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The Human Right to Water in Israel: A Case Study of the Unrecognised Bedouin Villages in the Negev

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In the case 9535/06 Abadallah Abu Massad and Others v Water Commissioner and Israel Lands Administration *(2011), the Israeli Supreme Court ruled that the right to water deserves constitutional protection under Israel's Basic Law: Human Dignity and Freedom. The Court also found support for the right to water under both international human rights law and Israeli statutory law. At the same time, the Court held that the right to water is not absolute but must be balanced against the rights of the state. The case was brought by residents of unrecognised Bedouin villages in the Negev, a desert region in southern Israel, who do not have access to household water. The Court found that in exercising its discretion regarding additional water access points, the Israeli Water Authority could consider the 'illegal' nature of these villages. Applying the criteria of reasonableness and proportionality, the Court ultimately affirmed the Israeli Water Authority's policy in unrecognised villages in the Negev. Despite this administrative deference, the invocation of constitutional and international human rights law raises the level of scrutiny that should be applied to a review of the Israeli Water Authority's exercise of discretion. The Court's opinion is coloured and influenced by long-standing land disputes between the indigenous Bedouin population and the State of Israel. Drawing on empirical research conducted in December 2011, the analysis attempts to place the* Abu Massad *decision in its proper historical and political context. The dispute over land in the Negev can be traced back to the days of the Ottoman Empire. More recent efforts by the Israeli government as set out in the Goldberg Report and the Prawer Plan, and the international community's response to these efforts, are discussed. In light of the history and current political context, it may be prudent for the Israeli Water Authority to re-assess the effectiveness of its existing water policy in unrecognised Bedouin villages in the Negev.*

Keywords: human right, water, Bedouin, Negev, unrecognised

1. Introduction

On 5 June 2011, the Israeli Supreme Court ruled in a case brought by residents of unrecognised Bedouin villages in Israel that the right to water deserves constitutional protection under Israel's Basic Law: Human Dignity and Freedom. The Court also found support for the right to water in international human rights law and under the Israeli Water Law.[1] To understand the legal and policy implications of this Supreme Court case, empirical research was conducted in Israel in

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[1] CA 9535/06 *Abadallah Abu Massad and Others v Water Commissioner and Israel Lands Administration* (not reported, 5 June 2011). See Adalah, 'Israeli Supreme Court: Arab Bedouin in the Unrecognized Villages in the Negev Have the Right to "Minimal Access to Water"', 6 June 2011, http://adalah.aiforms.com/eng/?mod=articles&ID=1634.

December 2011. Approximately twenty interviews with non-governmental organisations (NGOs), government officials, Bedouin leaders, attorneys and academics in Israel were carried out and visits were made to Bedouin villages.[2] During the interviews, it became clear that studying the question of access to water for the Bedouins in Israel was like peeling back an onion: there were always more layers to get through, and the deeper one went the more potent and volatile the issues became. At the core of this metaphorical onion lie deeply divergent narratives about land ownership in the Negev.[3]

Section 2 of this article begins with the *Abu Massad* decision, setting out the key facts and synthesising the Court's legal analysis. The original case and the subsequent appeal to the Israeli Supreme Court were brought by six Bedouin plaintiffs, on behalf of hundreds of people who had sought improved water access to their villages; their requests had been denied by the Israeli Water Authority's Water Committee. The applicants live in unrecognised villages, which are settlements that are considered illegal under Israeli law; in contrast, the Bedouins believe that they are the rightful owners of this land. Although the Court did not delve deeply into the underlying disputed land claims, these issues are ever present in the backdrop to the *Abu Massad* case and they influenced the Court's analysis. The Supreme Court determined that even though the Bedouins are living in 'illegal' villages they have a right to water under Israeli and international law. The Court also held, however, that this right must be balanced against the rights of the state to enforce its laws and development planning vision. The Court uses the criteria of relevance, reasonability and proportionality to weigh the protected right against the state's interest, ultimately affirming the policy of the Israeli Water Authority (IWA) regarding unrecognised villages in the Negev. As a result, despite the broad legal holding and the reference to the right to water, the actual application of the ruling to the facts of the case is quite narrow.

The Israeli Supreme Court's ruling is then reconsidered in light of the normative criteria of the human right to water under international law. Key differences between Israeli and international law are highlighted. Nevertheless, the Supreme Court's invocation of the right to water under the Israeli Basic Law and under international human rights law is important because it heightens the level of judicial scrutiny that can be applied to the IWA's policy decisions in the Negev. If the IWA were to apply the criteria suggested by the *Abu Massad* Court's analysis, it would probably realise that the number of water centres and private access points for unrecognised villages needs to be increased.

In order to situate the Supreme Court's decision within the broader historical and political context, Section 3 of the article attempts to summarise over a hundred years of history surrounding the Bedouins' disputed land claims in the Negev, starting with their claims under Ottoman rule and moving to the present day. The Israeli government has recently taken steps to address the land issues of Bedouins living in unrecognised villages in the Negev. The initial

[2] The list of interviewees is on file with the authors.

[3] Deborah F Shmueli and Rassem Khamaisi, 'Bedouin Communities in the Negev' (2011) 77 *Journal of the American Planning Association* 109, 111 (describing the Negev, which constitutes the southern half of Israel, as an 'arid expanse stretching southward from Kiryat Gat and Ashdod to the Gaza Strip and Sinai').

recommendations for the Israeli government's most recent plans were set out in a document known as the Goldberg Report, which was relatively well received by the Bedouin communities and the NGOs that work with them. However, the follow-up implementation plan, known as the Prawer Plan, has been criticised significantly, including by the international community.

