterplanning, namely, the preparation from below of a master plan for the unrecognized Bedouin villages.[76] We also show that alternative plans proposed by the Bedouins over the years can provide a solution to important elements of the crisis by resolving one of the major elements fueling the conflict: the insecurity of tenure on their ancestors' lands.

During the first few decades of Israeli rule, the main concern of most Bedouin communities was survival, subsistence, and recovery from the disaster of the *Nakba*.[77] The imposed military rule following the 1948 conflict constrained their ability to mobilize. However, mainly during the 1980s, indigenous groups began to organize and mobilize a more systematic struggle for their land and housing rights.[78] This mobilization occurred both from within, through local leadership and the power of tribalism and identity politics, and from external forces, mainly through the increasing activity of civil society organizations. The

persistent neglect of planning in and for the Bedouin villages was premised in part on the lack of progress in settling the land conflict.[79] On the other hand, the partial success of the indigenous strategy of clinging to their lands has created a distinct and stark indigenous space, marked by large-scale informal development surrounding the city of Beersheba from the north, east, and south.

In the 1980s civil society organizations began to work among the unrecognized communities, advocating professionally for their rights and for civil equality. Most notable among them was the Regional Council of the Unrecognized Villages (RCUV), which, for the first time, united the villages behind an elected (voluntary) leadership and presented a more assertive Bedouin voice in planning and public debates, which we examine in the next section.[80] Other notable civil society organizations that began advocating for Bedouin villages during these years were Bimkom—Planners for Planning Rights, the Association for Civil Rights in Israel (ACRI), the Association of the 40, Adalah (the Legal Center for Arab Minority Rights in Israel), the Forum for Coexistence in the Negev, the Arab Center for Alternative Planning, and the Association for the Support and Defense of Bedouin Rights (headed by the well-known activist Nuri al-ʻUqbi, whose land claims are central to this book).[81]

The Bedouin claim is that the provision of urban services and human rights for state citizens must not depend on settling the land dispute, which from their perspective was initiated by the state's denial of their historic land rights. More important, the provision of health and education services to citizens and children should not be dependent on the "legal" status of their localities.[82] The recommendations of the Goldberg Commission clearly support this claim.

9.2.2 Regional Council of the Unrecognized Villages

The RCUV is a grassroots organization that formed in 1997 as a response to dire communal leadership needs and the constant demanding claims by the authorities. This need was typified by the previous powerful head of the Ministry of the Interior, Southern District, Shalom Danino: "It is well known that the Bedouins have no leadership. . . . One can never tell what they want. . . . They speak in 100 voices."[83]

The RCUV was originally established to combat this stereotype by setting up a body not only to represent the Bedouins in their interactions with the authorities but also to initiate a democratic process for self-managing Bedouin

communities and space. At the outset, the self-appointed RCUV consisted of elected representatives of the then forty-six unrecognized "villages" (nonurban localities, often accommodating thousands of people), who in turn elected the council head. As we have seen, this was reduced to thirty-five members, because eleven localities were partly recognized between 1997 and 2005 (RCUV plan, 2012). So far five elections have been held (1997, 2001, 2005, 2009, 2012), each producing a leadership change. The incumbent head, Attiya al-'Assem, was also the inaugural chair in 1997–2002.

Initially, Israeli authorities were hostile toward the RCUV. The state refused to recognize the council and instead strengthened a bureaucratic body known as the Bedouin Development Authority (BDA), an Orwellian term for a body renowned for its persistent attempts to remove the Bedouins from the villages and resettle them in minimum urban centers.[84] In 2009, following the Goldberg Report and the government's new initiative to "solve" the Bedouin land and settlement problem, the BDA was upgraded to a level of government authority, known as the Authority for the Regulation of Bedouin Settlement. For four years the authority was within the Prime Minister's Office, but in early 2014 it was placed under the auspices of the Ministry of Agriculture and Rural Development.[85]

Despite official nonrecognition of the Bedouin villages and the RCUV as an entity, the government began to include the new leadership in unofficial consultations and even began, as described earlier, to compromise on the long-standing hard-line denial of village recognition. This followed a persistent campaign for recognition, equality, and establishment of Arab local governments in the Bedouin region by the RCUV in coordination with other key civil society organizations.

In 1999 the RCUV published a blueprint document titled *A Plan for Municipal Authority for the Arab Bedouins of the Unrecognized Villages in the Negev*.[86] For the first time, this document presented a map of the Bedouin communities, including the Arabic names (previously unknown to most Jews), details of their communal histories, and official demand for recognition of all Bedouin localities.[87] The plan was not prepared by professional planning teams but was rather a document aimed at voicing the community demands for recognition, development, and equality and at creating a presence in the public realm. All forty-six localities identified by the 1999 RCUV document as deserving recognition accommodated at least 300 people—well beyond the minimal limit

of 40 households set by the Israeli Ministry of the Interior for recognizing (Jewish) localities.[88] The demand to establish Arab local government for the provision of services was also in line with the conditions of other nonurban settlements in all regions of Israel.

The document received a dismissive reaction from the authorities. It was widely criticized as "amateur," "radical," "wild," and even "ridiculous."[89] Yet it later formed the basis for persistent public pressure and a new type of dialogue, which bore some results. Most notable was the incremental recognition and/or establishment of eleven Bedouin localities, as described earlier, which was in stark contrast to previous government claims. The recognized Bedouin localities began to appear on official maps and in 2003 were incorporated into the newly established Abu Basma Regional Council.[90]

Another important achievement of the RCUV campaign was during the work of the Goldberg Commission. Although the RCUV presentation to the Goldberg Commission triggered much debate in the community between proponents and opponents of such participation, its close involvement in supporting the preparation of Arab testimonies clearly had an impact on Goldberg's recommendations to recognize the Bedouin villages. Moreover, it was essential in airing publicly the native narrative of dispossession and displacement, as described in the previous chapters.[91]

To date, these results have been partial and have brought only small improvement to the actual lives of the tens of thousands of Bedouins in these growing localities. The recognition was a necessary first step, but the slow pace of planning meant that even more than a decade after recognition, residents of the villages are still unable to build legally and their localities lack most basic services, such as roads, water, electricity, public transport, and schools. Frustration increased among indigenous groups when it became clear that the Goldberg breakthrough proposals were being ignored and even reversed by the Netanyahu government that has ruled since 2009.

9.2.3 The RCUV Alternative Plan

Under these circumstances and because of the frustration of village residents who continued to suffer under Israel's planning neglect and pervasive discrimination, the RCUV decided to step up its activism on behalf of the communities, mainly through counterplanning. Hence it decided to produce

a comprehensive, professional, and principled plan for recognition and development of all its communities. The focus was to formulate a clear vision for the future of Bedouin space, provided for and by the communities. The RCUV lacked the expertise and resources and hence had to form coalitions with other organizations and apply for external funds. In 2009 it managed to secure substantial grants and form a coalition with Israel's main human rights organization in the planning field: Bimkom—Planners for Planning Rights. The RCUV also sought to enlarge its community's involvement by including women, thus entering into a cooperation agreement with Sidra—Association of Arab Bedouin Women in the Negev. During 2009–2012, the RCUV and Bimkom with assistance from Sidra conducted this ambitious project, which became a major topic of discussion and contention among the Bedouins. It resulted in the publication of a comprehensive professional plan for recognition and development of Bedouin space.

The master plan was designed to generate, for the first time, a communal process for organized presentation of community history, needs, and future visions. It resulted in a four-year-long project and publication of a document compiling 350 pages of analyses, history, mapping, and surveys and presenting an alternative indigenous plan, prepared by professional planners. The document includes a series of expert reports, composed by members of the Bedouin community, dealing with society, economy, services, health, lands, and women of the unrecognized villages.

The project conducted fourteen workshops, three of which were regional in scale, with the remainder being local. The workshops focused on four localities of different types selected as "key sites" for in-depth analysis and planning. Two workshops were dedicated to women's needs, problems, and observations. The project also conducted a comprehensive survey of the localities, their history, population, employment, backgrounds, education, land uses, needs, and problems. In parallel, aerial photographs were purchased, digitized, and analyzed using GIS technology, resulting in a thorough understanding of the spatial development and patterns. The information was combined to formulate a long-term planning strategy: recognition and development of all Bedouin communities.

The RCUV plan demonstrates that, in contrast to government claims and plans, it is both feasible and desirable to recognize all the unrecognized localities in their current location (with the possible exception of two).[92] The plan is set to fulfill the key recommendation of the Goldberg Report outlined in

Figure 8. Public participation meetings for the preparation of the Regional Council of the Unrecognized Villages alternative plan.

Chapter 8: "to recognize the villages as much as possible."[93] This was done by decoupling the dispute over legal ownership of the land from the question of land-use planning and supply of social services. The plan supports Bedouin land claims but also wishes to proceed with village recognition and provision of services without being bogged down with endless legal processes associated with the land claims.

The master plan is guided by two key principles—civil equality and cultural and historical recognition—that are the basis of a realistic and professional strategy. In the target year of 2030, the population of all the localities will reach 230,000, out of a total Bedouin population of 440,000 expected to reside at that time in the Beersheba area. This represents a notable decline in fertility rate, although it remains significantly higher than the surrounding Jewish population.

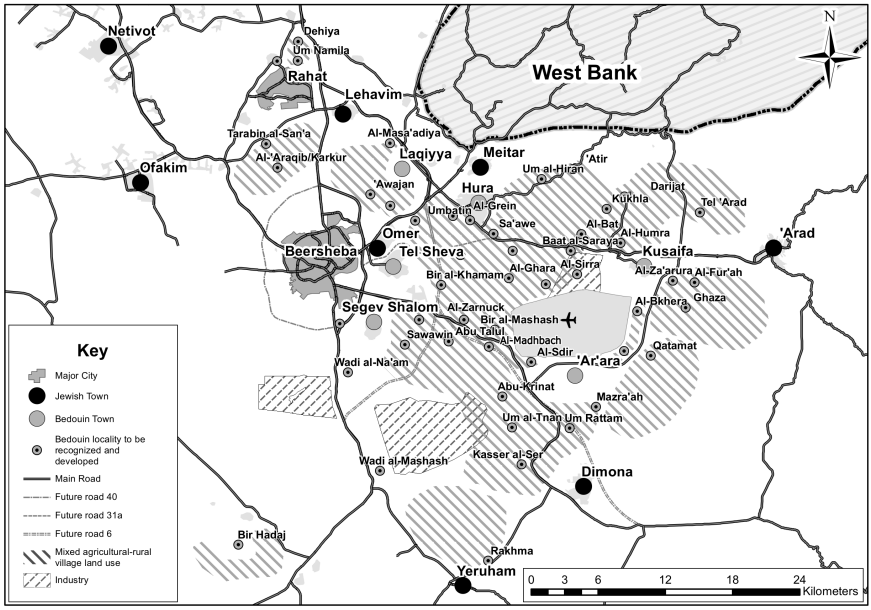
The plan outlines the launching of an institutional and legal process that would lead to provision of the standard infrastructure and services to which all Israeli citizens are entitled. Detailed economic, social, and political-moral analyses show that recognition of the Bedouin localities in their historical locations,

to which the Bedouins are naturally attached, is preferable to the current government plans for massive relocation. The plan will also prevent the deterioration of the conflict between the state and the Bedouins and will help Jews of the Negev by resolving a conflict that has retarded much of the region's development.

In more detail, the RCUV plan sets forth recommendations on three levels: regional, local, and administrative-procedural.

At the regional level the plan proposes a spatial and municipal solution for all of the thirty-five localities that have remained unrecognized to date, whether by incorporating them into the nearest town, by creating "clusters" of villages, or by recognizing them as independent localities in the framework of newly created regional councils. The plan also outlines regional economic development strategies along three geographic axes: northern, eastern, and southern (see Map 9). These axes will be serviced by public transportation, employment zones, and public institutions.

The plan recommends that the provision of both housing and agricultural land will be equal to the standards of the Jewish rural sector. The plan took as



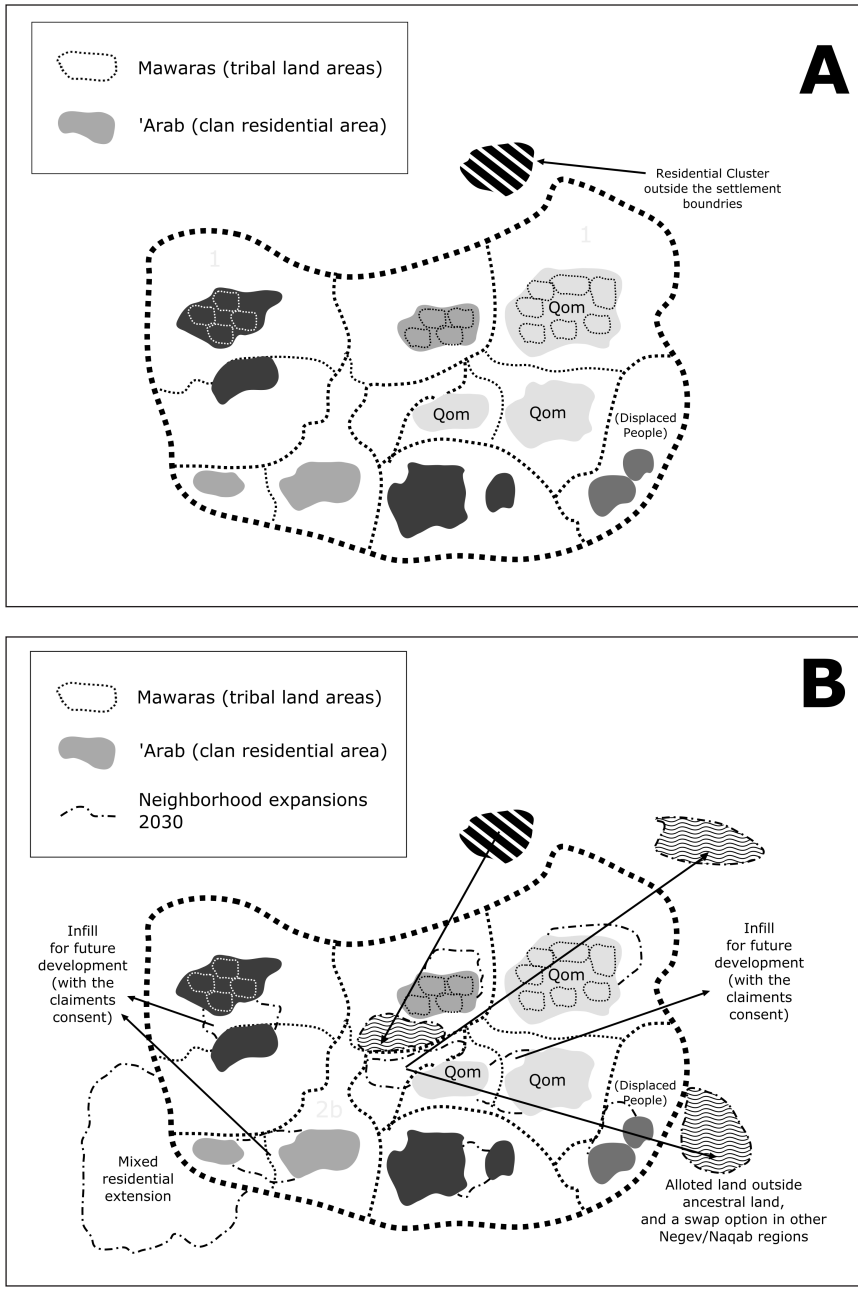
Map 9. The Regional Council of the Unrecognized Villages alternative master plan: full recognition and integration. Source: Regional Council of the Unrecognized Villages.

a comparable standard the neighboring Jewish Bnei Shimon Regional Council, composed of eleven rural Jewish villages. It then calculated the land allocation according to the number of agricultural households and the standards used by Bnei Shimon. This resulted in the need for 250,000–300,000 *dunum*s of land in addition to the land already used by the Bedouin villages by the target year of 2030.[94] Such a policy will mainly entail the formalization of existing indigenous patterns of land use and possession, with allocation of additional vacant state lands, which exist in the vicinity, to accommodate the expected population growth.

Finally, though devoted to the planning of existing Bedouin localities, the plan also recommends returning, where possible, landless Bedouin communities evicted by Israel in the 1950s to their original lands. This recommendation is not analyzed or developed in depth, but the plan argues that this could provide a form of indigenous justice, by providing solutions for landless displaced communities that are still seeking recognition and permanent settlement. Many of the sites from which the Bedouins originated have remained vacant or are used for extensive low-intensity agriculture.

At the locality level the plan proposes that the "Bedouin locality" be recognized as a distinct type to be incorporated into the Israeli planning system and that it be codified, similar to other settlement types, such as moshav or kibbutz. Such recognition will allow the planning system to accept the historical and spatial logic of the Bedouin locality, including its traditional patterns of family residences and tribal land system. The plan proposes that within two decades the densities and public spaces of each village will be consolidated by the indigenous communities to meet the standards of rural localities enshrined in National Plan 35 for all rural settlements in the rest of Israel. The plan shows that this is clearly a doable task.

The thorough analysis of spatial settlement patterns resulted in the classification of Bedouin localities into five subtypes: (1) family farms, (2) shepherding villages, (3) rural-agricultural villages, (4) community localities, and (5) Bedouin neighborhoods. To this end, for the first time in Israel's history, the plan contains several models for the development of Bedouin localities (see Map 10). This (prototype and flexible) model was developed after extensive consultation with local communities and is based on the ties forged between the communities and their living environment. It is founded on the ongoing viability of the traditional systems of land allocation and inheritance,



Map 10. Structure and future of Bedouin localities: (A) spatial code; (B) future planning solutions. Source: Regional Council of the Unrecognized Villages.

which spatialized social relations, according to tradition, on three different levels of land holdings: (1) the tribe (*'ashira*), (2) tribal segments (*'ai'lah*), and (3) extended families (*qom*).

Importantly, as the workshops conducted during the planning process revealed, the indigenous division of land, governed by traditional law, is routinely and widely accepted by all Bedouin communities, regardless of state approval. The workshops also revealed that the only possible exceptions are landless and land-deprived groups, who rightly point out the lack of social justice in that system toward groups who do not belong to the powerful landowning tribes. In this light, the plan suggests that the right planning strategy is to respect the traditional land system as a planning infrastructure for future development; at the same time the plan asks for state lands for landless Bedouins and maintains the principle of equality in land allocation in comparison to other groups of Israeli society. Appropriate land allocation must thus be made for the provision of modern facilities and services to facilitate economic development of all Bedouin areas.

The development model also presents an option for building new expansion areas or neighborhoods as additions to existing communities and for bringing remote and isolated clusters of Bedouins into the built-up area through new arrangements of land exchange and (possibly mobile) development rights. The plan also outlines the recommended development patterns of roads, public institutions, and open spaces in the various communities.

Although most of the Bedouin localities comply with the general working of this model (with obvious local variations), the plan also found it necessary to identify subtypes, as already mentioned. This is because such subtypes would have different needs in terms of land, land use, density, employment structures, and community structure. Although sharing several foundations, the subtypes of Bedouin localities would also have varying development trajectories, which should be articulated in full participation with local communities. The five planning subtypes are the following:

1. *Family farm*: small, separate clusters located on land owned by the residents, whose lifestyle is agricultural (similar to existing Jewish farms in the Negev).
2. *Shepherding village*: a small, low-density village with sufficient grazing and agricultural areas.

3. *Rural-agricultural village*: a residential neighborhood development but with a rural population density and with continued cultivation of agricultural areas.
4. *Community village*: agricultural lands, with rural population density and rural construction, at the margins of a village, far from urban centers.
5. *Bedouin neighborhood*: agricultural lands with rural and suburban construction density, mostly at the neighborhood margins, near a suburban or urban locality.

The third main aspect deals with the administrative-procedural level. The plan recommends a process of municipal incorporation of all villages, either into existing regional and local governments or through the creation of a new regional council. The plan identified three municipal statuses and fitted the localities with the most appropriate type depending on its size, carrying capacity, location, residents' preferences, and social structure. The three administrative arrangements are the following:

1. *Independent locality*: full recognition of the village, including granting the status of a local council or including the village in a regional council.
2. *Part of a village cluster*: joining a locality composed of a number of small autonomous villages; this village cluster would be part of a regional council.
3. *Inclusion in an existing town as a neighborhood*: recognition of the village, in situ, as part of an existing urban council, by expanding the latter's jurisdictional boundary. The nature of the neighborhood (rural, community, suburban) would be determined in the planning process.

Still on the administrative level, the plan recommends the establishment of a designated planning unit devoted to the recognition and incorporation process. The unit would be located in the Southern District of the Israeli Planning Administration (previously under the Ministry of the Interior and currently under the Ministry of Finance). This unit would conduct urban and regional planning for all Israelis. It would replace the current special BDA. The BDA is perceived by the communities as hostile and threatening and as governed by manipulated security considerations. The BDA has done little over the years to develop Bedouin localities or move toward resolution of the conflict. The pro-

posed new civil planning unit would focus on a fast track for recognition and planning of the long-neglected Bedouin villages, a venture that should be accorded the status of a national high-priority project. This new unit would include significant representatives from the villages, professional and academic experts, and government representatives.

The plan proposes a recognition process composed of eight main stages that will lead from the current state of neglect and marginality to full recognition and that will place the Bedouin localities on a path of development and prosperity. The recommended steps are:

1. Declaration of the locality as being under a "recognition process," with cessation of house demolitions and classification of all existing structures as "under consideration."
2. Determination of locality type (as in the classification outlined earlier).
3. Calculation of land needs for the locality based on equal standards to Jewish rural localities and allocation of land for the locality for present and future needs (*mishbetzet* in Hebrew).
4. Demarcation of finite residential areas, where possible, according to traditional landholdings and social segments; and the protection of other, agricultural and open areas.
5. The allocation of land for future development to each segment, including landless families.
6. The granting of municipal status and formal address to the recognized locality.
7. Formulation and approval of outline zoning plans and the issuing of building permits to all remaining buildings and structures.
8. Connection to all social and development infrastructure.

A similar process was implemented successfully among the unrecognized Bedouin villages in the Galilee, which have all been recognized and have received outline plans during the last two decades.[95] In the Negev such a process will shape Bedouin space according to the standard principles of land allocation, development standards, densities, infrastructure, and services, as customarily practiced in Israel's Jewish rural zones, and will recognize the unique spatial and social features of Bedouin village development.

It should be noted that the RCUV plan, despite its major contributions to a generation of community-oriented planning, has some weaknesses. For example, the NGOs that produced the plan are associated in Israel's political map with leftist elements that support minority rights. Hence they are considered "suspicious" by the authorities, who are reticent to accept their suggestions. Further, the plan is designated as a strategic master plan, that is, a nonstatutory document. As such, it cannot act as a detailed guide for building and development and needs to be translated into statutory outline plans in order to enable legal development. This would require considerable resources and organization, which do not appear to be available to the Bedouin communities. Finally, one of the desired effects of the master plan is to educate the public and generate a new voice in the public discourse. Given the lack of media, communication, and planning expertise among the RCUV staff (as opposed to the ad hoc group that composed the plan), the plan's public visibility remains somewhat marginal.

The RCUV plan was launched in the summer of 2012 and was presented at a range of conferences and to most of Israel's decision-making forums, such as the National Planning Council, Negev Jewish mayors, Knesset committees, and the BDA. As illustrated, it provides an achievable path to the resolution of the planning conflict between Negev indigenous groups and the state. The plan received positive comments and endorsement not only from Arab and left-wing Knesset members but also from decision makers, especially Minister Benjamin Begin, who commented on several occasions that "the alternative plan is serious, thorough and presents us with many ideas for the future planning of the Bedouin areas."[96] Similar comments were made by General (ret.) Doron Almog, who was responsible for implementing the Prawer plan in the BDA. Yet, to date, government plans continue to overlook the proposals of the indigenous communities and proceed according to the provisions of District Plan 4/14/23, which still threatens most unrecognized localities with destruction and forced relocation.

9.2.4 Planning *Terra Nullius*: An Overview

As a summary, Table 9.1 provides a timeline of the most significant plans produced for the Bedouin region by Israel's planning authorities and the counterplans produced by the indigenous communities and associated NGOs.

Overall, our analysis shows that state and regional plans demonstrate the ongoing failure of the Israeli planning system to use the tools at its disposal to

redress the distress, deprivation, and poverty suffered by the Bedouins. With a few exceptions, by and large Israeli plans have been used to deepen the oppression and deprivation of this marginalized indigenous group, thereby increasing its poverty and alienation.

After nearly seven decades of failed Israeli planning, the spatial and visual consequences are plain to see. The Beersheba region is characterized by a vivid contrast between the recognized, planned, and well-developed Jewish spaces, the recognized but isolated and deprived Bedouin towns, and the sprawling unrecognized Bedouin Arab indigenous space, which hosts more than 100,000 citizens and vast tracts of land in conditions of distress and existential insecurity.

Notably, there were brief periods, mainly between 1995 and 2005, when the state showed some flexibility and progress toward partial recognition. Yet, for most of the Israeli period, planning has been used as a tool to coerce the indigenous Bedouins into urban living, remove them from ancestral land, deny minimal basic services to the communities, segregate them from other groups, and distance them from regional resources and opportunities.

This pattern of state planning, whether national or district, substantiates the theoretical frameworks highlighted in Section 1.4. Indeed, the use of planning as control and "the dark side of planning" are widely evident in the state's treatment of the Bedouins. The language is professional and rational, but the planning is used to marginalize the Bedouins and deny their rights to their villages. One might argue that the modern planning of the seven Bedouin towns, where state services are provided, runs against this argument. Although this is partly true, the towns are also known for their social problems and economic marginality and are almost entirely ranked in the lowest decile of Israel socioeconomic order.[97] As such, the towns appear to be another illustration of the oppressive qualities of planning.

The Judaization and de-Arabization goals of most state and Jewish plans link these plans directly to internal-colonial and postcolonial theories. Without exception, the state plans reviewed here illustrate how colonizing attitudes, institutions, and even legal discourses continue to frame the planning of the Bedouin region. This approach is somewhat softened by the constraints of a modern state, which create tensions between the Bedouins' civil status as citizens and the ethnic colonization goals pursued by the state. Yet, at best, the tensions only slow the Judaization plans and do not change the colonizing

logic. This conclusion also highlights the relevance of critical legal-geographic analysis to unpack the putative equal citizenship of the Bedouins and illustrates how law, plans, and policies continue to further ethnic discrimination and oppression.

Yet the analysis of planning solutions for the region shows that the indigenous communities are not passive or idle. Since the 1980s they have staged, with a range of civil society organizations, a systematic campaign for rights and development. Since the 1980s they have started to advocate, litigate, and mobilize for recognition of all Bedouin villages and localities. This mobilization created a countermovement against government plans. A significant move in this campaign was the creation of the RCUV's comprehensive master plan, which demonstrates that all unrecognized Bedouin localities can be recognized and developed according to Israel's own planning and legal standards.

The dialectical process, in which the state and the Bedouins provide starkly different visions for the region's future, continues to fuel the ongoing dispute over the planning of the northern Negev. Despite putative efforts to resolve the conflict, it has actually deepened in recent years, culminating in the unprecedented wave of protest and contestation against the Prawer-Begin strategy and law.

Despite this conflict and decade-long stalemate, our analysis also shows that the distance between the two sides in terms of planning is not overwhelming and is even bridgeable. It is noteworthy that few genuine attempts to establish a mediation process have taken place. The most notable attempt was launched by the Israeli Ministry of Justice in 2005–2006. It produced a feasibility study that showed good chances for progress in some of the cases.[98] Mediation, especially on the local or regional (rather than the national) level, is particularly apt as a method for the planning process. Unlike the legal struggles over landownership or the combative nature of identity politics, mediation offers ample avenues for negotiation, flexibility, hybridity, inclusion, and transitional justice.

A recent example of the positive potential of planning was the process during which all (previously unrecognized) Bedouin villages in the Galilee were recognized during the last two decades. Although fewer Bedouins with smaller land claims live in the Galilee, until the 1990s the state still steadfastly refused to recognize more than twenty rural localities. In the 1980s, however, indigenous communities and civil society organizations began to offer

counterplans, demanding recognition and equality. This process resulted in recognition and accommodation of all northern Bedouin communities in rural, recognized, and now relatively developed localities.[99] To be sure, large gaps remain between Bedouin Arabs and Jews in the Galilee, but the situation improved dramatically after the recognition and planning of these villages.

The same process can be applied to the Negev. Indeed, the indigenous RCUV plan, which uses the basic democratic principles of equality and recognition, and the official Goldberg Report offer opportunities for a planning conversation that has long been missing between the indigenous Bedouins and the state. Such conversations, framed within a fair mediation process and using the positive potential of land-use planning, still offer real opportunities to propel the process of reconciliation and indigenous justice. With this opening in mind, we can turn to our concluding observations.

CONCLUSION

In ending this book, we return to ʿAraqib and the *al-ʿUqbi* case, which has accompanied us throughout. In Section C.1 we examine the denouement of the case before the Supreme Court, and in Section C.2 we offer our conclusions.

C.1 DEAD END? THE *AL-ʿUQBI* CASE IN THE SUPREME COURT

On May 14, 2015, while we were writing the book, the Israeli Supreme Court dismissed the appeal and practically all the appellants' arguments and upheld the state's position and the lower court's decision.[1] We focus here only on several components of the principal opinion delivered by Justice Esther Hayut, which provides a stark yet representative ending to this book. It appears as though the Court endeavored to close all possible gaps in the Dead Negev Doctrine (DND) and to construct a "fortified" legal edifice to deter future Bedouin land claimants.

C.1.1 Land Acquisition Act

The Supreme Court first ruled on the legality of the expropriation of the al-ʿUqbi family's land according to the Land Acquisition Act (1953). Justice Hayut did recognize that today this act would be unconstitutional, because it contravenes the right of property protected by the Basic Law: Human Dignity and Liberty (1992).[2] However, relying on Section 10 of this law, which shields legislation preceding it, and on earlier precedents, Justice Hayut ruled that, because of the unique historical circumstances of its enactment following

the establishment of Israel in 1948, the Land Acquisition Act should not be reinterpreted to fit current, more liberal norms.[3] As we show later, this constrictive interpretation contravenes the canons of constructions developed by the Israeli Supreme Court. Having concluded that the expropriation of the land was legal, Justice Hayut examined whether the appellants were entitled to compensation for the land taken. To do so, she had to decide whether, before its expropriation, the land belonged to the al-'Uqbi family or to the state, that is, she had to rule on the Dead Negev Doctrine (DND).

C.1.2 The *al-'Uqbi* Supreme Court Decision and the DND

Although, as we have seen, components of the DND are intertwined and mutually supportive, we have distilled eight core elements of the DND, all present in Justice Hayut's ruling:[4] (1) There was legal continuity with Ottoman and British land laws; (2) the Bedouins lacked a functioning land system; (3) previous regimes never recognized Bedouin legal autonomy or customary law; (4) the Bedouins' failure to register their land by the date decreed by the British Mewat Land Ordinance made them perpetual trespassers; (5) at least until 1921 the Bedouins did not regularly cultivate Negev lands; (6) at least until 1921 the Bedouins were nomadic, lacking permanent settlements; (7) the Bedouins are not an indigenous group; and (8) the legal burden to establish their rights against these stipulations rests solely on the Bedouins.

The al-'Uqbi family requested that the Court use its power to reverse the DND as well as the *al-Hawashlah* precedent embodying the doctrine.[5] However, in her decision, Justice Hayut refused to do so and further entrenched the DND. She decreed that any land that constituted *mawat* land in 1858 continued to be so (component 1).[6] This ruling laid a practically impossible evidentiary onus on possessors, who have to prove, more than 150 years later, that in 1858 their particular plot fulfilled all the conditions exempting it from being *mawat* (component 8). The appellants argued that the tribe inhabited, possessed, and cultivated the land at least since 1807, and therefore it was not *mawat*.[7] As one would expect, the justice found that the al-'Uqbi family failed to prove these conditions (component 5). She also found that they failed to lift the evidentiary burden that the land was "revived" after 1858 (components 1, 5, and 8).[8]

In addition, Justice Hayut ruled that a "reviver" also had to have requested to register the land in his name before the date set in the Mewat Land Or-

dinance (April 16, 1921) (component 4).[9] However, as demonstrated in this book, the Mewat Land Ordinance did not specify that those not registering their cultivated land became trespassers, nor was the ordinance ever applied in the Negev. Further, in many cases Mandate officials and judges recognized unregistered revived *mawat* land as belonging to the reviver, even if he did not request to register it by that date.[10]

According to the DND, a person can refute the classification of land as *mawat* if he can prove that its distance from a recognized town or village is under 1.5 miles.[11] Justice Hayut conceded that the tribe "wandered" in the claimed land and possibly used it for grazing and parking. This, however, did not suffice, because she adopted a restrictive Eurocentric viewpoint of what could constitute a legitimate settlement. She painstakingly and captiously reviewed the vast amount of evidence produced by the appellants and ruled that none of it authenticated the presence of an ancient Bedouin settlement in which the tribe dwelled permanently on the specific claimed plots (components 6 and 8). Even though aerial photos from 1945 disclosed two houses on the claimed plots as well as several tents and water holes adjacent to them, these did not prove the existence of a "village."[12]

Justice Hayut concluded that, although the tribe did "roam" in the area and even used the plots during "certain periods for parking, grazing and seasonal agriculture," a permanent settlement did not exist at the time of the determining date, 1858.[13] Justice Hayut concluded that therefore the land was *mawat*.[14] Because Justice Hayut acknowledged Bedouin presence and partial cultivation, her interpretation of the DND and its ramifications are even more sweeping than the *terra nullius* rationale, which construed the land as empty and uncultivated and therefore open for the taking.[15]

Justice Hayut also rejected the al-'Uqbi family's claim that the Bedouins enjoyed legal autonomy and applied their own customary property system and that therefore the rules regulating *mawat* land did not apply to them (components 2 and 3). In doing so, she attempted to construct a historical picture that was unsubstantiated even by the sources she quoted. Such a maneuver evinces the Court's power to determine which supportive knowledge would be accepted and which knowledge it could simply ignore or suppress.[16] For instance, Justice Hayut quoted scholar Yasemin Avci in support of the claim that the Ottoman government regarded the Negev as being under its sovereignty.[17] However, the al-'Uqbi family claimed autonomy, not sovereignty.

Furthermore, Justice Hayut seems to have misunderstood Avci's argument. The opening sentences of Avci's article that Justice Hayut quoted present a historical argument describing a gradual Ottoman transformation taking place between the 1860s and the 1900s and consisting of increasing attempts to control and integrate the Negev Bedouins. Furthermore, referring to the establishment of Beersheba in 1901, Avci remarks that this and other recent modernizing Ottoman processes "meant that the government attempted to penetrate the nomad's way of life." Thus even the passage quoted by Justice Hayut does not support her conclusion that no Bedouin autonomy existed during the mid-nineteenth century.

Justice Hayut further stated that little is known about the situation of the Negev land in the late Ottoman period.[18] Thus, although she admitted that knowledge was scarce, she nevertheless imposed the burden of proof on the Bedouins, who could not lift it because of the scarcity of evidence (component 8).

Justice Hayut manifested a similar attitude regarding Bedouin autonomy during the British Mandate period.[19] The promise made to the sheikhs by Secretary of State for the Colonies Winston Churchill and High Commissioner Herbert Samuel in 1921—"the special rights and customs of the Bedouin tribes of Beersheba will not be interfered with"—was not sufficiently clear to her and could not serve as evidence of granting autonomy to the Bedouins.[20]

The regular acquisition of land from the Bedouins by Jews and its registration by the Ottoman and British authorities also failed to convince Justice Hayut that previous governments recognized Bedouin land rights.[21] More than 160,000 *dunum*s of Negev land transactions were registered during that period, most of which concerned sales from the Bedouins to Jews and Jewish land companies.[22] However, according to Justice Hayut, because the land in the Negev did not undergo settlement of title at the time, the registration did not serve as evidence of landownership.[23]

More significantly, Justice Hayut did not respond to the appellants' powerful argument that the registration of so many land transactions served as evidence that the Mandate authorities and their land registration officials did not consider this land as belonging to the Mandate, but contrarily proved that they recognized and validated the power of the Bedouin owners to transfer the ownership of this land.[24] According to Justice Hayut, such registrations only proved that the Mandate officials "agreed to register these transactions," but this "did not commit them to recognize [these transactions] or rights acquired in them."[25]

Justice Hayut dismissed all the evidence provided by the appellants to prove that they cultivated the land (components 5 and 8). For instance, she stated that the earliest document produced by them was a receipt attesting to the payment of a tithe in 1927–1928. Although Oren Yiftachel, in his expert testimony, claimed that the receipt concerns crops grown in ʻAraqib, it did not contain a rubric indicating the exact place where the crop was grown. In addition, according to Justice Hayut, this constituted an isolated receipt, dating from 1927—that is, six years after 1921, the year after which one could not acquire rights to *mawat* land (component 4). Yet, contrary to the judge's view, one could interpret the granting of this receipt as proof that the British did recognize the al-ʻUqbi family's rights to the land, even though it was cultivated after the "magic" date of 1921.[26]

The appellants further produced an aerial photo from 1945, which proved, according to the expert opinions of Yiftachel and the aerial decipherer, that the al-ʻUqbi family cultivated part of the plots. Justice Hayut was willing to assume that the land was indeed cultivated by the appellants and not by someone else. However, according to her, the aerial photo proved cultivation of only some of the plots, and even they were not intensively cultivated in a way that covers most of their area.[27] Nonetheless, the aerial photos attested that 95% percent of *arable* land was cultivated, *amounting to 65% all claimed land* in this proceeding.[28]

The appellants also produced oral testimonies from the tribe's elders. However, Justice Hayut accepted the lower court's ruling that these were too general and did not point with sufficient precision to the specific plots and specific dates and quality of cultivation. Furthermore, some witnesses testified that once every few years a drought occurred, and during that period, the land could not be cultivated. The *British Village Statistics of Palestine* (1945) strengthened these testimonies.[29] Justice Hayut referred likewise to a 1937 British document that reported that the Bedouins cultivated their land only in "favorable seasons." The judge concluded, therefore, that this evidence proved that the Bedouins could not cultivate the land continuously and effectively, as required by Section 103 of the Ottoman Land Code. Thus the proposition advanced by Justice Hayut is that, because the land suffered periodic droughts and because the Bedouins cultivated the land mainly according to "premodern" techniques, they could not acquire rights to the land![30]

Justice Hayut also accepted the lower court's dismissal of the indigeneity claim (component 7). She ruled that the appellants did not prove the existence of a treaty binding Israel in this regard. She decreed that a rule based on inter-

national treaties is not binding in internal Israeli law unless it is formally incorporated by Israeli legislation.[31] However, as we saw in Chapter 8, the leading view of Israeli jurisprudence stresses that internal norms should be interpreted as much as possible in conformity with treaties signed by Israel.[32] As to the argument that rights of indigenous people have attained the status of customary international law, the judge ruled that the burden lay on those pressing such a claim.[33] However, as we saw in Chapter 8, there is strong support for the argument that some rights included in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) have attained the status of customary international law.

The al-'Uqbi family argued that their indigenous status should have an effect on the courts' recognition of their land rights and on the flexibility of admitting and weighting evidence. Following other jurisdictions, Israeli courts should open themselves to new types of evidence, such as traditional indigenous documentation, oral testimonies, intertribal agreements, and expert reconstruction of indigenous legal practices, and should shift the evidentiary onus to the state.[34] In addition, they pleaded that their indigeneity should lead to the adoption of an interpretive rule, according to which when several plausible interpretive options exist, the interpretation favoring indigenous property rights should be preferred.[35] Thus Bedouin encampments should be construed as "settlements" for categorizing *mawat* and *miri* land. Justice Hayut, however, decided in favor of the state on these issues as well.[36] She ruled that in order to register land in the state's name, it sufficed that the opposite side failed to prove its right. Justice Hayut ruled that the burden lay on the al-'Uqbi family to prove that the land was not *mawat* and that there was continuous cultivation before 1921 and to show also the receipt of an authorization in 1921.[37]

The appellants argued also that Ottoman and Mandatory legislation should be interpreted in light of the Israeli Basic Law and constitutional principles concerning equality and protection of property.[38] Justice Hayut ruled that such an interpretation is not a "'magic formula' to create rights from naught," and she dismissed this argument as well.[39]

Justice Hayut painstakingly rejected all evidence produced by the appellants as flawed, insufficient, vague, and unclear. As such, the Supreme Court erected insurmountable evidentiary and procedural barriers, which effectively made futile any attempt to prove that the appellants had rights to the land (component 8).[40] Hence she accepted the lower court's findings and its rejection of the detailed results of field surveys, which mapped more than 100 remnants of a

settlement—dozens of stone and mud houses, dozens of terraces, five cemeteries (one with a seven-generation tomb), multiple tent sites, seven wells and cisterns, and boundary demarcation between the tribal possessions.[41] Further, the Mandate's list of tithe taxpayers, in which 'Araqib appeared under the rubric of "settlement," did not suffice in Justice Hayut's eyes to prove the existence of a permanent settlement. One can assume, wrote the judge, that 'Araqib described the "crops region" from which the tax was collected.[42] The judge did not indicate where she imagined these crop taxpayers lived or perhaps she just imagined them as roaming in circles around their sporadic crops, setting their tents randomly.[43] However, as we know, at that time, 70,000 to 100,000 Bedouins inhabited the Negev, with their territories and landholdings clearly demarcated and protected by customary law.

Finally, as expected, Justice Hayut dismissed the appeal, proclaiming as legal the acquisition of the land according to the Land Acquisition Act. She also rejected the arguments concerning rights acquired according to customary Bedouin law, Ottoman and Mandatory law, equity, international law, and the Basic Laws. She decided that the appellants had no rights to the land nor any right to compensation.[44]

Justice Hayut's two fellows on the Supreme Court bench, Justice Salim Jubran (the only Arab justice on the Supreme Court) and Justice Eliakim Rubinstein, concurred. All three justices expressed the wish that solutions would be found in good will and mutual respect, indicating that the Israeli Supreme Court was not the venue to seek such solutions.

Here, we have almost reached the end of our story. Yet, before concluding, we should mention the last attempt by the al-'Uqbi family to seek justice and recognition in the Israeli judicial system. Israeli Supreme Court law allows a "further hearing" of a case, in exceptional situations.[45] Miriam Naor, the Court's president, denied such a request submitted by the al-'Uqbi family.[46] She emphasized that the Supreme Court had not pronounced a ruling that contradicted a previous precedent, nor did it decide a new, difficult, or important ruling that warranted a further hearing.[47] She emphasized that "the settlement of the rights of the Bedouin tribes in the Negev lands, is an intricate, complex, and sensitive social, legal, and political issue that did not reach yet a full solution." The complexity of the issue stemmed from the difficulty in setting a planning policy and from the historical and legal controversies over landownership. Naor concluded her decision by dismissing the request and

stressing that she agreed with her colleagues in the appeal that it would be "appropriate to find a solution that would satisfy all parties, from a wide perspective and mutual respect." However, "a further hearing is not the way for it."[48]

Here ends the legal journey began by Nuri al-'Uqbi many years ago. The Supreme Court closed and locked the gates of justice to his tribe. There are no more Israeli judicial steps he can take.

C.2 OVERVIEW AND OUTLOOK

In beginning this final part, we recap the main outlines of the conflict, which is one of the harshest and most enduring land disputes in Israel/Palestine. As shown in detail throughout this book, the Bedouins, who constitute an indigenous community and are Israeli citizens, claim land rights based on customary and formal laws, possession, and cultivation for generations. By contrast, Israel, turning to formalistic and questionable interpretations of Ottoman and British statutes and to a slanted reading of the Negev's historical geography, considers all Bedouins who reside outside state-recognized townships as illegal trespassers. Moreover, Israel maintains that they invaded unlawfully empty and "dead" (*mawat*) state land.

We call this official position the Dead Negev Doctrine (DND), a concept strongly evocative of the *terra nullius* colonial doctrine. To be sure, just as *terra nullius* relied on a settlers' imagined and distorted historical geography, which legally emptied the land from its previously existing indigenous population, so Israel treated the Negev as "dead," though it was neither "dead" nor empty. It was inhabited, demarcated, allocated, used, and cultivated for generations by its indigenous Bedouin population. Even though there is no agreement over the precise dates marking the beginning of Bedouin presence in the region, it is clear that they have inhabited the region for centuries.

As shown in our novel historical analysis of the region's legal geography, plenty of concrete evidence exists of the rich history of the Negev Bedouins. Notable is a comprehensive survey of the Negev conducted by the Zionist Palestine Land Development Company. It revealed that by 1920 significant parts of the Negev, especially the Beersheba Valley and northwestern Negev (where the al-'Uqbi family claims land rights), were inhabited, cultivated, and owned by the Bedouins. During that period, between 66,000 and 90,000 Bedouins were grouped into eight Bedouin tribal confederations (*qaba'il*) and some ninety-five tribes (*'asha'ir*).

As in most parts of the country, the 1948 war was a decisive turning point for the land regime in the Negev. The overwhelming majority of the Negev Bedouins fled or were expelled and were not allowed to return. They became refugees, their settlements were destroyed, and their land was confiscated and allocated for Jewish settlements and use. In the early 1950s the approximately 14,000 Bedouins who remained were placed under a military government in the *siyaj* region, an area of 1 million *dunum*s east and north of Beersheba.

Since then, the Negev Bedouins and the state have been entangled in a deep and ongoing land dispute. In the 1970s Israel initiated a land registration process, in which the Bedouins asserted their land claims, of which, 620,000 *dunum*s (5% of the Negev) remain unregistered and in formal dispute. The rest of pre-1948 Bedouin land was registered in the name of the state or other public entities, using a range of nationalizing legal processes. To date, two-thirds of the disputed unregistered lands continue to be held, settled, and worked by Bedouins, including most of the al-'Uqbi claimed lands.

Currently, 220,000 Bedouins constitute more than one-fourth of the region's population, but they occupy only 3.5% of the land. Half of them reside in seven planned towns; the rest inhabit thirty-five unrecognized and eleven partly recognized localities. Simultaneously, Zionist institutions and the Israeli state have built, developed, or otherwise supported 110 Jewish settlements in the region, including more than 100 rural and semirural settlements, many on lands previously inhabited by the Bedouins. The state has also facilitated the construction of about sixty single-family farms, all but one of which are Jewish.

Thus the Beersheba region has been thoroughly Judaized during the last seven decades. It is characterized by a stark contrast between the recognized, planned, and developed Jewish spaces, the recognized but deprived Bedouin towns, the partly recognized Bedouin localities, and the unrecognized Bedouin indigenous localities in which more than 100,000 citizens and vast tracts of land exist under conditions of distress and existential insecurity. Before explaining the role of the mighty DND in facilitating this fractured legal geography, we first address the major scholarly and legal approaches used in this book.

C.2.1 Scholarly and Legal Frameworks

As we demonstrated in Chapter 1, mainstream approaches such as modernization, urbanization, globalization, and majority-minority relations fell short in explaining the situation of the Negev Bedouins and their land dispute with

Israel. Hence we introduced and applied a novel synthesis of scholarly perspectives and concepts to analyze this complex conflict, including settling ethnocracies, internal colonialism, indigeneity, gray space, and critical legal geography.

We conceptualized (in Section 1.3) the state-Bedouin land conflict as taking place within a settling ethnocracy—that is, a regime type that facilitates the expansion of a dominant ethnic nation in a multiethnic contested territory. In this regime type the project of ethnic settlement and domination is presented as an ultimate "truth" upon which society is built. Within this framework Israeli jurists and mainstream scholars have forged a hegemonic discourse regarding the indigenous Bedouins as being "illegal," "trespassers," even as a "danger" to the state and its Judaization settlement project. We have also conceptualized (in Section 1.4) the Bedouins as trapped in a gray space, a zone of instability and threat, located between the lightness of full membership, recognition, legality, and safety and the darkness of exclusion, denial, criminalization, and eviction. Gray spacing (i.e., maintaining the inferior material and legal position of marginalized groups) has been shown to recur as a strategy of the elites to control and oppress peripheral groups in a wide range of global locations, particularly in contemporary, rapidly expanding, metropolitan regions.