Although all sides would like a speedy resolution to the situation, it could still be many years before a final solution to the Bedouin land claims in Israel is reached. Moreover, the research suggests that the IWA's policy in unrecognised villages may not be effective. Currently, the Authority does not provide household access to water because it seeks to incentivise or pressure the Bedouins to move from unrecognised villages to established townships. However, many Bedouins in unrecognised villages are not willing to relinquish their land claims and their traditional way of life simply to have better access to water and other municipal services. In light of the history and current political context, it may be prudent for the IWA to re-assess the effectiveness of its existing policy and increase access to water in unrecognised Bedouin villages in the Negev.

The Israeli Supreme Court's decision in *Abu Massad* is an important window into the challenging water and land issues facing the unrecognised Bedouin villages in the Negev region of Israel. Although there is no question that the underlying land disputes need to be resolved equitably, it is also critical to ensure that the human right to water is realised for the Bedouins, thereby promoting the basic human dignity of all of Israel's citizens.

2. THE ABU MASSAD CASE

2.1 FACTUAL HISTORY

The *Abu Massad* case stems from an administrative appeal[4] before the Supreme Court of Israel brought by six Bedouin Israeli citizens who live in unrecognised, or 'illegal', Bedouin villages. The Bedouins are indigenous groups of semi-nomadic Arab tribes who live in the desert region of Israel known as the Negev.[5] Each appellant represented several dozen people.[6] The appellants sought the Supreme Court's review of the IWA's denial of their requests to have 'private'

[4] Marcia Gelpe, 'Constraints on Supreme Court Authority in Israel and the United States: Phenomenal Cosmic Powers; Itty Bitty Living Space' (1999) 13 *Emory International Law Review* 493, 522–23 ('In Israel, the Supreme Court also reviews the legality of administrative actions. For historical reasons, the Supreme Court of Israel, sitting as the High Court of Justice, sits as the court of first instance in petitions for review of most administrative decisions').

[5] See below Section 3.1; Ismael Abu-Saad, 'The Indigenous Palestinian Bedouin of the Naqab: Forced Urbanization and Denied Recognition' in Nadim N Rouhana and Areej Sabbagh-Khoury (eds), *The Palestinians in Israel Readings in History, Politics and Society* (Mada al-Carmel (Arab Center for Applied Social Research) 2011) 121; Ilana Meallem, Yaakov Garb and Julie Cwikel, 'Environmental Hazards of Waste Disposal Patterns – A Multimethod Study in an Unrecognized Bedouin Village in the Negev Area of Israel' (2010) 65 *Archives of Environmental and Occupational Health* 230.

[6] *Abu Massad* (n 1) para 3.

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water connections established at a point near their homes. The Court begins its analysis by framing the issue as follows:[7]

> This appeal raises the question of to what extent Bedouins living in various illegal places of settlement in the Negev have a legal right to demand that the state install private connection points to water in their illegal places of accommodation.

Without access to household water connections, individuals in unrecognised Bedouin communities must obtain water in one of two ways.[8] They may purchase water from a 'water centre' located near a legal village and independently transport it back to their village homes. These water centres may be located many kilometres from an unrecognised village. A water centre is a large pipe that is sub-divided into smaller diameter pipes, each of which has a water meter attached to it. Each meter provides water that is used by a large family, a clan or a tribe, which means that anywhere from twenty to hundreds of people may use the water coming from one water meter.

Alternatively, the Bedouins in unrecognised villages may obtain permission from the water committee to establish a 'private' water access point; this permission will be granted only if the applicant can substantiate 'special humanitarian considerations'.[9] A 'private' water connection is not a household water connection, but rather is access to a roadside water pipe. The pipe is usually further sub-divided so that it provides access to many families. One person is normally responsible for collecting payment from the other users and paying the water bill.

Although the government pays for the water access point, the Bedouin villagers are required to pay for the materials necessary to deliver the water from the main pipe back to their individual homes.[10] In most instances, the 'pipe' is a one-inch flexible black PVC pipe that snakes across the ground and, in some instances, is buried underground.[11] The water centres or private access points are often located near the road, but in many instances villages may be located several kilometres from the road.[12] As a result, the pipes extend for many kilometres, are exposed to the elements and to damage, and result in low water pressure. Most Bedouin families have some sort of tank or storage container somewhere near their homes into which the water pipe feeds.[13] Although the quality of the water may be acceptable when it leaves the water centre, it is likely to be of questionable quality by the time it is consumed because of the way in which it is transported and stored.

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[7] ibid.
[8] The factual history set out in the court decision is supplemented by first-hand knowledge gained through interviews and field visits conducted in Israel in December 2011.
[9] *Abu Massad* (n 1) para 1.
[10] The information in this paragraph is from personal knowledge as result of field research conducted in Israel in November and December 2011.
[11] Personal knowledge gained from interviews and field visits.
[12] ibid; Orly Almi, 'Water Discipline: Water, the State and the Unrecognized Villages in the Negev', Physicians for Human Rights – Israel, May 2006, 11, http://www.phr.org.il/uploaded/articlefile_1164626037675.pdf.
[13] ibid.