Critical legal-geographic tools highlight the connections between space, law, and ethnic and power relations. Our analysis (in Section 1.4) relies on critical legal-geography scholarship, which foregrounds neglected and hidden areas and boundaries where hierarchical social orders are forged and lines between legal and illegal presence, emplacement, and displacement are drawn. In our case, such a critical examination exposed the ways in which the Israeli legal system created and enforced quasi-objective spatiolegal categories ("village," "ownership," "cultivation," "trespasser," "dead land," "state land," "nomadism," and so forth) and infused them with meanings that strengthen the "state" (and connected powerful groups) and weaken the Bedouins. By applying a comparative critical legal-geographic approach, we exposed (in Section 1.5) the similarity between Israel's internal colonial treatment of the Bedouins and the ways other settler states have handled indigenous groups, subjecting them to modern legal systems, with their insurmountable obstacles and alien categories. We observed that the challenge facing the settling Jewish group was more complex than in many settler societies, because modern land laws had already been established by the previous imperial Ottoman and Brit-

ish rulers. Hence, to gain statutory control over contested lands, it was necessary for the legal system to construct new "truths" that purported to continue the previous legal regimes while simultaneously erasing previous indigenous protection, possession, ownership, and development rights.

Yet the hegemonic worldviews constructed by the settling regime have been challenged by indigenous groups and critical intellectuals, contributing to the unsettling of the system of oppression and silencing. The voicing of indigenous outlooks and claims and the emergence of aboriginal title jurisprudence in common law has generated heated multidisciplinary academic debates between conservative and critical scholars. Simultaneously, mainstream and colonial intellectuals and experts "normalize" and legitimize contested state narratives under the guise of "scientific truth." Such mobilization is vital for dispossessing legal doctrines to continue and function in the face of contestation and resistance.

In the Negev land cases most Israeli academic involvement reflects and shapes this pattern of power-knowledge. However, as explained, our research findings, as well as our ethical position, support most of the Bedouin claims in this debate. On the other side, a group of academics, whom we call the deniers, contribute their prestige to deny Bedouin indigenous land claims and spatial rights, granting such dispossession academic legitimacy. As we show in what follows, such "scholarly knowledge" is vital for the maintenance of the DND. Simultaneously, it is widely supported by the Israeli legal system, although it is seriously flawed on historical, geographic, legal, and ethical grounds.

C.2.2 The Dead Negev Doctrine

As we have demonstrated, indigenous dispossession entails ongoing and sustained mechanisms of repression, denial, and erasure. Hence Israel constructed the DND—much like the *terra nullius* approaches by colonizing states—as a comprehensive spatiolegal justificatory doctrine. The doctrine dispossesses the Bedouins and classifies them as trespassers on their land, thereby denying the very act of appropriation. Although Israel purports to merely implement Ottoman and British Mandate legislation, its DND is a creative bricolage of intertwined, often ambiguous and elusive historical, legal, and geographic claims as well as procedural and evidentiary legal tools, which we contest throughout the book.

We have identified in the book eight major components of the DND, as follows:

1. There is legal continuity with Ottoman and British land laws.
2. The Bedouins lacked a functioning land system.
3. Previous regimes never recognized Bedouin legal autonomy or customary law.
4. The Bedouins' failure to register their land by the date decreed by the British Mewat Land Ordinance made them perpetual trespassers.
5. At least until 1921 the Bedouins did not regularly cultivate Negev lands.
6. At least until 1921 the Bedouins were nomadic, lacking permanent settlements.
7. The Bedouins are not an indigenous group.
8. The legal burden to establish their rights against these stipulations rests solely on the Bedouins.

Together these eight components constitute two basic, partly overlapping, and mutually reinforcing planks: the legal and legal-historical plank (components 1–4, 7, and 8) and the historical-geographic plank (components 5 and 6). Throughout this book, we systematically debunked most of the claims on which the DND is founded.

As detailed in Part II, the Bedouins did have (and still have) a well-functioning indigenous land system. Israel has not practiced legal continuity, as it claims, because the interpretation, rulings, and practices of previous Ottoman and British regimes consistently respected Bedouin customary rights and awarded them full ownership whenever the Bedouins sought recognition. This was most evident when Jews purchased vast amounts of lands from the Bedouins, with these sales duly recognized and registered by previous regimes. In addition, as shown in Part III, contrary to state claims, ample evidence exists on the region's geography during the nineteenth and first half of the twentieth Century. Our analysis reveals the existence of dozens of Bedouin permanent settlements and widespread systematic agricultural cultivation, which was taxed and hence sanctioned by past regimes.

A key legal tool, which enables the DND to dispossess the Bedouins while simultaneously denying it, consists of imposing on them a series of unat-

tainable burdens of proof, formal onuses as well as tests, procedures, and categories alien to them and to the way they manage their space and society (component 8). This indigenous and until recently mainly oral community is subjected to Kafkaesque demands regarding evidence on times and events far in the past. As might be expected, the Bedouins consistently fail to overcome these burdens and to establish their land rights.

The Israeli position in this regard differs noticeably from its sister Anglo-settler common law jurisdictions. The Canadian Supreme Court, for instance, displaying self-awareness and an understanding that two systems of law are at play and acknowledging indigenous evidentiary impediments, ruled that occupation by indigenous peoples was not "based on a Torrens system."[49] It stressed that this type of case requires "decisions based on the best evidence that emerges, not what a lawyer may have envisaged [because] what is at stake is nothing less than justice for the Aboriginal group . . . and the reconciliation between the group and broader society."[50] Such a culturally sensitive approach is dearly lacking from Israeli jurisprudence.

Indeed, as demonstrated in Part IV, the Bedouins form an indigenous community according to accepted international and comparative law characterizations. This recognition entails powerful legal ramifications. The adoption, by an overwhelming majority, of the UNDRIP in 2007 constituted a crucial moment in the process of the recognition of indigenous rights. Segments of the UNDRIP, notably consultation, land, equality, and nondiscrimination rights, are becoming binding customary international norms that are increasingly recognized by international, regional, and national legal authorities, as recently stated by the prestigious International Law Association.[51] The growing recognition of indigenous land and consultation rights as forming part of customary international law carries immediate, direct, and potentially dramatic consequences for domestic Israeli law. Those norms that became customary international law apply directly to the Bedouins as part of internal Israeli law and bind Israeli authorities, including the Israeli Supreme Court. This obviously contradicts what that court held in the *al-'Uqbi* case. In other words, our analysis shows that the DND is seriously flawed—scientifically, legally, and morally.

As explained in Part V, Israel has sought to Judaize the Negev through several territorial strategies. Israeli land-use and development plans toward the Bedouins consist mainly of coerced urbanization, modernization, law enforcement, and land nationalization. Yet state policies have not always been stable.

Several government agencies have attempted to make partial compromises. There were brief periods when some relatively autonomous governmental officials, agencies, planning boards, and public commissions showed some flexibility and progress toward Bedouin recognition and equality. The Goldberg Commission (2008) was one such promising avenue. This demonstrates that potentially, if will would only exist, some progress could be achieved in cooperation with state institutions.

On several occasions the Bedouins have devised alternative solutions and visions for the region's future from below, of which the most elaborate is the alternative plan devised by the Regional Council of the Unrecognized Villages (RCUV). The RCUV decoupled the dispute over legal land ownership from the question of planning and recognition, concentrating on the latter. It proposed a spatial and municipal solution for all thirty-five localities that, to date, have remained unrecognized.

However, so far, the dialectical process, in which the state and the Bedouins provide starkly different visions for the region's future, continues to fuel the ongoing dispute over the planning of the northern Negev and hampers the possibility of solving this harsh and enduring land dispute. Before concluding, it is worthwhile to point to some possible directions and ways out of this dangerous impasse.

C.2.3 Settling the Dispute?

We do not purport to offer detailed solutions, as we believe that these should evolve out of a dialogical process of recognition, trust building, negotiation, and mediation, to be conducted between the state and the Bedouins, while honoring historical and indigenous rights. The principal aim of this book is to raise serious doubts about Israel's use of the DND and unravel its sophisticated mechanisms as a tool for dispossessing and marginalizing the Bedouins. Simultaneously, we provide much-needed knowledge and a novel outlook, thus contributing to open discussions and possibilities that should lead to agreements based on principles of decolonization, human dignity, equality, recognition, and reconciliation.

We can draw inspiration from a number of reconciliatory processes conducted in other settler societies that followed long years of dispossession and marginalization of indigenous communities. Such processes have led to various outcomes. Although far from being perfect in reaching historical justice,

they were based on recognition of indigenous narratives and rights and on mutual compromises that at times benefited all parties involved. In Australia and New Zealand, for instance, following recognition of native land rights, indigenous peoples allowed co-use and co-management rights on their traditional lands and received economic benefits from the state.[52] Such approaches provide an appropriate mechanism for the Israeli-Bedouin conflict. The interests and needs of the state and the Bedouins are not wholly incompatible. Alongside the material and actual return of the land, there should be recognition of the historical land use and rights of the Bedouins and their narrative of dispossession and state responsibility, as well as a public apology. The actual current and future use of the claimed lands—which would not result in any further displacements—could be negotiated between the parties. For instance, in claimed Bedouin land not used for residence or agriculture, Bedouin ownership could be recognized. The land could be zoned for traditional uses, such as grazing, or a national park, in which the Bedouins would enjoy special privileges.

Thus, despite the conflict and decades-long stalemate, our analysis shows that the substantive distance between the two sides is not overwhelming or unbridgeable. Components of the Goldberg Commission recommendations as well as the planning solutions advanced by the RCUV can serve as a reasonable ground for beginning negotiation and mediation. Such negotiations, needless to say, should be conducted within the framework on human and indigenous rights devised by the international community and should not be subject to the massive asymmetric power relations between the parties involved.

It is noteworthy that, to date, few genuine attempts to mediate between the parties have taken place. The most notable one was initiated by the Israeli Ministry of Justice in 2005–2006 and was conducted by the Harvard- and MIT-based Consensus Building Institute. This feasibility study showed that good chances existed for progress by mediation in some of the cases. Regrettably, the government aborted the process. Until and if such reconciliatory steps are renewed, we can point to only a few promising directions and strategies.

In common law settler societies, high courts increasingly assume a leadership and reconciliatory role. They struggle to trace a new path, reconcile past and present, and conceive of a more equitable future. Unlike their Israeli counterparts, judges in other settler states realize and acknowledge that their dominant legal paradigms were constructed by and for settler groups and

therefore should not serve as the sole criterion for adjudication of land disputes. The Supreme Court of Canada, for instance, ruled in *Tsilhqot'in* (2014) that "the dual perspectives of the common law and of the Aboriginal group bear equal weight in evaluating a claim for Aboriginal title."[53] Israeli legal institutions, which bear a distinct legacy of the common law heritage, should begin looking at the evolving jurisprudence of their fraternal jurisdictions.

As renowned scholar Jérémie Gilbert recently noted, we are witnessing the "emergence of a comprehensive common law doctrine on indigenous peoples' land rights."[54] Admittedly, this road is often convoluted, with its exact destiny yet to be devised, and actual transformation is still limited. Yet these momentous transformations have also taken place outside former British colonies, whereby leading state and regional legal institutions began to recognize indigenous land rights and abandon previous dispossessing doctrines in favor of transitional justice and reconciliation.

For instance, starting with *Awas Tingni v. Nicaragua* (2001) and continuing thereafter, the Inter-American Court of Human Rights recognized indigenous land rights and ruled against states' violation of these property rights.[55] National courts in Latin America have walked a similar path, contributing to a growing case law that seeks to protect historical and present land rights of indigenous communities. Similar developments have taken place in Africa, again, both in regional and national jurisdictions. For instance, in a momentous decision, the African Court on Human and Peoples' Rights decreed in 2010 that Kenya's eviction of the Endorois indigenous community from its ancestral lands violated the African Charter, and it ordered Kenya to recognize and restitute their property rights.[56]

Regrettably, Israeli courts have positioned themselves light-years behind the transformative role that high courts in other jurisdictions—including in Anglo-settler states (e.g., *Mabo* [1992] and *Tsilhqot'in* [2014]), Latin America (e.g., *Awas Tingni* [2001] and *Aurelio* [2007]), and Africa (e.g., *Richtersveld* [2003] and *Endorois* [2010])—took upon themselves. To realize this gap, it suffices to compare the transformative and empathic language in these decisions with the formal and harsh ruling in the *al-'Uqbi* case.

Inspiringly, in some recent cases the *terra nullius* doctrine has been rescinded, annulled, and derided by international law and many regional and national jurisdictions. New approaches are gaining ground, reforming (though only partly) the legal and geographic landscape of indigenous pres-

ence in modern nation-states. Some of these norms, including parts of the UNDRIP, are arguably assuming the status of binding customary international law. Therefore, critically, they may officially constitute an integral part of Israeli law that should implement the norms and prohibitions of the UNDRIP. Other norms, such as those included in the 1966 international human rights covenants, to which Israel is a party, guarantee rights to self-determination, equality, and nondiscrimination and should guide Israeli courts when they interpret statutes. Following such encouraging international developments, the time has come for Israel to reject in like manner the DND and its derivative regulations and policies. This ethical approach is preferable to continuation of discrimination, dispossession, and nonrecognition.

A new enlightened and politically savvy approach would enable the Bedouins to attain property rights to their ancestral lands and introduce criteria of distributive justice for future land and development needs. Israeli law does have the adequate tools—though not the sufficient legal and political will—to overwrite or bypass the debilitating DND. Such instruments include the recognition of unregistered property rights, the validation of customary Bedouin tribal law, including property and inheritance laws, and the recognition of oral testimonies and traditional documents.

Important developments that took place in Israeli law after the establishment of the DND make it possible to respect many of the international norms mentioned. One of these was the enactment of the Basic Law: Human Dignity and Liberty (1992), which protects a person's dignity and property. Significantly, the Israeli Supreme Court is not officially bound by its own precedents. In past cases involving different types of claimants, it has reversed previous rulings and reinterpreted and limited statutes that infringed on basic human rights and property rights.

Recently, Supreme Court justice Uzi Fogelman summarized the current doctrine, emphasizing that, in light of the strengthening of the right to property in the Basic Law, "the legal meaning of acts preceding it might change in a manner that would give increased weight to the right of property in relation to other interests competing with it." According to Justice Fogelman, such an approach is particularly applicable when interpreting British Mandate and early Israeli legal norms, because current Israeli values and interests differ remarkably from those outdated laws. Judges should therefore reinterpret archaic laws that infringe property rights in light of current perspectives and values.[57]

However, as we have seen, in the *al-ʿUqbi* case the Israeli Supreme Court stubbornly rejected attempts to apply this approach to Bedouin land rights and to rely on the Basic Law and particularly on the concepts of human dignity, liberty, property, and equality enshrined in it.[58] This decision also stands in stark contrast to groundbreaking findings of courts in numerous foreign jurisdictions, which have ruled that indigenous land is included in and protected by the right of property recognized in regional and national covenants, constitutions, and additional significant legal documents.

In describing and assessing the range of strategies used by African indigenous communities to resist dispossession and protect their rights and way of living, Albert Kwokwo Barume highlights a range of strategies, such as

> open conflicts, legal challenges, lobbying at the international level against their states' policies, voluntarily ignoring the expropriation measures taken by the state by continuing to use "clandestinely" the contentious lands, burning the resources on land taken away from them by government, etc.[59]

A meaningful tool of resistance of African indigenous communities is their version of the Palestinian concept of *sumood*, which means "steadfastness" or "holding to the ground." As we have shown throughout this book, *sumood* has become a main tool in the Bedouin indigenous resistance to Israeli policies. Likewise, as a Massai elder noted in the context of East African indigenous struggle, "They took the land on paper, but the land on the ground is ours."[60]

In light of the current impasse, the Bedouins will continue to struggle for the recognition of their land rights in various forms and fora. Should they continue their efforts to engage with the Israeli judiciary and challenge the DND, they may consider Barume's sober assessment of the impediments and venues open to African indigenous communities. For instance, Barume recommends holding "sensitizing seminars" for judges, which should expose them to comparative and international relevant legal norms and solutions.[61]

In this context we contend that the Bedouins should also plan litigation thoroughly and strategically, carefully choosing their test cases and preparing their legal claims in a far more professional manner than in the past. Preparations should include systematically gathering and analyzing archival and additional historical evidence, such as archaeological remains; presenting aerial photograph analyses and introducing past diaries and personal accounts; enrolling leading experts, such as historians, social scientists, anthropologists,

archaeologists, geographers, and comparative and international legal scholars; getting acquainted with legal procedures; and mastering pertinent international law instruments. The Bedouins should carefully assess their financial resources and the availability of experienced lawyers.

However, because Israeli courts do not offer at this moment a promising path for Bedouin land claimants, alternative venues should be seriously explored. These include a fair historical and geographic investigation of landownership outside the courtroom, relying on oral testimony, internal documents, and other indigenous evidence; "truth commissions" regarding the events of the 1948 *Nakba* (Palestinian disaster) and years of military rule in the Negev; advocating equal and just allocation of state land to Bedouins and the Jewish rural sector; and implementation of appropriate planning solutions for Bedouin unrecognized villages on a basis equal to that of Jewish communities.

In line with recommendations by international institutions such as the prestigious International Law Association, the Bedouins should lobby Israel (directly or through the involvement of international entities) to restructure its domestic law and should initiate "constitutional amendments, institutional and legislative reforms, judicial action, administrative rules, special policies, reparation procedures and awareness-raising activities" to fully realize indigenous peoples' human rights consistently with the norms set up by the UNDRIP.[62] Such changes should be part of a broader Israeli policy that departs from its decades-long policies and practices of land dispossession and Judaization of space and move toward a policy that is based on historical justice and civic, not ethnic, considerations.

However, it is highly unlikely that Israel would embark on such a transformative path without experiencing powerful pressures that unsettle the status quo. Such pressure could, and has already begun to, come from different angles. One such course of action, as noted, is *sumood*. It consists of maintaining the sheer magnitude of the problem on the ground. Although Israel attempts to displace the Bedouins, they cling stubbornly to the land, and notwithstanding the state efforts and investments, Bedouin presence and demographic expansion change the region's geography. Another venue, already initiated by the Bedouins, consists of involving international and foreign institutions, governments, and NGOs to monitor and assist them in advancing their human and indigenous rights.

In addition, there is a need to educate the public and the decision makers in Israel and abroad and to make use of various channels to do so. Because the conflict is complex, it is crucial to translate available knowledge into un-

derstandable narratives. This would clearly present the Bedouins' perception of their history and rights, using mass and social media tools, to counter state efforts to project the Bedouins as criminal invaders and trespassers on state lands.

We believe that it is possible, and necessary, to urgently rescind the flawed DND and replace it with principles of recognition, fairness, and transitional justice. Change in the policy and adoption of a fair and open arrangement will also enable a just and accepted basis for viable settlement and recognition for the Bedouins in the Beersheba area and decolonize the relations between the state and its indigenous minority. Such settlement will benefit all inhabitants of the region—Jew and Arab alike. It will bring Israel closer to its international legal commitment and to the group of states seeking to correct past wrongs and move toward reconciliation as a basis for a dignified, stable, and thriving Negev in the near and distant future.

Finally, it may be apt to conclude with the perceptive words of ʿAtiyya al-ʿAssem, head of the RCUV, who represents the unrecognized indigenous communities. He spoke during the commemoration of the fifth anniversary of the first demolition (of more than 100) of the village of ʿAraqib, with which we opened the book. In the well-attended ceremony on July 29, 2015, al-ʿAssem's words capture the spirit of the indigenous struggle:

> Our struggle—symbolized by ʿAraqib—is one of existence. . . . We have no choice but to hang on to our *sumood* [steadfastness]. We cannot accept the state's so-called "generous offer" to abandon our lands for an urban land plot in one of the towns—this will destroy our communities and rob us off our homelands. . . . Nor can we accept the miserable living conditions our communities have been condemned to by the Jewish state. We strongly reject both options, and demand a third path: remain on the lands inherited from our forefathers, and receive all rights, services, and protection awarded to full citizens. We belong to our lands, and will not leave. . . . We demand what is rightly ours—no more and definitely no less.

APPENDIXES

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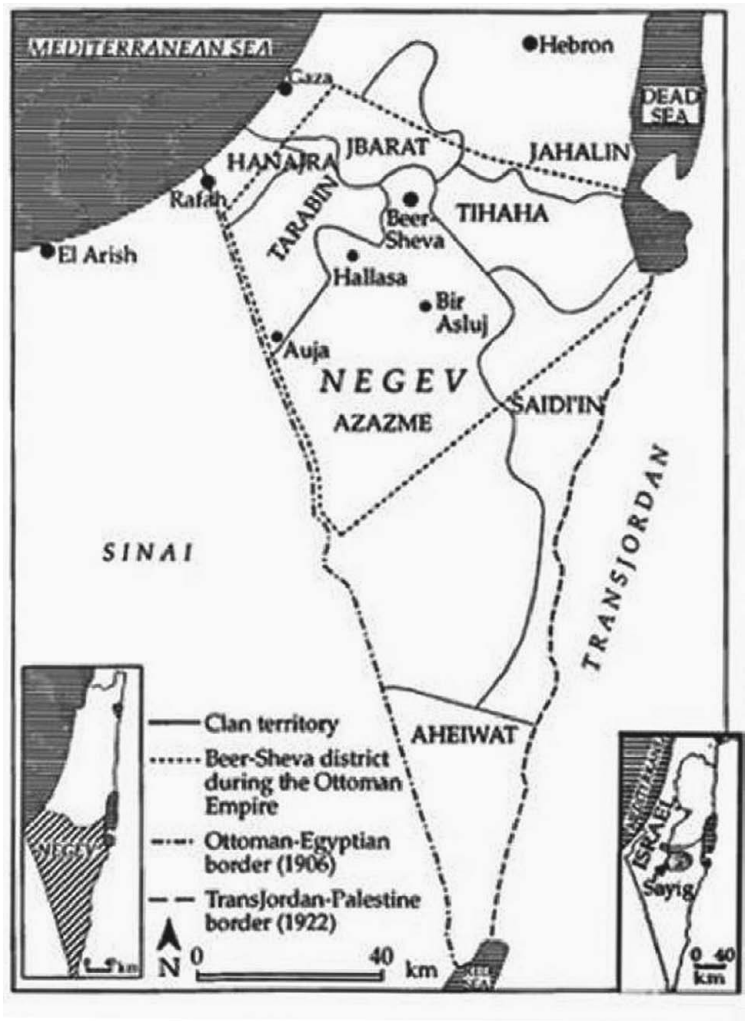
APPENDIX 1

Ottoman Tribal Map of the Negev



Appendix 1. Ottoman tribal map of the Negev, 1891. Source: Avinoam Meir, *As Nomadism Ends: The Israeli Bedouin of the Negev* (Boulder, CO: Westview Press, 1997), 76.

APPENDIX 2

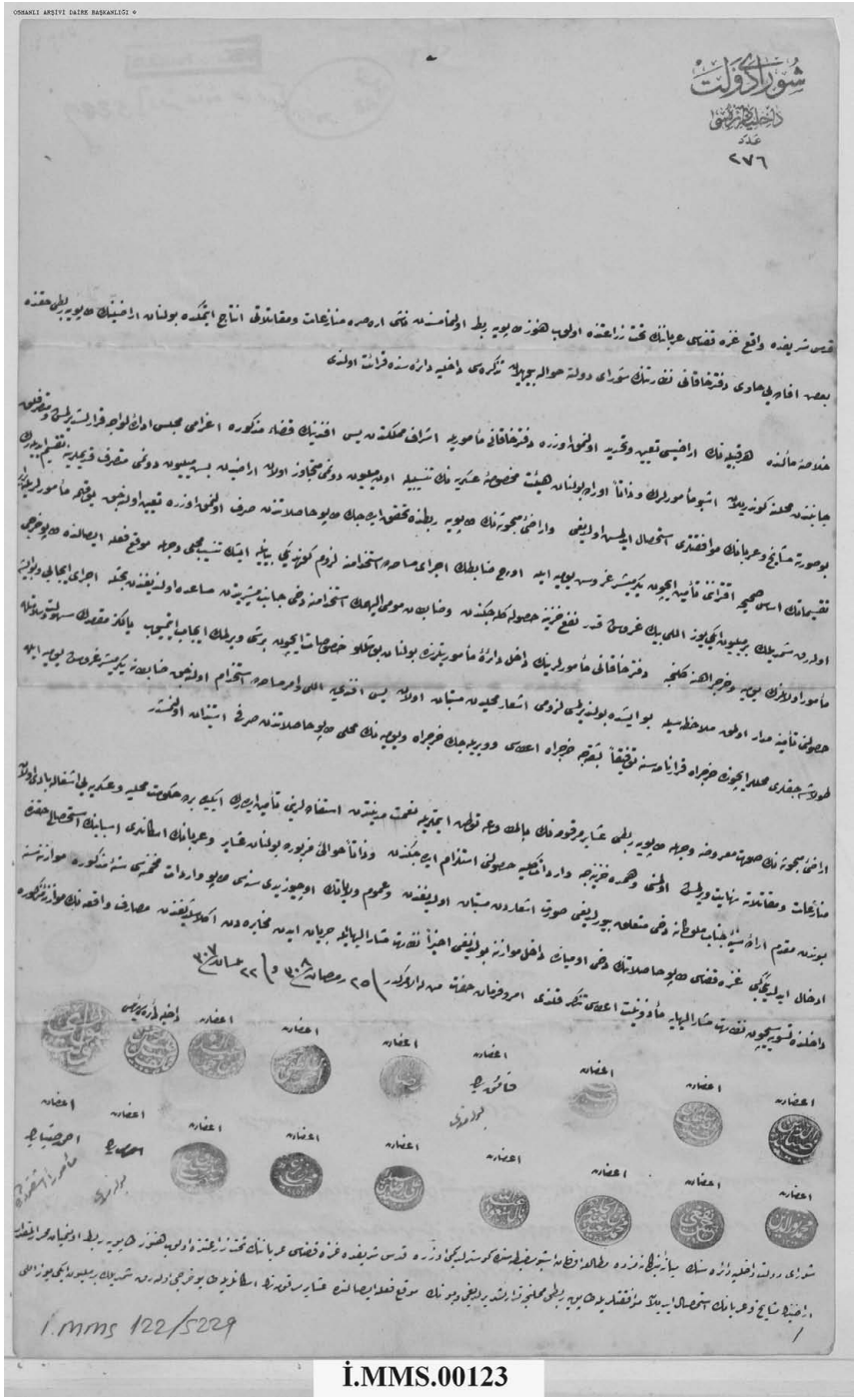
Ottoman Decision Regarding Miri Land in Beersheba

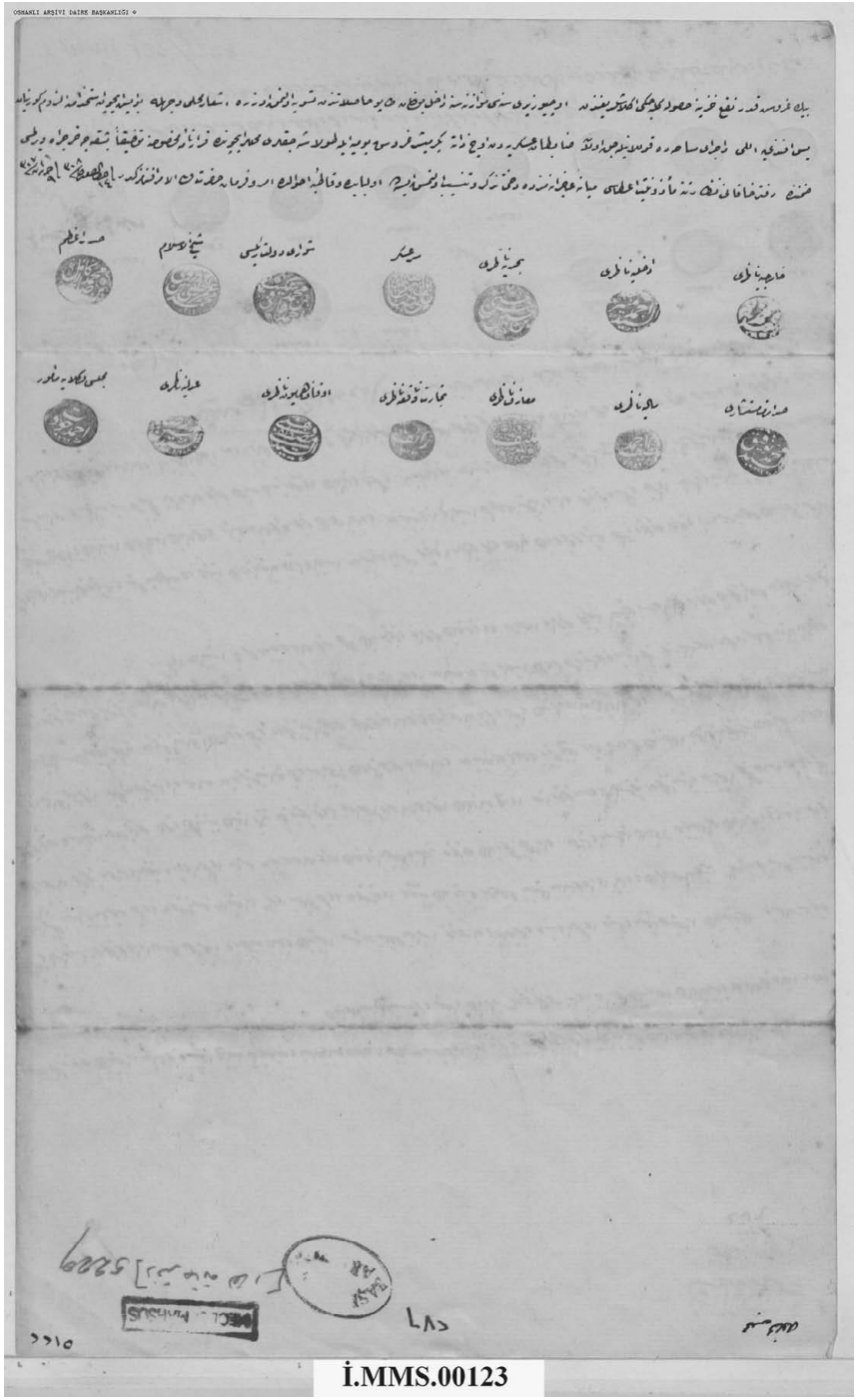
This 1891 document is about the tribal confederations' lands in the Gaza Subdistrict that are under cultivation but still not registered in the *tapu*, thus causing fights and conflicts among the Bedouins. The document points out that the Bedouins have possessed from time immemorial 5 million Ottoman *dunum*s out of the more than 10 million *dunum*s in the area. To define and demarcate the lands of each confederation (*qabilah*), the Ottoman government decided on an integrated mechanism of diplomatic and military representation, alongside Bedouin involvement and cooperation. Thus the Jerusalem Administrative Council was to appoint five Bedouin notables, a representative of the governor, and the director of the Ottoman Department of Land Registry. This way, the document emphasized, it would be possible to get the consent of the Bedouin sheikhs to register the lands. Once the mentioned lands were registered in the *tapu*, it would be possible to pay those who worked on the land registration from the collected *tapu* revenues. The officers would be paid 25 gurush each. If we put these words into action, we get nearly 1,250,000 gurush as *tapu* revenues. The officers, accompanied by a supervisor, would be allowed to survey the lands. The land registry officers' expenses would be paid, because this is their regular job, but the five Bedouin notables would each be paid 50 gurush per day. Daily payments and expenses for workers who would travel in the area would be paid from the *tapu* revenues, and hence approval was required from the government.

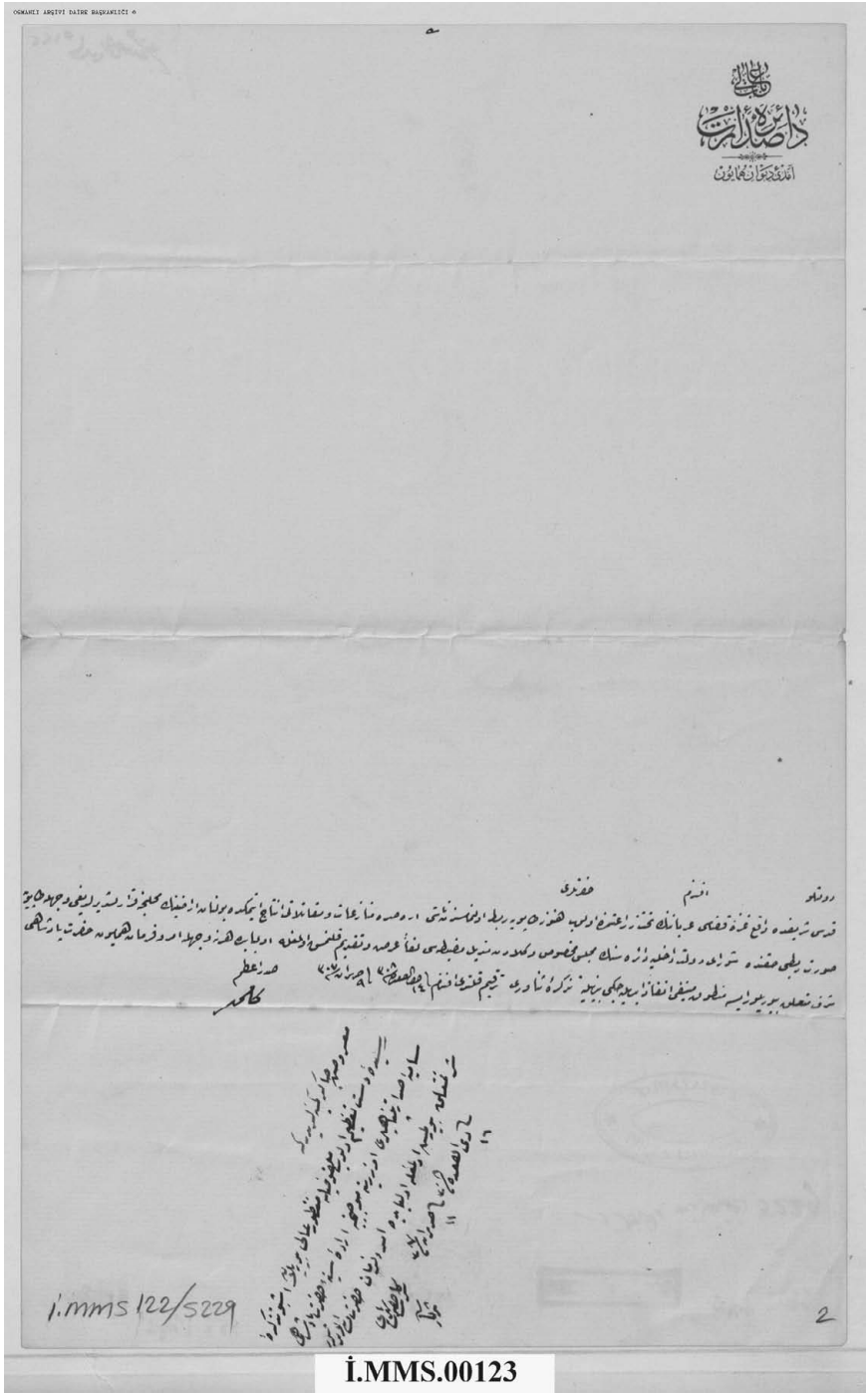
The registration of the discussed land would bring the goods of civilization to the Bedouins who were being settled. The disputes and fights that constantly took place and kept the local government and soldiers busy would come to an end. Moreover, the treasury would gain all the money, and this would comply with the sultan's will to settle the tribes.

The Ottoman authorities referred the decision to the Grand Vizierate for approval and especially for approval of the attached expenses.

Appendix 2. Ottoman *Majliss Ashura* decision about 5 million *dunums* of *miri* land in Beersheba, 1891. Source: Decision of the Council of State on Bedouin land registration, 22 Nisan 1307/4 May 1891, Başbakanlık Osmanlı Arşivleri (The Prime Minister's Ottoman Archives), Istanbul, İ.MMS 122/5229.







APPENDIX 3

Ottoman Purchase Documents for Beersheba Land

Holy Jerusalem District, Beersheba Region
Type: Ownership
(Borders of Purchased land)

Southward begins from the area of the well used by many. Walking with the big Beersheba wadi directly southward. Later it will turn with the above-mentioned wadi westward until pouring into Radhat Jamian and from there to the trench known as Al-Rughsat, near the point of crossing the road leading to the water of Beersheba. Between them there is a track leading to Gaza that stretches from mentioned wadi northward to the border between the Turk and Abraham and northward from the mentioned hill eastward to the track in a straight line and then eastward from the mentioned track from the side of the ruins to the west until the point where the big Beersheba wadi ends and from there to the wells of ibn 'Arfan and abu-Qabilah and Hassan al-Malth'a, approximately 2,000 *dunum*s. . . .

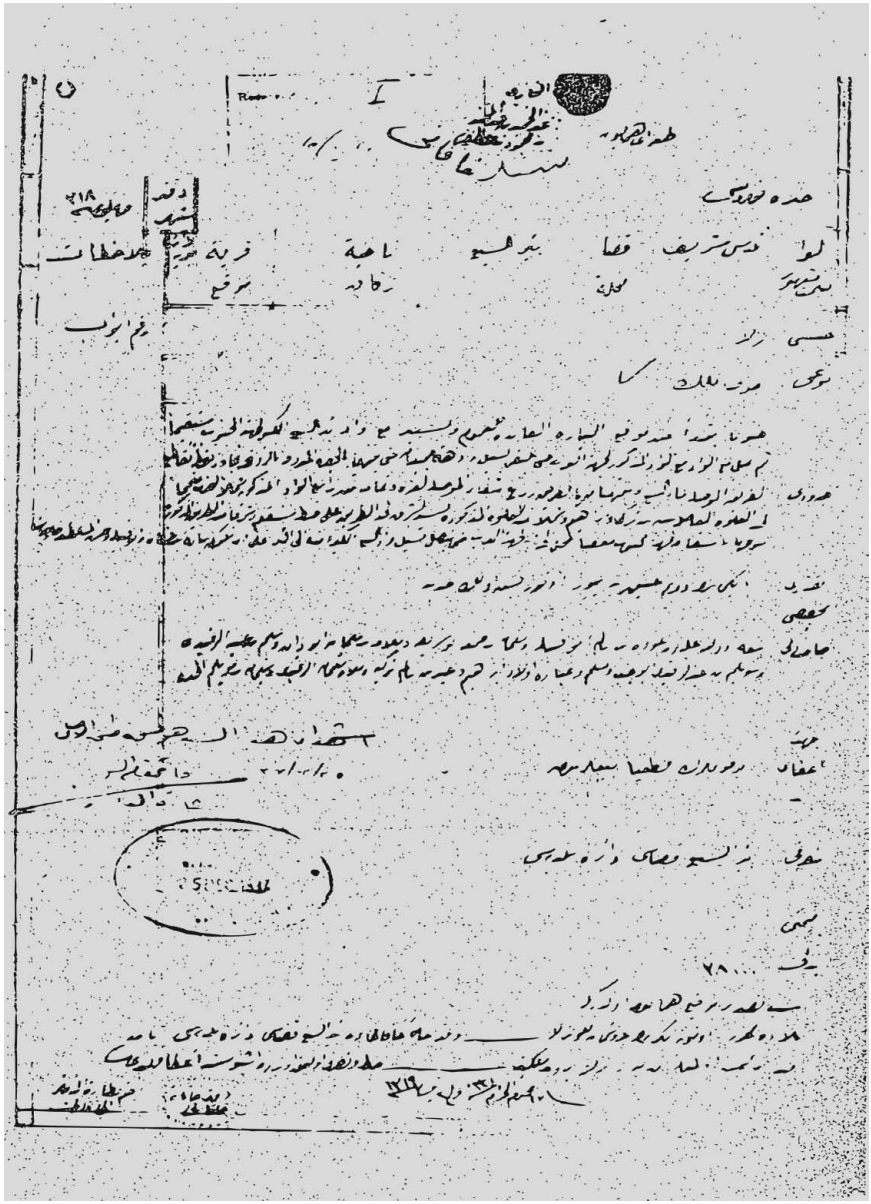
The owners and their descendent successors are: 'Ali ibn 'Auda, ibn Salem abu-Qabilah and Salameh abu-Sliman abu-Zaed, and Musallam ibn 'id al-Raqidi, and Swilem ibn 'Abed Allah al-Gharib and Musallam and 'Ayadah son of, and 'Id ibn Salem ibn Turkia. And Salman al-Raqidi, and Suleiman ibn Swilem al-Khada.

The giving [of the land] is absolute for the allocation of legal ownership, known as Beersheba—urban area . . . 2,800; Released land. . . .

17 to Muharram Month Hijra year 1321 (1901 on the Christian Calendar)
Land Registration Department

I approve this is copy is true to the original

'Aref al-'Aref
Governor of Beersheba District
December 25, 1937



Appendix 3. Ottoman purchase documents for Beersheba land, 1901. Source: Tuviyahu Archives of the Negev, Sasson Bar-Zvi Collection, 1686.14.001.

מחוז ירושלים הקדושה. נפת באר־שבע
הסוג: בעלות

דרומה מתחיל מאיזור הבאר המשמשת לרבים. ויילך עם ואדי באר־שבע הגדול לכיוון הישר דרומה. אחר־כך יפנה עם הוואדי הנזכר למערב עד שייפגש בשפך רדהת ג׳מיעאן ומשם לחפירה הידועה בשם אל־רוּ׳צת הסמוכה לנקודת חציית הדרך המובילה למי באר־שבע, שביניהם יש ירך המובילה לעזה, ונמשכת מראש הואדי הנזכר צפונה אל הגבול בין תורכי ואברהם וצפונה מהגבעה הנזכרת לכיוון מזרח עד לדרך בקו ישר. ומזרחה מהדרך הנזכרת ומצד החורבה למערב עד לשפך ואדי באר־שבע הגדול וממנו לבארות של אבן עַרפאן ואבו קבילה וחסן אל מלטעה. בערך . . . . . דונם.

הבעלים ויורשיהם הם: עלי אבן עודה אבן סאלם אבו קבילה, וסלאמה אבן סלימאן אבו זאיד, וכסלם אבן עיד א־רקידי, וסוילם אבן עבדאללה אלגריב, ומסלם ועיאדה בנו של אברהים. ועיד אבן סאלם אבן תורכייה, וסלאמה וסלמאן א־רקידי, וסליימאן אבן סוילם אלח׳דא.

הנתינה היא מוחלטת להקניית בעלות חוקית, ידועה בשם באר־שבע — איזור עירוני. (מלים תורכיות) 2800, אדמה משוהרת (כלים תורכיות).

17 לחודש מוחרם שנת 1321 (להגירה, 1901 למניין הנוצרים).

המחלקה לרישום מקרקעין

אני מאשר כי מסמך זה הנו עותק נאמן מן המקור.

עארף אל עארף
מושל נפת באר־שבע
25.12.37

APPENDIX 4

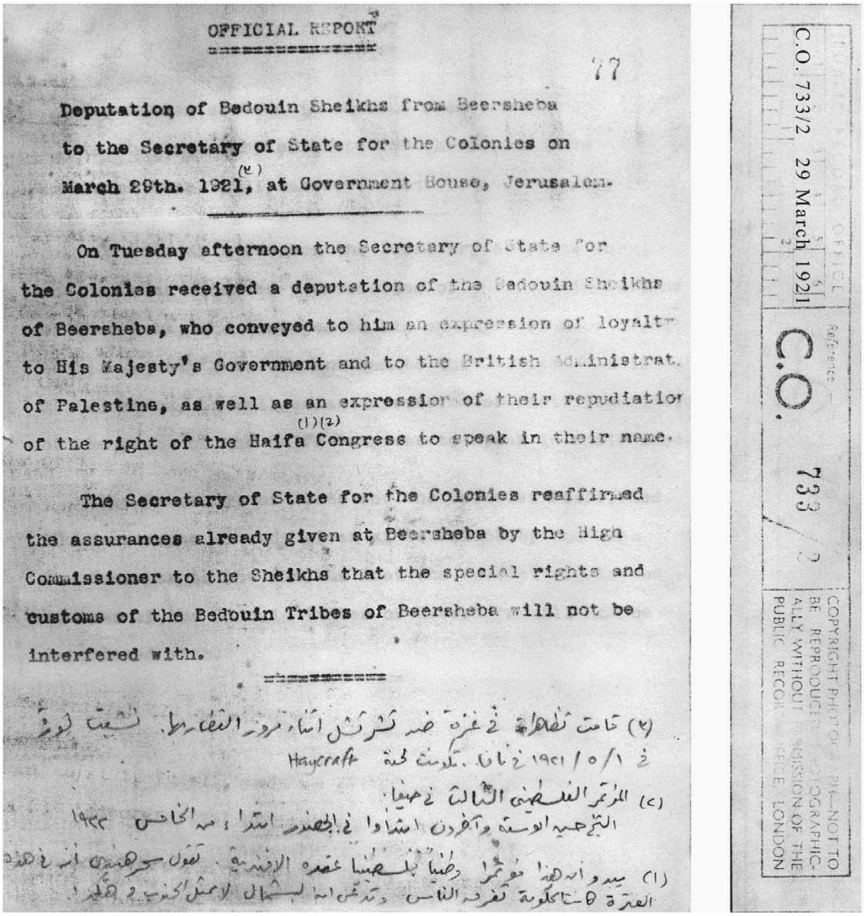
Churchill's Declaration on Bedouin Rights and Customs

OFFICIAL REPORT, Folio 77

Deputation of Bedouin Sheikhs from Beersheba to the Secretary of State for the Colonies on March 29th 1921, at Government House, Jerusalem.

On Tuesday afternoon the Secretary of State for the Colonies received a deputation of the Bedouin Sheikhs of Beersheba, who conveyed to him an expression of loyalty to His Majesty's Government and to the British Administration of Palestine, as well as an expression of their repudiation of the right of the Haifa Congress to speak in their name.

The Secretary of State for the Colonies reaffirmed the assurances already given at Beersheba by the High Commissioner to the Sheikhs that the special rights and customs of the Bedouin Tribes of Beersheba will not be interfered with.



OFFICIAL REPORT

77

Deputation of Bedouin Sheikhs from Beersheba to the Secretary of State for the Colonies on March 29th. 1921, (٢) **at Government House, Jerusalem.**

On Tuesday afternoon the Secretary of State for the Colonies received a deputation of the Bedouin Sheikhs of Beersheba, who conveyed to him an expression of loyalty to His Majesty's Government and to the British Administration of Palestine, as well as an expression of their repudiation of the right of the Haifa (١)(٢) Congress to speak in their name.