In the case at issue, the appellants sought to have additional 'private' water connections installed near their unrecognised villages.[14] The IWA did not dispute its obligation to provide water to the Bedouin community living in unrecognised villages in an amount 'required for their existence'[15] and 'as part of their basic rights to live in dignity'.[16] However, the IWA, which operates in accordance with the Israeli Water Law, only provides household water connections to houses that are legal and have the requisite building permits under Israeli law. As noted by the Court, these 'illegal settlements … contradict the laws of planning and the government policy' of desiring to relocate the Bedouins to established towns where municipal services are provided.[17]

The Court further stated:[18]

> [c]lose to half of the Bedouin community lives in permanent settlements, established by the governments of Israel over the years, as part of a general plan designed for this purpose. The other half of the Bedouin community lives on illegal sites, also termed 'unrecognised villages'.

As a result, if a Bedouin family moves to a township, that family will 'receive[e] full connection to water infrastructure, and to other vital services that the country provides to those living within its boundaries by law, such as electricity and other municipal services'.[19] However, if the Bedouin family decides to remain in an unrecognised village, then the government provides water centres, or other access points, from which the Bedouins can transport water back to their homes.[20] By only providing direct water connections to those Bedouins who have agreed to move to townships, the IWA promotes the Israeli government's policy of 'creat[ing] incentives for the Bedouin community to settle in legal permanent villages, in various alternatives offered by the state'.[21]

2.2 THE COURT RECOGNISES THE RIGHT TO WATER

The Supreme Court of Israel stated that the appeal 'raises the question of to what extent Bedouins living in various illegal places of settlement in the Negev have a legal right to demand that the state install private connection points to water in their illegal place of accommodation'.[22]

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[14] *Abu Massad* (n 1) para 3.
[15] ibid para 40.
[16] ibid para 12.
[17] ibid para 12.
[18] ibid para 5.
[19] ibid para 12.
[20] ibid para 12. See also Rawia Abu Rabia, 'Redefining Polygamy Among the Palestinian Bedouins in Israel: Colonialism, Patriarchy, and Resistance' (2011) 19 *American University Journal of Gender, Social Policy and Law* 459, 481 ('Half of the Bedouins live in these [unrecognized] villages, which do not have basic services such as paved roads, running water, garbage disposal, health care services, and an education system, because the State of Israel denies them').
[21] *Abu Massad* (n 1) para 40.
[22] ibid para 1.

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The Court looked at four different sources of law to find support for the proposition that a right to water exists: (i) the right to water derived from constitutional law, in this case Basic Law: Human Dignity and Freedom; (ii) comparative law, that is, the laws of other countries that recognise the right to water; (iii) the right to water under international law; and (iv) the right to water based on statutory arrangement or common law, in this case the Israeli Water Law.[23] Each of these is discussed in turn below.

2.2.1 Basic Law: Human Dignity and Freedom

The Court examined the right to water by looking to Israel's Basic Law: Human Dignity and Freedom, which was adopted in 1992.[24] Like several other countries that inherited the common law tradition, Israel does not have a written constitution but instead relies on Basic Laws.[25] Until 1992, Israel did not have any Basic Laws on human rights or civil liberties.[26] The Basic Law: Human Dignity and Freedom is regarded as 'superior to normal legislation'[27] and as if it had 'constitutional force'.[28] Some provisions of Basic Laws had been considered 'entrenched' because they could only be changed by an absolute majority of the Knesset, while 'non-entrenched' provisions could be changed by regular laws.[29] However, in 1995, a majority of the Court justices indicated that they would also treat non-entrenched provisions of Basic Laws as supreme over ordinary legislation.[30]

In *Abu Massad,* the Supreme Court of Israel establishes that the right to water may be interpreted as implicit within the Basic Law: Human Dignity and Freedom. It grounds the right in human dignity, which it describes as a 'complex concept' involving both positive and negative obligations.[31] Notably, the Basic Law does not define dignity, but instead uses the term in broad

[23] ibid para 19.
[24] This law is sometimes translated into English as the Basic Law: Human Dignity and Liberty. See, eg, Baruch Bracha, 'Constitutional Upgrading of Human Rights in Israel: The Impact of Administrative Law' (2001) 3 *University of Pennsylvania Journal of Constitutional Law* 581.
[25] Ran Hirschl, 'Israel's "Constitutional Revolution" – The Legal Interpretation of Entrenched Civil Liberties in an Emerging Neo-Liberal Economic Order' (1998) 46 *American Journal of Comparative Law* 427, 429; Gregory H Fox and Georg Nolte, 'Intolerant Democracies' (1995) 36 *Harvard International Law Journal* 1, 34. See also Gelpe (n 4) 500–06 (providing an overview of Israel's Basic Laws).
[26] Hirschl, ibid 429.
[27] Yoav Dotan, 'The Spillover Effect of Bills of Rights: A Comparative Assessment of the Impact of Bills of Rights in Canada and Israel' (2005) 53 *American Journal of Comparative Law* 293, 304.
[28] Frances Raday, 'Self-Determination and Minority Rights' (2003) 26 *Fordham International Law Journal* 453, 470.
[29] Gelpe (n 4) 517, 530–32.
[30] ibid 517. See also Keren Weinshall-Margel, 'Attitudinal and Neo-Institutional Models of Supreme Court Decision Making: An Empirical and Comparative Perspective from Israel' (2011) 8 *Journal of Empirical Legal Studies* 556, 577 ('The 1992 Basic Laws state that these [certain] rights cannot be violated, except under specified circumstances. Three years later, the ISC handed down a precedential ruling according to which a law that did not meet these new constitutional requirements could be invalidated by the Court (CA 6821/93 *Mizrachi Bank Ltd v Migdal* 49(4) 221; Kretzmer 1996 [ie David Kretzmer, 'The New Basic Laws on Human Rights' in Itzhak, Zamir and Allen Zysblat (eds), *Public Law in Israel* (1996) 141–75]').
[31] *Abu Massad* (n 1) para 22. See also Dotan (n 27) 306 (noting that Basic Law: Human Dignity and Freedom 'comprises certain important human rights within the boundary of constitutional protection, including the right

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provisions: 'There shall be no violation of the life, body or dignity of any person as such', and 'all persons are entitled to protection of their life, body and dignity'.[32] Earlier Supreme Court rulings clarify that 'the dignity of a person as a legislative right also includes the minimum of human existence, such as a roof over one's head, basic food, and basic medical care', which is an idea that 'has put down deep roots in the Israeli legal system'.[33] After a lengthy discussion on dignity, the Court concluded that '[a]ccessibility to water sources for basic human use falls within the realms of the right for minimal existence with dignity'.[34] The Court found that the right to water has a constitutional basis under Israeli law because it is 'anchored in the Basic Law: Human Dignity and Freedom'.[35] At the same time, the Court noted that the right to water is not an absolute right, but a right that must be balanced against countervailing concerns under a standard of reasonability and proportionality.[36] This test is discussed in greater detail in Section 2.3 below.

2.2.2 COMPARATIVE LAW

In determining that a legislative right to water exists under Israeli law, the Court cites the domestic constitutions of other countries. The Supreme Court of the State of Israel routinely engages in comparative law analysis and has been described as the 'most important comparative constitutional law institute of the world'.[37]

In the *Abu Massad* decision, the Supreme Court of Israel acknowledged that the constitutions of numerous other countries have included the human right to water, and specifically referred to the constitutional right to water provisions of South Africa, Gambia, Uganda, Zambia, Ethiopia and Nigeria. Additionally, the Court examined the work of several prominent scholars who have

to self-dignity, free movement, privacy, and property. It also contains protections against arbitrary arrest and search and seizure'); Neomi Rao, 'On the Use and Abuse of Dignity in Constitutional Law' (2008) 14 *Columbia Journal of European Law* 201, 202 ('In the wake of the horrors of World War II, the international community settled on "human dignity" as the focal point for human rights and constitutional protections').

[32] Basic Law: Human Dignity and Freedom, 1992 (Israel); Gelpe (n 4) 509–10 (noting that dignity has been interpreted broadly at times to include, for example, the right to wear a beard).

[33] *Abu Massad* (n 1) para 21 (citing Legislative Appeal 3829/04 *Twito v Municipality of Jerusalem* 2004 PD 59(4) 769, 779).

[34] ibid para 23.

[35] ibid para 23. See also Dotan (n 27) 315 (noting that after the formation of the 1992 Basic Laws, the Israeli Supreme Court adopted a 'Constitutional style' rhetoric in some landmark decisions, such as those involving sex-based discrimination).

[36] *Abu Massad* (n 1) para 24. See also Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 72, 131 (describing the history of proportionality adjudication in Israeli jurisprudence, including key Israeli Supreme Court cases such as HCJ 361/82 *Hamri v Commander of Judea and Samaria* 1982 PD 36(3) 439, CA 6821/93 *United Mizrachi Bank Ltd v Migdal Cooperative Village* 1995 PD 49(4) 221, and *Beit Sourik Village Council v Government of Israel* 2004 PD 58(5) 807).

[37] Alexander Somek, 'The Deadweight of Formulae: What might have been the Second Germanization of American Equal Protection Review' (1998) 1 *University of Pennsylvania Journal of Constitutional Law* 284 fn 1. See also Aharon Barak, 'Response to the Judge as Comparatist: Comparison in Public Law' (2005) 80 *Tulane Law Review* 195 (discussing the importance of comparative law in Israeli Supreme Court jurisprudence).

written on the human right to water.[38] By showing international support for the underpinnings of its opinion, the Court bolsters its own conclusion that a right to water can and does exist under Israeli law.

2.2.3 International Law

The Court next examined the right to water under the International Covenant on Economic, Social and Cultural Rights (ICESCR), which Israel ratified in 1991.[39] That the Israeli Supreme Court looked to international law in this case for guidance is not unusual.[40] Until 1992, Israel had no Basic Laws on individual human rights and instead drew on a variety of sources to establish such norms, including the United Nations' Universal Declaration of Human Rights.[41]

The Court in *Abu Massad* analysed General Comment 15 of the United Nations Committee on Economic, Social and Cultural Rights, which states that the right to water is contained within the right to an adequate standard of living, and 'inextricably related' to the rights to health, adequate housing and food. General Comment 15 further notes:[42]

> Water is a limited natural resource and a public benefit, fundamental for life and health. The human right to water is indispensable for leading life in human dignity. It is a prerequisite for the realization of other human rights.