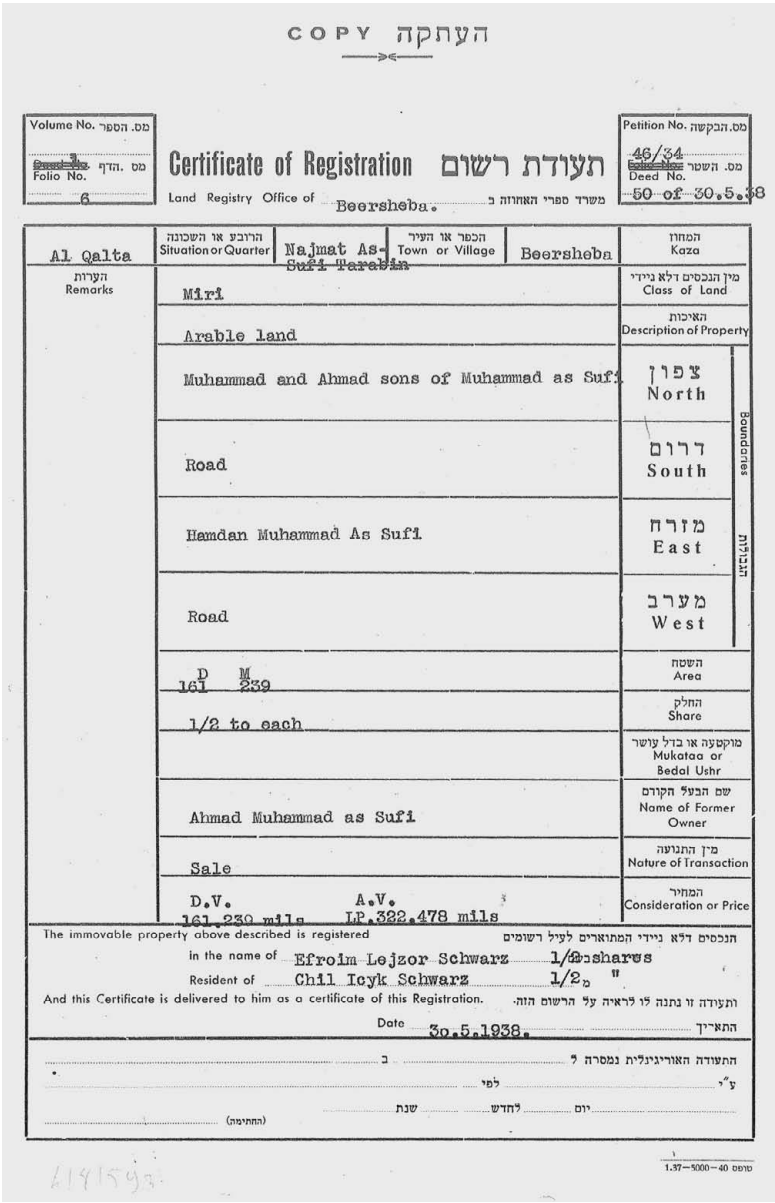
The Secretary of State for the Colonies reaffirmed the assurances already given at Beersheba by the High Commissioner to the Sheikhs that the special rights and customs of the Bedouin Tribes of Beersheba will not be interfered with.

(٢) قامت تظاهرة في غزة ضد تشرشل أثناء مروره بالقطار. نشبت ثورة
في ١/٥/١٩٢١ في يافا. تكونت لجنة Haycraft
(٣) المؤتمر الفلسطيني الثالث في حيفا.
[illegible] اشتركوا في الحضور ابتداءً من الخامس ١٩٢٢
(١) يبدو أن هذا مؤتمرا وطنيا فلسطينيا عقده الإنجليز. تقول [illegible] أنه في هذه
الفترة قامت الحكومة تفرقة الناس [illegible]

Appendix 4. *Winston Churchill's declaration of preserving Bedouin rights and customs*, 1921. Source: National Archives of the UK, Kew, Richmond, CO 733/2.

APPENDIX 5

Miri Land Registration by Bedouins



COPY העתקה

Volume No. מס. הספר 3 | Folio No. מס. הדף 6

Certificate of Registration תעודת רשום

Land Registry Office of Beersheba. משרד ספרי האחוזה ב

Petition No. מס. הבקשה 46/34 | Deed No. מס. השטר 50 of 30.5.38

Al Qalta	הרובע או השכונה Situation or Quarter	Najmat As-Sufi Tarabin	הכפר או העיר Town or Village Beersheba	המחוז Kaza

הערות Remarks	
	מין הנכסים דלא ניידי Class of Land: Miri
	האיכות Description of Property: Arable land
	צפון North: Muhammad and Ahmad sons of Muhammad as Sufi
	דרום South: Road
	מזרח East: Hamdan Muhammad As Sufi
	מערב West: Road
	השטח Area: D 161 M 239
	החלק Share: 1/2 to each
	מוקטעה או בדל עושר Mukataa or Bedal Ushr:
	שם הבעל הקודם Name of Former Owner: Ahmad Muhammad as Sufi
	מין התנועה Nature of Transaction: Sale
	המחיר Consideration or Price: D.V. 161.230 mils A.V. LP.322.478 mils

Boundaries הגבולות

The immovable property above described is registered in the name of Efroim Lejzor Schwarz 1/2 shares
Resident of Chil Icyk Schwarz 1/2 "

נכסים דלא ניידי המתוארים לעיל רשומים

And this Certificate is delivered to him as a certificate of this Registration. ותעודה זו נתנה לו לראיה על הרשום הזה.

Date 30.5.1938. התאריך

התעודה האוריגינלית נמסרה ל ב

ע"י לפי

יום לחדש שנת (התחימה)

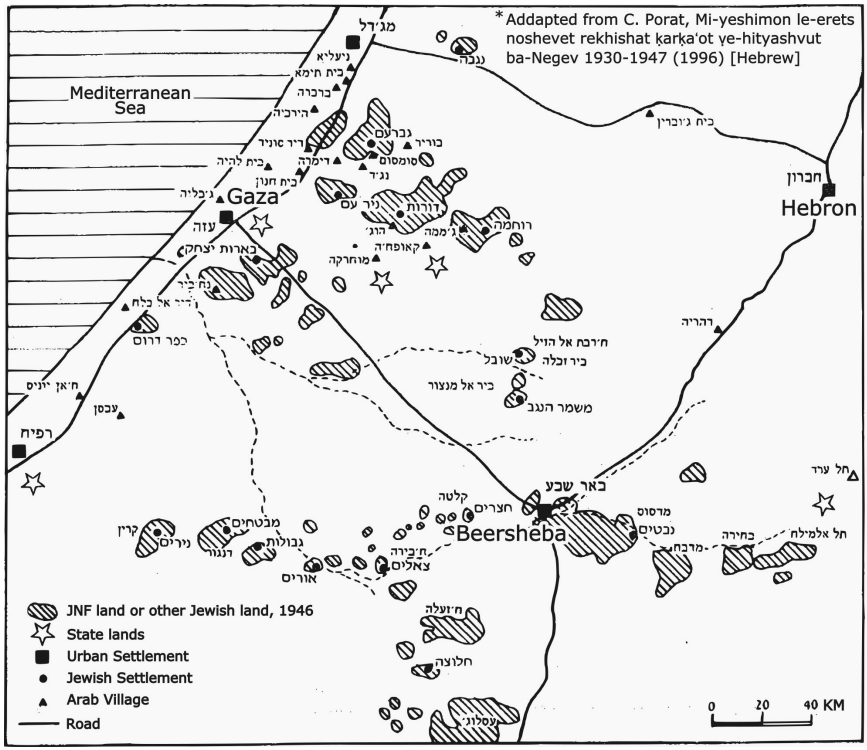
L18/593

1.37—5000—40 טופס

Appendix 5. Land registered as *miri* by Bedouins in the 1930s. Source: Certificate of Registration, 1938, Central Zionist Archives, L18/593.

APPENDIX 6

Jewish Purchases of Bedouin Lands

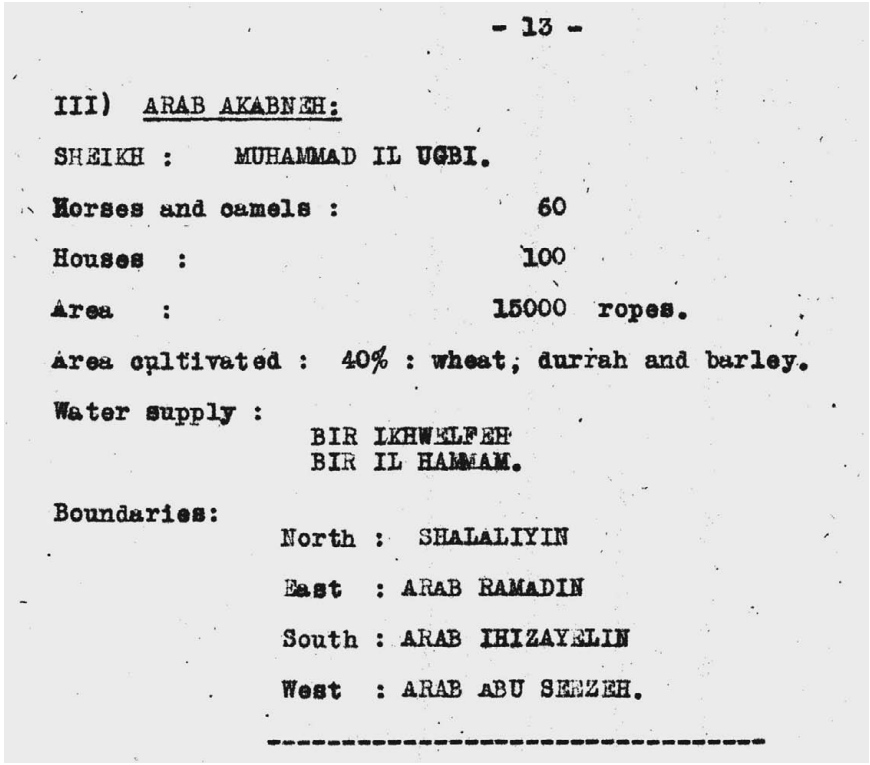


Appendix 6. Map of Jewish purchases of Bedouin lands. Adapted from Chanina Porat, *From Wasteland to Inhabited Land: Land Purchase and Settlement in the Negev, 1930–1947* (Jerusalem: Yad Izhak Ben-Zvi Press, 1996), 158 (Hebrew).

APPENDIX 7

Report Showing Bedouin Cultivation and Ownership

These two pages from a Palestine Land Development Company report that documents Bedouin land use (residential, cultivation, grazing), boundaries, and ownership in the area belonging to the al-ʿUqbi tribe (known as Arab ʿAqbanah).



- 13 -

III) ARAB AKABNEH:

SHEIKH : MUHAMMAD IL UGBI.

Horses and camels : 60

Houses : 100

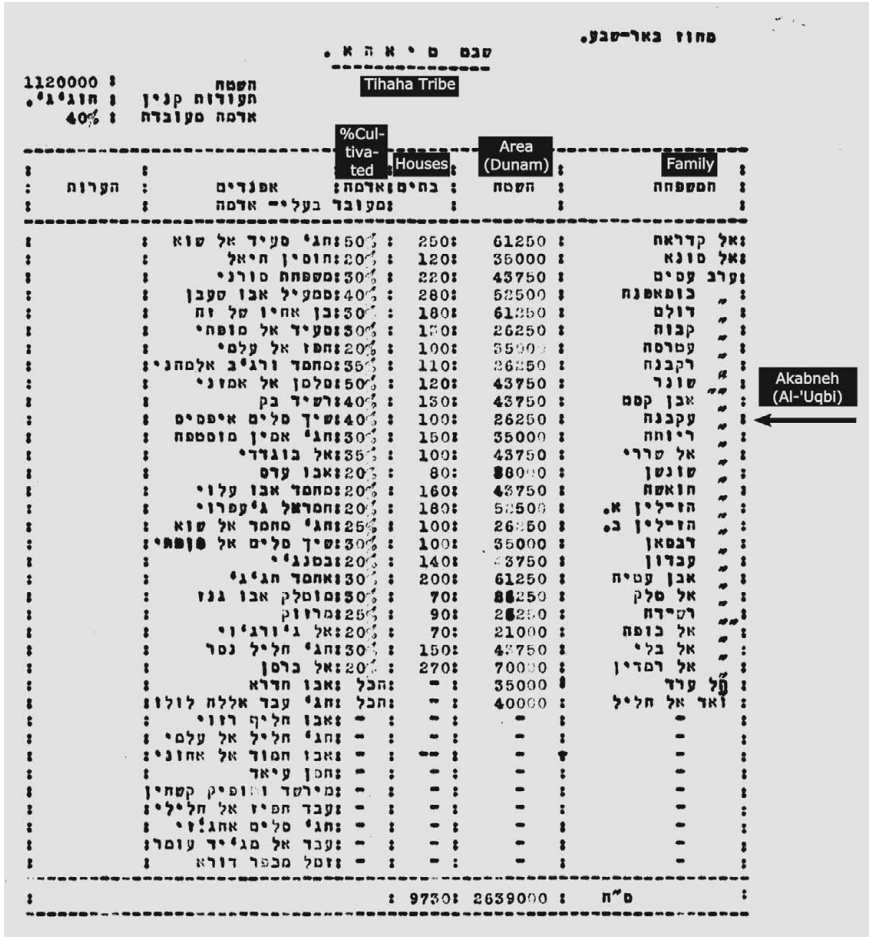
Area : 15000 ropes.

Area cultivated : 40% : wheat; durrah and barley.

Water supply :
BIR LKHWELFEH
BIR IL HAMMAM.

Boundaries:
North : SHALALIYIN
East : ARAB RAMADIN
South : ARAB IHIZAYELIN
West : ARAB ABU SEEZEH.

Appendix 7. *Palestine Land Development Company report showing vast Bedouin cultivation and ownership, 1920*. Source: Central Zionist Archives, L18/127/2, L18/6289.



מחוז באר-שבע.

שבט ט י א ה א.

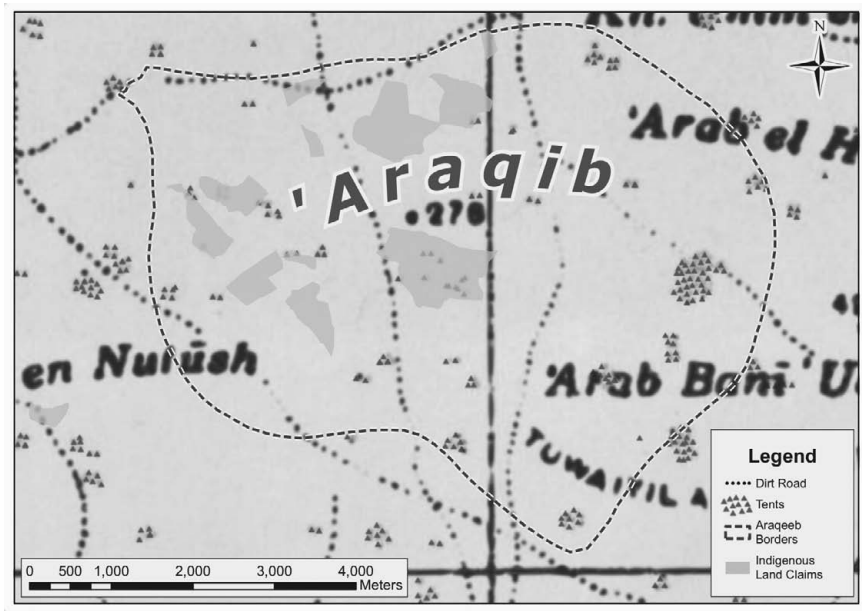
Tihaha Tribe

1120000	חשטח
חוג'ג'.	תעודות קנין
40%	אדמה מעובדת

Family	Area (Dunam)	Houses	%Cultivated	אפנדים	הערות
חמולה	חשטח	בתים	אדמה מעובדת בעלי־ אדמה		
אל קדראח	61250	250	50%	חג' סעיד אל שוא	
אל סונא	35000	120	20%	חוסין חיאל	
ערב עסים	43750	220	30%	משפחת סורני	
" כופאפנה	52500	280	40%	סמעיל אבו סעבן	
" דולם	61250	180	30%	בן אחיו של זח	
" קבוה	26250	150	30%	סעיד אל מופתי	
" עטרסה	35000	100	20%	חסן אל עלמי	
" רקבנה	26250	110	35%	מחמד ורג'ב אלמחני	
" שונר	43750	120	50%	סלמן אל אמוני	Akabneh (Al-'Uqbi)
" אבן קסם	43750	150	40%	רשיד בק	
" עקבנה	26250	100	40%	שיך סלים איפסים	←
" ריוחה	35000	150	30%	חג' אמין מוסטפה	
" אל שרפי	43750	100	35%	אל בוגדדי	
" שונשן	8000	80	20%	אבו עדס	
" חואשה	43750	160	20%	מחמד אבו עלוי	
" הזילין א.	52500	180	20%	חסראל ג'עפרוי	
" הזילין ב.	26250	100	25%	חג' מחמד אל שוא	
" רבפאן	35000	100	30%	שיך סלים אל מוסתפ	
" עבדון	43750	140	20%	בסנג'י	
" אבן עטים	61250	200	30%	אחמד חג'ג'	
" אל סלק	86250	70	30%	סולק אבו גנז	
" רשידת	26250	90	25%	מרזוק	
" אל כופה	21000	70	20%	אל ג'ורג'וי	
" אל בלי	43750	150	30%	חג' חליל נסר	
" אל רמדין	70000	270	20%	אל כרסן	
חל ערד	35000	-	-	חכל אבו חדרא	
ואד אל חליל	40000	-	-	חכל חג' עבד אללה לולו	
"	-	-	-	אבו חליף רזוי	
"	-	-	-	חג' חליל אל עלמי	
"	-	-	-	אבו חמוד אל אחוני	
"	-	-	-	חסן עיאד	
"	-	-	-	מירשד ואופיק קשתין	
"	-	-	-	עבד חפיז אל חלילי	
"	-	-	-	חג' סלים אחג'וי	
"	-	-	-	עבד אל מג'יד עוסר	
"	-	-	-	זסל מכפר דורא	
ס"ח	2639000	9730			

APPENDIX 8

Mandate Original Tents Map



Appendix 8. Mandate original tents map focusing on ʻAraqib. Source: "Palestine: Distribution of the Nomad Population of the Beersheba Sub District," Israel State Archives, Collections–Maps–0003bay, old number: Map 298/2. The ʻAraqib boundaries have been added by the authors.

APPENDIX 9

Sanad Between the al-ʻUqbi Family and abu-Shliha

On the date stated below and in the presence of the undersigned witnesses, Mr. Mohammad bin Salem al-Qurayshi al-ʻUqbi purchased with his own money from the seller, Mohammad bin Salamih al-Mgheirbi of the Alamat-Tayaha, the land plot that is located at al-ʻAraqib and that is bounded from the west by the land of Qasim bin Musa bin Qasim abu Shalha, from the south by the buyer's land and the land of Salem al-Qurayshi al-ʻUqbi, from the east by the land of Abdullah bin Sbeih al-ʻUqbi and the land of Salamih al-Qurayshi al-ʻUqbi, and from the north by the land of the mentioned buyer. The land size is 100 Gazan *ma'anah*, according to the mentioned boundaries, and it is free of any other right and is bought with the sum of 214 French lira only, handed from the buyer's hand to the seller's hand. The seller is selling his land out of free choice and is aware of the meaning of his sale and is transferring all the rights to the buyer. From this date on, this land becomes the property of the buyer Mohammad bin Salem al-Qurayshi al-ʻUqbi, and he is free to undertake any actions regarding his property, and he is authorized to begin the issuance of a *tapu* registration certificate from the land registry under his name. The seller's cousin will guarantee the implementation of this contract and its conditions.

Signed and issued in the presence of the witnesses on the 16th of Ramadhan 1331 Hijri (August 19, 1913)

[Signatures of parties, the guarantor, and witnesses]

Appendix 9. *Sanad* (purchase document) for land sold to the al-Uqbi family by abu-Shliha, 1911. Source: Al-Uqbi Family Archives.

APPENDIX 10

Sanad Between Muhammad al-Mugharbi and al-'Uqbi

500 hundred French francs only
On the date
The witnesses have signed

Muhammad Iben Haj 'AndAllah, the Ottoman Muslim who resides in Saja'iya neighborhood of Gaza, purchased with his money from the seller, the late Musa ibn Salem, son of the late Qassem abu-Shliha, the Ottoman Muslim from the Alamat Tayaha in the Beersheba District, from the owners of the desert and its inhabitants. The above-mentioned Musa agreed to final sale when he was healthy and in full awareness with no applied pressure when he knew and understood the meaning of the sale of his own property that he received as legitimate [*sheri'i*] inheritance from his father, Salem. The land is near the sown land in 'Araqib and is called 'Al-taeb in a size of eight and a half *habel* according to the measurement of the Alamat. This is the land whose boundaries are the main track (Al-thani) and Nassar abu-Hamud, in the east the land of Abid abu-Maqrab that previously belonged to abu-Janub, and from the north the land of Haj Hassin al-Butatlah and the land of al-Salama ibn Qassem, and on the west the land of 'Ali al-Mugharbi, and it ends near the land of Salameh ibn Qassem.

[Signatures of six sheikhs and notables]

Appendix 10. *Sanad* (purchase document) for land sold to Muhammad Ben-Salem al-Mugharbi by Muhammad Salameh al-ʿUqbi, 1911. Source: Al-ʿUqbi Family Archives.

APPENDIX 11

Sanad Between Abu-Mudeighim and the al-ʻUqbi Tribe

350 Palestinian jiniya
Total of 350 Palestinian jiniya

On this date and in front of witnesses Sliman ben Salem Abu-Mudeighim and his brother Hussein, who own two-thirds, and Sliman ben Rashud and his nephew Sliman ben Ibrahim, called al-Qseir Abu-Mudeighim, who own one-third in their own money and for themselves without other monies from the sellers, [purchased land from] every one of the following: Salem and his brother Frih, sons of Sliman ben Sabih al-ʻUqbi and their niece Turfa bint Salman ben Sbeih al-ʻUqbi, all from the Tayaha tribe of Bene Uqba, who belong to the District of Sab'a. The above sold the land, being healthy and aware of their action, a property under their ownership and under laws that rule their ownership and usage that they received through *shri'a* inheritance from past generations, and this is the entire piece of agricultural land empty and ready for sowing that lies in the ʻAraqib area from the lands of the above-mentioned al-ʻUqbi tribe. The land area is forty-five *habel* according to the *habel* measurement of the above-mentioned tribe, of which thirty *habel* being two-thirds of the land that are the part of Sliman and his brother Hussein and the remaining third of fifteen *habel* to Sliman ben Arshud and his nephew Sliman ben Ibrahim, who received the land by legitimate inheritance from their forefathers from past generations. [The land's] borders are from the south successors of Salameh ben Berri, and east Ali Abu-Sbeih, and north the successors of Salamah ben Odah al-Huzzail, and west to Haj Ayesh Abu-Mudeighim and west the successors of Slama al-Qureishi land. They [past owners] sell all the rights, including usage of roads and all that is known and related to this final voluntary and binding sale and will evict all rights in full willingness and total renunciation with no scheming and no reversal; everything and all is included in the sum of 350 Palestinian jiniya as a full sum paid to the above-mentioned sellers from the buyers' hands after subtracting the sums previously paid to the successors of the sellers and their agreement to this with no animosity or coercion and according to their declaration and approval and admission that all in the sale meeting were where the agreement was drafted and approved by each one of the sellers; [and] each one of the buyers and the legitimate acceptance of leaving after clear understanding released and declared by each one of the sellers by good will and without fear of law breaking or counterfeit release the land fully and absolutely in front of the public and community and by saying and approval by each one of them the correctness of the legitimate approval, being healthy, honest, and righteous people who are the successors who sell the property received their full sum. As this document and agreement were drafted in a proper manner in the *tabu* office, the sellers approve the sale and the orderly eviction with no delay or with no postponement; the sellers agree that Hassan Salameh Abu Skut and Amasallam ben Salem al-Qawasma, all from the tribe of Alamat al-Tayaha, are the guarantors to this deal with no objectors and no privilege or inciting people, and this according to the custom accepted by the tribes; the guarantors received the permission and guaranteed the making of this deal [and they made a] monetary guarantee for any damage

Appendix 11. *Sanad* (land purchase document) for land sold to the Abu-Mudeighim family (ancestors of current ʻAraqib dwellers) by Sliman ben Sabih al-ʻUqbi and members of the al-ʻUqbi tribe. Source: Al-Uqbi Family Archives.

of loss caused to the buyers and approved the matter and signed and testified the witnesses and wrote their names and signed the agreement as needed.

[After the text, thirty-one income stamps in denominations of 20 mils and 2 mils were attached, bearing the dates of 9 Muhram 1348 (Hijri) and August 16, 1929.]

Turfa bint Salman ben Sliman ben Sbeih al-ʻUqbi
Frih ben Salman ben Sbeih al-ʻUqbi
Salem ben Sliman ben Sbeih al-ʻUqbi
Mussallam ben Salem al-Qawasba
Hassan ben Salameh Abu Skut

Sliman ben Salama ben Berri—identifying witness
Salim ben Kast—identifying witness
Shriki ben Jaber—identifying witness

APPENDIX 12

Sanad Between Haj Muhammad and His Son Suliman

On the date December 8, 1942, appeared Mr. al-Haj Muhammad al-'Uqbi from the Bane 'Uqba tribe, being the seller who will be called hereafter Side A, and Suliman Ben al-Haj Muhammad al-'Uqbi from the above-mentioned tribe, who will be called hereafter Side B, being the buyer.

1. The sides reached agreement according to the conditions and obligations mentioned below.
2. Side A sold the entire two plots of land that exist in the area known as al-'Araqib, and the borders of the first plot, called A-Zankulia, and its borders are the wide track from the south; in the east, successors of Abdallah ben Isbah al-Uqbi. From the north the great wadi, and at the end the successors of Abed Allah ben Sbaiah mentioned above. From the west, the land of al-Haj Ahmad al-'Uqbi and a creek of water and near it, on the lower side—these are the borders and its size is approximately 100 *ma'ana* [10 hectares]. The second plot is called Maresa al-Sada, and its borders are, from the south, the land of Hussein ben Salam al-Buaslah. From the east, the land of al-Haj Muhammad al-'Uqbi. From the north, the wide track. From the west, the land of Salem ben al-Haj Muhammad al-'Uqbi. In its entirely its size is approximately 60 *ma'ana*.
   In total, the land area of both plots is approximately one hundred and sixty *ma'ana* [16 hectares].
3. Side A declares that he sold and gave the entire two plots according to the above-mentioned boundaries for the sum of 600 Palestinian pounds . . . the value of the entire above-mentioned land that was sold. In addition, Side A pledges to evict the land and leave it and give it to Side B for the above sum he declared to have received from Side B.
4. Side A is hereby obliged to appear in the *tabu* and the land management offices for the approval and proof that the lands were under the ownership of Side B and that he can use it as he pleases.
5. Registration expenses, fees for mapping, drafting, surveying, and other expenses will be carried out by Side B. Side A shall prepare all the documents and papers needed for any approach and any need to sign and approve and receive permission and for proof of ownership and receiving the payment for inspection of any institution requiring such documents from Side B.
6. Side A is hereby obliged to disprove all arguments of anybody having any claims for these lands or standing against Side B to whom the land was sold. In addition Side A declares that it will not be late or delay the above-mentioned eviction conditions at any time Side B will present to him.
7. Side A hereby declares that, since signing this agreement, all the above-mentioned lands turned to the ownership of Side B, who has the right to use them as he pleases. In addition he declares that he is allowed to name this land and build on it any stone building, afforestation or plantation, digging of wells, including all that is known as building, as he pleases.

Appendix 12. *Sanad* for the sale of two plots of land, ʻAraqib 1 and ʻAraqib 2, from Haj Muhammad to his son Suliman, the land claimer. Source: Al-ʻUqbi Family Archives.

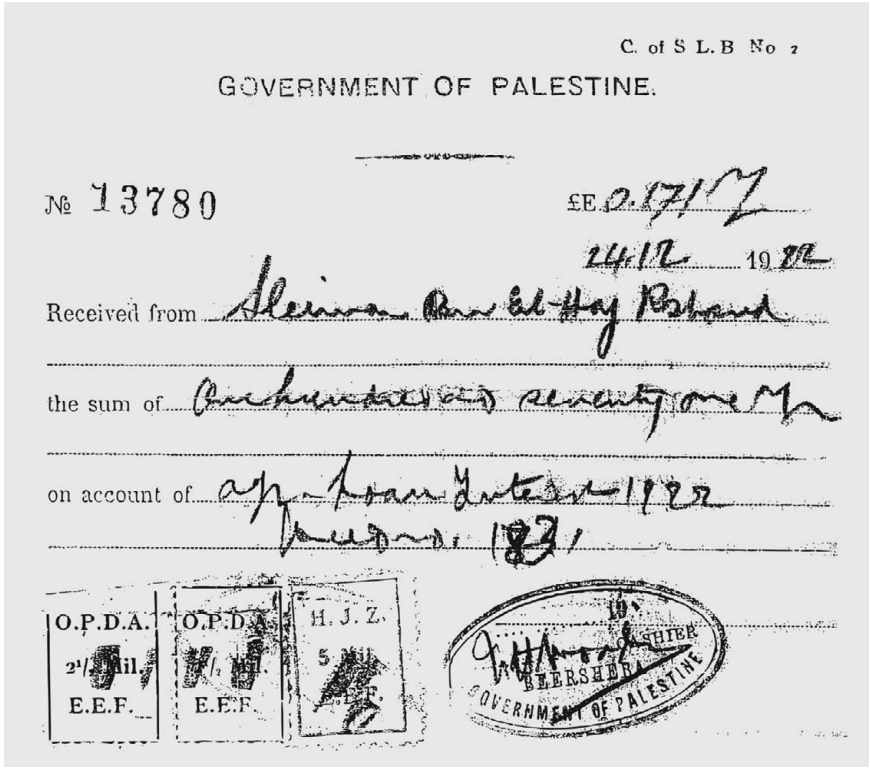
8. Side A is hereby committed to give up all rights and evict the land that was sold as mentioned above to Side B, without contravening any of the conditions mentioned above.

[At this point in the document, stamps with a value of 50 mils each, dated December 8, 1942, are attached, and there is the thumb signature of al-Haj Muhammad al-ʻUqbi (Side A).]

Witnesses
Salman Ali Abu-Mansour
Ahmad al-ʻUqbi
Musa Salman Angiz
Hassan Khalili al-Jabur
Suliman Muhammad al-Asseibi
Salama al-ʻUqbi
Salem al-Haj Muhammad al-ʻUqbi
Hassan Musa al-Buasla
Ahmad Ali al-Juabrah

APPENDIX 13

Receipt of Tax Paid to British Authorities



C. of S L.B No 2

GOVERNMENT OF PALESTINE.

№ 13780 £E. 0.171/7

24/12 1922

Received from Sheikh Rashid Hajj Ibrahim

the sum of One hundred and seventy one Mils

on account of Agricultural Tax 1922

Jaffa 1923

O.P.D.A. 2½ Mil. E.E.F.

O.P.D.A. ½ Mil. E.E.F.

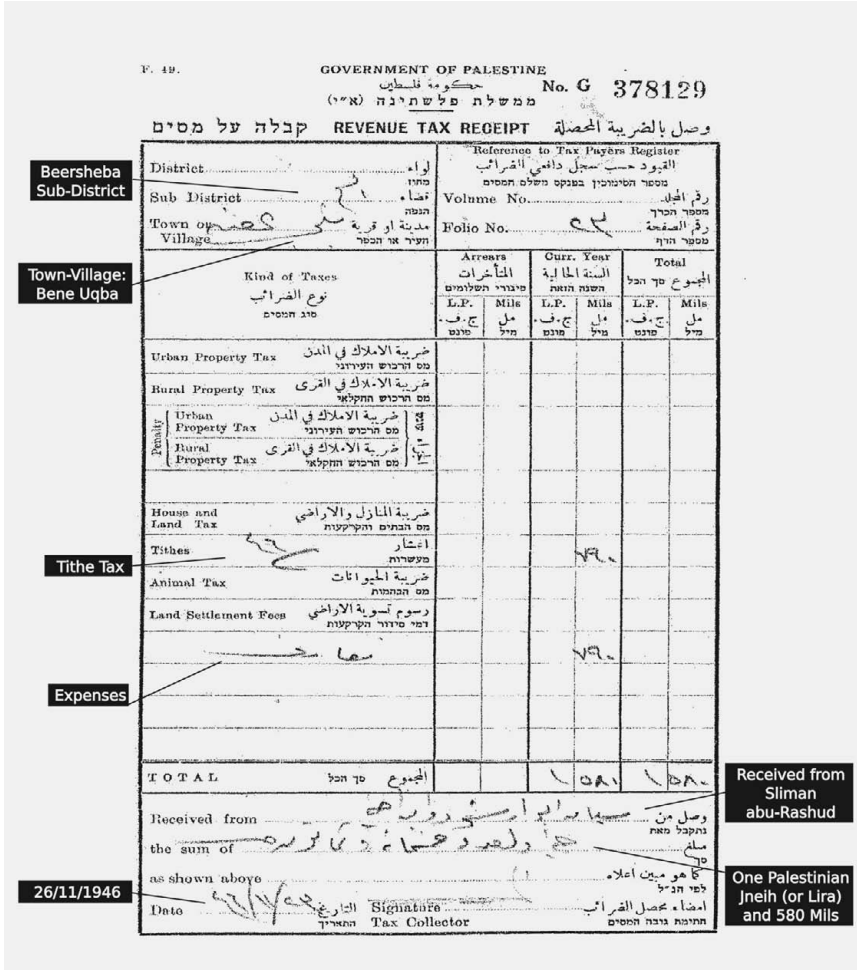
H. J. Z. 5 E.E.F.

DISTRICT COMMISSIONER BEERSHEBA GOVERNMENT OF PALESTINE

Appendix 13. Receipt for crop tax paid to the British authorities, 1922. Source: Al-'Uqbi Family Archives.

APPENDIX 14

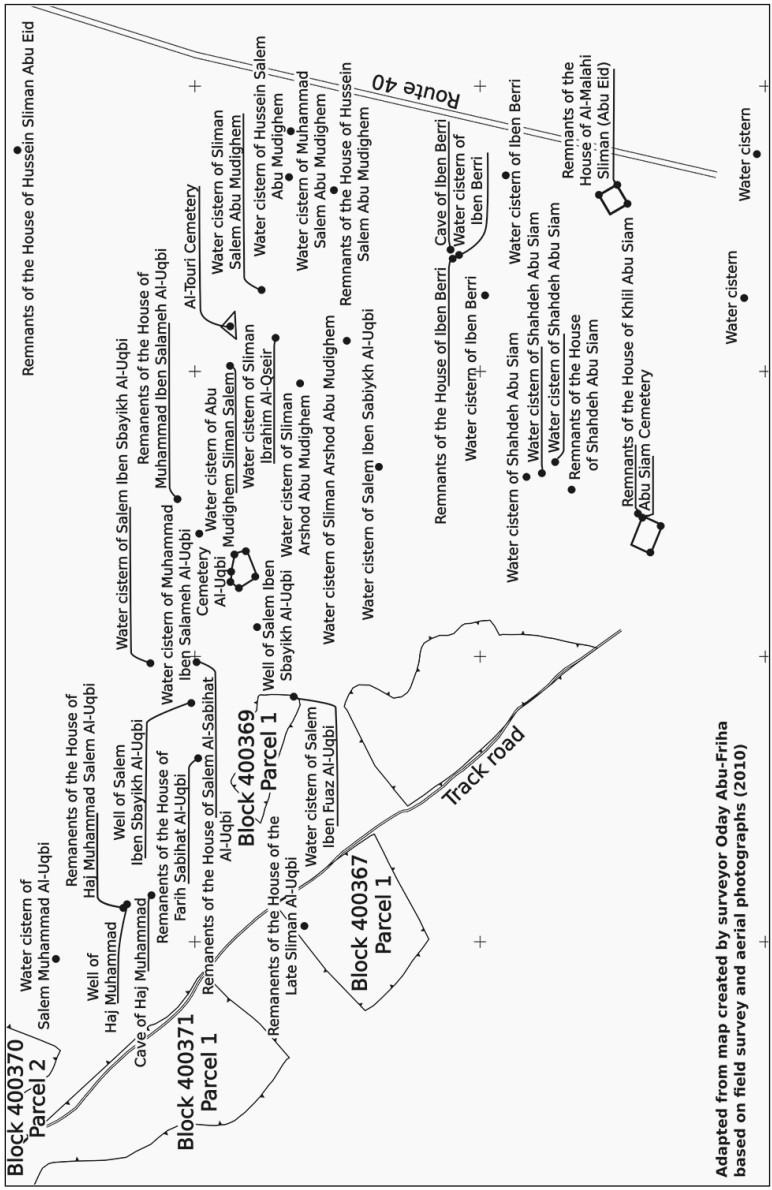
Receipt of Tax Paid to British Authorities



Appendix 14. Receipt for crop tax paid to the British authorities. Source: Al-'Uqbi Family Archives.

APPENDIX 15

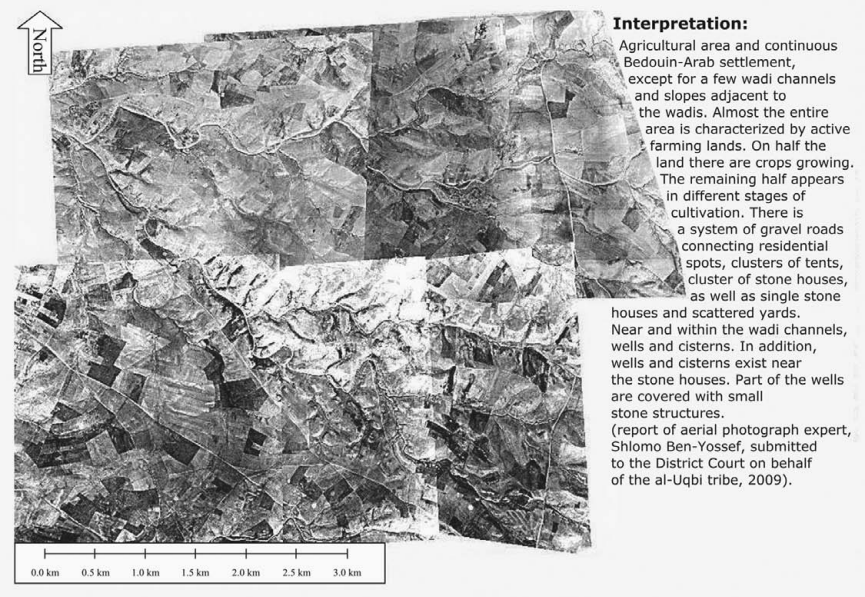
Settlement Remnants in ʿAraqib



Appendix 15. Locations of settlement remnant sites near claimed land in the ʿAraqib area, 2011. Source: Odeh Abu-Friha, independent surveyor, Beersheba, submitted to the al-ʿUqbi land claim, CC (BS) 7161/16.

APPENDIX 16

Aerial Photograph of ʻAraqib



Appendix 16. Aerial photograph of ʻAraqib, 1945. Source: Israel Mapping Center.

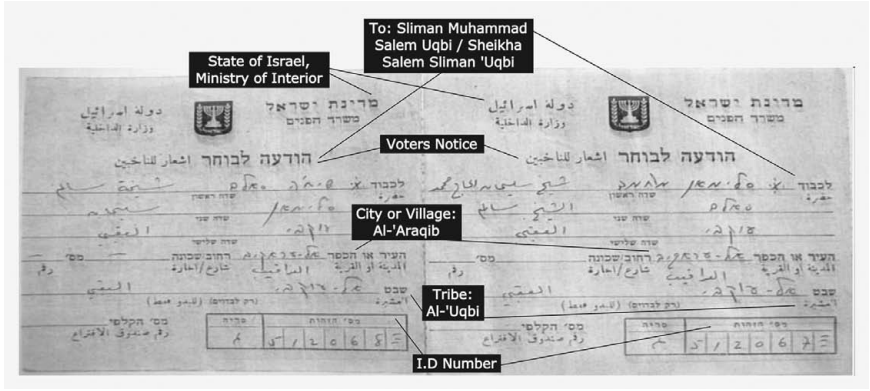
APPENDIX 17

Tax Receipt for ʿAraqib Crops

Appendix 17. Receipt for a tax payment for ʿAraqib crops, 1950. Source: Al-ʿUqbi Family Archives.

APPENDIX 18

Elections Notice



Appendix 18. Elections notice for the al-'Uqbi tribe in the locality of 'Araqib, 1949. Source: Al-'Uqbi Family Archives.

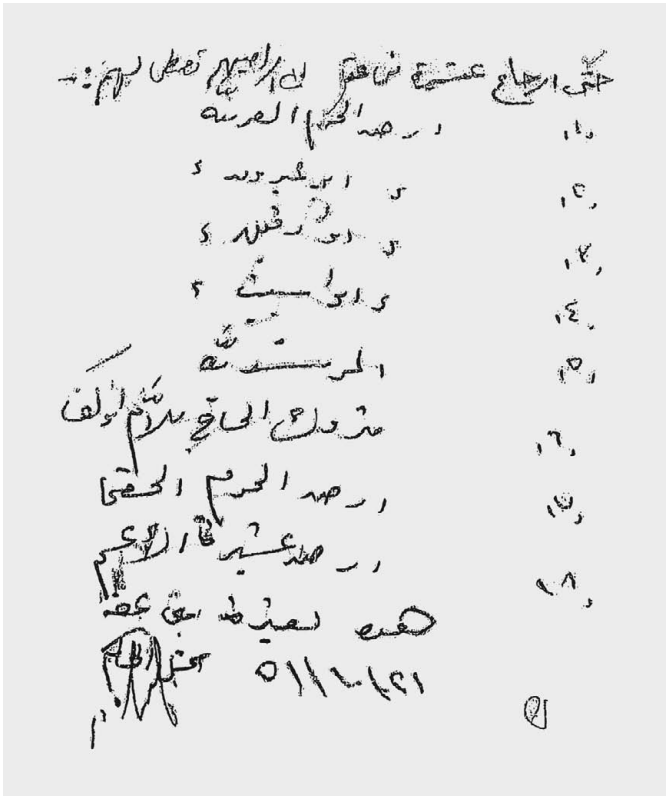
APPENDIX 19

Note from Military Governor

Until such time that the people of the al-'Uqbi tribe return to their land, they will receive:

– The land of al Khurum—west
– " Abu 'Abdoun
– " Abu Raqai'q
– " Abu Sbeit
– " al-Majadiyya
– " abandoned estate of Haj Salam Abu-Kaf
– " Khurum al-Jakma
– " al-'Assem

All these to the people of the Bene Uqba Tribe
October 21, 1951
Representative of the governor
A. Shemesh



Appendix 19. Note from the military governor on the temporary allocation of lands for the al-'Uqbi tribe near Hura. Source: Al-'Uqbi Family Archives.

APPENDIX 20

Letter from Sheikhs

His Excellency the Military Governor of the Negev,
via the Representative of the Military Governor to the Eastern Area
From:
1. Sheikh Suliman al-'Uqbi, sheikh Bani Uqba tribe
2. Sheikh Amir al-Talalqa, sheikh of the Talalqa tribe
3. Sheikh Muhammad al-Finish

We, the sheikhs of the above listed tribes, present before you that the government compelled us to move from the northern area to the eastern area. On the one hand, we moved as we were forced to, and on the other, we trusted the promises of your government, as the order was carried out by all tribes who moved from the northern area to the eastern area. You promised us orally to return to our lands and villages. All moved except for Sheikh Suliman al-Huzzail and 600 of his tribe. And you know that the tribes that remained in the northern area remained without doubt on their own lands. The tribe of Sheikh Salman, about 2,000 people, remained on their lands. Hence, what is the reason for violating our rights and the rights of our tribes in contrast with the rest of the tribes? Why should they live on land that is not theirs, when the original owners plowed and improved these lands and lost money? As other tribes remained in the northern area, we hereby write our request, and it is important to stress that our rights should be preserved like the rights of other tribes. It is clear to you that, like all citizens under your government, we ask for equal rights with our fellow citizens: Why not treat us equally with our tribal fellows in the northern area? We notify you that we feel that our rights are violated and that we do not feel equal with other tribes. We feel deeply hurt in our souls for this discrimination and ask to be treated equally. We inform you that we refused to plow the land in the eastern region and not cultivate even a single *dunum*, preferring to lose our main source of income only because we are not treated equally to other tribes.

Finally, we ask for your government's mercy to allow our return to our place, and to link our destiny with the other tribes, and if this is impossible, we ask that you notify us with a written statement that asks us to leave Israel. And if this is impossible, we inform you that we will leave the eastern area to the north as soon as possible based on your oral promises to us. The decision is in your hands to do as you wish.

We are hoping that you accept our request and guarantee our equality

With appreciation

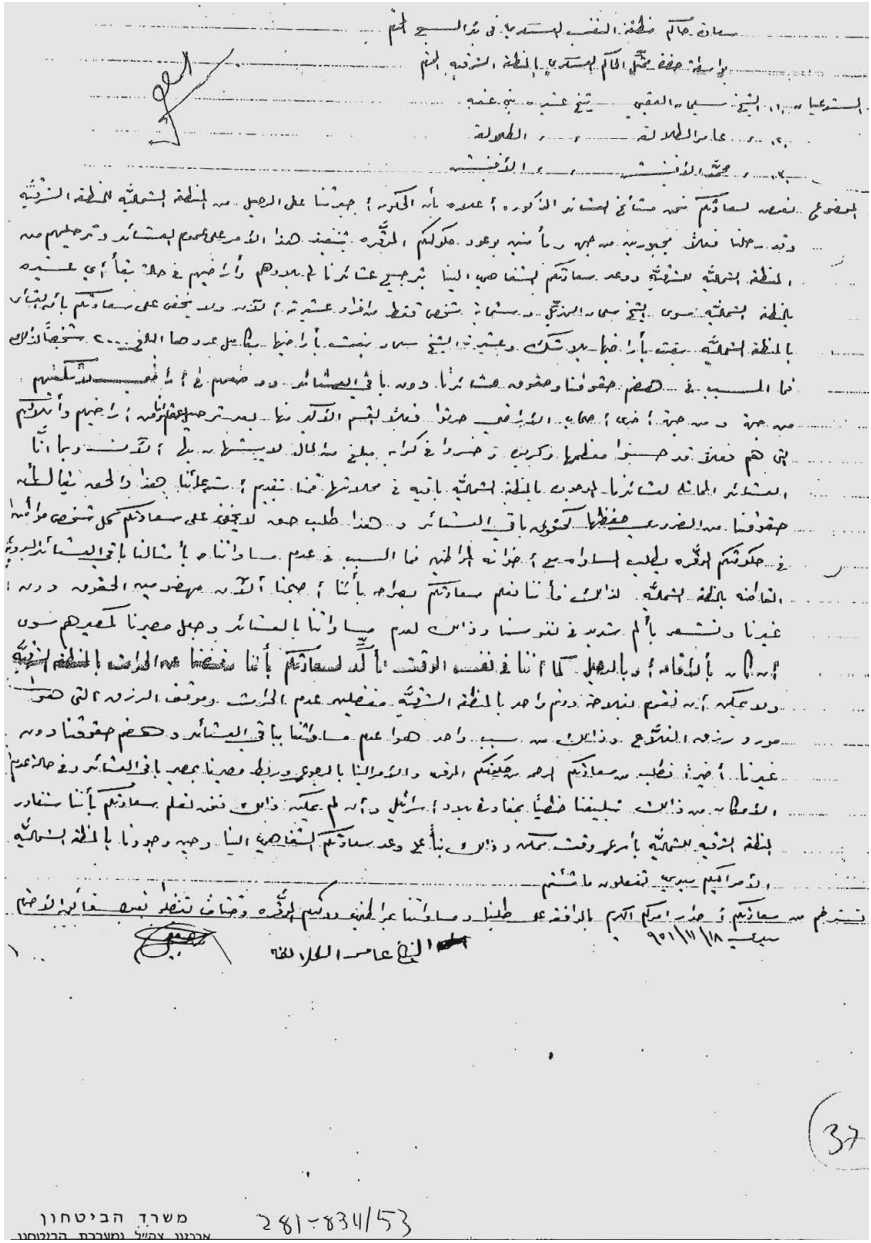
Signed	Signed
Sheikh Suliman al-'Uqbi	Sheikh Omar al-Talalqa

November 18, 1951

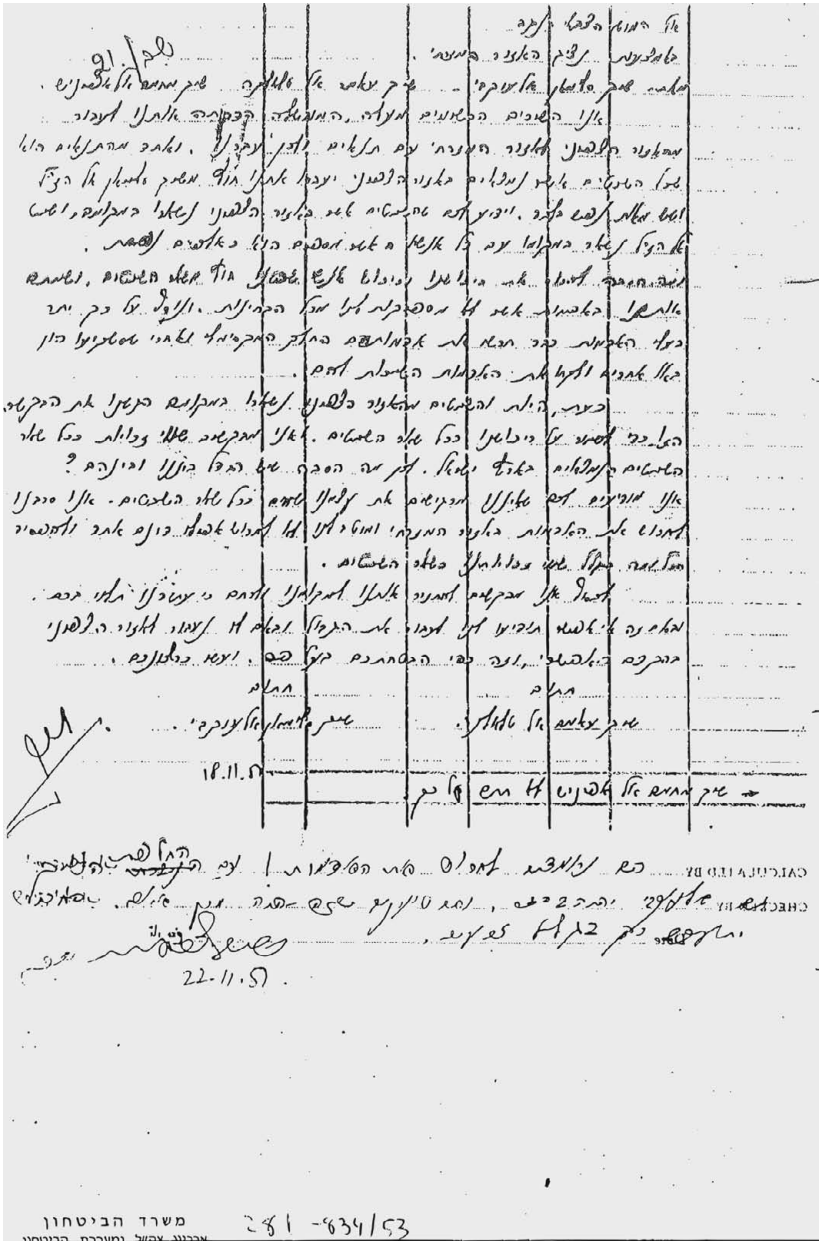
[Comments by the military government clerk]
Muhamad al-Finish did not sign it.