General Comment 15 also defines the human right to water as everyone's entitlement to 'sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses'.[43]

Interestingly, the Court did not discuss the most recent developments on the human right to water at the international level. In July 2010 a UN General Assembly Resolution recognised a human right to safe drinking water and sanitation by a vote of 122 in favour, none against, with 41 abstentions.[44] Although Israel, along with the US, Canada and other countries, abstained from the General Assembly resolution, the Human Rights Council adopted by consensus a resolution recognising the right in September 2010.[45] In Resolution 15/9 the Human Rights Council affirmed that the human rights to water and sanitation derived from the right to an adequate

[38] *Abu Massad* (n 1) para 19.
[39] Economic and Social Council, Committee on Economic, Social and Cultural Rights, 'Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment No. 15, The Right to Water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)' UN Doc E/C.12/2002/22) (2002) (The Right to Water);
[40] Rebecca R Zubaty, 'Foreign Law and the US Constitution: Delimiting the Range of Persuasive Authority' (2007) 54 *UCLA Law Review* 1413 fn 235 (noting that the Israeli Supreme Court routinely employs law clerks to advise the justices on customary international law).
[41] Gelpe (n 4) 506.
[42] *Abu Massad* (n 1) para 29.
[43] The Right to Water (n 39).
[44] The Human Right to Water and Sanitation, UNGA Res 64/292, 3 August 2010.
[45] United Nations Department of Information, News and Media Division, 'General Assembly Adopts Resolution Recognizing Access to Clean Water, Sanitation as Human Rights, by Recorded Vote of 122 in Favour, None Against, 41 Abstentions', 28 July 2010, http://www.un.org/News/Press/docs/2010/ga10967.doc.htm; United

standard of living, and were inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity under the ICESCR.[46]

The Court's discussion of General Comment 15 is worth scrutiny. The Court noted that '[t]he element of accessibility has four aspects: physical access to water, economic access to water, equality in access to water and access to information about water'.[47] The Court then cites section 16 of the Comment, which discusses the rights of special populations, including (i) rural and deprived urban areas; (ii) indigenous peoples; and (iii) nomadic and traveller communities.[48] Notably, the Court did not explain why it highlights these three populations; nor did it attempt to link the Bedouins to these groups. Yet, by doing so, the Court appears to be signalling that the Bedouins are a unique population whose status as indigenous or nomadic peoples could be a factor to be considered when assessing the human right to water.[49] These are topics that will be discussed in greater detail below in Sections 2.3.3 and 3.3.

2.2.4 ISRAELI WATER LAW

Finally, the Court examined the issue in light of Israel's 1959 Water Law, which provides that 'every person is entitled to receive water and to use it subject to the provisions of this law'.[50] The Court detailed some restrictions that accompany this statutory right: most notably, that although receiving adequate water is a right, it is generally dependent on payment.[51]

After recognising that a right to water exists under Israeli and international law, the Court then considered whether the IWA had properly exercised its administrative discretion when it created a policy that potentially infringes upon this right. The balancing test that it employed is discussed in the next section.

2.3 LEGAL ANALYSIS

In the *Abu Massad* case, the Israeli Supreme Court reviewed the decision of the Court for Water Matters[52] in order to assess whether the Israel Water Authority had exercised its discretion

Nations Human Rights Council, Resolution adopted by the Human Rights Council 15/9 Human Rights and Access to Safe Drinking Water and Sanitation' UN Doc A/HRC/RES/15/9 (2010).

[46] ibid.

[47] *Abu Massad* (n 1) para 29.

[48] ibid.

[49] See, eg, United Nations Special Rapporteur on the Rights of Indigenous People, James Anaya, 'Annex VI: Israel: Situation of Unrecognized Bedouin Villages in the Negev Desert', http://unsr.jamesanaya.org/casos-2011/06-israel-situation-of-unrecognized-bedouin-villages-in-the-negev-desert, UN Doc A/HRC/18/35/Add.1 (2011); Yehuda Gruenberg, 'Note: Not All Who Wander Should Be Lost: The Rights of Indigenous Bedouins in the Modern State of Israel' (2008) 34 *Brooklyn Journal of International Law* 185, 196–202 (discussing Israel's obligations under international law towards its indigenous Bedouin population).

[50] *Abu Massad* (n 1) para 30.

[51] ibid para 32.

[52] See Ori Aronson, 'Inferiorizing Judicial Review: Popular Constitutionalism in Trial Courts' (2010) 43 *University of Michigan Journal of Law Reform* 971 fn 189 ('Israel is actually a curious case, since it combines centralized and diffuse systems of judicial review: when it sits as the High Court of Justice, the Supreme Court hears constitutional (and some administrative) cases as a court of first instance, admitting (mostly written)

appropriately in light of the right to water, as recognised in the Basic Law: Human Dignity and Freedom.[53] It scrutinised the state's policy, first according to the criteria of relevance, and then according to the standards of reasonability and proportionality. The case concerns public administrative law, which has historically played a unique role in Israel.[54]

2.3.1 RELEVANCE

In Israeli jurisprudence, the concept of 'relevance' refers to factors that may or may not be considered in making decisions.[55] The Supreme Court has held[56] that

> authorities should take into account two main kinds of relevant considerations: specific considerations that are relevant to the case at hand and general considerations which apply to administrative powers generally and derive from the basic values and principles of the legal system. Prominent among these general freedoms are individual freedoms and equality.