They are ready to graze their lands. With the replacement of Sheik al-'Uqbi it will be fine. They claim it was kind of a threat [unreadable] only because of the seeds.

[Signature]
November 22, 1951



Appendix 20. Letter from sheikhs to the military governor requesting a return to their lands, 1951. Source: Israeli Defense Forces Archive, 281-834/53.



APPENDIX 21

Letter from Military Governor Hanegbi

Military Governor in the Negev
November 14, 1951
To: AGA"M/Operations
Subject: Transfer of Bedouins in the Negev

The following is a review of the reasons that determined the transfer of the Bedouins during its first stages.

1. *The General Background to the Transfer for Security*
   A. The dwelling of the Bedouins in the northern region (Shoval-Mishmar Hanegev) is a decisive factor in the planning of the regional defense of the settlements in the region in regard to the possibility of a renewed war with the neighboring countries.
   B. Their parking in this region, which serves as a major route to the infiltration from the [Gaza] Strip to the Hebron area, serves as an assisting factor to the infiltration and hampers the security forces in their fight against it.
   C. Their parking near the Fallujah–Beersheba road, which is a major traffic route to our forces between the north and Beersheba, is an undesired thing—and might endanger the traffic and worsen the security situation.
   D. Nevertheless, the presence of the Bedouins in the region serves as a preliminary obstacle to the penetration of infiltrators from the east to our settlements in this line. The fact [is] that our settlements in the region almost do not suffer from mischiefs that are very common in other areas. Yet in the considerations on the transfer, decided mostly the three first major sections.

2. *Economic property*
   A. The Bedouins control in the region mentioned an area of approximately 100,000 *dunum*s of arable land, a fact that is a hampering factor to the planning of a more dense settlement in the region, and prevents the development opportunities.
   B. In the eastern region (the region of Nevatim–Kornov–Tel-Melih) there are still large arable uncultivated areas that can absorb the Bedouins from the northern region. And even though the eastern region is more arid, from an objective point of view there is in it a rather large Bedouin population, and undoubtedly, with the help of the governmental authorities that will help with the land, grazing, provision of grains and water for livelihood, it is possible to absorb them and allow them a decent living.
   C. The concentration of all the Bedouin population in the eastern and southern region brings them near the state borders and is fraught with danger of Jordanian forces' influence on them. With the fact of supply lines and Jordanian propaganda on Israel's injury of their rights, this makes the Bedouins a suspect element in relation to loyalty to the state. Additionally, the Bedouins raise the problem of their future [unreadable] in light of the fact of the previous transfer from the west to the north—and [then?] to the east, they are not sure that this is their last transfer and they demand a com-

Appendix 21. Letter from the military governor Michael Hanegbi explaining the transfer of the al-'Uqbi tribe. Source: Israeli Defense Forces and Defense Establishment Archives, 54-848/1959.

pelling promise from the state that it will take care of their future and secure their position as citizens of the state.

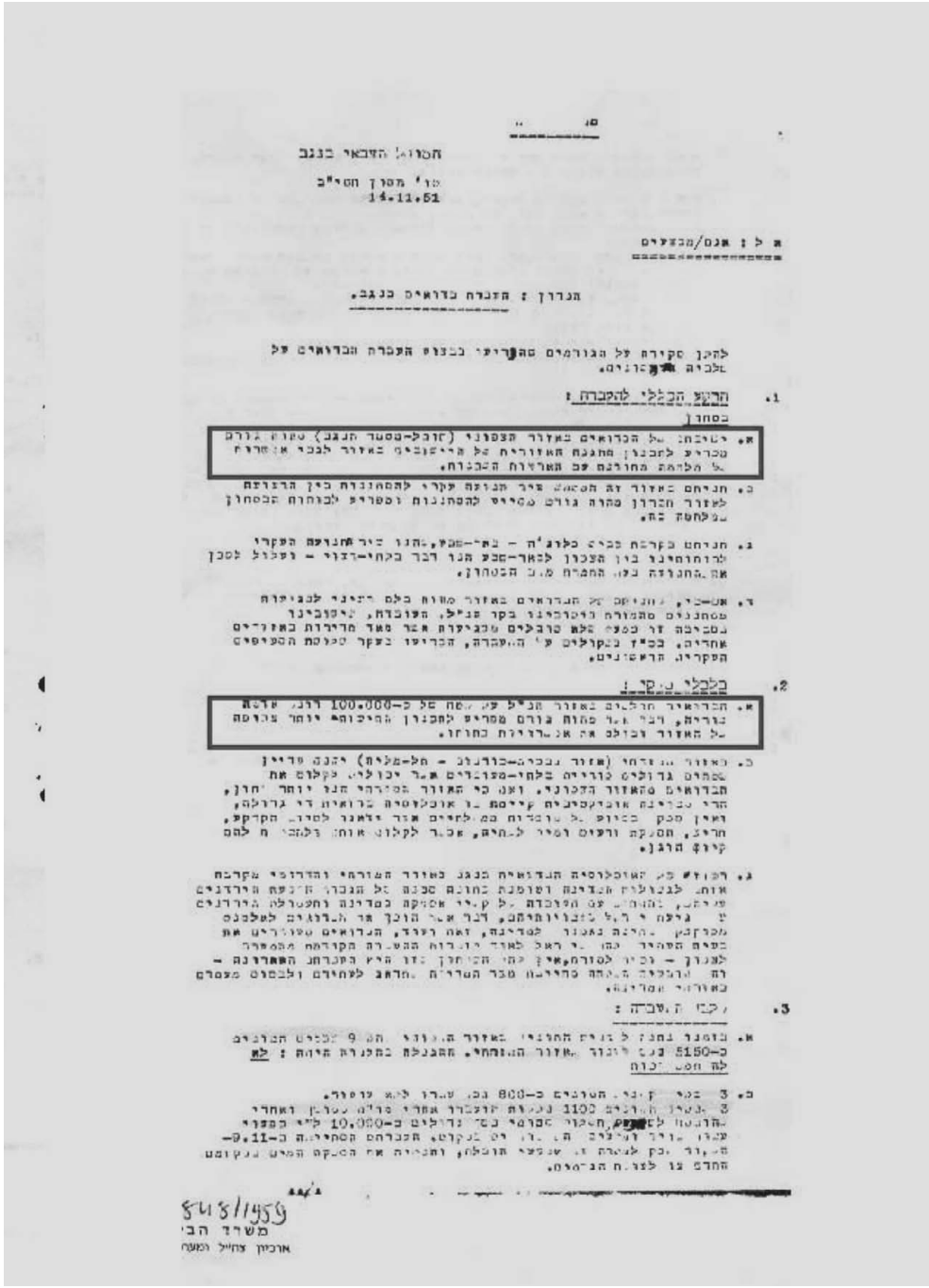
3. *Extent of transfer*
   A. At the time we gave [unclear word] the Bedouins parking in the northern area, there were nine tribes, which included approximately 5,150 people to move to the eastern area. The limitation was not to use force.
   B. Three tribes [unreadable], which include approximately 800 people, moved without objection. Three tribes, which include 1,100 souls, moved after [prolonged?] negotiation and after it was promised [unreadable] the payment of large sums of money, approximately 10,000 Israeli lira, as compensation [unreadable] in the place. Their transfer ended on November 9. The command provided for this purpose transportation means and secured the provision of water in their new location until the rainy season. The Ministry of Agriculture is plowing in the new lands and promised grant distribution. The army promised an addition of weapons for self-defense.
   C. The remainder of the tribes refuse to relocate, on the reason that the new area (the Tel Arad region) lacks water points and there is no sufficient security. They request to leave them in their place to the coming agricultural season, and promise to move after the harvest.
      Notwithstanding the restriction against the use of force, an attempt was made, with the authorization of the [southern] command, to compel them to move—units of the [military] government dismantled several tents and loaded them on [cars/taxis]—the owners of the tents [unreadable] and did not join [unreadable].
      The thing stopped, and in a meeting with the general [commanding the southern] Command, it was agreed to leave them until after the harvest and [unreadable] end of harvest season until August 1952.

   [Next is a paragraph that is unreadable but mentions the location of Suliman al-Huzayil and "1,700 souls."]

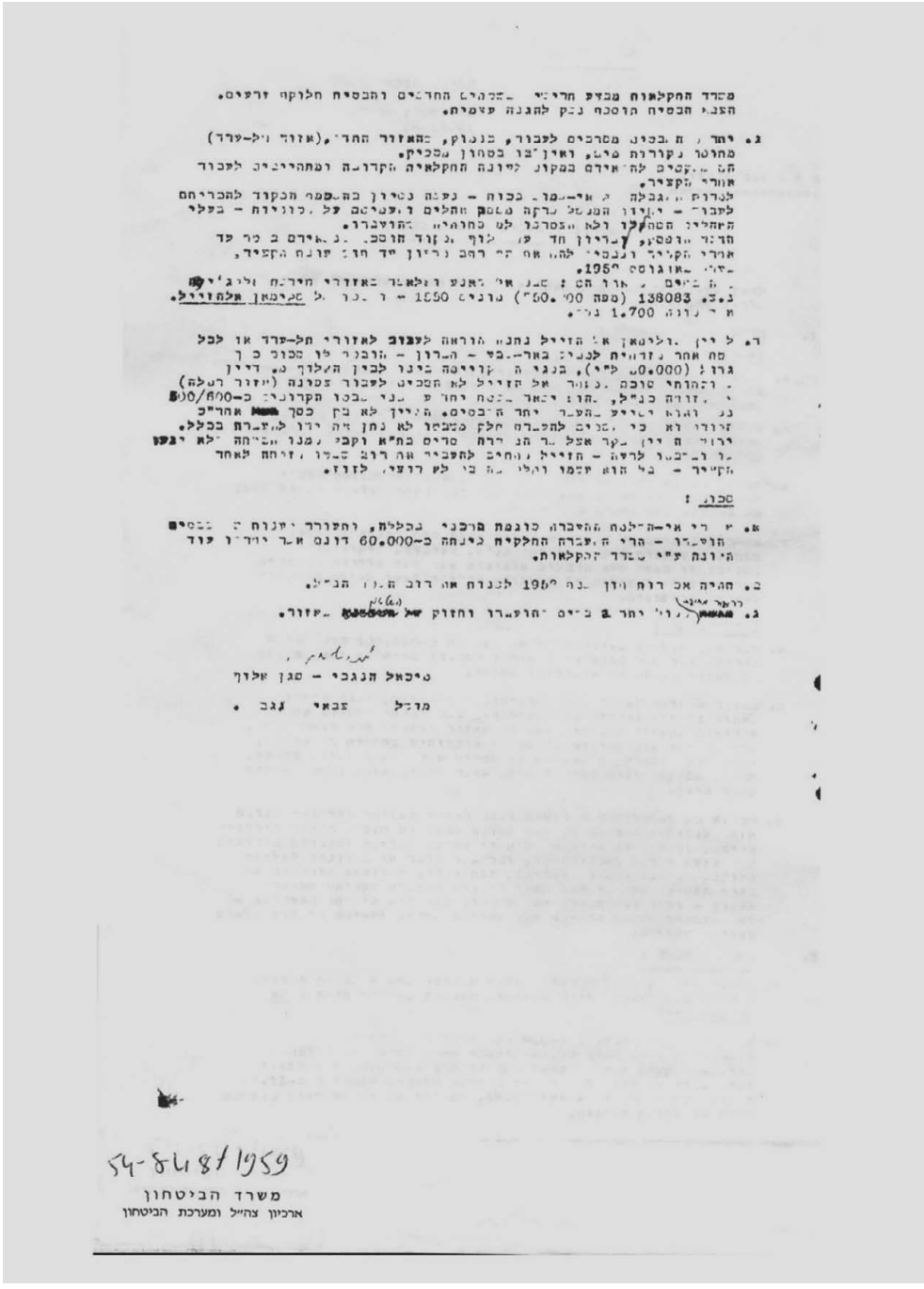
   D. [unreadable] Suliman al-Huzayil was given an order to move to the Tel-Arad region or to any other area east of the Beersheba-Hebron road. He was promised a large sum of money, [?]0,000 Israeli lira. A meeting was held between him and General M[oshe] Dayan, and in my presence it was concluded that [because?] al-Huzayil did not agree to move to the north (Ramle region) [unreadable] he will remain in the area with his close tribe members, approximately 500–600 souls, and he will assist in transferring the rest of the tribes. [Rest of the paragraph is unreadable.]

Conclusion
   A. Although the nonconclusion of the transfer impairs the plan [?] in totality, and will cause problems [?] with the tribes that were transferred, the partial transfer vacated approximately 60,000 *dunum*s. [Rest of the paragraph is unreadable.]
   B. There will be a possibility at the end of 1952 to vacate most of the above area.
   C. The transfer necessitates [unreadable] and the strengthening of the rule in the area.

Michael Hanegbi, Lt. Col.
Military Governor of the Negev



Appendix 21. Letter from the military governor Michael Hanegbi explaining the transfer of the al-'Uqbi tribe. Source: Israeli Defense Forces and Defense Establishment Archives, 54-848/1959.



54-8487/1959

משרד הביטחון
ארכיון צה"ל ומערכת הביטחון

APPENDIX 22

"Committee of Three" Minutes and Decision

State of Israel
Ministry of Justice
Secret

In response please refer to:
Department of Land Registration and Settlement LRK/HS/5/(20)
Main Office: Jerusalem
Phone: 4206, 4205, P.O. Box 189
A Heshvan, Taf Shin Yod Gimel

October 20, 1952
To: Minister of Justice
From: Yossef Weitz
Benjamin Fishman
Y. Palmon
Core committee for the question of ownership of Bedouin Negev lands

On August 3, 1952, you asked to convene representatives of interested parties to clarify the question of ownership of Bedouin lands in the Negev, in relation to interpellation 348 that Member of the Knesset Emil Habibi asked in this issue.

In consultation with the Adviser on Arab Affairs in the Prime Minister's Office, we determined that, taking into account the special character of the above question, it would be best to limit as much as possible the number of persons who would deal with elucidating this question, and we decided to add to us only Mr. Yossef Weitz, from the directorship of the [Jewish] National Fund for an urgent discussion on the question raised.

We convened on August 18, 1952, for a meeting in which participated the above mentioned members.

The problem we had to clarify was:

With the establishment of the state, a meaningful part of the Negev Bedouins were present within the borders of the State of Israel, while another part left its dwelling place and moved to areas outside the State of Israel.

We understand that for security needs, the Bedouin tribes that remained within Israeli borders were transferred from their regular dwelling place to a fixed area, where they are situated until today. This area does not belong to them, and they do not claim, and cannot claim, any property rights in relation to it.

Therefore the problem before us is in regard to the claims of the Bedouins who are legally present in Israel, to areas in the Negev lands, which are outside their current dwelling place.

The fact is known that, even at the time of the Turkish rule, the Bedouin tribes avoided, and in many cases also resisted, registering their land in the governmental land registries, and their argument was that the land registration will lead sooner or later to their drafting into military service, a thing they vehemently opposed.

With the conquest of the country by the British, it was found—except in isolated cases—that all Bedouin lands were unregistered in the land registry.

Nevertheless, the Bedouins saw all the lands cultivated by them as land in their ownership, even though they did not have land registration certificates. The authorities, both the Turkish and the British, recognized this fact.

Today, we should of course exclude from our discussion all the areas that were cultivated by the Bedouins that left the borders of Israel, since they are considered absentees according to the Absentee Property Act of 1950.

Their property, as "absentee property," is vested in the Custodian of Absentee Property, and he has control over it according to the stipulations of the above-mentioned statute.

Our discussion is limited only to those areas *that were cultivated by the Bedouins who are legally present in Israel*, and in relation to this, two questions stand before us:

(A) Did the extensive cultivation of the Negev Land that the Bedouins cultivated, throughout the limitation period, bestow upon them a legal right to ownership?

(B) Do the Bedouins have the needed evidence to prove cultivation of the above-mentioned lands?

As to the first question, the fact is known that during the Mandate period, very considerable areas were registered in the Bedouins' name, on the basis of evidence that these lands were cultivated by them for the extent of the limitation period, and an important part of these lands was transferred, after their registration, to the [Jewish] National Fund, to other Jewish corporations, and to private Jews. So in this issue there are hundreds of precedents, and we are of the opinion that the government of Israel cannot and should not ignore them.

As to the second question, we think that, in addition to the registration certificates that were given during the Mandate period to the Bedouin tribes, which would certainly be submitted as proof of registration of part of their lands, it is quite possible that the Bedouins have evidence of possession also to many other areas, such as receipts for payment of Warko and Tithe, that would serve them as proof of cultivation of other large areas.

As a result of our discussion, we reached the following conclusion:

(A) We are of the opinion that one should not avoid recognizing the rights of the Bedouins to ownership of those areas that they could prove were under their cultivation for a long period (limitation period).

(B) That if the government is of the opinion that for security reasons the Bedouins should be kept attached to those lands that were allocated to them by the military authorities, one should avoid, for the time being, from opening the Land Registration Office in Beersheba.

(C) The government should be urged to enact as soon as possible the Land Acquisition (Validation of Acts and Compensation) Law (1952), so that it would enable transferring to the Development Authority those areas that were ever in the cultivation of the Bedouins, and that there would be a possibility to compensate those Bedouins who could prove ownership of those areas, either by transferring those lands that were allocated for the Bedouins in the Negev by the military authorities, or by monetary compensation.

Y. Weitz Y. Palmon B. Fishman

BP/TV

5742/10

מדינת ישראל

משרד המשפטים
אגף
מחלקת רישום והסדר הקרקעות
הלשכה הראשית

סודי

במשובה נא לחזכיר:
לרק/חס/5(20)-

ירושלים,
שלמון, 4205, 4206 ת. ד. 189
א' חשון, תשי"ג
20 אוקטובר, 1952

אל: שר המשפטים.

מאת: יוסף ויץ
בנימין פישמן
י. פלמון
} ועדה מצומצמת לענין ברור שאלת בעלות קרקעות הבדואים בנגב.

ביום 3 לאוגוסט, 1952, בקשת לכנס נציגים של גורמים מעונינים לברור שאלת בעלות קרקעות הבדואים בנגב, בקשר עם השאילתה מספר 348 אשר הגיש חבר הכנסת אמיל חביבי בענין זה.

תוך התיעצות עם היועץ לענייני הערבים במשרד ראש הממשלה, קבענו שבהתחשב עם אופיה המיוחד של השאלה הנדונה, מוסב לצמצם עד כמה שאפשר את מספר האנשים שיעסקו בברור שאלה זו והחלטנו לצרף אלינו רק את מר יוסף ויץ, מהנהלת הקרן הקיימת לדיון דחוף בשאלה שהתעוררה.

נתכנסנו ביום 18 לאוגוסט, 1952, לישיבה בה השתתפו חברי הועדה הנזכרים לעיל.

הבעיה שעמדה לפנינו לברור, היתה :-

עם קום המדינה, נמצא חלק נכר מבדואי הנגב בגבולות מדינת ישראל, בעוד שחלק אחר עזב את מקום מגוריו ועבר לשטחים שמחוץ למדינת ישראל.

אנו מבינים שלשם צרכי בטחון, העברו שבטי הבדואים שנשארו בגבולות ישראל, ממקום מגורם הרגיל, לשטח קבוע שבו הם נמצאים עד היום הזה. שטח זה אינו שייך להם ואין הם תובעים, ואינם יכולים לתבע, כל זכויות בעלות ביחס אליו.

הבעיה שלפנינו היא לפיכך בנוגע לתביעתם של הבדואים הנמצאים כחוק בישראל, לשטחים באדמות הנגב, שהם מחזן למקום מגורם כיום.

ידועה העובדה שעוד בזמן שלטון התורכים נמנעו שבטי הבדואים, ובמקרים רבים גם התנגדו, לרשום קרקעותיהם בספרי האחוזה הממשלתיים, ונמוקם היה שרשום קרקעות יביא במוקדם או במאוחר, לכך שהם יתפשו לשרות צבאי, דבר שלו התנגדו הבדואים בתוקף.

Appendix 22. Original minutes and decision of the "committee of three" to recognize Bedouin landownership, 1951. Source: "Hitkatvut Be'I'nyanei Misrad Rishum Karkaot Be'Beer-Sheva, Dokh Ha'Va'ada Ha'Metsumtsemet Le'Berur She'elat Ba'alut Karka'ot Ha'Beduim Ba'Negev," Israel State Archives, ISA–justice–justice–000rb9h, old number: /10-ל 5742.

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עם כבוש הארץ על ידי הבריטים, נמצאו - מלבד אמקרים בודדים - כל אדמות הבדואים בלתי רשומות בספרי האחוזה.

אף על פי כן, ראו הבדואים את כל השטחים המעובדים על ידם כשטחים שבבעלותם, למרות שלא היו בידם תעודות רשום, השלטונות, הן התורכים והן הבריטים, הכירו בעובדה זו.

כיום יש כמובן להוציא מדיוננו את כל השטחים שהיו מעובדים על ידי הבדואים שעזבו את גבולות ישראל, שהם בגדר נפקדים לפי חוק נכסי נפקדים תש"י - 1950.

נכסיהם "כנכסי נפקדים" מוקנים לאפוטרופוס לנכסי נפקדים, ולו השליטה עליהם לפי הוראות החוק הנ"ל.

דיוננו מצטמצם רק לאותם השטחים שעבדו על ידי הבדואים הנמצאים כחוק בישראל, ובקשר לכך עמדו בפנינו שתי שאלות :-

(א) האם העבוד האקסטנסיבי שעבדו הבדואים את אדמות הנגב, במשך תקופת התישנות, יכולה להקנות להם זכות חוקית לבעלות.

(ב) האם יש בידי הבדואים ההוכחות הדרושות להוכחת עבוד האדמות הנדונות.

אשר לשאלה הראשונה, הרי ידועה העובדה שבתקופת שלטון המנדט, גרשמו שטחים נכרים מאד בשטח של הבדואים, על יסוד הוכחות ששטחים אלה היו נעבדים על ידם במשך תקופת התישנות, וחלק חשוב של אדמות אלה העברו, לאחר רשומן, לקרן קימת, להברות יהודיות אחרות, וכן ליהודים פרטיים. כך שבענין זה ישנם מאות תקדימים, ואנו סבורים שממשלת ישראל לא תוכל, ואינה צריכה, להתעלם מהם.

ואשר לשאלה השניה : אנו סבורים, שמלבד תעודות הרשום שנתנו בתקופת המנדט לשבטי הבדואים, שיוגשו בודאי כהוכחות רשום חלק מאדמותיהם, הרי לא מן הנמנע שיש בידי הבדואים הוכחות חזקה גם לשטחים רבים אחרים, כגון : קבלות תשלום ורקו ועושר, שישמשו כהוכחת עבוד שטחים נרחבים יותר אדמות.

כתוצאה מדיוננו, באנו לידי הסכום הבא :-

(א) אנו סבורים שאין להמנע מלהכיר בזכויות הבדואים לבעלות אותם השטחים שיוכיחו שהיו בעבודם, תקופה ארוכה (תקופת התישנות).

-3-

(ב) שאם הממשלה סבורה שמסעמי בטחון יש להחזיק את הבדואים צמודים לאותם השטחים שהוקצו להם על ידי שלטונות הצבא, יש להמנע, לפי שעה, מפתח את פשרד רשום הקרקעות בבאר-שבע.

(ג) יש להאיץ בממשלה להעביר בהקדם האפשרי את חוק רכישת מקרקעים (אשור פעולות ופצויים) תשי"ב-1952, כך שיאפשר להעביר לרשות הפתוח את אותם השטחים שהיו אי פעם בעבודם של הבדואים ושהחא האפשרות לפצות את אותם הבדואים שיוכיחו בעלות לשטחים הנ"ל, בין על ידי העברת אותם המקרקעים שהוקצו למושב הבדואים בנגב על ידי שלטונות הצבא, או על ידי פצויים כספיים.

י. ניר י. פלמון ב. פישמן

בפ/שב

NOTES

INTRODUCTION

1. In Hebrew this operation was called *mivtza' tzuk eitan*, literally "Operation Strong Cliff."

2. As we explain later, in our context the term *unrecognized localities* refers to Bedouin settlements that, according to the official Israeli position, are located on public land and were built without permits. These localities do not appear in official maps or plans.

3. Elisheva Goldberg, "Israel's Bedouin: Caught Between the Iron Dome and Hamas," *The Atlantic*, August 1, 2014, tinyurl.com/kzkr3pp (accessed June 3, 2017).

4. Chaim Levinson, Ido Efrati, Jack Khoury, and Revital Hovel, "Man Killed in Rocket Strike on Negev Bedouin Community," *Haaretz*, July 19, 2014, tinyurl.com/mjvjm6v (accessed June 6, 2017).

5. Levinson et al., "Man Killed."

6. Goldberg, "Israel's Bedouin."

7. H.C.J. 5019/14 *Abu Afash v. GOC, Home Front Command*, Petition for Temporary Injunction (July 16, 2014), par. 7, 11 (Hebrew) (copy with authors), and Defendant's Response (August 17, 2014), par. 17. See also Revital Hovel, "High Court Rejects Petition Seeking Rocket Shelters for Bedouin Villages Now," *Haaretz*, July 21, 2014, tinyurl.com/zrzqa2u (accessed June 6, 2017).

8. On *terra nullius*, see Sections 1.2 and 1.5; on legal geography, see Section 1.1.

9. See Ahmad Amara, "The 'Negev' Redefined," paper presented at the New Directions in Palestinian Studies Workshop, Brown University, March 2014 (copy with authors). For the historical geography of the region, see Chapter 5.

10. See Patrick Macklem, "Indigenous Recognition in International Law: Theoretical Observations," *Michigan Journal of International Law* 30.1 (2008): 177–210, esp. 184; and Melanie Riccobene Jarboe, "Collective Rights to Indigenous Land in *Carcieri v. Salazar*," *Boston College Third World Law Journal* 30.2 (2010): 395–415, esp. 400.

11. David Hollinsworth, "Racism and Indigenous People in Australia," *Global Dialogue* 12.2 (2010): 2. For a discussion, see Sections 1.5 and 1.6.

12. For a review of the case, see Section 4.4. In the Conclusion, we address the Israeli Supreme Court decision, which was handed down toward the end of the writing of this book.

13. C.C. (Beersheba) 7161/06 *al-'Uqbi et al. v. State of Israel* (unpublished; March 3, 2012) (Hebrew).

14. On the DND and *mawat* land, see Section I.4.

15. By the time we finalized the book, in summer 2016, the village had been demolished 108 times; "Al-'Araqib: List of Demolitions," Negev Coexistence Forum for Civil Equality, tinyurl.com/hup2a69 (accessed July 5, 2015) (Hebrew).

16. Land Rental Agreement Between Haj Muhammed and Hussein al-Turi (al-'Araqib 2), 1944, al-'Uqbi Family Archives (Hebrew) (copy with authors); "Demolitions and Arrests in al-'Araqib: Summary of the Passing Week," Negev Coexistence Forum for Civil Equality, June 20, 2014, tinyurl.com/j54n9ep (accessed July 6, 2017); Isabel Kershner, "A Test of Wills over a Patch of Desert," *New York Times*, August 26, 2010, tinyurl.com/z3cyxje (accessed June 6, 2017); "Al-'Araqib: A Background Paper About the Demolitions," Negev Coexistence Forum for Civil Equality, July 31, 2011, tinyurl.com/hgq4bvq (accessed June 6, 2017); "From al-'Araqib to Susiya: The Forced Displacement of Palestinians on Both Sides of the Green Line," *Adalah*, May 2013, tinyurl.com/hcexazs (accessed June 6, 2017); Neri Brenner, "Bedouin Against 'Racist' Prawer Bill: 'We'll Perish on This Land,'" Ynetnews, June 26, 2013, tinyurl.com/jzkxagg (accessed June 6, 2017); "UN Rights Chief Urges Israel to Reconsider Bill That Would Displace Thousands of Bedouin," UN News Center, July 25, 2013, tinyurl.com/h8fqrhl (accessed June 6, 2017); Jill Jacobs, "U.S. Jews See the Bedouin Issues as a Test for Jewish Values—and Donations," *Haaretz*, September 3, 2013, tinyurl.com/jgm46ez (accessed June 6,2017); Shirly Seidler, "Israel Begins Razing Bedouin Village of Al-Arakib for 50th Time," *Haaretz*, June 12, 2014, tinyurl.com/zgv3yty (accessed June 6, 2017).

17. The Negev/Naqab Bedouin Arabs are part of the Palestinian people. Here, for the sake of clarity, we primarily refer to this population as Bedouin Arabs or simply Bedouins. It should be noted that this is the term most commonly used by the community itself.

18. The list of the seven townships and the eleven recognized villages can be found in the Prawer Bill: *Draft Bill for the Arrangement of Bedouin Settlement in the Negev*, 5773/2013, HH (Governmental Draft Bills) 316, app. 1 (Hebrew). There is disagreement over the exact number of Bedouins living in the unrecognized villages. For a complete list of the forty-six villages, see the Goldberg Report: State of Israel, *Recommendations of the Team for Application of the Report by the Goldberg Commission for the Regulation of Bedouin Settlement in the Negev*, Governmental Decision 3707, 2011, arts. 65–67, tinyurl.com/6r2ubnr.

19. Ismael Abu-Saad, Harvey Lithwick, and Kathleen Abu-Saad, *A Preliminary Evaluation of the Negev Bedouin Experience of Urbanization: Finding of the Urban Household Survey* (Beersheba: Center for Bedouin Studies and Development, 2004).

20. For details, see Section 1.6 and Chapter 4.

21. Lorenzo Veracini, "Terra Nullius and the 'History Wars,'" *On Line Opinion: Australia's e-Journal of Social and Political Debate*, February 10, 2006, tinyurl.com/jmeqr3k (accessed June 6, 2017).

CHAPTER 1

1. For a review of the literature, see, for example, Ido Shahar, "The New Academic Literature About the Bedouins in the Negev in a Critical Perspective," *Notes About the Bedouins* 34 (2004): 40–54 (Hebrew); Oren Yiftachel, "The Internal Colonial Paradigm," in *Indigenous (In)Justice: Human Rights Law and the Bedouin Arabs in the Naqab/Negev*, ed. Ahmad Amara, Ismael Abu-Saad, and Oren Yiftachel (Cambridge, MA: Harvard University Press, 2012), 289–318; and Richard Ratcliffe, Mansour Nasasra, Sarab Abu Rabia-Queder, and Sophie Richter-Devroe, "Introduction: Rethinking the Paradigms," in *The Naqab Bedouin and Colonialism: New Perspectives*, ed. Mansour Nasasra, Sophie Richter-Devroe, Sarab

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16. These scholars are Ruth Kark, Seth Frantzman, and Havatzelet Yahel. Professor Kark is a renowned historical geographer of the Hebrew University of Jerusalem. She has submitted expert opinions supporting the DND in a number of key cases, including the *al-'Uqbi* case. Yahel served until recently as the director of the Department of Civil Cases in the State Attorney's Office in Beersheba and was a leading figure in representing the counter-

claims against the Bedouin land claimants. Frantzman is an editor of the English-language newspaper *Jerusalem Post*. Both Yahel and Frantzman did their doctoral studies under the supervision of Kark. For representative publications, see Havatzelet Yahel and Ruth Kark, "Israel Negev Bedouin During the 1948 War: Departure and Return," *Israel Affairs* 21.1 (2015): 48–97; Ruth Kark and Seth Frantzman, "The Negev: Land, Settlement, the Bedouin and Ottoman and British Policy, 1871–1948," *British Journal of Middle Eastern Studies* 39.1 (2012): 53–77; and Havatzelet Yahel, Ruth Kark, and Seth J. Frantzman, "Contested Indigeneity: The Development of an Indigenous Discourse on the Bedouin of the Negev, Israel," *Israel Studies* 17 (2012): 78–104. See more in Section 4.4.

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27. See Guadelupe T. Luna, "Chicana/Chicano Land Tenure in the Agrarian Domain: On the Edge of a 'Naked Knife,' " *Michigan Journal of Race and Law* 4 (1998): 39–144.

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33. Braverman et al., "Introduction," 1.

34. Braverman et al., "Introduction," 1. See also Blomley, "Law and Geography"; Kedar, "Legal Geography"; and Delaney, *The Spatial, the Legal*.

35. Alexandre Kedar, "Expanding Legal Geographies: A Call for a Critical Comparative Approach," in Braverman et al., *The Expanding Spaces of Law*, 95–119; Yiftachel, *Ethnocracy*; Delaney, *The Spatial, the Legal*.

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40. Shiri Spector Ben-Ari, *Bedouin Settlement in the Negev* (Jerusalem: Knesset Research and Information Center, November 5, 2013), 10, tinyurl.com/gnxqsxm (accessed June 30, 2017) (Hebrew).

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43. Carpenter and Riley, "Indigenous Peoples," 173, 182.

44. Tieman Mennen and Cynthia Morel, "From M'Intosh to Endorois: Creation of an International Indigenous Right to Land," *Tulane Journal of International and Comparative Law* 21.1 (2012): 37–83.

45. See Kedar, "Expanding Legal Geographies," 102–5.

46. Mennen and Morel, "From M'Intosh to Endorois," 47; Kedar, "Expanding Legal Geographies," 95, 101–12.

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48. Russell Smandych, "Mapping Imperial Legal Connections: Toward a Comparative Historical Sociology of Colonial Law," *Adelaide Law Review* 31.2 (2010): 187–228.

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50. Mennen and Morel, "From M'Intosh to Endorois," 41; David J. Seipp, "The Concept of Property in the Early Common Law," *Law and History Review* 12 (1994): 34; Fitzmaurice, *Sovereignty*, 11, 23; Jennifer Pitts, "Political Theory of Empire and Imperialism," *Annual Review of Political Science* 13 (2010): 216–18; Williams, *American Indian*, 96–108; Anaya, *Indigenous Peoples*, 16–19; James Tully, *An Approach to Political Philosophy: Locke in Contexts* (New York: Cambridge University Press, 2007), 140; John Locke, *The Second Treatise of Civil Government*, ed. J. W. Gough (Oxford: Basil Blackwell, 1948 [1690]), 15, 17; Pitts, "Political Theory," 215.

51. Emmerich de Vattel, *The Law of Nations; or the Principles of Natural Law*, ed. James Brown Scott, trans. Charles G. Fenwick (Washington, DC: Carnegie Institute, 1916 [1758]), bk. I, ch. 18, sec. 209, 85; Banner, *Possessing the Pacific*, 17.

52. Karin Mickelson, "The Maps of International Law: Perceptions of Nature in the Classification of Territory," *Leiden Journal of International Law* 27 (2014): 624; Katja Göcke, "Protection and Realization of Indigenous Peoples' Land Rights at the National and International Level," *Goettingen Journal of International Law* 5 (2013): 91. See also Seth Gordon, "Indigenous Rights in Modern International Law from a Critical Third World Perspective," *American Indian Law Review* 31 (2006): 406; Banner, *Possessing the Pacific*, 10; Stuart Banner, *How the Indians Lost Their Lands: Law and Power on the Frontier* (Cambridge, MA: Harvard University Press, 2005); Robert J. Miller, "The Doctrine of Discovery," in Miller et al., *Discovering Indigenous Lands*, 6–22; Jacinta Ruru, "Concluding Comparatively: Discovery in the English Colonies," in Miller et al., *Discovering Indigenous Lands*, 247–67; and UN Commission on Human Rights, *Prevention of Discrimination*.

53. See, for example, C.A. 4220/12 *al-ʿUqbi et al. v. State of Israel*, par. 49.

54. Miller, "Doctrine of Discovery," 9–15.

55. Joseph William Singer, "Original Acquisition of Property: From Conquest and Possession to Democracy and Equal Opportunity," *Indiana Law Journal* 86 (2011): 764.

56. Steven Paul McSloy, "Because the Bible Tells Me So: Manifest Destiny and American Indians," *St. Thomas Law Review* 9.1 (1996): 37–38.

57. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat) 543 (1823). See also Seth Korman, "Indigenous Ancestral Lands and Customary International Law," *University of Hawaii Law Review* 32.2 (2010): 409; Peter Russell, "High Courts and the Rights of Aboriginal Peoples: The Limits of Judicial Independence," *Saskatchewan Law Review* 16 (1998): 249, 253; and Wiessner, "Rights and Status," 60.

58. *Johnson v. M'Intosh*, 588–91 (emphasis added). In subsequent cases the Marshall Court expanded the scope of indigenous land rights to include "a full right of occupation and all use of the land, timber, and subsurface extraction that accompanies such occupation" (*Worcester v. Georgia*, 31 U.S. (6 Pet.) (1832), 515, 556, 559–60). The Court also recognized hunting grounds and other areas connected to a tribe's "habits and modes of life" (*Mitchel v. United States*, 34 U.S. (9 Pet.) (1835), 711, 746). See also Kent McNeil, "Judicial Treatment of Indigenous Land Rights," *Comparative Research in Law and Economy* 4.5 (2008): 8–9, tinyurl.com/hwg278y (accessed June 30, 2017); and Mennen and Morel, "From M'Intosh to Endorois," 48. This limited recognition was used in the late twentieth and early twenty-first centuries in the process of the (re)construction of indigenous land rights. See also Mennen and Morel, "From M'Intosh to Endorois," 49–50; Singer, "Original Acquisition," 768; and Wiessner, "Rights and Status," 62–63.

59. Peter Novick, *That Noble Dream: The "Objectivity Question" and the American Historical Profession* (Cambridge, UK: Cambridge University Press, 1988), 1; see also Benton and Straumann, "Acquiring Empire"; and Fitzmaurice, *Sovereignty*.

60. Banner, *Possessing the Pacific*, 26.

61. See *Mabo v. Queensland (No. 2)*, (1992) 175 CLR 1. For a discussion of the case, see Sections 7.3 and 8.3.

62. UN Office of the High Commissioner for Human Rights, United Nations Human Settlements Program, *Indigenous People's Right to Adequate Housing: A Global Overview*, Report 7 (2005), www.ohchr.org/Documents/Publications/IndigenousPeoplesHousingen.pdf (accessed June 30, 2017).

63. UN Commission on Human Rights, *Human Rights of Indigenous Peoples: Indigenous Peoples and Their Relationship to Land*, E/CN.4/Sub.2/18, June 3, 1999, par. 31. See also Fitzmaurice, *Sovereignty*, 302; John Sheehan, "Applying an Australian Native Title Framework to Bedouin Property," in Amara et al., *Indigenous (In)Justice*, 239; Miller et al., *Discovering Indigenous Lands*; Göcke, "Protection and Realization," 92; Paul Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849–1989* (Vancouver: University of British Columbia Press, 1990), 40, quoted in Nicholas Blomley, "Law, Property, and the Geography of Violence: The Frontier, the Survey, and the Grid," *Annals of the Association of American Geographers* 93.1 (2003): 129; UN Commission on Human Rights, *Prevention of Discrimination*, pars. 37, 38, 40; Yiftachel et al., "Re-Examining the DND"; Blomley, "Law, Property," 121–41.

64. Mickelson, "Maps of International Law," 623–24.

65. *Western Sahara: Advisory Opinion of 16 October 1975*, International Court of Justice Reports, 39, www.icj-cij.org/files/case-related/61/061-19751016-ADV-01-00-EN.pdf (accessed June 30, 2017). See also Fitzmaurice, *Sovereignty*, 325–30.

66. Henry Reynolds, *The Law of the Land* (Melbourne, Australia: Penguin, 1992). See,

for example, *Mabo v. Queensland (No. 2)*, par. 18 of Justice Toohey's decision and par. 36 of Justice Brennan's decision; Andrew Fitzmaurice, "The Genealogy of Terra Nullius," *Australian Historical Studies* 38.129 (2007): 1–15; and Fitzmaurice, *Sovereignty*, 328–30.

67. *Mabo v. Queensland (No. 2)*, pars. 39 and 33 of Justice Brennan's decision.

68. McHugh, *Aboriginal Title*, 272.

69. Andrew Fitzmaurice, "The Great Australian History Wars," University of Sydney, March 15, 2006, tinyurl.com/zb27qob (accessed June 30, 2017); Fitzmaurice, *Sovereignty*, 330 and fn 86, 302 and fn. 1; Lorenzo Veracini, "Terra Nullius and the 'History Wars,'" *On Line Opinion*, February 10, 2006, www.academia.edu/30453848/Terra_nullius_and_the_history_wars (accessed June 30, 2017); Fitzmaurice, "Genealogy of Terra Nullius," 1; Stuart Banner, "Book Review: *The Invention of Terra Nullius: Historical and Legal Fictions on the Foundation of Australia*," *Legal History* 10.1–2 (2006): 259–62. For such critiques, see Michael Connor, "Error Nullius," *The Book Bulletin* 121 (2003): 76–78, tinyurl.com/h9xvyqf (accessed June 30, 2017); Michael Connor, *The Invention of Terra Nullius* (Sydney: Macleay Press, 2005); and Bain Attwood, "Law, History, and Power: The British Treatment of Aboriginal Rights in Land in New South Wales," *Journal of Imperial and Commonwealth History* 42.1 (2014): 171, 175. See also Bain Attwood, "History, Law, and Aboriginal Title," *History Workshop Journal* 77 (2014): 283–90; and Henry Reynolds, "A New Historical Landscape? A Response to Michael Connor's 'The Invention of Terra Nullius,'" *The Monthly: Australian Politics, Society, and Culture*, May 2006, tinyurl.com/zpf8psc (accessed June 30, 2017).

70. Banner, "Book Review."

71. Stuart Banner, "Why *Terra Nullius*? Anthropology and Property Law in Early Australia," *Law and History Review* 23.1 (2005): 95, 99; Banner, *Possessing the Pacific*, 26; Fitzmaurice, *Sovereignty*; Benton and Straumann, "Acquiring Empire."

72. Banner, *Possessing the Pacific*, 26–27; Fitzmaurice, *Sovereignty*, 304–6; Fitzmaurice, "Great Australian History Wars"; Fitzmaurice, "Genealogy of Terra Nullius," 1; Fitzmaurice, *Sovereignty*, esp. ch. 11.

73. Fitzmaurice, *Sovereignty*, 8 and also 33.

74. Fitzmaurice, *Sovereignty*, 330. See also Benton and Straumann, "Acquiring Empire."

75. Veracini, "Terra Nullius."

76. Banner, *Possessing the Pacific*, 2.

77. Banner, *Possessing the Pacific*, 13–46; Banner, "Why *Terra Nullius*?" 92–95, 99, 110; Göcke, "Protection and Realization," 93; Singer, "Original Acquisition," 771.

78. Mickelson, "Maps of International Law," 624.

79. Nicholas Blomley, "Cuts, Flows, and the Geographies of Property," *Law, Culture, and the Humanities* 7.2 (2011): 213. See also Nicholas Blomley, *Rights of Passage: Sidewalks and the Regulation of Public Flow* (New York: Routledge, 2011).

80. Blomley, "Cuts, Flows"; J. W. Singer, "Well Settled? The Increasing Weight of History in America Indian Land Claims," *Georgia Law Review* 28 (1994): 485. According to Singer, Americans address the issue of conquest through two major approaches: repression and legitimation (Singer, "Original Acquisition," 766).

81. Kedar, "Legal Geography," 414–19.

82. Kedar, "Legal Geography," 418; Russell, "High Courts," 248.

83. Delaney, *The Spatial, the Legal*.

84. Russell, "High Courts," 248; Kedar, "Legal Geography," 413.

85. Blomley, "Law, Property," 128–29.

86. Gordon, "Indigenous Rights," 402.

87. Kedar, "Legal Geography," 415.

88. Shamir, "Suspended in Space"; David Wilkins, *American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice* (Austin: University of Texas Press, 1997), 3.

89. Mennen and Morel, "From M'Intosh to Endorois," 44.

90. UN Commission on Human Rights, *Prevention of Discrimination*, pars. 46–62; Nell Newton, "Indian Claims in the Courts of the Conqueror," *American University Law Review* 41.3 (1992): 820. For time-limiting examples, such as statutes of limitations, see Newton, "Indian Claims," 790–800; and Michael J. Kaplan, "Proof of Extinguishment of Aboriginal Title to Indian Lands," *American Law Report* 41 (1979): 471. For examples of hindering evidentiary rules, see Kaplan, "Proof of Extinguishment," 436; Deborah Geier, "Power and Presumptions; Rules and Rhetoric; Institutions and Indian Law," *Brigham Young University Law Review* (1994): 451, 454, 472; William W. Fisher III, "Property and Power in American Legal History," in *The History of Law in a Multi-Cultural Society: Israel, 1917–1967*, ed. Ron Harris, Alexandre Kedar, Pnina Lahav, and Assaf Likhovski (Burlington, VT: Ashgate, 2002), 394; Luna, "Chicana/Chicano Land Tenure," 49; Kaplan, "Proof of Extinguishment"; Newton, "Indian Claims," 818; and Kent McNeil, "The Onus of Proof of Aboriginal Title," *Osgoode Hall Law Journal* 37.4 (1999): 781–82. For examples of the manipulation of legal categories and misrepresentation of precedents, see Joseph Singer, "Sovereignty and Property," *Northwestern University Law Review* 86 (1991): 3, 6; Singer, "Well Settled?" 521; and Nell Newton, "At the Whim of the Sovereign: Aboriginal Title Reconsidered," *Hastings Law Journal* 31.6 (1980): 1215–85.

91. Treaty of Waitangi, New Zealand, February 6, 1840, tinyurl.com/5vh3ys (accessed June 30, 2017). See also Banner, *Possessing the Pacific*, chaps. 2 and 3.

92. Vine Deloria, *Behind the Trail of Broken Treaties: An Indian Declaration of Independence* (New York: Delacorte Press, 1974).

93. Wolfe, "Settler Colonialism," 399.

94. Annie H. Abel, "The History of Events Resulting in Indian Consolidation West of the Mississippi River," in *American Historical Association Annual Report for 1906* (Washington, DC: American Historical Association, 1906), 412, quoted in Wolfe, "Settler Colonialism," 399.

95. Kedar, "Legal Geography."

96. *Alternative Master Plan for the Unrecognized Bedouin Villages in the Negev*, report produced by Bimkom—Planners for Planning Rights and the Regional Council for the Unrecognized Villages in the Negev (2012), 108–13, tinyurl.com/jf72ljg (accessed June 30, 2017) (Hebrew). An abridged version of this report in English is available at tinyurl.com/hmqz7re (accessed June 30, 2017).

97. Porat, *Bedouin-Arab in the Negev*.

98. For an assessment of the Prawer-Begin plan, see Conclusion.

99. Ismael Abu-Saad, "Introduction: State Rule and Indigenous Resistance Among al-Naqab Bedouin Arabs," *Hagar: Studies in Culture, Polity, and Identities* 8.2 (2008): 2–24.

100. The data are for the year that includes the second half of 2012 and the first half of 2013. *Report on the Destruction of Arab-Bedouin Houses in the Negev 2012/2013*, Negev Coexistence Forum for Civil Equality, 1, www.dukium.org/wp-content/uploads/2011/06/HD_Report_E_2014.pdf (accessed June 30, 2017) (Hebrew). The number of structures demolished between July 2013 and June 2014 is estimated by the same NGO to be 859. See Ori Tarabulus and Michal Rotem, *The House Demolition Policy in the Negev-Naqab* (Beersheba: Negev Coexistence Forum for Civil Equality, 2014), tinyurl.com/ju53s68 (accessed June 30, 2017). Additional statistics on house demolitions and evacuations present different numbers: 1,073 in 2014, as opposed to 697 in 2013 (information from the Office of Internal Security, as reported in *Haaretz*: tinyurl.com/zkte7xb [accessed June 30, 2017]).

101. Benny Morris, *The Birth of the Palestinian Refugee Problem, 1947–1949* (Cambridge, UK: Cambridge University Press, 1989), 525–28; Yiftachel, *Ethnocracy*, 197–205.

102. State of Israel, *Recommendations of the Team for Application of the Report by the Goldberg Commission for the Regulation of Bedouin Settlement in the Negev*, 2008, pars. 80 and 90, www.moag.gov.il/yhidotmisrad/rashut_buduim/Goldberg/documents/Doch_Vaada_Shofet_Goldberg.pdf, (accessed June 30, 2017) (Hebrew). On the Goldberg Commission, see Section 9.1; and Yiftachel et al., "Re-Examining the DND," 49.

103. Meir, "Geo-Legal Aspects."

104. Ilan Yeshurun, "Toward a Solution to the Problem of the Bedouin," lecture given at the annual meeting of the Israel Planners Association, Beersheba, February 10, 2011.

105. See Chapter 4.1.

106. C.A. 218/74 *al-Hawashlah v. The State of Israel*, 141. Various committees dealt with the Bedouin question in general and specifically with regard to land status. This is not the place to list all of the committees; however, it is worth noting that even during the 1948 war, a team of ranking governmental staff and Prime Minister Ben-Gurion dealt with the Bedouin question. See David Ben-Gurion, *The War of Independence: Ben-Gurion's Diary, 1947–1949*, vol. 3 (Tel Aviv: Company for the Distribution of the Teachings of David Ben-Gurion, 1982) (Hebrew); and Yosef Weitz, *My Diary and Letters to my Sons* (Ramat Gan: Massada, 1965), 3: 357 (notes from November 25, 1948) (Hebrew). In 1952 the minister of justice appointed the Ministerial Committee for Clarifying the Question of Bedouin Land Ownership in the Negev. Ministry of Justice, State of Israel, *Report of the Ministerial Committee for the Clarifying the Question of Bedouin Land Ownership in the Negev* (1952), State of Israel Archives, Division 74, G-5742/10 (Hebrew). Recently, a ministerial committee headed by Supreme Court justice and state comptroller emeritus Eliezer Goldberg dealt with the issue. A team headed by Ehud Prawer dealt with the application of this report. State of Israel, *Recommendations*.

107. *Al-Hawashlah v. The State of Israel*, pars. 149–50.

108. Yahel, "Land Disputes," 2. See also C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Plaintiffs' Memorandum (March 3, 2012), pars. 70–79.

109. Aharon Leshno Yaar, "Re: Communication from Special Procedures Allegation Letter AL Indigenous (2001–8) ISR 2/2001," August 15, 2011 (on file with authors). Aharon Leshno Yaar was the Israeli ambassador to the Offices of the United Nations and International Organizations in Geneva.

110. C.C. (Beersheba) 4037/05 *Almahdi et al. v. State of Israel* (unpublished, January, 19, 2010), par. 30 (Hebrew).

PART II

1. See also Alexandre Kedar, "The Legal Transformation of Ethnic Geography: Israeli Law and the Palestinian Landholder, 1948–1967," *NYU Journal of International Law and Politics* 33 (2001): 923–1000; and Alexandre Kedar, "Majority Time, Minority Time: Land, Nationality, and Adverse Possession Laws in Israel," *Tel Aviv University Law Review* 21.3 (1998): 655–746 (Hebrew).

CHAPTER 2

1. Donald Quataert, *The Ottoman Empire, 1700–1922*, 2nd ed. (New York: Cambridge University Press, 2005), 29.

2. Southern Palestine is what was known as the Beersheba region and is known today as the Naqab (in Arabic) or the Negev (in Hebrew and English).

3. Eliezer Malchi, *The History of Law in Eretz-Israel: A Historical Introduction to the Law in Israel* (Tel Aviv: Dinim, 1953), 52 (Hebrew); Moses Doukhan, *Land Laws in Israel*

(Jerusalem: Jerusalem Publishing House, 1952), 25 (Hebrew); Jacques Kano, *The Problem of Land Between Jews and Arabs (1990–1917)* (Tel Aviv: Sifriat Poalim, 1992), 15 (Hebrew).

4. For a critique of the modernization and Westernization approach to the study of the Tanzimat reforms, see Avi Rubin, "Ottoman Judicial Change in the Age of Modernity: A Reappraisal," *History Compass* 7.1 (2009): 121; Butrus Abu-Manneh, "The Islamic Roots of the Gulhane Rescript," *Die Welt des Islams* 34 (1994): 173–203; and Haim Gerber, *The Social Origins of the Modern Middle East* (Boulder, CO: Lynne Rienner, 1987), 68–69.

5. Denise Jorgens, "A Comparative Examination of the Provisions of the Ottoman Land Code and Khedive Sa'id's Law of 1858," in *New Perspectives on Property and Land in the Middle East*, ed. Roger Owen (Cambridge, MA: Harvard University Press, 2000), 111.

6. Martha Mundy and Richard Saumarez Smith, *Governing Property, Making the Modern State: Law, Administration, and Production in Ottoman Syria* (New York: I. B. Tauris, 2007), 44–48.

7. E. Attila Aytekin, "Cultivators, Creditors, and the State: Rural Indebtedness in the Nineteenth Century Ottoman Empire," *Journal of Peasant Studies* 35.2 (2008): 292–313. On Ottoman land categories, see Section 2.7.

8. Huri İslamoğlu, "Property as a Contested Domain: A Reevaluation of the Ottoman Land Code of 1858," in *New Perspectives on Property and Land in the Middle East*, ed. Roger Owen (Cambridge, MA: Harvard University Press, 2000), 3.

9. Reşat Kasaba, *A Moveable Empire: Ottoman Nomads, Migrants, and Refugees* (Seattle: University of Washington Press, 2010), 103.

10. Dov Gavish, *Land and Map: The Survey of Palestine, 1920–1948* (Jerusalem: Yad Izhak Ben-Zvi, 1991) (Hebrew); Ruth Kark and Haim Gerber, "Ottoman Land Registration Maps in Palestine," *Cathedra* 22 (1982): 113–18 (Hebrew); Yitzhak Schechter, "Land Registration in Eretz-Israel in the Second Half of the Nineteenth Century," *Cathedra* 45 (1987): 147–48 (Hebrew). In describing the situation at the time, Arthur Ruppin wrote, "There were no accurate list of land (Cadaster) and not a book of land property, in their European sense." See Leah Doukhan-Landau, *The Zionist Companies for Land Purchase in Palestine, 1897–1914* (Jerusalem: Yad Izhak Ben-Zevi, 1979), 15 (Hebrew).

11. Mundy and Saumarez Smith, *Governing Property*, 96–103.

12. The Tabu Act of 1858, enacted in the same year as the OLC, contributed to the formalization of the registration system in the registry books. Gavish, *Land and Map*, 32; Doukhan, *Land Laws in Israel*, 25–38. However, the law does not stipulate the Tabu consolidation of property rights in land registration. See, for example, Tabu Act, secs. 3 and 22.

13. Frederic M. Goadby and Moses J. Doukhan, *The Land Law of Palestine* (Tel Aviv: Shoshany, 1935), 269. See also Doukhan, *Land Laws in Israel*, 366.

14. Goadby and Doukhan, *Land Law*, 271, 292. See also Aharon Ben-Shemesh, *Land Law in the State of Israel* (Tel Aviv: Masadah, 1953), 187–89, 307. As to the legislation of 1913, there are serious doubts that it was legally binding during the Ottoman period, because it never received parliamentary approval. See Haim Sandberg, *Land Title Settlement in Eretz-Israel and the State of Israel* (Jerusalem: Israel National Fund, 2000), 135, 148–150, 156–58 (Hebrew).

15. Avraham Hilleli, "Land Rights: General-Historic Background of Property Development in Israel," in *The Lands of Galilee*, ed. Avshalom Shmuely, Arnon Soffer, and Nurit Kliot (Haifa: Gestelit, 1983), 2: 586 (Hebrew).

16. Kasaba, *Moveable Empire*, 54, 107. The Ottoman settlement and sedentarization project continued until the empire's collapse in the early twentieth century.

17. Kasaba, *Moveable Empire*, 27.

18. Kasaba, *Moveable Empire*, 34, 101–2, 105.

19. Selim Deringil, "They Live in a State of Nomadism and Savagery: The Late Ottoman Empire and the Post-Colonial Debate," *Comparative Studies in Society and History* 45.2 (2003): 311–42.

20. Ussama Makdisi, "Ottoman Orientalism," *American Historical Review* 107.3 (2002): 768–96.

21. Clinton Bailey, "The Negev in the Nineteenth Century: Reconstructing History from Bedouin Oral Tradition," *Asian and African Studies* 14.1 (1980): 35–80; Joseph Ben-David, *Feud in the Negev: The Land Conflict Between the Bedouin and the State* (Beit Berel: Center for the Research of Arab Society, 1995).

22. Nimrod Luz, "The Creation of Modern Beersheba, an Imperial Ottoman Project," *Beersheba: Metropolis in the Making* 163 (2008): 163–78 (Hebrew); Joseph Ben-David, *Feud in the Negev*.

23. Clinton Bailey, *Bedouin Law from Sinai and the Negev: Justice Without Government* (New Haven, CT: Yale University Press, 2009), 100.

24. Yasemin Avci, "The Application of Tanzimat in the Desert: The Bedouins and the Creation of a New Town in Southern Palestine (1860–1914)," *Middle Eastern Studies* 45.6 (2009): 970–71.

25. Yizhak Levy, *The Unknown About Herzl* (1944), 4, Central Zionist Archives, AK41-5t, tinyurl.com/j228t7x (accessed June 10, 2017) (Hebrew).

26. In 2009 the name of this organization was changed to the Israel Land Authority.

27. Yosef Weitz, *My Diary and Letters to My Sons* (Ramat Gan: Massada, 1965), 1. Such a conclusion was also supported by the Goldberg Report, par. 3. State of Israel, Commission to Propose a Policy for Arranging Bedouin Settlement in the Negev, www.moag.gov.il/yhidotmisrad/rashut_buduim/Goldberg/documents/Doch_Vaada_Shofet_Goldberg.pdf (accessed June 10, 2017). See also Appendix 22 of this book.

28. Response from Daftar Hakani (Land Registry), Director to the Dahilye Nazareti (Ministry of interior), 9 Shaaban 1327, Ottoman State Archives, DH-MUI, 1327.N.4. See also Ahmad Amara, "The Negev Land Question: Between Denial and Recognition," *Journal of Palestine Studies* 42.4 (2013): 27–47.

29. Luz, "Creation of Modern Beersheba," 163 (emphasis added).

30. Martin Bunton, *Colonial Land Policies in Palestine, 1917–1936* (Oxford, UK: Oxford University Press, 2007), 49; Alexandre Kedar, "The Legal Transformation of Ethnic Geography: Israeli Law and the Palestinian Landholder, 1948–1967," *NYU Journal of International Law and Politics* 33 (2001): 923–1000.

31. Avci, "Application of Tanzimat," 976.

32. Avci, "Application of Tanzimat," 972.

33. Avci, "Application of Tanzimat," 973.

34. Decision of the Ottoman Council of State, 7 Teshrinisani 1316/November 20, 1900, Başbakanlık Osmanlı Arşivleri (The Prime Minister's Ottoman Archives) (BOA), I.DH, 1380/1318.N/18.

35. Letter from the Jerusalem Governor to the Ottoman Council of State, 14 Nisan 1317/April 27, 1901, BOA, I.DH, 1385/13.

36. Mundy and Saumarez Smith, *Governing Property*, 50–51.

37. Gideon M. Kressel, Joseph Ben-David, and Khalil Abu-Rabi'a, "Changes in the Land Usage by the Negev Bedouin Since the Mid-19th Century: The Intra-Tribal Perspective," *Nomadic Peoples* 28 (1991): 28–55, 29–30; Avci, "Application of Tanzimat," 976.

38. Kressel et al., "Changes in the Land Usage," 41.

39. Salman Abu-Sitta, *The Denied Inheritance: Palestinian Land Ownership in Beer Sheba* (London: Palestine Land Society, 2009), 6.

40. Avinoam Meir, *As Nomadism Ends: The Israeli Bedouin of the Negev* (Boulder, CO: Westview Press, 1997).

41. Kressel et al., "Changes in the Land Usage," 41.

42. 'Aref al-'Aref and Harold W. Tilley, *Bedouins Love, Law, and Legend: Dealing Exclusively with the Badu of Beersheba* (Jerusalem: Cosmos, 1944), 165–66.

43. See Section 3.3.

44. Yosef Ben-David, *The Bedouins in Israel: Land Conflicts and Social Issues* (Jerusalem: Jerusalem Institute for Israel Studies, 2004) (Hebrew); Sarah Abu-Rabia-Queder, *Excluded and Loved: Educated Bedouin Women's Life Stories* (Jerusalem: Eshkolot and Magnes, 2008) (Hebrew).

45. We received a copy of the document from the al-'Uqbi Family Archives. See Oren Yiftachel, Alexandre Kedar, and Ahmad Amara, "Re-Examining the 'Dead Negev Doctrine': Property Rights in Arab Bedouin Regions," *Law and Government* 14.1 (2012): 7–147, app. 6, tinyurl.com/jdg8oyz (accessed June 11, 2017) (Hebrew).

46. Dodik Shoshani, who held key Israeli positions in the management of Bedouin lands, reports that during the implementation of the Peace Law, Israel recognized traditional Bedouin ownership. See Dodik Shoshani, *My Life with the Bedouins* (Jo Alon: Kibbutz Lahav, 2010), 110–11 (Hebrew).

47. On Ottoman land categories, see Section 2.7.

48. Let us remember that, according to the OLC, if cultivation is performed with state authorization, the land should be registered in the cultivator's name as *miri* land. This is relevant not only to the OLC but also to the British Mewat Land Ordinance of 1921, which applied only to land revived without authorization. See Chapter 3.

49. See Gavish, *Land and Map*, 32; and Doukhan, *Land Laws in Israel*, 25–38. However, the Tabu Act did not condition the recognition of property rights in that land through its registration in the land registry. See, for example, Tabu Act, secs. 3 and 22.

50. Norman Bentwich, comp., "British Order in Council 1922," in *Legislation of Palestine, 1918–1925: Including the Orders-In-Council, Ordinances, Public Notices . . . etc.* (Alexandria: Whitehead Morris Ltd., for the Government of Palestine, 1926), 1: 1; Law and Administration Ordinance No. 1 of 5708/1948, Provisional Council of the State of Israel, tinyurl.com/jxzsza6 (Hebrew).

51. Law and Administration Ordinance No. 1 of 5708/1948, sec. 11 (Hebrew); Bunton, *Colonial Land Policies*, 38–49.

52. *Mahlul* land is *miri* land that was uncultivated for three years for no justified reason. See Bunton, *Colonial Land Policies*, 42–49. *Matruke* is land allocated for public purposes.

53. This ordinance applies to possessors who received the land in an unregistered land transfer, like the majority of the Bedouins did.

54. See discussions in Chapters 4 and 9 (Section 9.1).

55. Land (Settlement of Title) Ordinance, New Version, 1969, arts. 153–55, 162 (Hebrew).

56. Ottoman Land Code, art. 1, tinyurl.com/hagn7h9 (accessed June 10, 2017). For the description of land classifications, see Joshua Weisman, *Law of Property: General Part* (Jerusalem: Hebrew University, 1993), 27 (Hebrew); Doukhan, *Land Laws in Israel*; and Ben-Shemesh, *Land Law*.

57. *Mulk* land was defined in Section 2 of the OLC. See also Nathan Brun, *Judges and Lawyers in Eretz-Israel: Between Constantinople and Jerusalem, 1900–1930* (Jerusalem: Hebrew University, Magnes Press, 2008), 24–25 (Hebrew). For ease of the discussion, unless otherwise indicated, we call this area Israel/Palestine, even though this description does not fully match the geographic divisions and definitions during the Ottoman period. For

mawqufa land definition, see OLC, sec. 4, tinyurl.com/hagn7h9 (accessed June 10, 2017). *Matruke* land was defined in Section 5 of the OLC. For a more thorough discussion of the *matruke* category, see Section 3.1.1.

58. Critically, this category was not limited by location and could apply also to cultivated lands lying at a greater distance from inhabited places.

59. *Miri* land was defined in Section 3 of the OLC. See Doukhan-Landau, *Zionist Companies*, 13. For the concept of a bundle of rights, see, for example, Anthony Maurice Honoré, *Oxford Essays in Jurisprudence: A Collaborative Work* (Oxford, UK: Oxford University Press, 1961); and Lawrence C. Becker, *Property Rights: Philosophic Foundations* (London: Routledge & Kegan Paul, 1977), 18–20. For a recent review of the literature, see Anna di Robilant, "Property: A Bundle of Sticks or a Tree?" V*anderbilt Law Review* 66.3(2013): 869.

60. Avraham Halima, "Adverse Possession in Land and the Settlement of Title Law," in *Conference Protocol Institute for Judges Instruction*, 4/2 (1987) (copy with authors) (Hebrew); Yisrael Gilad, "Honor the Aged," *Mishpatim* 22.1 (1993): 233 (Hebrew).

61. According to Section 78, "Everyone who has possessed and cultivated State or Mevqufe land for ten years without dispute (*bila niza*) acquires a right by prescription and whether he has a valid title deed or not the land cannot be regarded as vacant, and he shall be given a new title deed gratuitously" (Goadby and Doukhan, *Land Law*, 259). See also Anton Minkov, "Ottoman Tabu Title in the 18th and 19th Centuries: Origin, Typology, and Diplomatics," *Islamic Law and Society* 7.1 (2000): 73–75; and Hilleli, "Land Rights," 580.

62. Doukhan, *Land Laws in Israel*, 48.

63. F. Ongley, trans., *The Ottoman Land Code* (London: William Clowes, 1892). The Israeli courts used Doukhan's Hebrew translation, which was not free of controversy. For example, Doukhan's translation spells out the distance of *mawat*'s boundary to be measured from the edge of a "town or village," whereas in Stanley Fisher's translation the description of the point from which the distance should be measured is "the nearest point where there are inhabited places." See Stanley Fisher, *Ottoman Land Laws: Containing the Ottoman Land Code and Later Legislation Affecting Land, with Notes and An Appendix of Cyprus Laws and Rules Relating to Land* (London: H. Milford, 1919), 5. Further, in a translation that Ottomanist Dr. Avi Rubin provided for this research, the term *al-kadim*, which was translated by Doukhan as "ancient time" or in the common English translation as "ab antiquo," is translated as "by custom." These differences and others have consequences regarding landownership and the dispute over it between the Bedouins and Israel.

64. Ongley, *Ottoman Land Code*, 54.

65. See Doukhan, *Land Laws in Israel*, 480.

66. Doukhan, *Land Laws in Israel*, 480.

67. Abraham Granott, *The Land System in Palestine: History and Structure* (London: Eyre & Spottiswoode, 1952).

68. Richard Clifford Tute, *The Ottoman Land Laws: With a Commentary on the Ottoman Land Code of 7th Ramadan 1274* (Jerusalem: Greek Convent Press, 1927), 98.

69. See Al-Mecelle (The Ottoman Courts Manual (Hanafi)), Article 1270, *Islamic Lawbase Collection*, tinyurl.com/jh3hfo4 (accessed June 10, 2017).

70. As Justice Tute mentions, "Of late, the sites of many towns and villages have been greatly extended, and new inhabited sites have been formed. This means that the limits of the *Mawat* have retreated with the advance of habitation" (Tute, *Ottoman Land Laws*, 98).

71. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Defendants Summary (March 3, 2012), par. 20.

72. Charles Arthur Hooper, *The Civil Law of Palestine and Trans-Jordan* (London: Sweet & Maxwell, 1938).

73. Hooper, *Civil Law of Palestine*, art. 1276. See identical version at tinyurl.com/jh3hfo4 (accessed June 10, 2017).

74. Hooper, *Civil Law of Palestine*, 54.

75. Shalom Cohen, *Collection of Ottoman Laws*, 2nd ed. (Tel Aviv: Lidor Print, 1954), 2: 77–78 (Hebrew). The "revivification" had to be reported within six months; if not, the price of the land would have been determined at the time of notification. See also Tute, *Ottoman Land Laws*, 69; and Minkov, "Ottoman Tabu Title," 73–75.

76. Bailey, *Bedouin Law*. For a similar approach, see Sandberg, *Land Title Settlement*, in which he writes, "Also in nomadic society, the leaving of accepted possession signs on the ground serves as a sufficient legal source to the rights of the group temporary absent from the area. . . . The autonomous internal system was very strong even without [land] registration" (48).

77. Doukhan, *Land Laws in Israel*, 48.

78. Doukhan, *Land Laws in Israel*, 46–47.

79. For a discussion on this subject, see Chapter 4.

CHAPTER 3

1. Assaf Likhovski, *Law and Identity in Mandate Palestine* (Chapel Hill: University of North Carolina Press, 2006), 21.

2. Geremy Forman and Alexandre Kedar, "Colonialism, Colonization, and Land Law in Mandate Palestine: The Zor al-Zarqa and Barrat Qisarya Land Disputes in Historical Perspective," *Theoretical Inquiries in Law* 4.2 (2003): 491–539, esp. 499.

3. Ron Harris, Alexandre Kedar, Pnina Lahav, and Assaf Likhovski, eds., *The History of Law in a Multicultural Society: Israel 1917–1967* (Farnham, UK: Ashgate, 2002), 6–7; see also Forman and Kedar, "Colonialism," 491.

4. For a thorough discussion of the historiography of land law during the British Mandate, see Forman and Kedar, "Colonialism," 499–500. See also Kenneth W. Stein, *The Land Question in Palestine, 1917–1939* (Chapel Hill: University of North Carolina Press, 1984).

5. Naomi Shepherd, *Ploughing Sand: British Rule in Palestine, 1917–1948* (New Brunswick, NJ: Rutgers University Press, 2000), 100–104.

6. Stein, *Land Question*, 213; Shepherd, *Ploughing Sand*, 105. For a similar opinion, see Tyler P. N. Warwick, *State Land and Rural Development in Mandatory Palestine, 1920–1948* (Brighton, UK: Sussex Academic Press, 2001).

7. Martin Bunton, "'Progressive Civilizations and Deep-Rooted Traditions': Land Laws, Development, and British Rule in Palestine in the 1920s," in *Colonialism and the Modern World: Selected Studies*, ed. Gregory Blue, Martin Bunton, and Ralph Croizier (Armonk, NY: M. E. Sharpe, 2002), 145; see also Forman and Kedar, "Colonialism," 501; and Martin Bunton, *Colonial Land Policies in Palestine, 1917–1936* (Oxford, UK: Oxford University Press, 2007), 1.

8. See Government of Palestine, *A Survey of Palestine* (Washington, DC: Institute of Palestine Studies, 1991), 1–11 (originally prepared in December 1945 and January 1946 for the Information of the Anglo-American Committee of Inquiry).

9. Bunton, *Colonial Land Policies*, 30–59.

10. Bunton, *Colonial Land Policies*, 38–49.

11. Martin Bunton, "Inventing the Status Quo: Ottoman Land-Law During the Palestine Mandate, 1917–1936," *International History Review* 21 (1999): 29, 56.

12. Forman and Kedar, "Colonialism," 352.

13. Balfour Declaration (U.K., 1917), tinyurl.com/hdr3f2m (accessed June 10, 2017).

14. Mandate for Palestine, art. 6 (July 24, 1922), tinyurl.com/o8m99nt (accessed June 10, 2016).

15. Forman and Kedar, "Colonialism," 491–539.

16. Haim Gerber, *The Social Origins of the Modern Middle East* (Boulder, CO: Lynne Rienner, 1987), 60, see also 68.

17. Bunton, *Colonial Land Policies*, 31–38.

18. Permanent Mandates Commission, Minutes of the 5th Session (October 29, 1924), 78. For a discussion of the British Mandate conception of state land, see Forman and Kedar, "Colonialism."

19. Bunton, *Colonial Land Policies*, 57–58.

20. Bunton, *Colonial Land Policies*, 43, 63.

21. Letter from Norman Bentwich to Major Abramson notifying him of his appointment as chairman of the Commission, August 19, 1920, British National Archive, Colonial Office, CO 733/18. Abramson was a senior British officer who later became the second Palestine Commissioner of Lands. See Forman and Kedar, "Colonialism," 491.

22. *Legislation of Palestine*, ed. Norman Bentwich (Alexandria, Egypt: Whitehead Morris, 1926), 1: 135–36; Frederic M. Goadby and Moses J. Doukhan, *The Land Law of Palestine* (Tel Aviv: Shoshany, 1935); A. Ben-Shemesh, *Land Law in the State of Israel* (Tel Aviv: Masada, 1953), 147.

23. *Legislation of Palestine*, 1: 135–36.

24. For the Israeli interpretation of the ordinance, see Chapter 4.

25. See Avraham Hilleli, "Land Rights: General-Historic Background of Property Development in Israel," in *The Lands of Galilee*, ed. Avshalom Shmuely, Arnon Soffer, and Nurit Kliot (Haifa: Gestelit, 1983), 2: 586. On the situation in 1921, see Dov Gavish, *Land and Map: The Survey of Palestine, 1920–1948* (Jerusalem: Yad Izhak Ben-Zvi, 1991), 119 (Hebrew).

26. Moses Doukhan, *Land Laws in Israel* (Jerusalem: Jerusalem Publishing House, 1952), 50. Similarly, see Moses Doukhan, *Land Laws in Eretz-Israel* (Jerusalem: Ha'Poalim Press, 1925), 138.

27. Acting Chief Secretary Ronald Storrs to Palestine Arab Congress, November 21, 1924, British National Archive, Colonial Office, CO 733/75, 361, cited in Bunton, *Colonial Land Policies*, 48. Similarly, as stated by a British officer in 1926, the right to take over *mahlul* land was "practically never exercised." Minutes written by H. W. Young, September 22, 1926, British National Archive, Colonial Office, CO 733/116/17199, 337, cited in Bunton, *Colonial Land Policies*, 48.

28. Robert Harry Drayton, *The Laws of Palestine in Force on the 31st Day of December 1933* (London: Waterlow & Sons, 1934), 2: 852.

29. See Chapter 2.

30. Doukhan claims wrongly that it reverts to *mawat* land; it remains *miri*, because it is assigned again for others and not left to be revived again. Doukhan, *Land Laws in Israel*, 28.

31. *General Report of the Commission to Enquire into the Conditions of Land Settlement in Palestine (Chair—Major Abramson)*, 1921, British National Archive, Colonial Office, CO 733/18, 174761, pp. 9, 29 (hereafter Abramson Report), reproduced in Martin Bunton, ed., *Land Legislation in Mandate Palestine* (Cambridge, UK: Cambridge Archive Editions, 2010), 5: 50.

32. Abramson Report.

33. Later, Israeli case law held that in certain cases—for example, those regarding a person having a license to the land—permission did not have to be explicit or in writing. Silence too could be sufficient. See C.A. 496/89 *al-Kalab v. Ben-Gurion University of the Negev*, 45(4) P.D. 343, 350 (1991) (Hebrew).

34. On *tassaruf*, see Section 2.7.

35. 55/25 *Dajani v. Colony of Rishon le Zion* (1926); *Habbab v. Government of Palestine*, 14 P.L.R. 337, 339 (S.C., 1947); *Krikorian v. The Attorney General*, 10 P.L.R. 302, 2 A.L.R. 463 (S.C., 1943).

36. The appellant established her claim on the basis of Section 1273 of the Mecelle, which determined that when a person revives *mawat* land and leaves an uncultivated section in the middle of a cultivated plot, that person is entitled to receive property rights to the uncultivated section as well.

37. *Ghannameh v. The Attorney General*, 1 P.L.R. 162 (1927). "The Section [(b) of the Mewat Land Ordinance] says no more. It does not say if the squatter is to get a title deed or not, or if so, if he is to get it as of right or at the discretion of the Registrar, nor does it say if he is to get it gratis or on payment of the value."

38. In an obiter dictum, the Supreme Court stated that the position of the Land Registry Department was "ex gratia" and that the "appellant was not entitled to judgment for any of the land involved" but that it would not interfere with the Land Registry Department's position. *Ghannameh v. The Attorney General*, 163.

39. The land in dispute was divided into three different sections: swampland, cultivated land, and registered land. The government suggested that the appellant be granted rights to the cultivated land and to the registered land.

40. *Debbas v. The Attorney General*, [1943] A.L.R. 205.

41. *Debbas v. The Attorney General*, 207.

42. *Habbab v. Government of Palestine*.

43. The *Dajani* ruling was reported in Goadby and Doukhan, *Land Law*, 48–49; and in Doukhan, *Land Laws in Israel*, 51–52; and was cited in *Habbab v. Government of Palestine*, 124; and *Krikorian v. The Attorney General*, 463.

44. Doukhan, *Land Laws in Israel*, 52. See also *Chaviv v. Government of Palestine*, 7 P.L.R. 288 (S.C., 1940).

45. *Krikorian v. The Attorney General*, 463.

46. *Habbab v. Government of Palestine*, 339.

47. *Habbab v. Government of Palestine*, 339. The Court cited approvingly the review that appeared in Nedjib H. Chiha, *Traité de la propriété immobilière en droit Ottoman* (Cairo: Imp. al-Maaref, 1906), 115.

48. *Habbab v. Government of Palestine*, 340.

49. Bernard Dov Joseph later served as legal adviser to the Jewish Agency and became a dominant Israeli political figure, serving as minister of various departments, including the Israeli Ministry of Justice. Moses Doukhan represented the government.

50. *Habbab v. Government of Palestine*, 341. Similarly, if a person managed to grow cereals on land that was often flooded, it would be deemed revival, even if no additional work was done to protect it against flooding.

51. The consideration of the revival came in 1950, before an Israeli land officer concluded that the land was not revived. Habbab's appeal to the Israeli Supreme Court was dismissed. See C.A. 40/50 *Habbab v. The Government of Israel and Others*, 4 P.D. 494–500 (1953) (Hebrew).

52. *Abu Hana v. The Attorney General*, P.L.R. 221, 5 (S.C., 1938). For more on the affair, see Forman and Kedar, "Colonialism."

53. *Abu Hana v. The Attorney General*, 225.

54. C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, pars. 86–89, and Plaintiffs' Memorandum, pars. 52–53.

55. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Defendants Response, pars. 8, 16–18, and 23–34.

56. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*," par. 31.

57. C.A. 218/74 *al-Hawashlah v. The State of Israel*. See also C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Defendant's Response, pars. 70–79.

58. Meeting summary, March 1921, British National Archive, Colonial Office, CO 733/2/21/21698, folio 77. On Churchill's declaration, see Stein, *Land Question*, 60–61.

59. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Defendant's Response, pars. 70–79.

60. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, par. 31.

61. According to Article 45 of the Palestine Order in Council, 1922 (tinyurl.com/j3rcan5 [accessed June 10, 2017]), "The High Commissioner may by order establish such separate Courts for the district of Beersheba and for such other tribal areas as he may think fit. Such courts may apply tribal custom, so far as it is not repugnant to natural justice or morality."

62. If a conflict existed between the Mewat Land Ordinance and the Palestine Order in Council, the order trumped the ordinance both because of its higher normative level and because it was posterior to the ordinance. *The Establishment of Courts Order, Gazette*, August 1, 1924, 3.

63. Documents regarding the establishment of a tribal court by Israel with the participation of Sheikh al-'Uqbi, 1949, Israel Defense Forces and Defense Establishment Archives, 1447/52/80.

64. That is, by the president of the District Court or the relevant clerk. See *Ghandour v. Abou Ghaban*, P.L.R. 458 (S.C., 1934).

65. The Supreme Court ruled that the Mandatory requirement of approving land transactions does not apply to the Bedouins in Beersheba.

66. *Farhan v. Ali Kirreh*, 3 P.L.R. 30 (1936).

67. *Kirret v. Ghannam el Saneh*, 6 P.L.R. 513, 514 (S.C., 1939).

68. *Abu Hassan v. Irfan*, 11 P.L.R. 556, 557 (S.C., 1944).

69. The Court added that "twenty years have now passed, and it is more than time that this particular law as to the registration of sales should be applied even in Beersheba." C.A. 79/1942 *El Baik v. Gharbieh*, 9 P.L.R. 397 (S.C., 1942).

70. Ruth Kark and Seth Frantzman, "The Negev: Land, Settlement, the Bedouin and Ottoman, and British Policy, 1871–1948," *British Journal of Middle Eastern Studies* 39.1 (2012): 53–77. Professor Kark is a key player for the state in the debate over Bedouin land rights. See Section 3.4.

71. Doukhan, *Land Laws in Israel*, 390; Alexandre Kedar, "On the Legal Geography of Ethnocratic Settler States," *Current Legal Issues: Law and Geography* 5 (2003): 401–41; Gavish, *Land and Map*, 150–55.

72. Abraham Granott, *The Land System in Palestine: History and Structure* (London: Eyre & Spottiswoode, 1952), 74–75; Doukhan, *Land Laws in Israel*, 372–89; Brenna Bhandar, "Title by Registration: Instituting Modern Property Law and Creating Racial Value in the Settler Colony," *Journal of Law and Society* 42.2 (2015): 253–82.

73. Land (Settlement of Title) Ordinance (New Version), 1969 (Hebrew) (hereafter, Land Settlement Ordinance); Haim Sandberg, *Land Title Settlement in Eretz-Israel and the State of Israel* (Jerusalem: Israel National Fund, 2000), 48.

74. Dov Gavish and Ruth Kark, "The Cadastral Mapping of Palestine, 1858–1928," *Geographical Journal* 159.1 (1993): 70–80. See also Geremy Forman, "Settlement of Title in the Galilee: Dowson's Colonial Guiding Principles," *Israel Studies* 7.3 (2002): 61–83.

75. Gavish, *Land and Map*; Bunton, *Colonial Land Policies*; Hilleli, "Land Rights," 579; Hiram Danin, "Memories from the Early Days in Beersheba," in *Beersheba and Its Sites*, ed. Gideon Biger and Eli Schiller (Jerusalem: Ariel, 1991), 170–73 (Hebrew).

76. Yitzhak Oded, "Land Losses Among Israel's Arab Villagers," *New Outlook* 7 (1964):

10, 13; Gavish, *Land and Map*, 201, 203, 205; Shalom Cohen, *Collection of Ottoman Laws*, 2nd ed. (Tel Aviv: Lidor Print, 1954).

77. Gavish, *Land and Map*, 25–29.

78. Joseph Ben-David, *Feud in the Negev: The Land Conflict Between the Bedouin and the State* (Beit Berel: Center for the Research of Arab Society, 1995).

79. Ruth Kark, *Jewish Frontier Settlement in the Negev: 1880–1948* (Jerusalem: Ariel, 2002), 59 (Hebrew) (emphasis added).

80. *Report by His Majesty's Government in the U.K. of Great Britain and Northern Ireland to the Council of the League of Nations on the Administration of Palestine and Transjordan for the Year of 1930*, December 31, 1930, tinyurl.com/j7ue9jy (accessed June 10, 2017).

81. Ghazi Falah, "How Israel Controls the Bedouin in Israel," *Journal of Palestine Studies* 14.2 (1985): 35–36.

82. Eric Mills, *Census of Palestine, 1931* (Jerusalem: Greek Convent & Goldberg Press, 1932), 1: 335 (emphasis added).

83. Office of the Commissioner on Special Duty, Government of Palestine, Jerusalem, 1937, British National Archives, DCF/32-72.

84. Anglo-American Committee of Inquiry, *A Survey of Palestine: Prepared in December 1945 and January 1946 for the Information of the Anglo-American Committee of Inquiry* (Jerusalem: Government Printer, 1946–1947) (hereafter, *Survey of Palestine*), 256, tinyurl.com/ykyyaax (accessed June 10, 2017).

85. *Survey of Palestine*, 257.

86. Kark, *Jewish Frontier*, 52; Chanina Porat, *From Wilderness to Living Land: Land Purchase and Settlement in the Negev, 1930–1947* (Jerusalem: Yad Ben-Zvi, 1996) (Hebrew); Michael R. Fischbach, *Records of Dispossession: Palestinian Refugee Property and the Arab-Israeli Conflict* (New York: Columbia University Press, 2003), 259–60, 273.

87. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Defendant's Response, pars. 55–56.

88. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Defendant's Response, par. 76.

89. Kark, *Jewish Frontier*, 74, 76–78.

90. See, for example, in Kark, *Jewish Frontier* (50), where extensive blocks of land—covering about one-half of the map—are marked "Arab-owned land," or Map 7 (71), where they are marked "parcels purchased from Arab owners, in Jamema (Ruhama) in 1920."

91. Danin, "Memories," 170 (emphasis added).

92. Minutes of the meeting convened by Menachem Ussishkin (JNF chairman) for settlement in the Negev, November 23, 1925, Central Zionist Archives, KKL5/1551-20 (Hebrew).

93. Minutes of the meeting convened by Ussishkin, 3.

94. Oren Yiftachel, Alexandre Kedar, and Ahmad Amara, "Re-Examining the 'Dead Negev Doctrine': Property Rights in Arab Bedouin Regions," *Law and Government* 14 (2012): app. 8.

95. C.C. (Beersheba) 5278/08 *al-'Uqbi et al. v. State of Israel*, app. 50 (List of Arab Land Sellers in Beersheba) to Prof. Oren Yiftachel's opinion.

96. List of names of original Bedouin landowners of kibbutz land, 1926, Mishmar Hanegev Archive (copy with authors).

97. See the website of the Negev Coexistence Forum for Civil Equality, tinyurl.com/jsvdgpv (accessed June 10, 2017); and Ilana Curiel, "Al-'Araqib Was Destroyed Again," *Ynetnews*, January 16, 2011. www.ynet.co.il/articles/0,7340,L-4014318,00.html (accessed July 3, 2017).

98. Fischbach, *Records of Dispossession*, 259–260, 273; Sami Hadawi, *Village Statistics,*

1945: A Classification of Land and Area Ownership in Palestine (Beirut: Palestine Liberation Organization Research Center, 1970), 37.

99. David Ben-Gurion, *The War of Independence: Ben-Gurion's Diary, 1947–1949*, vol. 3 (Tel Aviv: Company for the Distribution of the Teachings of David Ben Gurion, 1982), 845.

100. Ministry of Justice, State of Israel, *Report of the Ministerial Committee for Clarifying the Question of Bedouin Land Ownership in the Negev*, 1952, State of Israel Archives, Division 74, G-5742/10 (Hebrew) (hereafter, Weitz Committee Report).

101. Weitz Committee Report, 2 (emphasis added).

102. Weitz Committee Report, 2.

103. Weitz Committee Report, 2.

104. Memo dated July 11, 1966, Israel Defense Forces and Defense Establishment Archives, Operations Division portfolio, Mem Beit 510 (2902) (Hebrew) (emphasis added).

CHAPTER 4

1. Justin McCarthy, *The Population of Palestine: Population History and Statistics of the Late Ottoman Period and the Mandate* (New York: Columbia University Press, 1990), 36; Hussein Abu Hussein and Fiona McKay, *Access Denied: Palestinian Access to Land in Israel* (London: Zed Books, 2003), 112; State of Israel, *Recommendations of the Team for Application of the Report by the Goldberg Commission for the Regulation of Bedouin Settlement in the Negev*, Governmental Decision 3707, 2011 (hereafter, Goldberg Report), arts. 11–15. The confederations are the Ahiwat, ʿAzazma, Hanajra, Jbarat, Tarabin, Tayaha, Wuhaydat, and Zullam.

2. See Helmut Muhsam, *Bedouin of the Negev: Eight Demographic Studies* (Jerusalem: Jerusalem Academic Press, 1996), 24; Benny Morris, *The Birth of the Palestinian Refugee Problem Revisited* (Cambridge, UK: Cambridge University Press, 2004), 528; and Goldberg Report, arts. 16–18.

3. The traditional owners of these lands filed claims regarding their land in the Mount Negev area, but these claims were rejected outright on the reasoning that the land was already registered as state property. The successors of the claimants argue to this day that their case should be reconsidered. The Goldberg Commission supports this assertion. See Goldberg Report, arts. 80 and 90.

4. Michael Fischbach estimates that the land "nationalized" in the Beersheba region amounts to approximately 1.7 million *dunum*s. See Michael R. Fischbach, *Records of Dispossession: Palestinian Refugee Property and the Arab-Israeli Conflict* (New York: Columbia University Press, 2003), 30, 50–51, 80. For a review of other assessments of the expropriated lands, see Geremy Forman and Alexandre Kedar, "From Arab Land to 'Israel Lands': The Legal Dispossession of the Palestinians Displaced by Israel in the Wake of 1948," *Environment and Planning D: Society and Space* 22 (2004): 809–830, esp. 812. Haia Noach estimates that out of 1.25 million *dunum*s expropriated pursuant to the Absentee Property Law, 137,400 *dunum*s were expropriated in the Negev. See Haia Noach, *The Existent and the Non-Existent Villages: The Unrecognized Bedouin Villages in the Negev* (Tel Aviv: Pardes, 2009), 36 (Hebrew).

5. See Haim Sandberg, *Land Title Settlement in Eretz-Israel and the State of Israel* (Jerusalem: Israel National Fund, 2000), 345.

6. Goldberg Report, art. 31.

7. Different estimates exist regarding the amount of land that was claimed. For example, the Albeck Report estimates the amount of land claimed at 1.5 million *dunum*s, of which 600,000 *dunum*s were tribal grazing grounds. State of Israel, Ministry of Justice, *Summary Report of the Team of Experts on Land Settlement in the Siyaj and the Northern Negev* (Jeru-

salem: Ministry of Justice, October 20, 1975) (Hebrew) (copy with the authors). According to the Goldberg Commission, from the time of the announcement of land settlement on May 2, 1971, until October 10, 1979, 3,220 claims were filed concerning 776,856 *dunum*s (Goldberg Report, art. 33). In addition, 220,000 *dunum*s of Mount Negev land (originally inhabited by Bedouins) were registered in the state's name (Goldberg Report, art. 31). Even though a few hundred claims have been settled through negotiation and court rulings, 570,000 *dunum*s, involving about 2,800 claims, are still pending (Goldberg Report, art. 34). According to data provided to the Goldberg Commission by the Bedouin Development Authority, 2,749 claims concerning an area of 592,000 *dunum*s were still in dispute as of 2008 (Goldberg Report, art. 35). According to the Begin Report, there are currently 2,900 registered claims, concerning 12,000 claimants and encompassing 589,000 *dunum*s. Prime Minister's Office, State of Israel, *Regulating the Status of Bedouin Settlement in the Negev: Summary of the Process of Consultation with the Public Regarding the Draft Law for the Regulation of Bedouin Settlement in the Negev and Recommendations Relating to Policy and Amendments to the Draft Law*, 2013, 8, tinyurl.com/h2adnfj (accessed June 6, 2017) (Hebrew) (hereafter, Begin Report).

8. For more details, see Joseph Ben-David, *Feud in the Negev: The Land Conflict Between the Bedouin and the State* (Beit Berel: Center for the Research of Arab Society, 1995), 73, 75. See also Ghazi Falah, "Israeli State Policy Towards Bedouin Sedentarization in the Negev," *Journal of Palestine Studies* 18.2 (1989): 76.

9. Goldberg Report, art. 30.

10. Land (Settlement of Title) Ordinance (New Version), 5729/1969, arts. 34, 38, 55 (Hebrew) (hereafter, Land Settlement Ordinance (1969)).

11. Albeck Report, 1 (emphasis added).

12. Albeck Report, 1.

13. This conclusion applied explicitly to the *siyaj* area but implicitly and in practice to the entire Negev.

14. Albeck Report, 1.

15. C.A. 218/74 *al-Hawashlah v. The State of Israel*.

16. Albeck Report, 1.

17. Albeck Report, art. 5.

18. In theory, the Bedouins could have purchased private and state land; however, it seems that this option was unrealistic because of the absence of a significant real estate market in the Negev (certainly at that time). In a few cases the Bedouins were able to purchase apartments or houses in Beersheba or in other Negev urban localities.

19. Albeck Report, art. 4. See also Ronen Shamir, "Suspended in Space: Bedouins Under the Law of Israel," in *Law and History*, ed. D. Guttwein and M. Mautner (Jerusalem: Shazar Center for Israeli History, 1997), 473–96.