With regard to relevance, the *Abu Massad* Court stated that the 'element of illegal settlement' is a relevant consideration that the administrative agency may take into account when considering whether another water point should be created.[57] The Court does not directly grapple with the legitimacy of the underlying policy questions about land tenure or indigenous rights. As discussed in Section 3, the story of land in the Negev is one of competing narratives. The State of Israel does not recognise the vast majority of the Bedouins' claims to land for numerous historical, political and legal reasons, the most important for the Israeli government being that most Bedouins did not register their land under the Ottoman Empire or British mandate prior to 1948.[58] However, many Bedouins believe

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evidence, and deciding thousands of petitions every year; however constitutional claims may also be brought through the regular course of litigation, beginning at a lower trial court and eventually reaching the Supreme Court sitting as the High Court of Appeals (the same justices occupy both roles)').

[53] See Bracha (n 24) 631–42 (discussing the nature of administrative discretion and identifying four relevant criteria for judicial review: relevance, reasonableness, proportionality and equality); Gelpe (n 4) 524 (noting that in reviewing the legality of administrative action, the Israeli Supreme Court may consider a number of key factors, including whether 'the administrative authority had statutory authorization to act in the matter, followed the proper procedure, considered the proper factors in reaching its decision, or violated a basic value, or individual right, without express statutory authority to do so'); Josh Goodman, 'Divine Judgment: Judicial Review of Religious Legal Systems in India and Israel' (2009) 32 *Hastings International and Comparative Law Review* 477, 513 (noting that a state administrative body 'must adhere to norms of administrative law, including reasonability, proportionality, and procedural adequacy in decision-making').

[54] Itzhak Zamir, 'Administrative Law' in Itzhak Zamir and Sylviane Colombo (eds), *The Law of Israel: General Surveys* (Harry and Michael Sacher Institute for Legislative Research and Comparative Law, the Hebrew University of Jerusalem 1995) 51–52.

[55] Bracha (n 24) 634 (noting that an administrative authority in Israel must take into account all considerations relevant to exercising its power).

[56] Michal Tamir, 'Public Law as a Whole and Normative Duality: Reclaiming Administrative Insights in Enforcement Review' (2006) 12 *Texas Journal on Civil Liberties and Civil Rights* 43, 64 (citing Zamir (n 54) 70).

[57] *Abu Massad* (n 1) para 42.

[58] Ahmad Amara and Zinaida Miller, 'Unsettling Settlements: Law, Land, and Planning in the Naqab' in Ahmad Amara, Ismael Abu-Saad and Oren Yiftachel (eds), *Indigenous (In) Justice: Human Rights Law and Bedouin Arabs in the Naqab/Negev* (Harvard University Press 2012) 81–89. See also Section 3.1.1.

that they rightfully own the land on which they reside, or from which they have been removed; as a result, many refuse to move to the townships and prefer to maintain their traditional lifestyle, even if that means living in villages that the government deems 'illegal'. The Court did not address these issues directly, but stated[59] that

> The illegal settlements of the Bedouin throughout the Negev have become a national problem par excellence, whose implications are widespread in all areas of life. These settlements greatly damage the laws of planning and construction and the protection of property; they are a case of a 'group of people making a law unto themselves', and choosing, at their own discretion, when and how to settle, with total disregard to state laws, including basic planning regulations …
>
> Over and above all, the phenomenon of illegal Bedouin settlement is an expression of deep disregard for the governance of law, and of principles of public order that bind all citizens. A civilized and well-managed country cannot accept a situation where a group of people make a law for themselves, which opposes the rules of public order and law, and exceeds the realms of a normal society.

In effect, the Court determined that, as part of the exercise of its administrative discretion, the IWA may consider the legal status of the Bedouin settlement when assessing requests for additional water sources and determining the level of accessibility to water that would comply with the Basic Law: Human Dignity and Freedom. This is an important point because it allows the Court to give greater deference to the state's policy when balancing the state's interests against the right to water under the reasonability and proportionality test.

2.3.2 Reasonability and Proportionality

When assessing the administrative reasonability and proportionality of the government's policy, the Court balances the relative weights of each side's position.[60] On the one hand is the government's policy of not providing direct household water access to Bedouins in unrecognised villages as a means of incentivising them to move to the government-planned townships. On the other hand is the Bedouins' right to water as established under Israel's Basic Law: Human Dignity and Freedom.

The Court balanced the state's interests against the rights of the Bedouins using the standards of reasonability and proportionality. These two concepts have historically been a feature of Israeli

[59] *Abu Massad* (n 1) para 42.

[60] See Rao (n 31) 237 ('Evaluating a government's justification for infringing on a right will necessarily require going through the state's various rationalizations for its actions. Modern constitutional adjudication, therefore, often turns on policy debates, rather than the definition and interpretation of rights'); Sweet and Mathews (n 36) 77 (noting that proportionality analysis 'does not camouflage judicial lawmaking. Properly employed, it requires courts to acknowledge and defend – honestly and openly – the policy choices that they make when they make constitutional choices'); Tamir (n 56) 68 (noting that proportionality in Israel is 'one of the main instruments for judicial review of discretionary power. Proportionality emerged about fifteen years ago as a new ground of administrative review, although it had been implicit long before. The Supreme Court held that even where the balance of interests allows the authority to restrict a human right, the power should be exercised in proportion to need or danger. To this end, the authority must take into account the legislative purpose and the particular circumstances of the case').

administrative law,[61] but were incorporated into constitutional analysis by way of a limitation clause[62] set out in paragraph 8 of the Basic Law: Human Dignity and Freedom: 'There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required'.[63]