20. Goldberg Report, art. 50.

21. Data from the Bedouin Development Authority, as referenced in Havatzelet Yahel, "Land Settlement in the Negev," *Notes About the Bedouin* 38 (2006): 54 (Hebrew). Of this area, approximately 80,000 *dunum*s were evacuated for the sake of building an airport in Nevatim following the peace treaty with Egypt. See Goldberg Report; and State of Israel, Land Acquisition in the Negev Act (Peace Treaty with Egypt), 5740/1980 (Hebrew). See also Shlomo Swirski and Yael Hasson, "Invisible Citizens: Israeli Government Policy Toward the Negev Bedouin," *Information on Equality* 14 (September 2005): 19–21 (Hebrew).

22. For a comprehensive analysis of this case law, see Alexandre Kedar, "Majority Time, Minority Time, Land Nation, and the Law of Adverse Possession in Israel," *Law Review* 21 (1998): 665–746 (Hebrew); and Alexandre Kedar, "The Legal Transformation of Ethnic

Geography: Israeli Law and the Palestinian Landholder, 1948–1967," *NYU Journal of International Law and Politics* 33 (2001): 923–1000.

23. A.C. 518/61 *State of Israeli v. Badran*, 16 P.D. 1719 (1962). See also F.H. 17/62 *Badran v. State of Israel*, 17 P.D. 1191 (1963) (Hebrew).

24. *State of Israel v. Badran*, 1719.

25. For the OLC and its different versions and interpretations, see Section 2.7. Section 103 of the OLC refers only to the range of a loud shout, as does Section 1270 of the Mecelle.

26. *State of Israel v. Badran*, 1720.

27. For a similar use of the 1.5-mile criterion, see C.A. 26/62 *State of Israel v. Nazzal*, 16 P.D. 1722 (1962) (Hebrew); C.A. 274/62 *State of Israel v. Suad*, 16 P.D. 1946 (1962) (Hebrew); and C.A. 55/63 *Suad v. State of Israel*, 20(2) P.D. 3 (1966) (Hebrew).

28. See Chapter 2.

29. Moses Doukhan, *Land Laws in Israel* (Jerusalem: Jerusalem Publishing House, 1952), 48. See Section 2.1.

30. See Section 2.7.

31. See Section 3.1.

32. *State of Israel v. Badran*, 1720 (emphasis added).

33. See discussion in Section 2.7.

34. *General Report of the Commission to Enquire into the Conditions of Land Settlement in Palestine (Chair, Major Abramson)*, 1921, Public Records Office, London, CO 733/18, 174761, p. 10 (emphasis added).

35. Land (Settlement of Title) Ordinance (New Version), sec. 1 (1969) (emphasis added).

36. See Section 2.7.

37. See discussion of the Mandate legislation and rulings in Section 3.2.

38. *State of Israel v. Badran*; *Suad v. State of Israel*, 4–5; C.A. 298/66 *Cassis v. State of Israel*, 21(1) P.D. 372, 374 (1967) (Hebrew).

39. Land (Settlement of Title) Ordinance (1928), sec. 29.

40. C.A. 472/59 *al-Gadir v. State of Israel*, 16 P.D. 648 (1961).

41. C.A. 25/62 *State of Israel v. Diab*, 16 P.D. 1485 (1962). See also C.A. 342/61 *State of Israel v. Sawaed*, 15 P.D. 2469, 2475 (1961). Compare to C.A. 452/59 *Daoud v. al-Shaer*, 15 P.D. 1392 (1961).

42. See discussion in Section 3.1.

43. *State of Israel v. Badran*, 1720–21.

44. *State of Israel v. Badran*, 1720–21.

45. The use of evidence and procedural rules as a means to achieve fundamental objectives is not unique to the Israeli judicial system. For example, see UN Commission on Human Rights, *Human Rights of Indigenous Peoples: Indigenous Peoples and Their Relationship to Land*, E/CN.4/Sub.2/18, June 3, 1999, par. 55. See also Nell Newton, "Indian Claims in the Courts of the Conqueror," *American University Law Review* 41.3 (1992): 820; and Guadelupe T. Luna, "Chicana/Chicano Land Tenure in the Agrarian Domain: On the Edge of a 'Naked Knife,'" *Michigan Journal of Race and Law* 4 (1998): 39–144.

46. Steve Wexler, "Burden of Proof, Writ Large," *University of British Columbia Law Review* 33 (1999): 78.

47. H.C.J. 73/53 *"Kol Ha'am" Company Limited v. Minister of the Interior*, 7 P.D. 871, 884 (1953).

48. See letter from the Director of the Department of Ownership and Registration in the Israel Land Authority to Yossef Weitz, Director of the Israel Land Authority, May 29, 1964. The letter suggests that land in the Bnei Shimon area in the Negev that might be claimed by the Bedouins should be claimed by the state as *mawat* lands, according to the

Supreme Court ruling in *Badran v. State of Israel*. The letter is quoted in Sandberg, *Land Title Settlement*, 350n53.

49. See C.A. 218/74 *al-Hawashlah v. The State of Israel*.

50. For a critical analysis of the *al-Hawashlah* ruling, see Shamir, "Suspended in Space"; and Issachar Rosen-Zvi, *Taking Space Seriously: Law, Space, and Society in Contemporary Israel* (Burlington, VT: Ashgate, 2004), ch. 3.

51. The land settlement case that was mentioned in the appeal is 3/69. The District Court handed down its decision in 1972, as did the Supreme Court in 1984. See also *al-Hawashlah v. The State of Israel*, 143.

52. *Al-Hawashlah v. The State of Israel*, 146.

53. See Section 1.5.

54. *Al-Hawashlah v. The State of Israel*, 143–44.

55. *Al-Hawashlah v. The State of Israel*, 147.

56. *Al-Hawashlah v. The State of Israel*, 148. Beersheba was established only at the beginning of the twentieth century; however, it is possible that Justice Halima was not aware of this, as his remarks suggest an assumption that Beersheba had existed in 1858, when the OLC was enacted.

57. *Al-Hawashlah v. The State of Israel*, 148.

58. *Al-Hawashlah v. The State of Israel*, 148. See also Shamir, "Suspended in Space," 481–82.

59. See Section 4.3.

60. *Al-Hawashlah v. The State of Israel*, 148–49.

61. *Al-Hawashlah v. The State of Israel*, 148.

62. *Al-Hawashlah v. The State of Israel*, 150.

63. *Al-Hawashlah v. The State of Israel*, 149.

64. *Al-Hawashlah v. The State of Israel*, sec. 7.

65. *Al-Hawashlah v. The State of Israel*, 152.

66. *Al-Hawashlah v. The State of Israel*, 150.

67. *Al-Hawashlah v. The State of Israel*, 149–50.

68. *Al-Hawashlah v. The State of Israel*, 150–51.

69. The Bedouins did not have legal representation in the District Court but were represented in their appeal to the Supreme Court.

70. Avraham Halima, "The Negev Lands in the Eyes of the Law," *Land Use Research Institute* 24 (1986): 9 (Hebrew).

71. Havatzelet Yahel, "Land Disputes Between the Negev Bedouin and Israel," *Israel Studies* 11.2 (2006): 1–22, esp. 12–13.

72. After 2007, this organization changed its name to the Bedouin Development Authority.

73. The state submitted counterclaims in response to Bedouin claims that had been submitted thirty years earlier. Yahel, "Land Disputes."

74. See testimony of Ilan Yeshurun, deputy director of the Bedouin Development Authority, before the Goldberg Commission, Goldberg Commission Protocols (Minutes), May 20, 2008, 123–26 (Hebrew) (copy with the authors). According to a report by the Israel Land Authority, the state has filed 370 counterclaims regarding approximately 160,000 *dunum*s. See Israel Land Authority, State of Israel, *The Bedouin in the Negev*, 2010, tinyurl.com/jkbbody (accessed June 11, 2017).

75. See testimony of Ilan Yeshurun before the Goldberg Commission, May 20, 2008, Goldberg Commission Protocols (Minutes), 123–26 (copy with the authors). See also Yeshurun's presentation at the annual conference of the Planners Union at Ben-Gurion

University (February 10, 2011) during the special panel "Going Forward to Solve the Bedouin Problem."

76. See, for example, Rosen-Zvi, *Taking Space Seriously*, 46–49; Hussein and McKay, *Access Denied*, 121–24; and Shamir, "Suspended in Space," 481–82.

77. Goldberg Report, arts. 16–18.

78. Yahel, "Land Disputes," 11.

79. Yahel, *Land Settlement*, 45–60; and Yahel, "Land Disputes." At the time of writing *Land Settlement in the Negev* (in Hebrew), Yahel served as head of the Civil Department of the Southern District, and at the time of writing *Land Disputes Between the Negev Bedouin and Israel* (in English), she served as head of the Land Title Settlement Unit.

80. Haim Sandberg, *Israel Lands: Zionism and Post-Zionism* (Jerusalem: Hebrew University, 2007), 22 (Hebrew). See also Gideon Biger, "The Bedouin in the Negev: Truth or Fantasy," *Haaretz*, June 26, 2001, tinyurl.com/hmovlp7 (accessed June 11, 2017) (Hebrew).

81. Israel Land Authority, *Bedouin in the Negev*, 2010, tinyurl.com/jkbbody (accessed June 11, 2017). For the publicity film produced by the Israel Land Authority about the Bedouins, see *Lands of the Negev*, Israel Ministry of Foreign Affairs YouTube channel, youtu.be/ei8yHjk_MbM (accessed August 19, 2013).

82. *Land* 66 (2009) (Hebrew).

83. Ibrahim Waqili, speech delivered at Land Day Ceremony, 'Araqib, March 30, 2011.

84. C.C. (Beersheba) 7161/06 *al-'Uqbi et al. v. State of Israel*, Plaintiffs' Memorandum of Law (2010), pars. 31–34 (Hebrew); Goldberg Report, art. 20.

85. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Plaintiffs' Memorandum, pars. 31–34.

86. For the claims, see, for example, Ministry of Justice, State of Israel, *Memorandum of Claim*, August 30, 1973, on file with the authors.

87. In this book we focus on the principal case, in which claims involving six of the plots were consolidated. Three of the plots are located in 'Araqib (south of the current Bedouin city of Rahat) and three are in Zehilika (northwest of Rahat). C.A. 4220/12 *al-'Uqbi et al. v. State of Israel* (2012), pars. 1 and 27–31 (Hebrew), and Plaintiffs' Memorandum (November 18, 2013), pars. 12–25. The action sought to register the land in the names of eight of Suleiman's heirs.

88. According to an amendment to the Land Settlement Ordinance, disputed claims over land are referred to the relevant district court. See Land Settlement Ordinance (New Version), art. 43. The state responded by requesting that the Court dismiss *in limine* the al-'Uqbi's claim and register the land in the name of the Bedouin Development Authority and the State of Israel, because it was expropriated in compliance with the Land Acquisition Act. District Court judge Yadin Timor rejected the request. See C.C. 7161/06 *al-'Uqbi et al. v. State of Israel* (November 2008) (copy on file with the authors) (Hebrew).

89. The first session before Judge Dovrat took place on June 7, 2009. The case encompassed almost 12,000 pages of court minutes, and eleven days were devoted to hearing witness testimonies. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Plaintiffs' Memorandum, opening paragraph.

90. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel* (unpublished, March 15, 2012).

91. At the start of the trial, attorneys Shai Gabsi and Radwan Abu Arara represented Suleiman al-'Uqbi's descendants. In April 2010 attorney Michael Sfard replaced Gabsi. The late journalist Aviva Lori opined that the trial was "among the most important that the country has known." See Aviva Lori, "The Battle over Bedouin Land in al-'Araqib Is Being Conducted in a Beersheba Court," *Haaretz*, August 8, 2010, www.haaretz.co.il/hasite/spages/1185410.html (Hebrew).

92. On the conflict, see Section 4.4.5.

93. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Plaintiffs' Memorandum, par. 6, and Memorandum of Plaintiffs' Response, pars. 1–4; C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, pars. 2, 14, and 19, and Plaintiffs' Memorandum, opening page.

94. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, hearing before Judge Timor (unpublished, June 22, 2008) (copy with the authors). See also C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, par. 5, and Plaintiffs' Memorandum, pars. 74–94; and C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, Plaintiffs' Memorandum.

95. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Plaintiffs' Memorandum, pars. 23–28.

96. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Plaintiffs' Memorandum, par. 51; C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, Plaintiffs' Memorandum, opening page; *Badran v. State of Israel*, 1717.

97. Otherwise, we would reach absurd conclusions. Can we imagine that the definition of a "family member" would not include individuals born after the enactment of the definition? Is Tel Aviv not a "city" for the purpose of the OLC because it was established fifty years after the OLC's enactment? See C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Plaintiffs' Memorandum, pars. 68–73; and C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, pars. 117–25, and Plaintiffs' Memorandum, pars. 95–101.

98. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Plaintiffs' Memorandum, pars. 81–94.

99. C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, Plaintiffs' Memorandum, pars. 66–71; C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Memorandum of Plaintiffs' Response, pars. 6 and 7.

100. C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, par. 6.

101. C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, par. 6, and Plaintiffs' Memorandum, pars. 3 and 49–50. On land acquisition by Jews, see Section 3.3.

102. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, par. 3; C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, Plaintiffs' Memorandum, par. 56.

103. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Plaintiffs' Memorandum, pars. 95–107. On the Bedouins as indigenous people, see Chapter 7.

104. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Plaintiffs' Complaint, hearing before Judge Timor (unpublished, June 22, 2008) (copy with the authors). See also C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Plaintiffs' Memorandum, pars. 108–110; and C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, pars. 146–52.

105. There is almost no room under the Land Acquisition Act for canceling the expropriation. See *al-'Uqbi et al. v. State of Israel*, Memorandum of Defendant's Response, pars. 1–6.

106. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, par. 8. The state disputed the claims on the grounds that all the documents submitted by the plaintiffs could not be specifically connected to one of the disputed plots or because they lacked legal force in relation to the state. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Memorandum of Defendant's Response, pars. 59–69.

107. See *Badran v. State of Israel*; *State of Israel v. Suad*; and *State of Israel v. Sawaed*. For further discussion of these cases, see Kedar, "Legal Transformation."

108. *Al-Hawashlah v. The State of Israel*, 147–50.

109. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Memorandum of Defendant's Response, par. 13.

110. The state argued that tax records could be at most evidence of occupying the land, not of cultivating it. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Memorandum of Defendant's Response, par. 32.

111. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, par. 7, and Memorandum of Defendant's Response, pars. 1 and 7–11.

112. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Memorandum of Defendant's Response, par. 20.

113. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Memorandum of Defendant's Response, par. 21.

114. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Memorandum of Defendant's Response, par. 20. For another interpretation of the requirement to register *mawat* land in 1921, see Section 3.1.

115. According to the State Property Act, the state has residuary ownership of land, and consequently the evidentiary onus lies on any person claiming land rights. Furthermore, according to the Land Settlement Ordinance (New Version), the state is not a conventional party and the legislature gave it a preferred position, seeing it as the owner unless proven otherwise. See C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Memorandum of Defendant's Response, pars. 80–82.

116. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Memorandum of Defendant's Response, pars. 70–79.

117. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Memorandum of Defendant's Response, pars. 89–93.

118. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Memorandum of Defendant's Response.

119. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel.*

120. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, pars. 11–14.

121. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, par. 22. See also C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, par. 45.

122. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, par. 32.

123. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, par. 16 (emphasis in original).

124. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, par. 19.

125. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, par. 26.

126. *Habbab v. Government of Palestine*, 14 P.L.R. (S.C., 1947), 337; C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*," par. 30.

127. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, pars. 28–30.

128. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, par. 36.

129. See Section 1.6.

130. Paul G. McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (New York: Oxford University Press, 2011), 241–43.

131. McHugh, *Aboriginal Title*, 242.

132. McHugh, *Aboriginal Title*, 246.

133. McHugh, *Aboriginal Title*, 269–71.

134. McHugh, *Aboriginal Title*, 272.

135. Henry Reynolds, *The Question of Genocide in Australia's History: An Indelible Stain?* (Ringwood, Australia: Viking, 2001).

136. McHugh, *Aboriginal Title*, 273.

137. McHugh, *Aboriginal Title*, 278–82.

138. The *al-Hawashlah* case and the use of knowledge that appears as scientific in this key case require a separate article.

139. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Expert opinion of Prof. Ruth Kark, January 30, 2010.

140. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, par. 21 (2012) (Hebrew), and Plaintiffs' Response, pars. 13–14.

141. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Plaintiffs' Memorandum, pars. 23–28.

142. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Plaintiffs' Response, par. 12.

143. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Defendant's Response, pars. 9–11 and 43–54 (copy with the authors).

144. See Section 1.6.

145. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Defendant's Memorandum, pars. 43–54.

146. The state reiterated this position also in its response to the appeal. C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, Defendant's Response, pars. 101–8.

147. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, par. 22. On Judge Dovrat's criticism of Kark's opinion, see Section 4.4.5.

148. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, par. 23.

149. Antonio Gramsci, *Selections from the Prison Notebooks* (London: Electric Book, 2001); Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Random House, 1975); Arundhati Roy, *Power Politics* (New York: South End Press, 2001); Mansour Nasasra, Sophie Richter-Devroe, Sarab Abu Rabia-Queder, and Richard Ratcliffe, eds., *The Naqab Bedouin and Colonialism: New Perspectives* (London: Routledge, 2014).

150. Gramsci, *Selections*, 12–15.

151. Roy, *Power Politics*, 7.

152. See Section 1.6.

153. Ruth Kark, *Frontier Jewish Settlement in the Negev, 1880–1948* (Jerusalem: Ariel, 2002), 57 (Hebrew). Although Kark refers to the late 1920s, it is clear that such a massive system of farming and settlement must have begun at least a decade earlier.

154. Kark, *Frontier Jewish Settlement*, 76–78.

155. Kark, *Frontier Jewish Settlement*, 50.

156. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Expert opinion of Prof. Ruth Kark (October 31, 2010), 11 (copy with the authors); C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Defendant's Memorandum, par. 1, and cross-examination protocol, Prof. Kark (June 6, 2010), 21–23 (copy with the authors).

157. Kark, *Frontier Jewish Settlement*, 59.

158. Ruth Kark and Seth J. Frantzman, "The Negev: Land, Settlement, the Bedouin and Ottoman, and British Policy, 1871–1948," *British Journal of Middle Eastern Studies* 39 (2012): 53–77.

159. Kark and Frantzman, "The Negev," 72.

160. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Expert opinion of Prof. Ruth Kark (January 30, 2010).

161. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Expert opinion of Prof. Ruth Kark (October 31, 2010), 4–5; for the omitted sentence, see William M. Thomson, *The Land and the Book: or, Biblical Illustrations Drawn from the Manners and Customs, the Scenes and Scenery of the Holy Land*, facsimile ed. (Piscataway, NJ: Gorgias Press, 2004 [1911]), 556–57.

162. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Expert opinion of Prof. Ruth Kark (January 30, 2010), 18–20, 47; Edward Robinson and Eli Smith, *Biblical Researches in Palestine, Mount Sinai, and Arabia Petraea: A Journal of Travels in the Year 1838* (London: John Murray, 1841), 306.

163. Minutes of a meeting dated May 13, 2010, regarding C.C. 7161/06 *Al-'Uqbi et al. v. State of Israel*, Protocols for the case, 18–20, 47 (copy with the authors). Robinson and Smith, *Biblical Researches*, 306.

164. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Expert opinion of Prof. Ruth Kark (January 30, 2010), 15.

165. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Expert opinion of Prof. Ruth Kark (January 30, 2010), 15. For the omitted sentence, see Tristram Henry Baker, *Journal of Travels in Palestine, Undertaken with Special Reference to Its Physical Character* (Jerusalem: Bialik Institute, 1975), 279, 285–86 (Hebrew).

166. Minutes of a meeting dated May 13, 2010, regarding C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Protocols for the case, 25–31, 47 (copy with the authors).

167. Kark, *Frontier Jewish Settlement*, 3.

168. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Expert opinion of Prof. Ruth Kark (January 30, 2010).

169. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Expert opinion of Prof. Ruth Kark (January 30, 2010), 16.

170. Kark justified the change in her opinion on the basis of new documents. These documents were not revealed in court and were not given a reference to an academic source or any other source. About these contradictions and cross-examination in court, see Minutes of a meeting about *al-'Uqbi et al. v. State of Israel*, May 13, 2010, Protocols for the case, 14–22, 47, 71–72, 73–75 (copy with the authors) and minutes of the meetings on May 6, 2010, and June 23, 2010, in the same source.

171. *Sanad* (pl. *sanedim* in Hebrew)—the internal property documents used by the Bedouins until today.

172. Minutes of the meeting dated May 13, 2010, Protocols, 71–72 (copy with the authors).

173. Minutes of a meeting about *al-'Uqbi et al. v. State of Israel*, May 13, 2010, Protocols, 73 (copy with the authors).

174. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Cross-examination protocol, Prof. Kark (June 23, 2010), 21–23 (copy with the authors).

175. Bent Flyvbjerg, *Rationality and Power: Democracy in Practice* (Chicago: University of Chicago Press, 1998), tinyurl.com/jgt6nqs (accessed June 11, 2017).

176. See Conclusion.

PART III

1. See Sections I.4 and 1.7.

CHAPTER 5

1. C.A. 218/74 *al-Hawashlah v. The State of Israel*.

2. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Defendant's Memorandum, par. 18 (Hebrew) (copy with the authors).

3. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Defendant's Memorandum, pars. 23–34.

4. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Expert opinion of Ruth Kark (January 30, 2010), 4 (copy with the authors).

5. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Plaintiffs' Memorandum (2007) (copy with the authors); C.A. 4220/12 *al-'Uqbi et al. v. State of Israel* (2012), Statement of Appeal, pars. 1 and 27–31 (Hebrew), and Appellants' Memorandum, pars. 12–25 (copy with the authors); C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, hearing before Judge Timor (unpublished, June 22, 2008), and Plaintiffs' Memorandum, pars. 35–36.

6. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, par. 19, and hearing before Judge Dovrat (unpublished, February 24, 2010) (copy with the authors); Shlomo Ben Yossef, "Expert Aerial Photos Decipher Opinion," September 2, 2009 (unpublished, on file with the authors) (Hebrew).

7. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, par. 26.

8. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, par. 19.

9. Other nearby areas receive 100– 250 millimeters of rain.

10. 'Aref al-'Aref, *History of Beersheba and Its Tribes*, trans. M. Kapeliuk (Tel Aviv: Shoshani Press, 1937), 192–200 (Hebrew); Avraham Negev, "Preservation and Forgetfulness in Ancient Geographical Names in the Central Negev," *Cathedra* 4 (1977): 121–32 (Hebrew).

11. Aref Abu-Rabi'a, *Bedouin Century: Education and Development Among the Negev Tribes in the Twentieth Century* (New York: Berghahn Books, 2001), 1–3; Joseph Ben-David, *The Bedouin in Israel: Land Conflicts and Social Issues* (Jerusalem: Land Policy and Land Use Research Institute, 2004), 52–53 (Hebrew).

12. Abu-Rabi'a, *Bedouin Century*, 1–6; Avinoam Meir, *As Nomadism Ends: The Israeli Bedouin of the Negev* (Boulder, CO: Westview Press, 1997), 74–86; Clinton Bailey, "Dating the Arrival of the Bedouin Tribes in Sinai and the Negev," *Journal of the Economic and Social History of the Orient* 28 (1985): 20–49.

13. Wolf-Dieter Hütteroth and Kamal Abdulfattah, *Historical Geography of Palestine, Transjordan, and Southern Syria in the Late 16th Century* (Erlangen: Selbstverlag der Fränkischen Geographischen Gesellschaft, 1977).

14. Hütteroth and Abdulfattah, *Historical Geography*, 28–29. According to Hütteroth and Abdulfattah, "From the use of the term 'mazra'a,' it is clear that it denotes, with very few exceptions, an agricultural area which has no permanent settlement on it" (29).

15. Hütteroth and Abdulfattah, *Historical Geography*, 29.

16. The census mentions the U Yatim, U Jaram, U B 'Attiyya, U B 'Atta, U B Haytam, and U B Sawalina tribes. The designations U and B stand for *'urban* and *bani* (sons of), respectively. See Hütteroth and Abdulfattah, *Historical Geography*.

17. David H. K. Amiran, "The Pattern of Settlement in Palestine," *Israel Exploration Journal* 3 (1953): 65–78; Avinoam Meir, "Geo-Legal Aspects of the Ottoman Land Law in Relation to the Negev," in *Economy and Land Among the Negev Bedouin: New Processes, New Insights*, ed. Avinoam Meir (Beersheba: Ben-Gurion University of the Negev, 2006), 53–56.

18. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Plaintiffs' Memorandum, par. 4; C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, Statement of Appeal, par. 21.

19. Some of them traveled during the summer or far from Bedouin settlement. See C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, Plaintiffs' Memorandum, pars. 103–7.

20. Victor Guérin, *Description géographique, historique et archéologique de la Palestine*, v. 2, *Judée* (Paris: L'Imprimerie Impériale, 1869); William M. Thomson, *The Land and the Book: Or, Biblical Illustrations Drawn from the Manners and Customs, the Scenes and Scenery of the Holy Land*, 2nd facsimile ed. (Piscataway, NJ: Gorgias Press, 2004 [1901]), 556–57.

21. Edward Robinson and Eli Smith, *Biblical Researches in Palestine, Mount Sinai, and Arabia Petraea: A Journal of Travels in the Year 1838* (London: John Murray, 1841), 1: 306.

22. Carel Willem Meredith van de Velde, *Narrative of a Journey Through Syria and Palestine in 1851 and 1852* (Edinburgh: William Blackwood & Sons, 1854), 2: 139.

23. Thomson, *Land and the Book*, 556–57. See also Henry Baker Tristram, *Journal of Travels in Palestine, Undertaken with Special Reference to Its Physical Character* (London: Society for Promoting Christian Knowledge, 1865), 372.

24. Edward Hull, *Mount Seir, Sinai, and Western Palestine: Being a Narrative of a Scientific Expedition* (London: Committee of the Palestine Exploration Fund by R. Bentley, 1885), 138–39.

25. Antonin Jaussen, *Coutumes des arabes au pays de moab* (Paris: Adrien-Maisonneuve, 1948), 246 (emphasis added). Translated into English for the authors by Dr. Cédric Parizot.

26. Edward Wilton, *The Negeb, or "South Country" of Scripture* (London: Macmillan, 1863), 222–29; Ulrich Jasper Seetzen, *Reisen Durch Syrien, Palästina, Phönicien, die Transjordan-Länder, Arabia Petraea und Unter-Aegypten* (Berlin: Verlegt bei G. Reimer, 1855); Max von Oppenheim, *Die Beduinen*, Bd. 2, *Die Beduinenstämme in Palästina, Transjordanien, Sinai, Hedjaz* (Wiesbaden: O. Harrassowitz, 1943).

27. See Section 1.7.

28. Edward Henry Palmer, *The Desert of the Exodus: Journeys on Foot in the Wilderness of the Forty Years' Wanderings; Undertaken in Connexion with the Ordnance Survey of Sinai, and the Palestine Exploration Fund* (Cambridge, UK: Deighton, Bell, 1871), 2: 294–349.

29. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Defendant's Memorandum, pars. 40 and 42, and pars. 20 and 22.

30. Claude Conder and Herbert Kitchener, *The Survey of Western Palestine: Memoirs of the Topography, Orography, Hydrography, and Archaeology: Judaea* (London: Committee of the Palestine Exploration Fund, 1883), 3: 392.

31. Alois Musil, *Arabia Petraea* (Vienna: A. Holder, 1907), 38.

32. On Musil's reports, see Y. Braslavsky, *Do You Know the Land*, vol. 3, *Around the Dead Sea* (Tel Aviv: Hakibbutz Hameuchad, 1943), 227–28.

33. Zalman David Levontin, *To the Land of Our Fathers* (Tel Aviv: Eitan, 1924), 1: 37 (Hebrew).

34. Levontin, *Land of our Fathers*, 36–37.

35. There is no exact dating of the visit, but in his writings, Schenkin describes the Beersheba school building, which is dated to 1912–1913. See Menachem Scheinkin, *The Writings of Menachem Scheinkin* (Jerusalem: Rubin Mass, with Miriam Scheinkin, 1935), 186–87 (Hebrew).

36. *Aspiration for the Negev*, 1974, Yad Ben Tzvi Archive, 2/5/1/1 (Hebrew).

37. Palestine Land Development Company, *The Negev*, ed. Yaakov Tahon (World Zionist Organization, 1920), Central Zionist Archives (CZA), L/6298/2 (1/33, Old no. L 2/127/18).

38. Data from Palestine Land Development Company, *The Negev*, ch. "Tayaha."

39. Palestine Land Development Company, *The Negev*.

40. *General Report of the Commission to Enquire into the Conditions of Land Settlement in Palestine (Chair, Major Abramson)*, 1921, Public Records Office, London, CO 733/18, 174761 (hereafter, Abramson Report).

41. Abramson Report, 9–10, 28–29.

42. Yasemin Avci, "Application of Tanzimat in the Desert: The Bedouin and the Creation of a New Town in Southern Palestine (1860–1914)," *Middle Eastern Studies* 45.6 (2009): 976–77.

43. Clinton Bailey, "The Negev in the Nineteenth Century: Reconstructing History from Bedouin Oral Tradition," *Asian and African Studies* 14.1 (1980): 35 and maps on 40–41.

44. Amiran, "Pattern of Settlement," 75–78.

45. David Grossman, "The Fallah and the Bedouin in the Desert Fringe: Relationships and Subsistence Strategies," in *The Arabs in Israel: Geographical Dynamics*, ed. David Grossman and Avinoam Meir (Ramat-Gan: Bar-Ilan University Press, Ben-Gurion University Press, and Magnes Press, 1994), 23 (Hebrew); David Grossman, *Expansion and Desertion: The Arab Village and Its Offshoots in Ottoman Palestine* (Jerusalem: Yad Ben-Zvi, 1994), 213–16 (Hebrew).

46. Avinoam Meir, "Contemporary State Discourse and Historical Pastoral Spatiality: Contradictions in the Land Conflict Between the Israeli Bedouin and the State," *Ethnic and Racial Studies* 32.2 (2009): 831; Meir, "Geo-Legal Aspects," 54.

47. This area lies between the contemporary localities of Sderot, Qiryat Gat, and Beersheba and a certain distance from Dimona. See Eliyahu Epstein, "Bedouin of the Negeb," *Palestine Exploration Quarterly* 71.2 (1939): 70.

48. George Eden Kirk, "Archaeological Explorations in the Southern Desert," *Palestine Exploration Quarterly* 70.4 (1938): 214–16.

49. State of Israel, *Recommendations of the Team for Application of the Report by the Goldberg Commission for the Regulation of Bedouin Settlement in the Negev*, Governmental Decision 3707, 2011, art. 9.

50. See maps of the Beersheba District and Hebron District from 1936 (sheets 12 and 15), based on aerial photographs. Copies at the Survey of Israel.

51. Al-'Aref, *History of Beersheba*.

52. Al-'Aref, *History of Beersheba*, 100–3; Braslavsky, *Do You Know the Land*, 248–49.

53. Bailey, "Negev in the Nineteenth Century," 40–41; Bailey, "Dating the Arrival," 20–49.

54. Seetzen, *Reisen*, 32–33.

55. Musil, *Arabia Petraea*, 36.

56. Von Oppenheim, *Die Beduinen*, 112.

57. Braslavsky, *Do You Know the Land*, 270–72; al-'Aref, *History of Beersheba*, 101.

58. Located where a road was later built at what is now the Talmei Bilu intersection. Sason Bar-Zvi, Aref Abu-Rabia, and Gideon Kressel, *The Charm of Graves: Mourning Rituals and Tomb Worshipping Among the Negev Bedouin* (Tel Aviv: MoD, 1998), 103 (Hebrew).

59. Robert Frier Jardine and B. A. McArthur Davies, *A Gazetteer of the Place Names Which Appear in the Small-Scale Maps of Palestine and Trans-Jordan* (Jerusalem: Department of Lands and Surveys, 1940).

60. Palestine Land Development Company, *The Negev*.

61. Palestine Land Development Company, *The Negev*, ch. "Tayaha," 1, 13.

62. Judge Dovrat compared the cultivation percentage to Araqib 6 and Araqib 60, where the cultivation percentages were 20% and 5%, respectively. See C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, par. 19 (Hebrew).

63. Ben Yossef, "Expert Aerial Photos," January 5, 1945, Survey of Israel, Flight PS13, photos 5032, 5033, 5034, 5132, 5133, and 5161.

64. Military Governor in the Negev, Receipt 0894, August 28, 1950, al-'Uqbi Family Archives; Finance Ministry, Receipts 110834 and 110837, January 24, 1950, al-'Uqbi Family Archives; C.C. (Beersheba) 5278/08 *al-'Uqbi et al. v. State of Israel*, Appendixes 47 and 49 to the opinion of Prof. Oren Yiftachel.

65. Ministry of Education, *School Report of Nuri al-'Uqbi*, December 25, 1950, al-'Uqbi Family Archive; C.C. (Beersheba) 5278/08 *al-'Uqbi et al. v. State of Israel*, Appendix 48 to the opinion of Prof. Oren Yiftachel.

66. Land Registry Office of Beersheba, registration dated May 24, 1956. See also the Turkish document on the registration of Beersheba land to its holders, May 4, 1891, Başbakanlık Osmanlı Arşivleri (The Prime Minister's Ottoman Archives) (BOA), IMMS, 122/5229; and Salman Abu-Sitta, *The Denied Inheritance: Palestinian Land Ownership in Beer Sheba* (London: Palestine Land Society, 2009), 6–7.

67. Land Registration of the Military Government, Israel Defense Forces Archive, 233–834/1953. A copy of the document is found in C.C. (Beersheba) 5278/08 *al-'Uqbi et al. v. State of Israel*, Appendix 51 to the opinion of Prof. Oren Yiftachel.

68. Land Registry Office of Beersheba, registration dated May 24, 1956; Abu-Sitta, *Denied Inheritance*, 6–7.

69. Additional evidence included an expert opinion of an aerial decipherer who showed

that in 1945, 584 out of 885 *dunum*s were cultivated and that 263 *dunum*s were possessed by British military as fortifications. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Plaintiff Memorandum, pars. 37 and 42–44.

70. C.C. (Beersheba) 5278/08 *al-'Uqbi et al. v. State of Israel*, Appendix 5 ("Agreement of 17 Sheikhs on the Allocation of Land Khirbet Yaacov," 1883) to the opinion of Prof. Oren Yiftachel (al-'Uqbi Family Archives; report copies available from the authors).

71. C.C. (Beersheba) 5278/08 *al-'Uqbi et al. v. State of Israel*, Appendix 27 ("Sanad: Sale Agreement Between Salam, Farih, and Aven Sbiha al-'Uqbi to Suleiman Hussein Abu-Modig'im al-Turi," 1909, 1929) to the opinion of Prof. Oren Yiftachel (al-Turi Family Archives). This appendix is reprinted as Appendix 11 of this book.

72. C.C. (Beersheba) 5278/08 *al-'Uqbi et al. v. State of Israel*, Appendix 28 ("Sanad: Sale Agreement Between Muhammad Salmeh al-Mu'rbe and Muhammad Salam al-'Uqbi," 1911) to the opinion of Prof. Oren Yiftachel (al-'Uqbi Family Archives). This appendix is reprinted as Appendix 10 of this book.

73. C.C. (Beersheba) 5278/08, *al-'Uqbi et al. v. State of Israel*, Appendix 29 ("Sanad: Sale Agreement, Araqib 1, 2, Between Haj Muhammad and His Son Suleiman," December 8, 1942) to the opinion of Prof. Oren Yiftachel (al-'Uqbi Family Archives).

74. Oren Yiftachel, Alexandre Kedar, and Ahmad Amara, "Re-Examining the 'Dead Negev Doctrine': Property Rights in Arab Bedouin Regions," *Law and Government* 14 (2012): 7–147 (Hebrew); C.C. (Beersheba) 5278/08 *al-'Uqbi et al. v. State of Israel*, Appendix 29 to the opinion of Prof. Oren Yiftachel.

75. Yiftachel et al., "Re-Examining the DND"; C.C. (Beersheba) 5278/08 *al-'Uqbi et al. v. State of Israel*, Appendix 30 ("Land Distribution Agreement Between Haj Muhammad and His Five Sons," 1935) to the opinion of Prof. Oren Yiftachel (al-'Uqbi Family Archives).

76. C.C. (Beersheba) 5278/08 *al-'Uqbi et al. v. State of Israel*, Appendix 31 ("Sanad: Zhiika Land Sale Agreement 132–134," September 5, 1935) to the opinion of Prof. Oren Yiftachel (al-'Uqbi Family Archives).

77. C.C. (Beersheba) 5278/08 *al-'Uqbi et al. v. State of Israel*, Appendix 33 ("Land Agreement Within al-'Uqbi tribe, Between Sheikh Suleiman and His Father Haj Muhammad," 1937) to the opinion of Prof. Oren Yiftachel (al-'Uqbi Family Archives).

78. C.C. (Beersheba) 5278/08 *al-'Uqbi et al. v. State of Israel*, Appendix 34 ("Rahen: Conditional Sale Agreement, Between Salameh al-'Uqbi and Suleiman al-'Uqbi, Araqib 6," September 28, 1945) to the opinion of Prof. Oren Yiftachel (al-'Uqbi Family Archives).

79. C.C. (Beersheba) 5278/08 *al-'Uqbi et al. v. State of Israel*, Appendix 22 ("Names of the Bedouin Owners from Whom the Land for the Kibbutz Mishmar Hanegev Was Purchased, Dubinsky Map," 1926) to the opinion of Prof. Oren Yiftachel (Mishmar Hanegev Archives).

80. C.C. (Beersheba) 5278/08 *al-'Uqbi et al. v. State of Israel*, Appendix 36 (receipts of payment of the tithe tax from Salman Al Haj Rashod [al-Turi] in 'Araqib, 1922–1935, approval of Sheikh al-'Uqbi), Appendix 37 (revenue of the tithe tax from Bani Uqba in 'Araqib, 1927–1928), and Appendix 38 (list of tithe tax payers in Zehilika, 1927–1928) to the opinion of Prof. Oren Yiftachel (al-'Uqbi Family Archives).

81. Ottoman Land Code, art. 3, 103, tinyurl.com/hagn7h9 (accessed July 3, 2017). See also Section 2.7.

82. The names of the Bedouin owners from whom the land for Kibbutz Mishmar Hanegev was purchased appear in the Dubinsky map (1926), Mishmar Hanegev Archives (copy with authors).

83. Letter from Michael Hanegbi, Military Governor, to the liaison officers of the Bed-

ouin, July 2, 1949, Israel Defense Forces and Defense Establishment Archives, 1447/52/80 (copy with authors).

84. Documents regarding the establishment of a tribal court by Israel with the participation of Sheikh al-ʿUqbi, 1949, Israel Defense Forces and Defense Establishment Archives, 1447/52/80 (copy with authors).

85. C.C. (Beersheba) 5278/08 *al-ʿUqbi et al. v. State of Israel*, Appendix 39 (Letter from Salama Abu-Fariya and others, confirming the ownership of Suleiman al-ʿUqbi on ʿAraqib land, 1973) and Appendix 40 (Letter from Suleiman al-Huzayil and others, confirming the ownership of Suleiman al-ʿUqbi on ʿAraqib land, 1973) to the opinion of Prof. Oren Yiftachel (al-ʿUqbi Family Archives).

CHAPTER 6

1. Havatzelet Yahel, "Land Settlement in the Negev," *Notes About the Bedouin* 38 (2006): 38 (Hebrew); Havatzelet Yahel, "Land Disputes Between the Negev Bedouin and Israel," *Israel Studies* 11.2 (2006): 1–22; Israel Land Authority, *Lands of the Negev*, Israel Ministry of Foreign Affairs YouTube channel, youtu.be/ei8yHjk_MbM (accessed August 19, 2013).

2. C.C. 7161/06 *al-ʿUqbi et al. v. State of Israel*, Expert opinion of Ruth Kark (January 30, 2010), 4, 11.

3. C.C. 7161/06 *al-ʿUqbi et al. v. State of Israel*, Defendant's Memorandum, par. 14.

4. C.C. 7161/06 *al-ʿUqbi et al. v. State of Israel*, pars. 22 and 26.

5. The most southern villages marked on the maps are Dhariyya, in the South Hebron Mountains, and Huj, in the northwestern Negev, on the way to Gaza. See Claude Conder and Herbert Kitchener, *The Survey of Western Palestine: Memoirs of the Topography, Orography, Hydrography, and Archaeology*, v. 3, *Judaea* (London: Committee of the Palestine Exploration Fund, 1883), 199.

6. See Chapter 5.

7. Emanuel Marx, *The Bedouin Society in the Negev* (Tel Aviv: Reshafim, 1974) (Hebrew); Avinoam Meir, "Geo-Legal Aspects of the Ottoman Land Law in Relation to the Negev," in *Economy and Land Among the Negev Bedouin: New Processes, New Insights*, ed. Avinoam Meir (Beersheba: Ben-Gurion University of the Negev, 2006), 54; Yaakov Habakkuk, *From the House of Hair to the House of Stone: Transition in Bedouin Dwelling—Ethnographic Research* (Tel Aviv: MoD, 1986) (Hebrew).

8. Tuvia Ashkenazi, *The Bedouin in the Land of Israel* (Jerusalem: Ariel, 2000), 31–33, 35 (Hebrew) (emphasis added).

9. Habakkuk, *House of Hair*, 105 (emphasis added).

10. Justin McCarthy, *The Population of Palestine: Population History and Statistics of the Late Ottoman Period and the Mandate* (New York: Columbia University Press, 1990), 35.

11. Meir, "Geo-Legal Aspects," 54; Habakkuk, *House of Hair*, 112–14.

12. Oren Yiftachel, Alexandre Kedar, and Ahmad Amara, "Re-Examining the 'Dead Negev Doctrine': Property Rights in Arab Bedouin Regions," *Law and Government* 14 (2012): 95 (Hebrew).

13. Meir, "Geo-Legal Aspects," 54; Habakkuk, *House of Hair*, 175–76, 195–202.

14. See Ronen Shamir, "Suspended in Space: Bedouins Under the Law of Israel," *Law and Society Review* 30.2 (1996): 231–58.

15. See Section 1.5.

16. C.C. 7161/06 *al-ʿUqbi et al. v. State of Israel*, Expert opinion of Ruth Kark (January 30, 2010).

17. The PEF map is available at www.amudanan.co.il (accessed June 8, 2017).

18. Noam Levin, Ruth Kark, and Emir Galilee, "Maps and the Settlement of South-

ern Palestine, 1799–1948: An Historical/GIS Analysis," *Journal of Historical Geography* 36 (2010): 6.

19. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, par. 20.

20. See, for example, the "layer" of sites of the Antiquities Authority on the Amud Anan site, amudanan.co.il (accessed June 8, 2017).

21. We have visited five sites that were omitted from the PEF map: Khirbat Karkur, Khirbat Amari, a cemetery near Khirba al-Bakr, a Byzantine well in the center of 'Araqib, and the Byzantine "white well" near Kibbutz Mishmar Hanegev. The sites seem ancient and noticeable, as they likely were in 1880, when the PEF survey was carried out.

22. For another critical analysis of the PEF map, see Noam Levin, "The Palestine Exploration Fund Map of the Holy Land as a Tool for Analyzing Landscape Changes: The Coastal Dunes of Israel as a Case Study," *Cartographic Journal* 43 (2006): 45–67.

23. Gottlieb Schumacher, "Researches in Southern Palestine," *Palestine Exploration Quarterly* 18 (1886): 171–94.

24. In Kark's expert opinion, the Fischer map is mentioned as proof that there were no settlements in the Negev. See C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Expert opinion of Ruth Kark (January 30, 2010), 9–11. The map from 1895, which mentions Zehilika, is available at tinyurl.com/jrtt7w4 (accessed January 14, 2017).

25. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Expert opinion of Ruth Kark (January 30, 2010), 9.

26. David Grossman, *Rural Arab Demography and Early Jewish Settlement in Palestine: Distribution and Population Density During the Late Ottoman and Early Mandate Periods* (New Brunswick, NJ: Transaction, 2011), 267–68.

27. Wolf-Dieter Hütteroth and Kamal Abdulfattah, *Historical Geography of Palestine, Transjordan, and Southern Syria in the Late 16th Century* (Erlangen: Selbstverlag der Fränkischen Geographischen Gesellschaft, 1977), 29–31.

28. These include Khirbat Laqia, Khirbat Zubaleh (later Rahat), Khirbat Mashash, Khirbat Abu-Tlool, Khirbat al-Wattan, and Khirbat Khura. They have all developed into large thriving localities accommodating thousands of people.

29. Meir, "Geo-Legal Aspects," 70 (emphasis added).

30. Marx, *Bedouin Society*.

31. The tribe's larger center is built in a central location, whereas the smaller clusters are built in a spread of 1–2 kilometers, according to the land division between tribe members. The tents map clearly demonstrates the existence of similar patterns across the Beersheba Valley and in the northern and northwestern Negev, where the density of tents is noticeably higher than in the southern and eastern regions. See "Tent Settlement Map 5941/1," 1947, Israel State Archives.

32. These clusters were built only inside the tribe's *dira* or *balad*.

33. Marx, *Bedouin Society*, 76–78; Avinoam Meir, "Contemporary State Discourse and Historical Pastoral Spatiality: Contradictions in the Land Conflict Between the Israeli Bedouin and the State," *Ethnic and Racial Studies* 32.2 (2009): 823–43.

34. UN General Assembly, *Report of the Ad-Hoc Committee on the Palestinian Question*, reported by Thor Thors, A/AC.14/32, 1947.

35. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Plaintiffs' Memorandum, pars. 30 and 47–50.

36. Suleiman's father was born in the mid-nineteenth century in 'Araqib and built a house there, in which he lived for the rest of his life. See C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, hearing before Judge Timor. See also C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, hearing before Judge Pilpel (unpublished, October 21, 2007) (copy with the authors), and

Plaintiffs' Memorandum, pars. 35–36; and C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, pars. 1 and 27–31, and Statement of Appeal, pars. 12–25 (Hebrew) (copy with the authors).

37. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Plaintiffs' Memorandum, pars. 81–94.

38. The photo also revealed a cemetery, a granary, a dam, and a big water pool as well as several structures such as stables and pens.

39. C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, Statement of Appeal, pars. 32–39 and 108–16.

40. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Plaintiffs' Memorandum, pars. 38–41; C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, pars. 43–44.

41. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Defendant's Memorandum, pars. 10–11 and 57.

42. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Defendant's Memorandum, pars. 12–14.

43. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Expert opinion of Ruth Kark (January 30, 2010), par. 20.

44. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Defendant's Memorandum, par. 12.

45. C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, Statement of Appeal, pars. 17, 20, 25, and 40–41.

46. Shlomo Ben Yossef, "Expert Aerial Photos Decipher Opinion," September 2, 2009 (unpublished), Flight PS13, January 5, 1945, Survey of Israel (Hebrew) (on file with the authors).

47. The 1945 aerial photos show a reservoir that was in 'Araqib and, north of it, at and around the sheikh's house, a few tents and farm structures connected by paths and a few major roads.

48. "Tent Settlement Map 5941/1," 1947, Israel State Archives.

49. During a tour of 'Araqib on August 15, 2009, we found that, despite the tribe's evacuation in 1951 and the destruction of most of its belongings and houses, the tribe's central cemetery was left unharmed, though it was neglected. More than 100 graves are at the site, and the cemetery stands out. See Yiftachel et al., "Re-Examining the DND," 124n402.

50. Yiftachel et al., "Re-Examining the DND," 125.

51. See also Benny Morris, *The Birth of the Palestinian Refugee Problem, 1947–1949* (Cambridge, UK: Cambridge University Press, 1987), 297–99.