The requirement of reasonableness has been interpreted from the phrases 'proper purpose' and 'to an extent no greater than required' in the Basic Law.[64] Because reasonableness is a function of the values at stake in a decision, the test of reasonableness becomes stricter when basic rights of the individual are involved.[65] The Israeli Supreme Court in the *Abu Massad* decision describes administrative reasonability as requiring a balancing 'between contrasting considerations, while giving appropriate relative weight to each side according to the matter at hand'.[66]

Proportionality, a concept that stems from reasonability, is the 'appropriate test for examining the nature of the damage to the basic right of man'.[67] It derives from the phrase 'to an extent no greater than required' in the limitation clause of the Basic Law: Human Dignity and Freedom.[68] Proportionality analysis has been described as 'the dominant mode of rights interpretation in modern constitutional jurisprudence' around the world.[69] Unlike the tiered standards of scrutiny used in US constitutional interpretation, proportionality analysis is 'trans-substantive, meaning it applies across rights adjudication'.[70] Proportionality analysis is the 'centerpiece of jurisprudence across the European continent, as well as in common law systems as diverse as Canada, South Africa, Israel, and the United Kingdom'.[71] The Israeli Supreme Court, however, applies this doctrine 'more consistently and rigorously than any other judicial body in the world'.[72] When

[61] Bracha (n 24) 636; Tamir (n 56) 68 ('Proportionality emerged about fifteen years ago as a new ground of administrative review, although it had been implicit long before'). See also Jason Litwack, *A Disproportionate Ruling for All the Right Reasons: Beit Sourik Village Council v The Government of Israel* (2006) 31 *Brooklyn Journal of International Law* 857, 878 ('The principle of proportionality is recognized as both a general standard of international law and a fundamental principle of Israeli administrative law').

[62] This phrase is sometimes translated as 'restriction clause'.

[63] Basic Law: Human Freedom and Dignity (n 32) art 8. See also Bracha (n 24) 636–37.

[64] Bracha (n 24) 636.

[65] ibid, text at fn 216. See also Tamir (n 56) 65 ('In Israel, "the unreasonableness of the decision in such cases may serve as an indication of a defect in the exercise of discretion" and "may be sufficient to shift the burden of proof … to the [administrative] authority"'(citing Zamir (n 54) 71)).

[66] *Abu Massad* (n 1) para 44.

[67] ibid para 44 ('Proportionality is perceived as one of the "main issues" deriving from reasonability, as a "making the demand for reasonability a concrete fact" or as a "branch on the tree of non-reasonability", in a place where an administrative entity is discussing the damage to a legislative right' (quoting Aharon Barak, *Proportionality: Infringement of Constitutional Rights and their Limitations* (Nevo 2010)).

[68] Bracha (n 24) 637.

[69] Rao (n 31) 205.

[70] Jamal Greene, 'The Finest Legal Mind: A Symposium in Celebration of Justice John Paul Stevens. Essay: The Rule of Law as a Law of Standards' (2011) 99 *Georgetown Law Journal* 1289, 1292.

[71] Jud Mathews and Alec Stone Sweet, 'All Things in Proportion? American Rights Review and the Problem of Balancing' (2011) 60 *Emory Law Journal* 797, 799.

[72] Sweet and Mathews (n 36) 132. See also Vicki Jackson, 'Book Review: Being Proportional About Proportionality – The Ultimate Rule of Law' (2004) 21 *Constitutional Commentary* 803, 813 ('For evidence of the growth of proportionality analysis in constitutional courts analysis around the world, one could look to the recent decision of the Israeli High Court holding [in HCJ 2056/04 *Beit Sourik Village Council v Government of Israel* 2004 PD 58(5) 807] that both Israeli and international public law require government conduct towards

considering proportionality, courts balance competing interests and consider whether there is sufficient state justification for allowing rights to be infringed.[73]

Inspired by comparative law, Israeli courts have given meaning to the concept of proportionality by developing three cumulative sub-tests that focus on the relationship between the means and the purpose.[74] The *Abu Massad* Court adopted this three-pronged standard.[75]

1. *Rational connection sub-test*: The 'rational connection' test considers whether 'the means rationally leads to the realization of the goal'.[76] Described as a 'suitability' inquiry, it requires 'judicial verification that, with respect to the act in question, the means adopted by the government are rationally related to stated policy objectives'.[77]
2. *Necessity sub-test*: The 'necessity' sub-test focuses on identifying 'the means whose violation is lesser'.[78] Also known as the 'least injurious means'[79] or 'least restrictive means'[80] test, it 'requires that the means, "even if rationally connected to the objective … should impair 'as little as possible' the right or freedom in question"'.[81] In other words, it ensures that 'the measure does not curtail the right any more than is necessary for the government to achieve its stated goals'.[82]
3. *Narrow proportionality sub-test*: The 'narrow proportionality' sub-test requires the upholding of a suitable ratio between the total benefit deriving from the violating action of the required purpose and the damage that might be caused from the violation of an individual's legislative right'.[83] It is also called the 'proportionate means test' because it 'invites the court to balance societal interests against individual rights by asking whether an infringement of rights is proportionate to the

citizens of the West Bank to be "proportional" and ordering the relocation of portions of the already-erected separation fence').