52. Yiftachel et al., "Re-Examining the DND," 128n418; C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Appendix 44 to the opinion of Prof. Oren Yiftachel. See also Survey of Israel, "Aerial photo of al-'Araqib settlement 2," October 2, 1949.

53. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Appendix 18 to the opinion of Prof. Oren Yiftachel,; Havatzelet Yahel and Ruth Kark, "Israel Negev Bedouin During the 1948 War: Departure and Return," *Israel Affairs* 21.1 (2015): 48–97.

54. Letter from Military Governor Michael Hanegbi to the Israeli Operations Directorate, the General Staff of the Israel Defense Forces, November 14, 1951, Israel Defense Forces Archive, 54-848/1959 (copy with authors).

55. The letter (dated October 21, 1951) specifies that the land would be given to the al-'Uqbi tribe, until their return (al-'Uqbi Family Archives; copy with authors).

56. The reply to this letter was later received from Michael Hanegbi, the military governor at the time. Letter from Military Governor Michael Hanegbi to the Israeli Operations Directorate, the General Staff of the Israel Defense Forces, November 14, 1951, Israeli Defense Forces Archive, 54-848/1959 (copy with authors).

57. Military Government Protocols, "A meeting with the Sheikhs," November 8, 1951, Israeli Defense Forces Archive, 233-854/1953 (copy with authors).

58. C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, par. 1.

59. Letter from ten sheikhs to Pinchas Rosen, Minister of Justice, April 21, 1958. See also a letter from Sheikh Suleiman Muhammad al-'Uqbi and Amer al-Talalqa to Military Governor Michael Hanegbi, November 18, 1951, Israeli Defense Forces Archive, 281-834/1953 (copy with authors).

60. Letter from the Bedouin sheikhs to Levi Eshkol, the Israeli Prime Minister, June 20, 1966, Israel State Archives, adviser on Arab affairs, Negev Bedouin, Vol. 3 [GL] 17003/1.

CHAPTER 7

1. C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, Appellants' Concluding Memorandum, par. 84.

2. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Plaintiffs' Memorandum, pars. 89–93 (Hebrew).

3. C.C. (Beersheba) 7161/06 *al-'Uqbi et al. v. State of Israel*, par. 35 (2012) (Hebrew).

4. UN Department of Economic and Social Affairs, *State of the World's Indigenous Peoples* (New York: United Nations, 2009), www.un.org/esa/socdev/unpfii/documents/SOWIP/en/SOWIP_web.pdf (accessed July 1, 2017); Birgitte Feiring, "Indigenous Peoples' Rights to Lands, Territories, and Resources," *International Land Coalition* (2013): 5, www.landcoalition.org/sites/default/files/documents/resources/IndigenousPeoplesRightsLandTerritoriesResources.pdf (accessed July 1, 2017); Ulia Popova-Gosart, "Indigenous Peoples, Attempts to Define", in *Biomapping Indigenous Peoples: Towards an Understanding of the Issues*, ed. Susanne Berthier-Foglar, Sheila Collingwood-Whittick, and Sandrine Tolazzi (Amsterdam: Rodopi, 2012), 87, 89.

5. See Section 1.5.

6. Erica-Irene A. Daes, "Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous Peoples—On the Concept of 'Indigenous People,'" in *The Concept of Indigenous Peoples in Asia: A Resource Book*, ed. Christian Erni (Copenhagen: International Work Group for Indigenous Affairs [IWGIA] and Asia Indigenous Peoples Pact [AIPP], 2008), 32.

7. See the Covenant of the League of Nations, tinyurl.com/c24bab (accessed July 1, 2017); and Daes, "Standard-Setting Activities."

8. Russell Lawrence Barsh, "Indigenous Peoples in the 1990s: From Objects to Subjects of International Law," *Harvard Law School Human Rights Journal* 7 (1990): 33–86; Eric Dannenmaier, "Beyond Indigenous Property Rights: Exploring the Emergence of a Distinctive Connection Doctrine," *Washington University Law Review* 86 (2008): 53, 57; Jeff J. Corntassel, "Who Is Indigenous? 'Peoplehood' and Ethnonationalist Approaches to Rearticulating Indigenous Identity," *Nationalism and Ethnic Politics* 9 (2003): 75, 84.

9. Jernej Letnar Černič, "State Obligations Concerning Indigenous Peoples' Rights to Their Ancestral Lands: Lex Imperfecta?" *American University International Law Review* 28.4 (2013): 1129, 1135; International Law Association (ILA), *Rights of Indigenous Peoples*, Interim Report from the Hague Conference, 2010, 6; John R. Bowen, "Should We Have a Universal Concept of 'Indigenous Peoples Rights'? Ethnicity and Essentialism in the Twenty-First Century," *Anthropology Today* 16.4 (2000): 12; Trond Thuen, "Discussion: The Concept of Indigeneity," *Social Anthropology* 14 (2007): 24; UN Development Group, *Guidelines on Indigenous Peoples Issues* (New York: United Nations, 2008), tinyurl.com/hvo492s (accessed July 1, 2017).

10. *Center for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v. Kenya*, 276/2003, African Commission on Human and Peoples' Rights, February 4, 2010, 1, 33, www.refworld.org/cases,ACHPR,4b8275a12.html (accessed July 1, 2017); Danilo Geiger, "Some Thoughts on 'Indi-

geneity' in the Context of Migration and Conflict at Contemporary Asian Frontiers," in *The Concept of Indigenous Peoples in Asia: A Resource Book*, ed. Christian Erni (Copenhagen: IWGIA and AIPP, 2008), 183–84; Kristen A. Carpenter and Angela R. Riley, "Indigenous Peoples and the Jurisgenerative Moment in Human Rights," *California Law Review* 102.1 (2014): 173–234, esp. 181.

11. Benedict Kingsbury, "'Indigenous Peoples' in International Law: A Constructivist Approach to the Asian Controversy," *American Journal of International Law* 92.3 (1998), 414.

12. Victoria Tauli-Corpuz, "The Concept of Indigenous Peoples at the International Level: Origins, Development, and Challenges," in *The Concept of Indigenous Peoples in Asia: A Resource Book*, ed. Christian Erni (Copenhagen: IWGIA and AIPP, 2008), 77.

13. Albert K. Barume, *Land Rights of Indigenous Peoples in Africa* (Copenhagen: IWGIA, 2010), 24–32.

14. Oren Yiftachel and Batya Roded, "On Denial and Rights: Bedouin Indigeneity in the Negev," *The Public Space* 9 (2014): 35 (Hebrew); Ronald Niezen, *The Origins of Indigenism: Human Rights and the Politics of Identity* (Oakland: University of California Press, 2003), 85–86; Gayatri Chakravorty Spivak, *In Other Worlds: Essays in Cultural Politics* (London: Methuen, 1987).

15. James Clifford, "Indigenous Articulations," *Contemporary Pacific* 13.2 (2001): 468; Maximilian C. Forte, "Renewed Indigeneity in the Local-Global Continuum and the Political Economy of Tradition: The Case of Trinidad's Caribs and the Caribbean Organization of Indigenous People," paper presented at the 24th Annual Third World Conference, Chicago, March 18–21, 1998; Brigham Golden, "The Lessons of 'Indigenous' Women for Theory and Activism in Feminist Anthropology," *Voices, the Annual Publication of the Society for Feminist Anthropologists* 5 (2001): 1; Manjusha S. Nair, "Defining Indigeneity: Situating Transnational Knowledge," *World Society Focus Paper Series* (Zurich: World Society Foundation, 2006).

16. Barume, *Land Rights*, 34.

17. Corntassel, "Who Is Indigenous," 75; Christian Erni, "Introduction: The Concept of Indigenous Peoples in Asia," in *The Concept of Indigenous Peoples in Asia: A Resource Book*, ed. Christian Erni (Copenhagen: IWGIA and AIPP, 2008), 17; Daes, "Standard-Setting Activities," 37–38; Geiger, "Some Thoughts on Indigeneity," 185.

18. United Nations Declaration on the Rights of Indigenous People, September 13, 2007, art. 33, tinyurl.com/7ans84 (accessed July 1, 2017). Convention 169 of the International Labor Organization (ILO) adopted the same approach in Section 1; see International Labor Organization, *Indigenous and Tribal Peoples Convention, C169*, June 27, 1989, sec. 1, tinyurl.com/36hd3z9 (accessed July 1, 2017) (hereafter, ILO, Convention 169); UN Department of Economic and Social Affairs, *State of the World's Indigenous Peoples*, 5.

19. ILO, *Indigenous and Tribal Peoples Convention, C107*, June 26, 1957, tinyurl.com/zt43qnc (hereafter, ILO, Convention 107).

20. ILO, Convention 107, art. 1.1.

21. ILO, Convention 169.

22. ILO, Convention 169, art. 1 (emphasis added).

23. Yiftachel and Roded, "Denial and Rights," 42; Daes, "Standard-Setting Activities," 37. See also UN Department of Economic and Social Affairs, Division for Social Policy and Development, *The Concept of Indigenous Peoples*, Workshop on Data Collection and Disaggregation for Indigenous Peoples, January 19–21, 2004, PFII/2004/WS.1/3, p. 6. On the debate over whether there should be a distinction between indigenous and tribal peoples, see Karin Lehmann, "To Define or Not to Define: The Definitional Debate Revisited," *American Indian Law Review* 31 (2006/2007): 509.

24. ILO, Convention 169, art. 1, sec. 2 (emphasis added).

25. UN Department of Economic and Social Affairs, *Concept of Indigenous Peoples*, 2, 4. See the preamble to the UN Declaration on the Rights of Indigenous Peoples, which states that it recognizes "the right of all peoples to be different, to consider themselves different, and to be respected as such," and also Sections 2 and 3 of the declaration.

26. ILA, *Rights of Indigenous Peoples*, 7; Kingsbury, "Indigenous Peoples," 421; Manuela Zips-Mairitsch, *Lost Lands' (Land) Rights of the San in Botswana and the Legal Concept of Indigeneity in Africa* (Copenhagen: IWGIA and LIT Verlag, 2013), 30; Douglas E. Sanders, "Indigenous Peoples: Issues of Definition," *International Journal of Cultural Property* 509 (1999): 4.

27. For a review of the situation in Asia, see Kingsbury, "Indigenous Peoples," 426–36.

28. Kingsbury, "Indigenous Peoples", 414.

29. UN Commission on Human Rights, *Consideration of a Draft United Nations Declaration on the Rights of Indigenous Peoples*, E/CN.4/WG.15/2, October 10, 1995. Quoted in Kingsbury, "Indigenous Peoples," 417–18, fn 17.

30. Kingsbury, "Indigenous Peoples," 435.

31. Erni, "Introduction," 15.

32. Republic of Botswana, *Tautona Times* no. 43 of 2006 (December 18, 2006), the weekly Electronic Press Circular of the Office of the President, quoted in Zips-Mairitsch, *Lost Lands*, 49.

33. On Africa, see, for example, Barume, *Land Rights*; and on Asia, see Christian Erni, ed., *The Concept of Indigenous Peoples in Asia* (Copenhagen: IWGIA and AIPP, 2008).

34. Rodolfo Stavenhagen and Ahmad Amara, "International Law of Indigenous Peoples and the Naqab Bedouin Arabs," in *Indigenous (In)Justice: Human Rights Law and Bedouin Arabs in the Naqab/Negev*, ed. Ahmad Amara, Ismael Abu-Saad, and Oren Yiftachel (Cambridge, MA: Harvard University Press, 2012), 169–70; Kingsbury, "Indigenous Peoples," 417, 421–24, 426–33.

35. Sanders, "Indigenous Peoples," 6–7.

36. Yiftachel and Roded, "Denial and Rights," 34, 37.

37. ILA, *Rights of Indigenous Peoples*, 7.

38. UN Department of Economic and Social Affairs, *Concept of Indigenous Peoples*, 1, 4. This "definition is one of the most cited reference points for defining 'indigenous'" (Dannenmaier, "Beyond Indigenous Property Rights," 60). See also UN Department of Economic and Social Affairs, *State of the World's Indigenous Peoples*, 4; ILA, *Rights of Indigenous Peoples*, 7.

39. José Martínez Cobo, *Study of the Problem of Discrimination Against Indigenous Populations*, E/CN.4/Sub.2/1986/7, 1986, add. 4, pars. 379–82, quoted in UN Department of Economic and Social Affairs, *Concept of Indigenous Peoples*, 2; and Kingsbury, "Indigenous Peoples," 419–20.

40. Quoted in Erni, "Introduction," 16.

41. Sanders, "Indigenous Peoples," 10.

42. Yousef Jabareen, "Redefining Minority Rights: Successes and Shortcomings of the UN Declaration on the Rights of Indigenous Peoples," *UC Davis Journal of International Law and Policy* 18 (2011): 119; Erni, "Introduction," 16; Tauli-Corpuz, "Concept of Indigenous Peoples," 92.

43. Sanders, "Indigenous Peoples," 9.

44. Kingsbury, "Indigenous Peoples," 420.

45. Zips-Mairitsch, *Lost Lands*, 35.

46. The term *Aboriginal* was used mainly by Australia and Canada. Zips-Mairitsch,

Lost Lands, 122. See also Patrick Thornberry, *Indigenous Peoples and Human Rights* (Manchester, UK: Manchester University Press, 2002), 55, quoted in Dannenmaier, "Beyond Indigenous Property Rights," 53, 62; Erni, "Introduction," 15–16; Corntassel, "Who Is Indigenous," 78–81; Franke Wilmer, *The Indigenous Voice in World Politics* (Newbury Park, CA: Sage, 1993), 97; Gerald R. Alfred and Franke Wilmer, "Indigenous Peoples, States, and Conflict," in *Wars in the Midst of Peace: The International Politics of Ethnic Conflict*, ed. D. Carment and Patrick James (Pittsburgh: University of Pittsburgh Press, 1997), 26–44; and Ted R. Gurr, *Peoples Versus States: Minorities at Risk in the New Century* (Washington, DC: United States Institute of Peace Press, 2000), 17.

47. S. James Anaya, *Indigenous Peoples in International Law* (Oxford, UK: Oxford University Press, 1996), 3–4.

48. Kingsbury, "Indigenous Peoples," 422.

49. Christian Erni, "Resolving the Asian Controversy: Identification of Indigenous Peoples in the Philippines," in *The Concept of Indigenous Peoples in Asia: A Resource Book*, ed. Christian Erni (Copenhagen: IWGIA and AIPP, 2008), 296.

50. For a similar view in the African context, see Barume, *Land Rights*, 54.

51. Zips-Mairitsch, *Lost Lands*, 89. See also Corntassel, "Who Is Indigenous," 81.

52. Corntassel, "Who Is Indigenous," 89.

53. Alfred Taiaiake and Jeff J. Corntassel, "Being Indigenous: Resurgences Against Contemporary Colonialism," *Government and Opposition* 40 (2005): 597; Bowen, "Should We Have a Universal Concept," 6–12; John Fowler, "The Concept of Indigeneity: Can the Declaration of the Rights of Indigenous People Be Understood Within Western Liberal Philosophy?" *Queensland Law Student Review* 4.1 (2011): 35; Rebecca Tsosie, "The New Challenge to Native Identity: An Essay on 'Indigeneity' and 'Whiteness,'" *Washington University Journal of Law and Policy* 18 (2005): 55; Kingsbury, "Indigenous Peoples," 446.

54. Jeremy Waldron, "Who Was Here First? Two Essays on Indigeneity and Settlement," *New Zealand Journal of Public Law* 1 (2002): 1–59.

55. Geiger, "Some Thoughts on Indigeneity," 189.

56. Waldron, "Who Was Here First," 18.

57. Waldron, "Who Was Here First," 10.

58. Popova-Gosart, "Indigenous Peoples," 93–94; Stuart Banner, *Possessing the Pacific: Land, Settlers, and Indigenous People from Australia to Alaska* (Cambridge, MA: Harvard University Press, 2007), 6.

59. Geiger, "Some Thoughts on Indigeneity," 189. Geiger mentions several additional similar Asian examples of recently arrived indigenous peoples (189–90).

60. Barume, *Land Rights*, 37, 40–41, 44.

61. For instance, the Mbororo are nomadic/seminomadic pastoralists who live mainly in Cameroon, Nigeria, Chad, and the Central African Republic. Barume, *Land Rights*, 42.

62. Barume, *Land Rights*, 51–52.

63. Geiger, "Some Thoughts on Indigeneity," 187, 188.

64. Corntassel, "Who Is Indigenous," 89–90, fn 68; Barume, *Land Rights*, 32–34.

65. African Commission on Human and Peoples' Rights (ACHPR), *Indigenous Peoples in Africa: The Forgotten Peoples? The African Commission's Work on Indigenous Peoples in Africa* (Banjul, Gambia: ACHPR; and Copenhagen, IWGIA, 2006), 23 (emphasis in original), tinyurl.com/hhzurdp (accessed July 1, 2017).

66. African Commission on Human and Peoples' Rights and International Work Group for Indigenous Affairs, *United Nations Declaration on the Rights of Indigenous Peoples: Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples*, May 2007, 30–31 (emphasis added),

tinyurl.com/gl8kuxk (accessed July 1, 2017). For a similar approach, see *Report of the African Commissions Working Group of Experts on Indigenous Population/Communities* (adopted at the Twenty-Eighth Session, 2003), summarized in *Center for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v. Kenya*, 276/2003, African Commission on Human and Peoples' Rights (February 4, 2010), 33–34.

67. ILA, *Rights of Indigenous Peoples*, 8 and references in fn 51; Erni, "Introduction," 19.

68. Kingsbury, "Indigenous Peoples," 455.

69. Kingsbury, "Indigenous Peoples," 453–55; for additional but not requisite indicia, see 454–55. See also Geiger, "Some Thoughts on Indigeneity," 190.

70. Barume, *Land Rights*, 40.

71. Geiger, "Some Thoughts on Indigeneity," 194.

72. ILA, *Rights of Indigenous Peoples*, 6. On the UNDRIP and the ramifications of the question of whether it reached the status of customary international law, see Chapter 8, especially Sections 8.1 and 8.5. Because of the high esteem, international prominence, and authority of the ILA, the reports of the Committee on the Rights of Indigenous Peoples and the ILA's resolution warrant serious attention. The ILA, established in 1873, is a highly regarded international jurists' organization. Its opinions help shape international jurisprudence and are commonly perceived as unofficial yet authoritative statements of current international law. See International Law Association, "About Us," www.ila-hq.org/index.php/about-us (accessed July 1, 2017); Robbie Sabel and H. Adler, eds., *International Law* (Jerusalem: Sacher Institute and the Law Faculty of the Hebrew University, 2003), 15, 21, 26 (Hebrew); and Michael Wood, *Third Report on Identification of Customary International Law*, report prepared for the International Law Commission for its 67th Session, May 4–June 5 and July 6–August 7, 2015, A/CN.4/682, 45, sec. 65.

73. ILA, *Rights of Indigenous Peoples*, 8; International Law Association (ILA), *Final Report*, from the Sofia Conference, "Rights of Indigenous Peoples," Resolution No. 5/2012 (2012), 2–3, file:///C:/Users/sandy/inSync%20Share/Downloads/Conference%20Report%20Sofia%202012%20(1).pdf (accessed July 1, 2017).

74. ILA, *Rights of Indigenous Peoples*, 8.

75. ILA, *Final Report*, 3. For a similar characterization in the African context, see Barume, *Land Rights*, 40.

76. See also Jabareen, "Redefining Minority Rights," 128; and Erni, "Introduction," 21.

77. Yiftachel and Roded, "Denial and Rights," 32–33; Amal Jamal, *Arab Minority Nationalism in Israel: The Politics of Indigeneity* (London: Routledge, 2011); Jabareen, "Redefining Minority Rights"; Hassan Jabareen, "Future Arab Citizenship in Israel," in *Challenging Ethnic Citizenship: German and Israeli Perspectives on Immigration*, ed. Daniel Levy and Yfaat Weiss (New York: Berghan Press, 2002), 196–220.

78. Iris Marion Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990), 42–48; Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy*, 2nd ed. (London: Verso, 2001); Antonio Gramsci, *Selections from the Prison Notebooks*, ed. and trans. Quinton Hoare and Geoffrey Nowell Smith (New York: International, 1971); Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 2006).

79. "Par ma foi, il y a plus de quarante ans que je dis de la prose, sans que j'en susse rien" ("Good heavens! For more than forty years I have been speaking prose without knowing it"), Molière, *Le Bourgeois Gentilhomme* (1670), Act II, Scene iv.

80. Barume, *Land Rights*, 34.

81. For a review of the development of the Bedouins' indigeneity discourse, see Seth J.

Frantzman, Havatzelet Yahel, and Ruth Kark, "Contested Indigeneity: The Development of an Indigenous Discourse on the Bedouin of the Negev, Israel," *Israel Studies* 17.1 (2012): 78–104; Yuval Karplus and Avinoam Meir, "Past and Present in the Discourse of Negev Bedouin Geography: A Critical Review," in *The Naqab Bedouin and Colonialism: New Perspectives*, ed. Mansour Nasasra, Sophie Richter-Devroe, Sarab Abu Rabia-Queder, and Richard Ratcliffe, eds. (Abingdon, UK: Routledge, 2012), 68–89; H. Yahel, R. Kark, and S. Frantzman, "Fabricating Palestinian History: Are the Negev Bedouin an Indigenous People?" *Middle East Quarterly* 19 (summer 2012): 3–14; Batya Roded and Erez Tzfadia, "Recognition of Indigenous' Land Rights: The Bedouin in Comparison," *Public Sphere* 7 (2012): 66–99 (Hebrew); S. S. Matari, "Mediation to Resolve the Bedouin-Israeli Government Dispute for the Negev Desert," *Fordham International Law Journal* 34 (2011): 1089–1130; Mansour Nasasra, "The Southern Palestine Bedouin Tribes and British Mandate Relations, 1917–48: Resistance to Colonialism," *Arab World Geographer* 14.4 (2011): 305–35; and T. S. Rangwala, "Inadequate Housing, Israel, and the Bedouin of the Negev," *Osgoode Hall Law Journal* 42 (2004): 415–72. See also D. Champagne and I. Abu Saad, eds., *Indigenous and Minority Education: International Perspectives on Education* (Beersheba: Negev Center for Regional Development, 2005); and Mansour Nasasra, "The Ongoing Judaization of the Naqab and the Struggle for Bedouin Indigenous Rights," *Settler Colonial Studies* 2 (2012): 81–87.

82. See Mansour Nasasra, Sophie Richter-Devroe, Sarab Abu Rabia-Queder, and Richard Ratcliffe, eds., *The Naqab Bedouin and Colonialism: New Perspectives* (London: Routledge, 2014), 1, 14. See also Ahmad Amara, Ismael Abu-Saad, and Oren Yiftachel, "Afterword," in *Indigenous (In)Justice: Human Rights Law and Bedouin Arabs in the Naqab/Negev*, ed. Ahmad Amara, Ismael Abu-Saad, and Oren Yiftachel (Cambridge, MA: Harvard University Press, 2012), 325.

83. Nasasra et al., *Naqab Bedouin*, 14.

84. We use the term *deniers* here to refer to active repeat players who deny Bedouin land rights and Bedouin indigeneity.

85. For example, C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, Defendant's Response.

86. Anat Raskin, "The Bedouin's Domain: Where Next?" (report of Prawer's lecture at the Center for Bedouin Studies and Development, Ben-Gurion University), 31 *East* (December 11, 2011), tinyurl.com/zsqm5ks (accessed January 28, 2015) (Hebrew).

87. Notes taken by the authors in a meeting of Bedouin leadership with Benny Begin, April 3, 2012.

88. Yiftachel and Roded, "Denial and Rights," 35–36.

89. Yahel et al., "Fabricating Palestinian History"; and Frantzman et al., "Contested Indigeneity." See also Amara et al., "Afterword," 319, 321–27.

90. Yahel et al., "Fabricating Palestinian History," 6. On the current understandings of indigeneity, see Section 7.2.

91. Anaya, *Indigenous Peoples*, 5.

92. The authors of "Fabricating Palestinian History," which was published in 2012, rely on Cobo's study from 1987 as well as on sources from the early 2000s. See Yahel et al., "Fabricating Palestinian History," 6, fn 26–30. They acknowledge that this view has recently been challenged, especially in the African context, but argue that a distinction between indigenous "precolonial" "first nationhood," and other minorities should be maintained. Yahel et al., "Fabricating Palestinian History," 7.

93. Yahel et al., "Fabricating Palestinian History," 14.

94. Yahel et al., "Fabricating Palestinian History," 14; Frantzman et al., "Contested Indigeneity." For additional arguments, which we find less powerful, see Yahel et al., "Fabricating Palestinian History," 11–13.

95. Frantzman et al., "Contested Indigeneity," 82. The authors refer in their footnotes to several articles and reports, most of them quite outdated.

96. Yahel et al., "Fabricating Palestinian History," 11, 13–14.

97. Barume, *Land Rights*, 51–52.

98. See Chapter 5.

99. Moshe Sharon, "The Bedouin and Israel Under the Islamic Regime," in *The Bedouin: Papers and Articles*, ed. Ya'akov Eini and Ezra Orion (Beersheba: Ben-Gurion University, Midreshet Sde Boqer, 1988), 36–48 (Hebrew); Clinton Bailey, "The Negev in the Nineteenth Century: Reconstructing History from Bedouin Oral Traditions," *Asian and African Studies* 14.1 (1980): 35–80.

100. C.C. (Beersheba) 7161/06 *al-'Uqbi et al. v. State of Israel*, Expert opinion of Ruth Kark (2010) (Hebrew) (on file with the authors).

101. See Section 2.3.

102. Nicholas Buchanan and Eve Darian-Smith, "Introduction: Law and the Problematics of Indigenous Authenticities," *Law and Social Inquiry* 36 (2011): 115, 117.

103. "Remaining 'Authentic' in a Changing World," *Indian Country Today*, February 22, 2008, quoted in Buchanan and Darian-Smith, "Introduction," 117, 119.

104. *R. v. Van der Peet*, [1996] 2 S.C.R. 507, par. 179, referenced in Jérémie Gilbert, "Historical Indigenous Peoples' Land Claims: A Comparative and International Approach to the Common Law Doctrine on Indigenous Title," *International and Comparative Law Quarterly* 56 (2007): 600n87.

105. Geiger, "Some Thoughts on Indigeneity," 190; Kingsbury, "Indigenous Peoples," 453–54.

106. Compare Banner, *Possessing the Pacific*, 40.

107. Moshe Dayan, interview in *Haaretz*, July 31, 1963, quoted in Ronen Shamir, "Suspended in Space: Bedouins Under the Law of Israel," *Law and Society Review* 30.2 (1996): 231.

108. Kenneth Bobroff, "Retelling Allotment: Indian Property Rights and the Myth of Common Ownership," *Vanderbilt Law Review* 54 (:(2001 1559; Nadav Knaan, "Law with No Future: The Traditional Property Law of the Cherokees and Other Southeastern Indians," M.A. thesis, University of Haifa, 2014 (Hebrew).

109. Banner, *Possessing the Pacific*, 29.

110. *Mabo v. Queensland* (No. 2), (1992) 175 CLR 1, par. 12; Kent McNeil, "Judicial Treatment of Indigenous Land Rights," *Comparative Research in Law and Economy* 4.5 (2008): 1–37, tinyurl.com/hwg278y (accessed July 1, 2017).

111. *Mabo v Queensland* (No. 2), par. 61 (emphasis added).

112. Quoted in McNeil, "Judicial Treatment," 11 (emphasis added).

113. Katja Göcke, "Protection and Realization of Indigenous Peoples' Land Rights at the National and International Level," *Goettingen Journal of International Law* 5 (2013): 104; McNeil, "Judicial Treatment," 19–20.

114. Charles Kingsley Meek, *Land Law and Customs in the Colonies* (London: Oxford University Press, 1946), 26–27, quoted in Jérémie Gilbert, *Indigenous Peoples' Land Rights Under International Law: From Victims to Actors* (Leiden: Brill, 2007), 95.

115. Kwamena Bentsi-Enchill, "Do African Systems of Land Tenure Require a Special Terminology?" *Journal of African Law* 9.114 (1965): 127, quoted in Gilbert, *Indigenous Peoples' Land Rights*, 95.

116. Joshua Weisman, *Law of Property: Ownership and Concurrent Ownership* (Jerusalem: Sacher Institute and Hebrew University, 1997), 195–264 (Hebrew); Alexandre Kedar and Oren Yiftachel, "Land Regime and Social Relations in Israel," in *Realizing Property*

Rights: Swiss Human Rights Book, ed. Hernando de Soto and Francis Cheneval (Zurich: Ruffer & Rub, 2006), 1: 129–46.

117. Elmien (Wilhelmina Jacoba) du Plessis, "African Indigenous Land Rights in a Private Ownership Paradigm," *Potchefstroom Electronic Law Journal* 14.7 (2011), dx.doi.org/10.4314/pelj.v14i7.3; Ben Cousins, "Potential and Pitfalls of 'Communal' Land Tenure Reform: Experience in Africa and Implications for South Africa," paper presented at the World Bank conference "Land Governance in Support of the MDGs: Responding to New Challenges," Washington, D.C., March 9–10, 2009; Hastings Winston Opinya Okoth-Ogendo, "The Tragic African Commons: A Century of Expropriation, Suppression, and Subversion," *University of Nairobi Law Journal* 1 (2003): 107–17.

118. *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* [2001], Inter-Am. Court, HR (ser. C) No. 79, 71 (par. 140 (d)), 140. Regarding Article 21 of the American Convention on Human Rights, the Inter-American Commission on Human Rights stated that "the Mayagna Community has communal property rights to land and natural resources based on traditional patterns of use and occupation of ancestral territory. . . . The overall territory of the Community is possessed collectively, and the *individuals and families enjoy subsidiary rights* of use and occupation." The Inter-American Court has underscored that "both the private property of individuals and communal property of the members of the indigenous communities are protected by Article 21 of the American Convention." See *Yakye Axa Indigenous Community v. Paraguay*, Ct. H.R. (ser. C) No. 125 (2005), Judgment, Merits, Reparations, and Costs, par. 143, sec. 60, cidh.org/countryrep/Indigenous-Lands09/Chap.V-VI.htm#_ftn29 (accessed July 1, 2017).

119. James Fenelon and Salvador Murguía, "Indigenous Peoples: Globalization, Resistance, and Revitalization," *American Behavioral Scientist* 51 (2008): 1656–71; Will Kymlicka, "The Internationalization of Minority Rights," *International Journal of Constitutional Law* 6.1 (2008): 1–32.

120. Frantzman et al., "Contested Indigeneity," 85.

121. Gregory Bennett and Jessica Dargiel, "Structural Violence and Political Transparency: A Case Study of the Bedouin Communities of Jordan vs. Israel," paper presented at the 24th Annual Conference of the International Association of Conflict Management, Istanbul, July 3–6, 2011, ssrn.com/abstract=1873478 (accessed July 1, 2017); Talia Berman-Kishony, "Bedouin Urbanization Legal Policies in Israel and Jordan: Similar Goals, Contrasting Strategies," *Transnational Law and Contemporary Problems* 17.2 (2008): 393–412; Dawn Chatty, "The Bedouin in Contemporary Syria: The Persistence of Tribal Authority and Control," *Middle East Journal* 64.1 (2010): 29–49; Nashaat Hussein, "Ethno-Conservation Among Bedouins of Sinai: Tribal Mechanisms and Customary Laws," *Egyptian Journal of Environmental Change* 2.1 (2010): 44–51.

122. See Yeela Raanan, "So Why Is the Government of Israel so Intent on Erasing the Village of al-'Araqib?" *Shatil*, September 13, 2010, tinyurl.com/hteera4 (accessed July 1, 2017).

123. Negev Coexistence Forum for Civil Equality, "The Indigenous Bedouin of the Naqab-Negev Desert in Israel," report submitted to the UN Permanent Forum on Indigenous Issues (2006) (on file with the authors).

124. See, for instance, Section 6.2.

125. See, for example, *Concluding Observations of the Committee on Economic, Social and Cultural Rights, Consideration of Reports Submitted by States Parties Under Article 16 and 17 of the Covenant, sec. 27, Israel* (2002), tinyurl.com/zcvrctz (accessed July 1, 2017).

126. See Rawia Aburabia, "Human and Land Rights of the Arab Minority in the Negev," paper presented at the Forum on Minority Issues Land and Housing Rights for Arab Mi-

norities in Israel, 8th Forum on Indigenous Peoples Issues, Association of Civil Rights in Israel, May 28, 2009.

127. See Carnegie Council, "Identity, Recognition, and Group Rights," *Human Rights Dialogue* 1.7 (1996), tinyurl.com/ju9ahuw (accessed July 1, 2017).

128. Yiftachel and Roded, "Denial and Rights." See also Frantzman et al., "Contested Indigeneity," 92, for a review of Bedouin participation and acceptance in indigenous forums.

129. Statement of Professor Rodolfo Stavenhagen, former United Nations Special Rapporteur for the Human Rights and Fundamental Freedoms of Indigenous People, *The International Human Rights of Indigenous Peoples and the Negev Bedouin Communities* (2010) (copy held by the authors).

130. Ken S. Coates, *A Global History of Indigenous Peoples: Struggle and Survival* (London: Palgrave Macmillan, 2004).

131. Ismael Abu-Saad, "Introduction: State Rule and Indigenous Resistance," *HAGAR Studies in Culture, Polity, and Identities* 8.2 (2008): 2–24.

132. Berman-Kishony, "Bedouin Urbanization."

133. Alexandre Kedar, "Land Settlement in the Negev in International Law Perspective," *Adalah Newsletter* 8 (2004): 1–7, tinyurl.com/hpdhkov (accessed July 1, 2017); Alean Al-Krenawi and John R. Graham, "The Story of Bedouin-Arab Women in a Polygamous Marriage," *Women's Studies International Forum* 22.5 (1999): 497–509.

134. Habitat International Coalition and Housing and Land Rights Network, *The Goldberg Opportunity: A Chance for Human Rights-Based Statecraft in Israel* (Cairo: HIC-HLRN, Middle East/North Africa Program, 2010), tinyurl.com/jl686l2 (accessed July 1, 2017).

135. Caecilie Mikkelson, ed., *The Indigenous World 2013* (Copenhagen: IWGIA, 2013), tinyurl.com/z27r25m (accessed July 1, 2017); Frantzman et al., "Contested Indigeneity," 90.

136. UN General Assembly, *Report by the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya*, A/HRC/18/35/Add.1, August 22, 2011, Annex VI, secs. 25 and 27 (emphasis added), tinyurl.com/gvowweu (accessed July 1, 2017).

137. UN General Assembly, *Report of the Special Rapporteur James Anaya*, sec. 26.

CHAPTER 8

1. Since the *al-'Uqbi* appeal was submitted, the remaining opposing countries changed their positions and now support the UNDRIP. African Commission on Human and Peoples' Rights and International Work Group for Indigenous Affairs, *United Nations Declaration on the Rights of Indigenous Peoples: Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples*, May 2007, tinyurl.com/gl8kuxk (accessed July 2, 2017). The United States, Australia, New Zealand, and Canada had reservations regarding the power of UNDRIP. C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, Plaintiffs' Summary (Hebrew), par. 129.

2. C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, 38 (3) P.D. 141 (2012), pars. 66–71 (Hebrew).

3. Albert K. Barume, *Land Rights of Indigenous Peoples in Africa* (Copenhagen: International Work Group for Indigenous Affairs [IWGIA], 2010); Christian Erni, ed., *The Concept of Indigenous Peoples in Asia: A Resource Book* (Copenhagen: IWGIA and Asia Indigenous Peoples Pact [AIPP], 2008); Paul G. McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (New York: Oxford University Press, 2011).

4. International Law Association (ILA), *Rights of Indigenous Peoples*, Interim Report from the Hague Conference (2010).

5. ILA, *Rights of Indigenous Peoples*, 3.

6. UN Department of Economic and Social Affairs, *State of the World's Indigenous Peo-*

ples (New York: United Nations Publications, 2009), 2, tinyurl.com/z4vxdls (accessed July 2, 2017); Benedict Kingsbury, " 'Indigenous Peoples' in International Law: A Constructivist Approach to the Asian Controversy," *American Journal of International Law* 92.3 (1998): 424–25; McHugh, *Aboriginal Title*, 225, 239; Kristen A. Carpenter and Angela R. Riley, "Indigenous Peoples and the Jurisgenerative Moment in Human Rights," *California Law Review* 102.1 (2014): 189.

7. Carpenter and Riley, "Jurisgenerative Moment," 175, relying on Hannah Arendt's phrase.

8. Carpenter and Riley, "Jurisgenerative Moment," 173, 175.

9. For an overview, see Carpenter and Riley, "Jurisgenerative Moment," 193–95.

10. UN Department of Economic and Social Affairs, *State of the World's Indigenous Peoples*, 2.

11. On the definition, see Section 7.2. On the influence of Cobo's report, see, for example, UN Department of Economic and Social Affairs, *The Concept of Indigenous Peoples*, PFII/2004/WS.1/3, 2004, sec. 1; see also ILA, *Rights of Indigenous Peoples*, 11.

12. Birgitte Feiring, "Indigenous Peoples' Rights to Lands, Territories, and Resources," *International Land Coalition* (2013)," 7, www.landcoalition.org/sites/default/files/documents/resources/IndigenousPeoplesRightsLandTerritoriesResources.pdf (accessed July 2, 2017).

13. International Labour Organization (ILO), *C169: Indigenous and Tribal Peoples Convention, 1989*, June 27, 1989, tinyurl.com/jf883hd (accessed July 2, 2017) (hereafter, ILO, Convention 169).

14. See Alexandra Xanthaki, "Reflections on a Decade of International Law: Indigenous Rights in International Law over the Past 10 Years and Future Developments," *Melbourne Journal of International Law* 10.1 (2009): 30.

15. Xanthaki, "Reflections," 30.

16. Rodolfo Stavenhagen and Ahmad Amara, "International Law of Indigenous Peoples and the Naqab Bedouin Arabs," in *Indigenous (In)Justice: Human Rights Law and Bedouin Arabs in the Naqab/Negev*, ed. Ahmad Amara, Ismael Abu-Saad, and Oren Yiftachel (Cambridge, MA: Harvard University Press, 2013), 170–71; Jernej Letnar Černič, "State Obligations Concerning Indigenous Peoples' Rights to Their Ancestral Lands: Lex Imperfecta?" *American University International Law Review* 28.4 (2013): 1129–71.

17. The states that abstained from voting were Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russia, Samoa, and Ukraine; Manuela Zips-Mairitsch, *Lost Lands? Rights of the San in Botswana and the Legal Concept of Indigeneity in Africa* (Copenhagen: IWGIA and LIT Verlag, 2013), 50n49. All the Asian governments present, except Bangladesh, voted in favor of the UNDRIP, although some of them expressed reservations. See Jannie Lasimbang, "Foreword," in *The Concept of Indigenous Peoples in Asia: A Resource Book*, ed. Christian Erni (Copenhagen: IWGIA and AIPP, 2008), 9.

18. On November 12, 2010, Canada officially endorsed the UNDRIP but without changing its position that it was "aspirational." Government of Canada, Indigenous and Northern Affairs, "Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples," November 12, 2010, tinyurl.com/b6ynwp9 (accessed July 2, 2017). Then, in 2016, it removed its objections and fully endorsed the UNDRIP. See "Canada Officially Adopts UN Declaration on Rights of Indigenous Peoples," CBC News, May 10, 2016, tinyurl.com/h64k62c (accessed July 2, 2017). On Australia, see "Experts Hail Australia's Backing of UN Declaration of Indigenous Peoples' Rights," UN News Center, April 3, 2009, tinyurl.com/jsr8pmz (accessed July 2, 2017); and Jenny Macklin, "Statement

on the United Nations Declaration on the Rights of Indigenous Peoples, Parliament House, Canberra," April 3, 2009, tinyurl.com/pozkxk6 (accessed July 2, 2017). For the United States, see U.S. Department of State, "Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples," January 12, 2011, 2009-2017.state.gov/s/srgia/154553.htm (accessed July 2, 2017). For New Zealand, see New Zealand Government, "Supporting UN Declaration Restores NZ's Mana," April 20, 2010, tinyurl.com/hrh6gez (accessed July 2, 2017).

19. ILA, *Rights of Indigenous Peoples*, 3. See also McHugh, *Aboriginal Title*, 226.

20. ILA, *Rights of Indigenous Peoples*, 20. For an overview of the UNDRIP, see also Yousef Jabareen, "Redefining Minority Rights: Successes and Shortcomings of the UN Declaration on the Rights of Indigenous Peoples," *UC Davis Journal of International Law and Policy* 18 (2011): 119–61.

21. For autonomy and self-determination in the UNDRIP, see ILA, *Rights of Indigenous Peoples*, 12–16.

22. Feiring, "Indigenous Peoples' Rights," 10. In case return is impossible, indigenous peoples "shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development" (ILO, Convention 169, art. 16(4)).

23. ILA, *Rights of Indigenous Peoples*, 21.

24. "The existence of the right of veto in favor of indigenous peoples seemed to be confirmed by the object and purpose of UNDRIP, as shown by other provisions included in the text, as well as by pertinent international practice" (ILA, *Rights of Indigenous Peoples*, 14–15).

25. International Law Association (ILA), *Final Report*, from the Sofia Conference, "Rights of Indigenous Peoples," Resolution No. 5/2012 (2012), 6–7.

26. ILA, *Rights of Indigenous Peoples*, 39.

27. ILA, *Rights of Indigenous Peoples*, 39.

28. ILA, *Rights of Indigenous Peoples*, 40.

29. ILA, *Rights of Indigenous Peoples*, 42, 45.

30. Katja Göcke, "Protection and Realization of Indigenous Peoples' Land Rights at the National and International Level," *Goettingen Journal of International Law* 5 (2013): 151. See also Jabareen, "Redefining Minority Rights," 119–61, where he argues that material compensation is not sufficient to heal the historical and psychological wounds.

31. ILO, Convention 169. James Anaya notes that the use of the present tense "traditionally occupy" instead of the past tense "occupied" could suggest that only lands presently occupied are entitled to recognition. However, "a sufficient contemporary connection with lost land may be established by a continuing cultural attachment to them, particularly if dispossession occurred recently." S. James Anaya, "International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State," *Arizona Journal of International and Comparative Law* 21 (2004): 40.

32. ILA, *Rights of Indigenous Peoples*, 21.

33. ILA, *Rights of Indigenous Peoples*, 22–23.

34. ILA, *Rights of Indigenous Peoples*, 23 (emphasis added).

35. ILA, *Rights of Indigenous Peoples*, 23.

36. ILA, *Rights of Indigenous Peoples*, 23, and see 24–27 for recent examples of legislation and court decisions.

37. ILA, *Rights of Indigenous Peoples*, 28.

38. ILA, *Rights of Indigenous Peoples*, 23.

39. Feiring, "Indigenous Peoples' Rights," 8.

40. "Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned" (ILA, *Rights of Indigenous Peoples*, 23).

41. Jérémie Gilbert, "Land Rights and Nomadic Peoples: Using International Law at the Local Level," *Nomadic Peoples* 16.2 (2012): 81; Kingsbury, "Indigenous Peoples," 439–40.

42. Feiring, "Indigenous Peoples' Rights," 9.

43. Göcke, "Protection and Realization," 147.

44. ILA, *Rights of Indigenous Peoples*, 39; ILO, Convention 169, arts. 14(2) and 14(3).

45. Feiring, "Indigenous Peoples' Rights," 9.

46. Göcke, "Protection and Realization," 131.

47. Göcke, "Protection and Realization," 137.

48. Černič, "State Obligations," 1148–54; Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton, NJ: Princeton University Press, 1980), 52, 76.

49. Černič, "State Obligations," 1155; see also 1151–54.

50. UN General Assembly, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development: Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, A/HRC/9/9, August 11, 2008, par. 46, tinyurl.com/zj7rrsl (accessed July 2, 2017).

51. Černič, "State Obligations," 1157.

52. For a review of international instruments and statements by various international bodies, see Göcke, "Protection and Realization," 127–29; and Feiring, "Indigenous Peoples' Rights," 11.

53. Kingsbury, "Indigenous Peoples," 437. For a discussion of the concepts of minority and indigenous rights and the overlap between them, see Jabareen, "Redefining Minority Rights," 121–31.

54. McHugh, *Aboriginal Title*, 227.

55. Göcke, "Protection and Realization," 126.

56. Feiring, "Indigenous Peoples' Rights," 12.

57. Barume, *Land Rights*, 271.

58. Feiring, "Indigenous Peoples' Rights," 12.

59. UN Office of the High Commission, *International Convention on the Elimination of All Forms of Racial Discrimination*, tinyurl.com/laowsqv (accessed July 2, 2017); Jabareen, "Redefining Minority Rights," 119, 125; Gilbert, "Land Rights" 79.

60. Gilbert, "Land Rights," 80.

61. Kingsbury, "Indigenous Peoples," 436–37.

62. Barume, *Land Rights*, 308.

63. UN Committee on Economic, Social, and Cultural Rights, *General Comment 7: The Right to Adequate Housing (Art. 11.1): Forced Evictions*, E/1998/22, May 20, 1997, par. 9, tinyurl.com/zvxpjj3 (accessed July 2, 2017).

64. UN Committee on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding Observations, Lao People's Democratic Republic*, CERD/C/LAO/CO/15, April 18, 2005, par. 18, tinyurl.com/j25ckg9 (accessed July 2, 2017).

65. Commission on Human Rights, *Forced Evictions: Analytical Report Compiled by the Secretary-General, Pursuant to Commission Resolution 1993/77*, E/CN.4/1994/20, December 7, 1993, documents-dds-ny.un.org/doc/UNDOC/GEN/G93/858/98/PDF/G9385898.pdf?OpenElement (accessed July 2, 2017).

66. UN Secretary-General, *Forced Evictions*, 6.

67. UN Secretary-General, *Forced Evictions*, 21.

68. UN Economic and Social Council (UN ESC), *Guiding Principles on Internal Displacement*, E/CN.4/1998/53/Add.2, February 11, 1998, www.un-documents.net/gpid.htm (accessed July 2, 2017).

69. UN ESC, *Guiding Principles*, Principle 28; see also Principle 14.

70. UN Committee on Economic, Social, and Cultural Rights, *General Comment 7*, par. 14. See also UN ESC, *Guiding Principles*, Principle 7.

71. UN Committee on Economic, Social, and Cultural Rights, *General Comment 7*, par. 16.

72. UN Subcommission on Human Rights, Resolution 2002/7, *Housing and Property Restitution in the Context of Refugees and Other Displaced Persons*, August 14, 2002; see also United Nations, *Declaration on the Rights of Indigenous People*, art. 28; and UN ESC, *Guiding Principles*, Principle 29.

73. UN Subcommission on Human Rights, Resolution 2002/7.

74. See UN Human Rights Council, *Implementation of General Assembly Resolution 60/251 of March 2006 Entitled "Human Rights Council": Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living*, A/HRC/4/18, February 5, 2007, Annex 1, par. 4.

75. Jabareen, "Redefining Minority Rights," 125.

76. Barume, *Land Rights*, 47.

77. John Borrows, "Landed Citizenship: Narratives of Aboriginal Participation," in *Citizenship in Diverse Societies*," ed. Will Kymlicka and Wayne Norman (Oxford, UK: Oxford University Press. 2000), 326.

78. UN General Assembly, *Declaration on the Rights of Persons Belonging to National, Ethnic, Religious, and Linguistic Minorities*, G.A. Res. 47/3, 92 Plenary Meeting, A/RES/47/135, December 18, 1992, tinyurl.com/h25pb7g (accessed July 2, 2017).

79. World Bank, *Operations Manual* (Geneva: World Bank, 2005), sec. OP 4.10, tinyurl.com/jtquw4h (accessed July 2, 2017).

80. World Bank, *Operations Manual*, par. 16. For review of criticism of the operational policies, see Barume, *Land Rights*, 323–26.

81. Xanthaki, "Reflections," 27–37.

82. Christian Erni, "Introduction: The Concept of Indigenous Peoples in Asia," in *The Concept of Indigenous Peoples in Asia: A Resource Book*, ed. Christian Erni (Copenhagen: IWGIA and AIPP, 2008), 13.

83. Feiring, "Indigenous Peoples' Rights," 14.

84. See Section 8.4; Michael Wood, *First Report on Identification of Customary International Law*, report prepared for the UN International Law Commission, 65th Session, May 6–June 7 and July 8–August 9, 2013, A/CN.4/663; Michael Wood, *Second Report on Identification of Customary International Law*, report prepared for the UN International Law Commission, 66th Session, May 5–June 6 and July 7–August 8, 2014; Michael Wood, *Third Report on Identification of Customary International Law*, report prepared for the UN International Law Commission, 67th Session, May 4–June 5 and July 6–August 7, 2015, A/CN.4/682; and Seth Korman, "Indigenous Ancestral Lands and Customary International Law," *University of Hawaii Law Review* 32 (2010): 397–98.

85. Černič, "State Obligations," 1145–46.

86. Jérémie Gilbert, *Indigenous Peoples' Land Rights Under International Law: From Victims to Actors* (Leiden: Brill, 2006), 66. See also Feiring, "Indigenous Peoples' Rights," 16.

87. Carpenter and Riley, "Jurisgenerative Moment," 175–76, 213.

88. Barume, *Land Rights*, 229.

89. Simon Cotterill, "Ainu Success: The Political and Cultural Achievements of Japan's Indigenous Minority," *Asia-Pacific Journal* 9.12 (2011), no. 2, tinyurl.com/jz9a92g (accessed July 2, 2017).

90. For such ties between New Zealand and Canada, see McHugh, *Aboriginal Title*, 232.

91. McHugh, *Aboriginal Title*, iv.

92. Garth Nettheim, Gary D. Meyers, and Donna Craig, *Indigenous Peoples and Governance Structures: A Comparative Analysis of Land and Resource Management Rights* (Canberra: Aboriginal Studies Press, 2002), 79–88.

93. Jérémie Gilbert, "Historical Indigenous Peoples' Land Claims: A Comparative and International Approach to the Common Law Doctrine on Indigenous Title," *International and Comparative Law Quarterly* 56.3 (2007): 583–611.

94. *Mabo v. Queensland* (No. 2), (1992) 175 CLR 1, pars. 28, 39, 56; Göcke, "Protection and Realization," 98; Korman, "Indigenous Ancestral Lands," 411.

95. See Native Title Act (1993), art. 3; and Korman, "Indigenous Ancestral Lands," 412.

96. Göcke, "Protection and Realization," 100. After some time, Australian courts began to backtrack from the direction mapped out by *Mabo*, making it more difficult for Aborigines to secure land rights. McHugh, *Aboriginal Title*, 158.

97. Gilbert, "Historical Indigenous Peoples' Land Claims," 591.

98. See *The Richtersveld Community and Others v. Alexkor Ltd. and Another*, 2003 (2) SA 27 (SCA) (S. Afr.); *Adong bin Kuwan and Ors. v. Kerajaan Negeri Johor and Anor*, referenced in Korman, "Indigenous Ancestral Lands," 439n266; *Sesana and Others v. Attorney-General*, (52/2002) [2006] BWHC 1, referenced in Xanthaki, "Reflections," 34; *Aurelio Cal v. Attorney General of Belize*, Claim Nos. 171–72 (Sup. Ct., October 18, 2007) (Belize), tinyurl.com/gpdrkew (accessed July 2, 2017); Gilbert, "Historical Indigenous Peoples' Land Claims," 585–91; Korman, "Indigenous Ancestral Lands," 422; Rodolfo Stavenhagen, "General Considerations on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples in Asia," in *The Concept of Indigenous Peoples in Asia: A Resource Book*, ed. Christian Erni (Copenhagen: IWGIA, 2008), 308, 312; and McHugh, *Aboriginal Title*, 192.

99. For a recent legal-geographic examination of such gatekeeping, see Melinda Harm Benson, "Rules of Engagement: The Spatiality of Judicial Review," in *The Expanding Spaces of Law: A Timely Legal Geography*, ed. Irus Braverman, Nicholas Blomley, David Delaney, and Alexandre Kedar (Stanford, CA: Stanford University Press, 2014), 215–38.

100. See Section 1.6; and Alexandre Kedar, "On the Legal Geography of Ethnocratic Settler States: Notes Towards a Research Agenda," *Current Legal Issues* 5 (2003): 414–17.

101. See, for example, Michael J. Kaplan, Annotation, *Proof and Extinguishment of Aboriginal Title to Indian Lands*, 41 A.L.R. Fed. 425 (1979), 436, 471.

102. Deborah A. Geier, "Power and Presumptions; Rules and Rhetoric; Institutions and Indian Law," *BYU Law Review* 1994.3 (1994): art. 1, 451, 454, 472.

103. Guadalupe T. Luna, "Chicana/Chicano Land Tenure in the Agrarian Domain: On the Edge of a Naked Knife," *Michigan Journal of Race and Law* 4 (1998): 39. See also Kaplan, *Proof and Extinguishment*, 436; Nell Jessup Newton, "Indian Claims in the Courts of the Conqueror," *American University Law Review* 41 (1992): 818n73; and Kent McNeil, "Judicial Treatment of Indigenous Land Rights," *Comparative Research in Law and Economy* 4.5 (2008): 20, tinyurl.com/hwg278y (accessed July 2, 2017).

104. McNeil, "Judicial Treatment," 20.

105. Benson, "Rules of Engagement."

106. McHugh, *Aboriginal Title*, 123.

107. McHugh, *Aboriginal Title*, 125; McNeil, "Judicial Treatment," 12; *Yorta Yorta*

Aboriginal Community v. Victoria, (2002) 214 CLR 422, pars. 163 and 190; Göcke, "Protection and Realization," 106.

108. Robert S. French, "Lifting the Burden of Native Title: Some Modest Proposals for Improvement," *Reform* 93 (2009), 13, referenced in McHugh, *Aboriginal Title*, 133.

109. McNeil, "Judicial Treatment," 21; Richard Bartlett, "An Obsession with Traditional Laws and Customs Creates Difficulty Establishing Native Title Claims in the South: Yorta Yorta," *University of Western Australia Law Review* 31 (2003): 35, 44, referenced in Göcke, "Protection and Realization," 106.

110. McNeil, "Judicial Treatment," 28; Göcke, "Protection and Realization," 107.

111. McNeil, "Judicial Treatment," 28; Göcke, "Protection and Realization," 107.

112. McNeil, "Judicial Treatment," 26.

113. *Mitchel v. United States*, 34 U.S. 711, 746 (1835).

114. *Confederated Tribes of the Warm Springs Reservation of Oregon v. United States*, 177 Ct. Cl 184, 194 (1966), referenced in McNeil, "Judicial Treatment," 25n129. Similarly, fishing and gathering activities can give rise to indigenous title. McNeil, "Judicial Treatment," 22. [1]

115. Göcke, "Protection and Realization," 106.

116. *United States v. Seminole Indians of Florida*, referenced in McNeil, "Judicial Treatment," 26n133.

117. See Joseph William Singer, "Well Settled? The Increasing Weight of History in American Indian Land Claims," *Georgia Law Review* 28 (1994): 509; Monroe E. Price, Robert N. Clinton, and Nell J. Newton, *American Indian Law: Cases and Materials*, 3rd ed. (Charlottesville, VA: Michie, 1991), 230–31; David H. Getches, *Federal Indian Law: Cases and Materials*, 3rd ed., ed. Charles F. Wilkinson and Robert A. Williams (Eagan, MN: West, 1993), 345; *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247–48 (1985); Philip P. Frickey, "Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law," *Harvard Law Review* 107 (1993): 417; Charles F. Wilkinson and John M. Volkman, "Judicial Review of Indian Treaty Abrogation: 'As Long as Water Flows, or Grass Grows upon the Earth'—How Long a Time Is That?" *California Law Review* 63.3 (1975): art. 2.

118. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, par. 143; Göcke, "Protection and Realization," 104; McNeil, "Judicial Treatment," 21.

119. *Delgamuukw v. British Columbia*, par. 149.

120. McNeil, "Judicial Treatment," 20. In *Delgamuukw v. British Columbia*, for instance, the Supreme Court ordered a new trial, partly because the lower court did not give sufficient weight to the claimants' oral histories.

121. *Delgamuukw v. British Columbia*, par. 87, referenced in McNeil, "Judicial Treatment," 21n103.

122. *Delgamuukw v. British Columbia*, par. 149, quoted in McNeil, "Judicial Treatment," 22n108.

123. *Tsilhqot'in v. British Columbia*, [2014] 2 SCR 257, par. 2.

124. *William v. British Columbia*, [2012] BCCA 285, par. 118, quoted in *Tsilhqot'in v. British Columbia*, par. 22.

125. *Tsilhqot'in v. British Columbia*, par. 23.

126. *Tsilhqot'in v. British Columbia*, par. 24, 25.

127. *Tsilhqot'in v. British Columbia*, par. 37.

128. *Tsilhqot'in v. British Columbia*, par. 32.

129. *Tsilhqot'in v. British Columbia*, par. 37.

130. *Tsilhqot'in v. British Columbia*, par. 38.

131. *Tsilhqot'in v. British Columbia*, par. 41.

132. *Tsilhqot'in v. British Columbia*, par. 44.

133. *Tsilhqot'in v. British Columbia*, par. 48.

134. Compare Section 4.4.

135. American Convention on Human Rights, *Pact of San Jose, Costa Rica*, tinyurl.com/jyv6zog (accessed July 29, 2014). See also *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am. Ct. H.R. (ser. C), No. 79 (August 31, 2001), par. 2, tinyurl.com/glyz8f4 (accessed July 2, 2017); and Korman, "Indigenous Ancestral Lands," 448.

136. ILO, Convention 169; Feiring, "Indigenous Peoples' Rights," 34.

137. Korman, "Indigenous Ancestral Lands," 437–38; International Labor Organization, *Application of Convention No. 169 by Domestic and International Courts in Latin America: A Casebook* (Geneva, 2009), tinyurl.com/zo2z5lr (accessed July 2, 2017); Černič, "State Obligations," 1142.

138. *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, par. 79, tinyurl.com/gtyc9mq (accessed July 2, 2017); Xanthaki, "Reflections," 32.

139. American Convention on Human Rights, *Pact of San Jose, Costa Rica*; Xanthaki, "Reflections," 32.

140. *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, par. 173.

141. "Symposium," *Arizona Journal of International and Comparative Law* 19.1 (2002); Xanthaki, "Reflections," 32.

142. *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, par. 173; UN News Center, "Nicaragua's Titling of Native Lands Marks Crucial Step for Indigenous Rights—UN Expert," December 17, 2008, tinyurl.com/ju5j45y (accessed July 2, 2017).

143. *Yakye Axa Indigenous Community v. Paraguay*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 141 (2006). See also McHugh, *Aboriginal Title*, 235.

144. McHugh, *Aboriginal Title*, 236, referring to *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Series C No. 172 (2007), pars. 79–80.

145. *Saramaka People v. Suriname*, 60–61, tinyurl.com/z5fmpcz (accessed July 2, 2017); McHugh, *Aboriginal Title*, 236.

146. Article 62, of the Constitution of Paraguay, tinyurl.com/hx5kufs (accessed July 2, 2017); Mexican Constitution, tinyurl.com/hne3j25 (accessed July 2, 2017); Title IV, Article 129, of the Brazilian Constitution, tinyurl.com/hxskzbl (accessed July 2, 2017); Title I, Article 5, of the Mexican Constitution, tinyurl.com/hgsfuho (accessed July 2, 2017); Republic of Ecuador, Constitution of 2008, tinyurl.com/7mb4ko2 (accessed July 2, 2017). Similar stipulations exist in the Venezuelan constitution, especially in Chapter VIII RA, tinyurl.com/h64c273 (accessed July 2, 2017); and the Bolivian Constitution, especially Chapter IV, tinyurl.com/psckagq (accessed July 2, 2017). See also Talia Naamat, Nina Osin, and Dina Porat, eds., *Legislating for Equality: A Multinational Collection of Non-Discrimination Norms*, Vol. 2, *Americas* (Boston: Martinus Nijhoff, 2013), 87; Černič, "State Obligations," 1141; Victoria Tauli-Corpuz, "The Concept of Indigenous Peoples at the International Level: Origins, Development, and Challenges," in *The Concept of Indigenous Peoples in Asia: A Resource Book*, ed. Christian Erni (Copenhagen: IWGIA and AIPP, 2008), 82–83; and Rainer Grote, "The Status and Rights of Indigenous Peoples in Latin America," *Heidelberg Journal of International Law* 59 (1999): 509.

147. Except Suriname. Caecilie Mikkelsen, ed., *The Indigenous World 2015* (Copenhagen: IWGIA, 2015), 145, tinyurl.com/zmmtcvd (accessed July 2, 2017); Feiring, "Indigenous Peoples' Rights," 34.

148. Tauli-Corpuz, "Concept of Indigenous Peoples," 82–83; Ley No. 3760, Gaceta Oficial No. 3039 (November 7, 2007) (Bolivia), referenced in Černič, "State Obligations," 1142n67.

149. Feiring, "Indigenous Peoples' Rights," 34.

150. Constitutional Court, No. 03343-2007-PA-TC of February 19, 2009 (Peru), referenced in Černič, "State Obligations," 1144–45n83.

151. Korman, "Indigenous Ancestral Lands," 458–59.

152. *Aurelio Cal v. Attorney General of Belize*, Claim Nos. 171–72 (Sup. Ct., October 18, 2007) (Belize), tinyurl.com/zy563rn (accessed July 2, 2017).

153. *Aurelio Cal v. Attorney General of Belize*, par. 127; Korman, "Indigenous Ancestral Lands," 459.

154. *Aurelio Cal v. Attorney General of Belize*, pars. 115–17.

155. *Aurelio Cal v. Attorney General of Belize*, par. 132, referenced in Korman, "Indigenous Ancestral Lands," 423n173; Carpenter and Riley, "Jurisgenerative Moment," 213.

156. McHugh, *Aboriginal Title*, 211–13.

157. Korman, "Indigenous Ancestral Lands," 454.

158. Stavenhagen, "General Considerations," 320; Feiring, "Indigenous Peoples' Rights," 29–31.

159. Feiring, "Indigenous Peoples' Rights," 30; Erni, *Concept of Indigenous Peoples*, 15, 325; Barume, *Land Rights*, 234–36; McHugh, *Aboriginal Title*, 190, 217; Stavenhagen, "General Considerations," 312–14.

160. *Kayano et al. v. Hokkaido Expropriation Committee*, [Sapporo Dist. Ct.], 1999, 38 I.L.M. 397 (Japan), quoted in Černič, "State Obligations," 1144–45n80; McHugh, *Aboriginal Title*, 223–24.

161. Referred to in McHugh, *Aboriginal Title*, 218.

162. *Adong bin Kuwan and Ors. v. Kerajaan Negeri Johor and Anor*, (1997) 1 MLJ 418, referenced in Korman, "Indigenous Ancestral Lands," 439n266.

163. *Adong bin Kuwan and Ors. v. Kerajaan Negeri Johor and Anor*, referenced in Korman, "Indigenous Ancestral Lands," 439n267.

164. Stavenhagen, "General Considerations," 308, 312.

165. McHugh, *Aboriginal Title*, 192, citing *Superintendent of Lands v. Madeli bin Salleh* and *Superintendent of Lands and Surveys Miri Division v. Madeli bin Salleh (suing as the administrator of the estate of deceased, Salleh bin kilong* (2007) 6 CLJ 509; (2008) 2 MLJ 677, par. 19.

166. On the African Commission on Human and Peoples' Rights, see "About ACHPR," tinyurl.com/ztkm9gy (accessed September 7, 2014); and Barume, *Land Rights*, 315–16.

167. On the African Court on Human and Peoples' Rights, see en.african-court.org/ (accessed July 2, 2017).

168. *Endorois Welfare Council v. Kenya*, pars. 80 and 209; Korman, "Indigenous Ancestral Lands," 426–27.

169. However, at the time of writing this book, the Kenyan government had not fully implemented the court's decision. See "The Endorois Decision Four Years On: The Endorois Still Await Action by the Government of Kenya," ESCR-Net blog post, 2014, minorityrights.org/2014/09/23/the-endorois-decision-four-years-on-the-endorois-still-await-action-by-the-government-of-kenya/ (accessed July 2, 2017); and "Following ESCR-Net Members' Advocacy, the UN Committee on ESCR Recommends the Kenyan Government to Consult the Endorois in All Stages of the Implementation Process," ESCR-Net, March 8, 2016, tinyurl.com/grvwosl (accessed July 2, 2017).

170. Article 29 of the Constitution of the Republic of Rwanda, Article 21 of the Constitution of the Republic of Chad, Article 30 of the Constitution of the Republic of Congo, Article 25 of the Constitution of South Africa, and Article 26 of the Constitution of the Republic of Uganda, all referenced in Černič, "State Obligations," 1143; Constitution of Kenya

(rev. ed., 2010), published by the National Council for Law Reporting with the Authority of the Attorney General, sec. 63, tinyurl.com/ndlmjau (accessed July 2, 2017); Barume, *Land Rights*, 10–11; McHugh, *Aboriginal Title*, 221–22.

171. Barume, *Land Rights*, 39, 40, 241; Korman, "Indigenous Ancestral Lands," 424.

172. *Sesana and Others v. Attorney-General*, (52/2002) [2006] BWHC 1, referenced in Xanthaki, "Reflections," 34.

173. Korman, "Indigenous Ancestral Lands," 424; Barume, *Land Rights*, 173–85.

174. *The Richtersveld Community and Others v. Alexkor Ltd. and Another*, par, 46; McHugh, *Aboriginal Title*, 199.

175. McHugh, *Aboriginal Title*, 200.

176. Barume, *Land Rights*, 181–82.

177. Barume, *Land Rights*, 181.

178. The settlement triggered criticism from some members of the community and their supporters, and internal strife ensued. Barume, *Land Rights*, 183–85.

179. Barume, *Land Rights*, 11.

180. McHugh, *Aboriginal Title*, 215; Černič, "State Obligations," 1145; Korman, "Indigenous Ancestral Lands," 438.

181. Act Relating to Legal Relations and Management of Land and Natural Resources in the County of Finnmark (No. 85, June 17, 2005) (Finland).

182. *Jon Inge Sirum and Others v. Essand Reindeer Pasturing District and another*, June 21, 2001, serial number 4B/2001, par. 30 of Justice Matningsdal's opinion, tinyurl.com/jy57yhy (accessed July 2, 2017), cited in McHugh, *Aboriginal Title*, 216.

183. The Statute of the International Court of Justice is annexed to the Charter of the United Nations, of which it forms an integral part. See United Nations, Statute of the International Court of Justice, October 24, 1945, legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf (accessed July 2, 2017); Rubie Sabel, ed., *International Law* (Jerusalem: Sacher Institute of the Law Faculty of the Hebrew University of Jerusalem, 2010), 9; and United Nations, Statute of the International Court of Justice, art. 38, 1.

184. Korman, "Indigenous Ancestral Lands," 395; R. R. Baxter, "Multilateral Treaties as Evidence of Customary International Law," *British Yearbook of International Law* 41 (1965–1966): 293 (arguing that treaties that codify law may influence, shape, and alter the law in signatory countries); Orna Ben-Naftali and Yuval Shany, *International Law Between War and Peace* (Tel Aviv: Ramot, Tel-Aviv University, 2006), 387–89 (Hebrew); Sabel et al. *International Law*, 14–17.

185. Ben-Naftali and Shany, *International Law*, 364.

186. Sabel et al., *International Law*, 10; Yaffa Zilbershats, "The Adoption of International Law into Israeli Law: The Real Is Ideal," *Mishpatim* 24 (1994): 337 (Hebrew).

187. Clive Parry, *The Sources and Evidences of International Law* (Manchester, UK: Manchester University Press, 1965), 57, quoted in Korman, "Indigenous Ancestral Lands," 396.

188. Korman, "Indigenous Ancestral Lands," 396–97. Objection needs to be persistent and visible.

189. Ben-Naftali and Shany, *International Law*, 391–92.

190. Sabel et al., *International Law*, 13; Ben-Naftali and Shany, *International Law*, 394–97.

191. Ben-Naftali and Shany, *International Law*, 364. See also Sabel et al., *International Law*, 9, 18–19.

192. On the difficulties of proving customary international law, see Ben-Naftali and Shany, *International Law*, 394–97; Sabel et al., *International Law*, 10–12; Wood, *First Report*; Wood, *Second Report*; and Wood, *Third Report*.

193. Sabel et al., *International Law*, 11.

194. Ben-Naftali and Shany, *International Law*, 397–99.

195. Korman, "Indigenous Ancestral Lands," 397–98. For the debate over state practice, see Korman, "Indigenous Ancestral Lands," 399–407; Ben-Naftali and Shany, *International Law*, 382–87; and Sabel et al., *International Law*, 11–12.

196. International Court of Justice (ICJ), *Legality of the Use or Threat of Nuclear Weapons: Advisory Opinion of 8 July 1996*, par. 70, 254–55, www.icj-cij.org/files/case-related/95/095-19960708-ADV-01-00-EN.pdf (accessed July 2, 2017).

197. Compare Alistair Rieu-Clarke, *International Law and Sustainable Development: Lessons from the Law of International Watercourses* (London: IWA, 2005), 26–27.

198. UN Economic and Social Council, *Report of the Commission on Human Rights*, 18th Session, March 19–April 14, 1962, E/3616/Rev. l, par. 105, quoted in Brenda Gunn, "Overcoming Obstacles to Implementing the UN Declaration on the Rights of Indigenous Peoples in Canada," *Windsor Yearbook of Access to Justice* 31 (2013): 147, 160.

199. UN Office of Legal Affairs, *Memorandum on Declaration*, E/CN.4/L.610, April 1962, 2, quoted in Gunn, "Overcoming Obstacles," 160.

200. Korman, "Indigenous Ancestral Lands," 442; Ben-Naftali and Shany, *International Law*, 404–08; Sabel et al., *International Law*, 13–14, 19–21.

201. Restatement (Third) of Foreign Relations Law of the United States, secs. 102, 103 (1987), quoted in Korman, "Indigenous Ancestral Lands," 452–53.

202. Ben-Naftali and Shany, *International Law*, 378–81; Sabel et al., *International Law*, 12–13.

203. Megan Davis, "To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years on," *Australian International Law Journal* 19 (2012): 36.

204. Xanthaki, "Reflections," 36. For similar approaches, see Davis, "To Bind or Not to Bind," 27–28.

205. Xanthaki, "Reflections," 36.

206. In addition, several countries that abstained in the original vote have since changed their approach and now endorse the UNDRIP. See Gunn, "Overcoming Obstacles," 151.

207. U.S. Department of State, "Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples," 1, 2009-2017.state.gov/s/srgia/154553.htm (accessed July 2, 2017). For Canada's original reserved endorsement of the UNDRIP, see Government of Canada, Indigenous and Northern Affairs, "Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples," November 12, 2010, tinyurl.com/b6ynwp9 (accessed July 2, 2017); for its later full endorsement in 2016, see "Canada Officially Adopts UN Declaration on Rights of Indigenous Peoples," CBC News, May 10, 2016, tinyurl.com/h64k62c (accessed July 2, 2017). For New Zealand, see New Zealand Government, "Supporting UN Declaration Restores NZ's Mana," April 20, 2010, tinyurl.com/hrh6gez (accessed July 2, 2017). For Australia, see Jenny Macklin, "Statement on the United Nations Declaration on the Rights of Indigenous Peoples, Parliament House, Canberra," April 3, 2009, tinyurl.com/pozkxk6 (accessed July 2, 2017).

208. Barume, *Land Rights*; Erni, *Concept of Indigenous Peoples*; McHugh, *Aboriginal Title*; Davis, "To Bind or Not to Bind," 38–39.

209. Mauro Barelli, "The Role of Soft Law in International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples," *International and Comparative Law Quarterly* 58 (2009): 967–68.

210. Davis, "To Bind or Not to Bind," 17, 19.

211. For a review of the literature, see Davis, "To Bind or Not to Bind," 17, 19, 24–25.

212. Göcke, "Protection and Realization," 125–26.

213. S. J. Anaya and R. A. Williams Jr., "The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System," *Harvard Human Rights Journal* 14 (2001): 55.

214. S. James Anaya and Siegfried Wiessner, "The UN Declaration on the Rights of Indigenous Peoples: Towards Re-Empowerment," *Jurist*, October 3, 2007, tinyurl.com/zcznf8l (accessed July 2, 2017). See also Xanthaki, "Reflections," 35; and Davis, "To Bind or Not to Bind," 41.

215. Xanthaki, "Reflections," 35. For a similar position, see Gunn, "Overcoming Obstacles," 162.

216. Xanthaki, "Reflections," 29, quoting *Police v. Abdulla*, [1999] 74 SASR 337, par. 37 (Perry, J.).

217. *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 71, par. 140(d).

218. *Aurelio Cal v. Attorney-General of Belize*, Claim 121/2007 (Supreme Court, Belize, October 18, 2007), par. 127.

219. Lorie M. Graham and Siegfried Wiessner, "Indigenous Sovereignty, Culture, and International Human Rights Law," *South Atlantic Quarterly* 110 (2009): 403.

220. UN General Assembly, *Promotion and Protection*, 13, unsr.jamesanaya.org/docs/annual/2008_hrc_annual_report_en.pdf (accessed July 2, 2017). See also Gunn, "Overcoming Obstacles," 160.

221. Korman, "Indigenous Ancestral Lands," 395.

222. McHugh, *Aboriginal Title*, 226.

223. Mathew Coon Come, grand chief of the Grand Council of the Crees, at a seminar organized by the Aboriginal and Torres Islander Commission, 1995, cited in Davis, "To Bind or Not to Bind," 21.

224. Göcke, "Protection and Realization," 125–26. Černič presents a similar position ("State Obligations," 114).

225. Zips-Mairitsch, *Lost Lands*, 56.

226. Barume, *Land Rights*, 252.

227. See International Law Association, "About Us." www.ila-hq.org/index.php/about-us (accessed July 2, 2017); and Wood, "Third Report," 45, sec. 65.

228. ILA, *Rights of Indigenous Peoples*, 6.

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236. Yuval Shany, "Economic, Social, and Cultural Rights in International Law: What Use Can the Israeli Courts Do with Them," in *Economic, Social, and Cultural Rights in Israel*, ed. Yoram Rabin and Yuval Shany (Tel Aviv: Ramot, Tel Aviv University, 2004), 334 (Hebrew).

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239. Zilbershats, "Adoption of International Law" (1994), 348. See also Yaffa Zilbershats, "The Adoption of International Law into Israeli Law: The Real is Ideal," in *Israel Yearbook on Human Rights*, ed. Yoram Dinstein and Jeff Lahav (Dordrecht: Martinus Nijhoff, 1996), 243–79 (Hebrew).

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242. Benvenisti, "Attitude of the Supreme Court," 210.

243. Benvenisti, "Attitude of the Supreme Court," 212.

244. H.C.J. 69/81 *Abu Aita et al. v. Commander of the Judea and Samaria Region et al.*, 37 (2) P.D. 197, 238–39 (1983) (Hebrew); *7 Selected Judgments of the Israeli Supreme Court 1*, 36 (emphasis in original), quoted in Benvenisti, "Attitude of the Supreme Court," 207, 212.

245. H.C.J. 390/79 *Dwikat v. Government of Israel*, 34 (1) P.D. (1979) (Hebrew).

246. H.C.J. 785/87; 845/87; 27/88 *Affo v. IDF Commander of the West Bank*, 38, and the cases cited there; Sabel et al., *International Law*, 29. See also Cr.A. 174/54 *Shtamfer v. Attorney General*.

247. C.A. 4289/98 (T.A.) *Shulamit Shalom v. Attorney General*, (3) P.M. 1 (1999) (Hebrew); Sabel et al., *International Law*, 30.

248. Lapidoth, "International Law Within the Israel Legal System," 811.

249. Barak-Erez, "International Law," 611, 615; Lapidoth, "International Law," 86, 91–92. See also Shany, "Economic, Social, and Cultural Rights," 337–38; and C.A. 3112/94 *Sufian Abu Hassan v. State of Israel*, P.D. 53 (1), 422, 429–30 (1999) (Hebrew), in which Justice Dalia Dorner stresses that the presumption of equivalence applies also to judicial discretion and therefore that the Court should refrain as much as possible from using its discretion against rules of conventional international law.

250. Barak-Erez, "International Law," 625–26; H.C.J. 2599/00 *Yated–Association for Children with Down Syndrome v. Ministry of Education*, 56 (1) P.D. 834, 846 (2002) (Hebrew); Lapidoth, "International Law," 86, 94–95; F.H. 7048/97 *Plonim v. Minister of Defense*, PD 54 (1), 721, 742–43 (2000) (Hebrew). For a recent statement of the existence of the presumption in Israel, see H.C.J. 7146/12 *Adam v. Knesset*, 1, 11–13.

251. Brody, "Status of International Law," 74.

252. For additional international law instruments, see Section 8.2. Israel signed the ICCPR and the ICESCR in 1966 and ratified them in 1991 without reservations. It signed the ICERD in 1966 and ratified it in 1979 without reservations. See Office of the Deputy Attorney General, State of Israel, tinyurl.com/jmbdjo7 (accessed July 2, 2017).

253. Cr. A. 5695/14 *Abed Elkader v. The State of Israel*, 1, 23–29, 34–36, 38 (2015).

254. Shany, "Economic, Social, and Cultural Rights," 335–41.

255. Shany, "Economic, Social, and Cultural Rights," 339–40.

256. H.C.J. 302/72 *Hilo v. The Government of Israel*, 27 (2) P.D. 162, 177 (1973) (Hebrew); Zilbershats, "Adoption of International Law" (1994), 319; Benvenisti, "Attitude of the Supreme Court," 207–8.

257. Cr.A. 336/61 *Eichmann v. Attorney General*, 16 (3) P.D. 2033, 2040 (1962) (Hebrew); Zilbershats, "Adoption of International Law" (1994), 319–20.

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260. Basic Law: Human Dignity and Liberty, 1992, S.H. 1391 (Hebrew), tinyurl.com/zmm3ew4 (accessed July 2, 2017).

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CHAPTER 9

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6. Shiri Spector Ben-Ari, *Bedouin Settlement in the Negev* (Tel Aviv: Knesset Research and Information Center, November 5, 2013), 10, tinyurl.com/gnxqsxm (accessed June 9, 2017) (Hebrew).

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33. Israel Land Authority, *A National Strategic Plan for Developing the Negev Area, Israel Ministry of Construction and Housing*, November 20, 2005, tinyurl.com/heukxp9 (accessed June 9, 2017); Reut Institute, *Daroma: Strategic Plan for the Negev*, 2006.

34. Ehud Prawer and Lirit Serphos, *Negev Bedouin Difficulties and Policy Recommendations* (Israeli National Security Council, 2006) (on file with the authors) (Hebrew).

35. Negev Coexistence Forum, *The House Demolition Policy in the Negev-Naqab* (Beersheba: Negev Coexistence Forum, 2014) (Hebrew, English, Arabic), tinyurl.com/ju53s68 (accessed June 9, 2017).

36. See Consensus Building Institute (CBI), *Report on Conflict Assessment: Disagreements on Development Issues in Kseiffa and UmBatin* (unpublished, 2006) (copy with the authors), tinyurl.com/z7w8gzg (accessed June 9, 2017).

37. Professor Mordechai Mironi, e-mail response, April 4, 2016 (on file with the authors). Mironi was part of the CBI team.

38. Goldberg Report, Introduction.

39. Goldberg Report, art. 71.

40. Goldberg Report, art. 71.

41. Goldberg Report, arts. 108–10.

42. Ahmad Amara, "The Goldberg Commission: Legal and Extra-Legal Means in Solving the Naqab Bedouin Caste," *HAGAR: Studies in Culture, Polity, and Identities* 8 (2008): 227–43. Article 4 of Government Resolution 2491 mentions that the Goldberg Commission's work is to be based on a memorandum submitted to it by the government. Prime Minister's Office, State of Israel, *The Establishment of a Commission to Draft Policy for Regulating the Bedouin Settlement in the Negev, Government Resolution No. 2491* (2006), art. 4, tinyurl.com/jlqcbrv (accessed June 9, 2017) (Hebrew). This memorandum is to include the "budget and the land stock that the government can allocate for the Bedouin case." The memorandum allocates 100,000 *dunum*s for solving the land claims; 25,000 *dunum*s out of the 100,000 *dunum*s should be within the planning boundaries of the existing Bedouin settlement and those under planning. (A copy of the government document is with the authors.)

43. Goldberg Report, art. 78 (emphasis added).

44. Prime Minister's Office, State of Israel, *Report of the Taskforce for the Implementation of the Goldberg Report for Regulating the Bedouin Settlement in the Negev Area*, Government Resolution 4411, 2009, 7, www.pmo.gov.il/Secretary/GovDecisions/2009/Pages/des4411.aspx (accessed June 9, 2017) (Hebrew) (hereafter, Prawer Report). The Prawer Task Force produced several documents and an active discourse on the topic. Hence several terms—such as "the Prawer Plan," "the Prawer Strategy" or "the Prawer Bill"—were used, often interchangeably in this discourse. This is reflected in the multiplicity of terms we use here.

45. Prawer Report, secs. 1.2 and 1.6.

46. The Prawer Bill is the popular name of the Draft Law for the Regulation of Bedouin Settlement in the Negev, 2013.

47. State of Israel, *Legal Memorandum, The Regulation of Bedouin Settlement in the Negev Bill*, January 3, 2012 (Hebrew).

48. Prime Minister's Office, State of Israel, *Regulating the Status of Bedouin Settlement in the Negev: Summary of the Process of Consultation with the Public Regarding the Draft Law*

for the Regulation of Bedouin Settlement in the Negev and Recommendations Relating to Policy and Amendments to the Draft Law, 2013 (Hebrew) (on file with the authors) (hereafter, Begin Report).

49. Begin Report, 3.

50. Eli Atzmon, "Re: My Assessment of the Begin Report Concerning the Regulating of Negev Bedouin Settlement," unpublished letter, February 4, 2013 (on file with the authors).

51. Regional Council of the Unrecognized Villages (RCUV), Bimkom—Planners for Planning Rights, and Sidra—Association of Arab Bedouin Women in the Negev, *Master Plan for the Unrecognized Villages, Abridged Version* (Jerusalem: Ayalon, 2012), tinyurl.com/hxc5bx6 (accessed June 9, 2017).

52. Prime Minister's Office, State of Israel, *Appendix to Government Resolution 3707, Government Resolution no. 5345, Internal Report for Applying the Bedouin Settlement in the Negev Committee's Recommendations*, 2013, tinyurl.com/h49u7jt (accessed June 9, 2017) (Hebrew).

53. Ministerial Committee of Legislation, State of Israel, May 6 2013; Jonathan Lis and Yanir Yigna, "The Ministerial Committee Requested the Coalition to Support Begin Law for the Regulation of Bedouin Settlement," *Haaretz*, May 6, 2013, tinyurl.com/c3dpygp (accessed June 9, 2017).

54. Adalah and the Negev Coexistence Forum for Civil Equality, "The Prawer-Begin Bill and the Forced Displacement of the Bedouin," *Adalah's Newsletter* 104 (2013), tinyurl.com/zu6qelx (accessed June 9, 2017).

55. State of Israel, 44th Session of the 19th Knesset, Knesset Minutes, "The Regulation of Bedouin Settlement in the Negev Bill" (2013) (Hebrew) (hereafter, Prawer Bill).

56. The Prawer Bill views all claims memos submitted to the Settlement Officer, recorded in a Claim File and published on October 24, 1979, as necessary and sufficient conditions, entitling the claimant or his successors to be included in the bill's scheme (Prawer Bill, sec. 28). The bill includes some additional claimants. Prawer Bill, secs. 28(a) and 28(b).

57. Prawer Bill, ch. G.

58. Prawer Bill, chaps. B and C.

59. Prawer Bill, secs. 72 and 81.

60. Prawer Bill, sec. 45.

61. See Prawer Report, secs. 1.2 and 1.3.

62. Prawer Bill, secs. 47 and 48.

63. Prawer Bill, sec. 46C.

64. Prawer Bill, secs. 46E and 49.

65. Prawer Bill, secs. 53–58.

66. The receipt of compensation depends on several additional conditions. See Prawer Bill, secs. 50 and 51.

67. Daniel Tsiddon, *The Price of the Disengagement: Economic Implications* (Jerusalem: Israel Democratic Institute, 2006), www.idi.org.il/books/2663 (accessed June 8, 2017) (Hebrew).

68. This applies even if the declaration of the area is subsequently revoked. Prawer Bill, sec. 66B.

69. Prawer Bill, sec. 70.

70. State of Israel, *Regulation of Bedouin Settlement in the Negev: Summary of Public Hearings Regarding the Law Memorandum on Bedouin Settlement in the Negev and Policy Recommendations* (January 23, 2013), 6 (on file with the authors); interview with Shmuel David, activity coordinator between the New Israel Fund Initiative, the Shatil Organization, and the Bedouin Community, July 1, 2015.

71. Ehud Prawer, lecture at Ben Gurion University, September 22, 2011; Institute of Democracy, April 12, 2012.

72. Atzmon, "Re: My Assessment."

73. For elaboration, see State of Israel, *Summary of Public Hearings Regarding the Law Memorandum on Bedouin Settlement in the Negev and Policy Recommendations* (January 23, 2013).

74. UN Economic and Social Council, *Concluding Observations of the Committee on Economic, Social, and Cultural Rights: Israel*, E/C.12/ISR/CO/3, 2011, 6–9.

75. Prime Minister's Office, State of Israel, *Transferring Responsibility for the Settlement of Bedouin Villages from the Prime Minister Office to the Ministry of Agriculture and the Rural Sector, Government resolution No. 1146*, 2014, tinyurl.com/zll86ct (accessed June 9, 2017) (Hebrew).

76. Oren Yiftachel, one of the authors of this book, was the coordinator and a key member of the RCUV's planning team.

77. Sarab Abu-Rabia-Queder, "We Are Strangers on Our Land: The Geography of Self and Place Identities Among the Bedouin-Arabs of the Negev," in *The Production of Bedouin Space in the Negev*, ed. Yuval Karplus and Avinoam Meir (Beersheba: Negev Center for Regional Development, 2013), 145–68 (Hebrew).

78. Meir, "Bedouin, the Israeli State."

79. Meir, *As Nomadism Ends*; Oren Yiftachel and Haim Yacobi, "Urban Ethnocracy: Ethnicization and the Production of Space in an Israeli 'Mixed City,'" *Environment and Space* 21.6 (2003): 673–93.

80. Meir, "Bedouin, the Israeli State"; Oren Yiftachel, "Bedouin-Arabs and the Israeli Settler State: Land Policies and Indigenous Resistance," in *The Future of Indigenous Peoples: Strategies for Survival and Development*, ed. D. Champagne and I. Abu-Saad (Los Angeles: American Indian Studies Center, 2003), 21–47.

81. Yiftachel, "Critical Theory."

82. Ahmad Amara, "Colonialism, Cause Advocacy, and the Naqab Case," in *The Naqab Bedouin and Colonialism: New Perspectives*, ed. Mansour Nasasra, Sophie Richter-Devroe, Sarab Abu-Rabia-Queder, and Richard Ratcliffe (New York: Routledge, 2014), 162–188.

83. "Debates Continue on Bedouin Settlement," *Sheva*, May 24, 1994, 7 (Hebrew); Meir, "Bedouin, the Israeli State."

84. Meir, "Bedouin, the Israeli State."

85. Nir Hasson, "Mediation Process with the Bedouin," Gevim Group, 2015, tinyurl.com/zjwhq6t (accessed June 9, 2017) (Hebrew).

86. Yiftachel, "Towards Recognition."

87. Oren Yiftachel and Haim Yacobi, "Control, Resistance, and Informality: Jews and Bedouin-Arabs in the Beer-Sheva Region," in *Urban Informality: Transnational Perspectives from the Middle East, Latin America, and South Asia*, ed. Ananya Roy and Nezar AlSayyad (Boulder, CO: Lexington, 2004), 118–36.

88. Tal Dahan, *The State of Human Rights in Israel and in the Occupied Territories 2012* (Tel Aviv: Association for Civil Rights in Israel, 2012), tinyurl.com/hb6lea4 (accessed June 9, 2017).

89. Jaber Abu-Kaf, personal communication, 2014. Abu-Kaf was the second chair of the RCUV.

90. Spector Ben-Ari, *Bedouin Settlement*, 10.

91. Attiya al-ʿAssem, personal communication, 2014.

92. These are Wadi al-Naam and al-Qrein East (al-ʿUqbi), which may have to move

because of pressing environmental and social problems. Such relocation, if it is to proceed, depends on prior agreement of the locals.

93. Goldberg Report, 1.

94. The range in land allocation derives from uncertainty about the number of households employed in agriculture in the target year.

95. Shmueli and Khamaisi, *Israel's Invisible Negev Bedouin*; Yiftachel and Yacobi, "Control, Resistance."

96. For example, in a meeting with a Bedouin delegation headed by the RCUV in the Prime Minister's Office, October 10, 2012.

97. Abu-Saad and Lithwick, *A Way Ahead*.

98. Hasson, "Mediation Process."

99. Oren Yiftachel, "The Internal Frontier: Territorial Control and Ethnic Relations in Israel," *Regional Studies* 30.5 (1996): 493.

CONCLUSION

1. C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*.

2. Basic Law: Human Dignity and Liberty, 1992, S.H. 1391, sec. 3 (Hebrew).

3. The Land Acquisition Act was one of the major legal instruments that, following the 1948 war, allowed massive land expropriation from Arabs/Palestinians. See C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, pars. 1 and 28–31 of Justice Hayut's opinion. On the Land Acquisition Act and the Israeli jurisprudence on it, see Alexandre Kedar, "On the Legal Geography of Ethnocratic Settler States: Notes Towards a Research Agenda," *Current Legal Issues* 5 (2003): 405–44; Geremy Forman and Alexandre Kedar, "From Arab Land to 'Israel Lands': The Legal Dispossession of the Palestinians Displaced by Israel in the Wake of 1948," *Environment and Planning D: Society and Space* 22.6 (2004): 809–830; and Alexandre Kedar, "Dignity Takings and Dispossession in Israel," *Law and Social Inquiry* 41.4 (2016): 866–87.

4. For an overview, see Section I.4.

5. C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, Plaintiffs Summary, pars. 33–34. For the reasons for this request, see Plaintiffs Summary, pars. 54–57.

6. Unless the claimants succeeded in proving that they revived and registered the land before 1921. C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, par. 64.

7. C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, pars. 10 and 14.

8. C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, par. 69.

9. C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, par. 69.

10. See Section 3.1.

11. C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, par. 54.

12. C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, pars. 53–60.

13. C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, pars. 55–60. Justice Hayut also ruled that the appellants did not prove that the land constituted *matruke*; see C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, pars. 65–68.

14. C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, par. 53.

15. See Section 1.6.

16. Bent Flyvbjerg, *Rationality and Power: Democracy in Practice* (Chicago: University of Chicago Press, 1998).

17. C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, par. 35.

18. C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, par. 35.

19. Justice Hayut mentioned correctly that the British enacted legislation geared to con-

trol the Bedouins, such as the Prevention of Crime (Tribes and Factions) Ordinance (1935) and the Bedouin Control Ordinance (1942).

20. C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, par. 38. On the statement, see Section 3.1.2.

21. On such acquisitions, see Section 3.3.

22. See Section 3.3.

23. C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, par. 41.

24. See, for example, C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, secs. 5, 6, 49, and 50, and appellants' conclusion (June 6, 2013). See also appellants' documents submitted to the Supreme Court on November 18, 2013, and May 5, 2014 (copy with the authors).

25. C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, par. 42.

26. C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, par. 71.

27. C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, par. 72.

28. For details, see Oren Yiftachel, "Supreme Court Decision on *al-'Uqbi v. the State of Israel*: May 2015 Overview and Critique" (unpublished document, May 31, 2015) (copy with the authors).

29. C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, par. 73.

30. C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, par. 73.

31. C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, par. 80.

32. See Section 8.4.

33. C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, par. 81.

34. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Plaintiffs' Memorandum, pars. 95–107; C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, Plaintiffs' Summary, pars. 127–41.

35. C.C. 7161/06 *al-'Uqbi et al. v. State of Israel*, Plaintiffs' Memorandum, pars. 95–107; C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, Plaintiffs Summary, pars. 127–41, and Concluding Statement, secs. 119–22.

36. Relying on an expansive, pro-state interpretation of Section 22 of the Settlement of Title Ordinance.

37. C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, par. 51.

38. C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, par. 82.

39. C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, par. 82.

40. C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, pars. 60–63.

41. The survey was conducted by Oren Yiftachel, cartographer Oudah Abu-Friha, and aerial photograph analyst Shlomo Ben-Yosef.

42. C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, par. 57.

43. C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, par. 58.

44. C.A. 4220/12 *al-'Uqbi et al. v. State of Israel*, par. 83.

45. *Hassan (Nuri) al-'Uqbi v. The State of Israel*, request for further hearing, May 31, 2015 (copy with the authors).

46. F.H.C. 3571/15 *Hassan (Nuri) al-'Uqbi and 14 Additional Applicants v. the State of Israel*, July 19, 2015 (Hebrew) (copy with the authors).

47. *Hassan (Nuri) al-'Uqbi v. The State of Israel*, par. 5 of Naor's decision.

48. *Hassan (Nuri) al-'Uqbi v. the State of Israel*, par. 7 of Naor's decision.

49. *Tsilhqot'in v. British Columbia* [2014] 2 S.C.R. 257, par. 38.

50. *Tsilhqot'in v. British Columbia*, par. 23.

51. International Law Association, *Rights of Indigenous Peoples*, Interim Report from the Hague Conference (2010); International Law Association, *Final Report*, from the Sofia Conference (2012); International Law Association, *Implementation of the Rights of Indigenous Peoples*, Draft Interim Report from the Johannesburg Conference (2016), www.ila-hq

.org/index.php/publications/order-reports (accessed June 11, 2017); Albert Kwokwo Barume, *Land Rights of Indigenous Peoples in Africa* (Copenhagen: International Work Group for Indigenous Affairs (IWGIA), 2010); Christian Erni, *The Concept of Indigenous Peoples in Asia: A Resource Book* (Copenhagen: IWGIA, 2008); P. G. McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford, UK: Oxford University Press, 2011).

52. Katja Göcke, "Protection and Realization of Indigenous Peoples' Land Rights at the National and International Level," *Goettingen Journal of International Law* 5.1 (2013): 121–23.

53. *Tsilhqot'in v. British Columbia*, par. 14.

54. Jérémie Gilbert, "Historical Indigenous Peoples' Land Claims: A Comparative and International Approach to the Common Law Doctrine on Indigenous Title," *International and Comparative Law Quarterly* 56.3 (2007): 586.

55. See Sections 8.3 and 8.4.

56. *Endorois Welfare Council v. Kenya*.

57. C.C. 8622/07 *Rotman v. National Roads Company of Israel*, par. 62 (delivered on May 14, 2012) (not published) (Hebrew).

58. See Section C.1.

59. Barume, *Land Rights*, 49.

60. Quoted in Barume, *Land Rights*, 78.

61. Barume, *Land Rights*, 332.

62. International Law Association, Resolution No. 5/2012, "Rights of Indigenous Peoples," sec. 11.

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