[73] Rao (n 31) 205. See also Sweet and Mathews (n 36) 87 (suggesting that constitutional judges employ proportionality adjudication in 'pursuit of two overlapping, general goals: (1) to manage potentially explosive environments, given the politically sensitive nature of rights review; (2) to establish, and then reinforce, the salience of constitutional deliberation and adjudication within the greater political system').

[74] Bracha (n 24) 638.

[75] *Abu Massad* (n 1) para 45 (citing Barak (n 67)). See also Sweet and Mathews (n 36) 133 (noting that former Israeli Supreme Court President Aharon Barak explicitly advocated for 'proportionality analysis as the method for determining when rights must yield to public law') (citing Aharon Barak, *Interpretation in the Law: Constitutional Interpretation* (Nevo 1994)).

[76] *Abu Massad* (n 1) para 45. See also Richard H Fallon Jr, 'Strict Judicial Scrutiny' (2007) 54 *UCLA Law Review* 1267, 1295 (describing the first sub-test of proportionality analysis as considering 'whether a legislative measure restricting basic rights is rationally related to a desired end'); Aharon Barak, 'Foreward: A Judge on Judging: The Role of a Supreme Court in a Democracy' (2002) 116 *Harvard Law Review* 16, 147 (under the first sub-test, 'an action is proportionate if it is appropriate for achieving the goal').

[77] Sweet and Mathews (n 36) 75. See also Tamir (n 56) 66 ('"suitability" requires that the means used must be appropriate to serve the legal aim').

[78] *Abu Massad* (n 1) para 45.

[79] Fallon (n 76) 1295.

[80] Sweet and Mathews (n 36) 75.

[81] Fallon (n 76) 1295–96.

[82] Sweet and Mathews (n 36) 75. See also Barak (n 76) 147 (noting that 'an action is proportionate if there are no other means appropriate for achieving the goal that would undermine the principles that we want to protect (such as human rights) to a lesser degree'); Tamir (n 56) 66 ('"necessity" requires that the means adopted are the least restrictive way to achieve the aim').

[83] *Abu Massad* (n 1) para 45.

> desired objective'.[84] In other words, 'an act is disproportionate if the harm to a protected value is too drastic in relation to the benefit of achieving the goal'.[85]

In *Abu Massad*, the Israeli Supreme Court treated reasonability and proportionality together and applied the three-pronged standard of review for proportionality. It found that under the first sub-test a rational connection exists between the goal of incentivising Bedouins to move to recognised settlements and the means.[86] The chosen means consist of refusing to directly connect homes in unrecognised Bedouin settlements to water sources but providing, for humanitarian reasons, for some access through common water centres or through private connections.[87]

The Court determined that the second sub-test on necessity was met because 'the existence of water centres enables the transportation of water to water reserves in the village, and the provision of individual permits in irregular cases limits the violation'.[88] In other words, the current policy is the least injurious way[89] for the state to further its policy of incentivising the Bedouins to move to recognised villages; the Bedouins' right to water is curtailed no more than is necessary for the state to achieve its goals.[90]

Under the third sub-test of narrow proportionality, the Court weighed the government's policy against the nature of the infringement. It determined that the 'policy does not violate the actual right of fundamental accessibility to water sources' because the damage relates only to the inconvenience and costs that are incurred by the Bedouins in having to transport water from the water centres back to their homes in unrecognised villages.[91]

In effect, the Court found that 'the implementation of the state planning policy on the level of accessibility of residents of the unrecognised Bedouin villages to water sources involves a violation of their right to water, which is afforded them as a human right'.[92] However, when weighed against the state's need for orderly planning, this was found to be a legitimate infringement of the Bedouins' rights.[93] The Court further explained[94] that:

> Proportionality is obtained, therefore, as long as a person's basic right to accessibility to water sources is maintained, even if this involves inconvenience and the bearing of certain monetary costs. To be

[84] Fallon (n 76) 1296.
[85] Barak (n 76) 148. See also Sweet and Mathews (n 36) 75–76 (describing this sub-test as 'balancing in the strict sense' or 'proportionality in the narrow sense. In the balancing phase, the judge weighs the benefits of the act – which has already been determined to have been "narrowly tailored", in American parlance – against the costs incurred by infringement of the right, in order to determine which "constitutional value" shall prevail, in light of the respective importance of the values in tension, given the facts'); Tamir (n 56) 67 ('proportionality in the strict sense requires that, viewed overall, the burden on the right at issue must not be excessive relative to the benefits secured by the state objective').
[86] *Abu Massad* (n 1) para 45.
[87] ibid para 45.
[88] ibid.
[89] Fallon (n 76) 1295.
[90] Sweet and Mathews (n 36) 75.
[91] *Abu Massad* (n 1) para 45.
[92] ibid para 44.
[93] ibid.
[94] ibid para 45.

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> noted that, in light of the phenomenon of illegal settlements, this is not an optimal system for water consumption, but a minimal arrangement, which intends to uphold the basic right to water, even though its realization involves effort and cost. The realization of the full right to water requires the legal arrangement of settlements, and this is contingent on the residents' choice, and open to their decision.

The Court's analysis ultimately comes down to this: Every Israeli citizen has a right to water, but this is not an absolute right to in-house access; rather, it is a right that is bounded and influenced by other government policies and priorities. In reconciling the 'contradicting policies' of illegality and human rights, the Court found that the Israeli Water Authority still had an obligation to provide 'reasonable accessibility to minimal quality water'.[95]

The Court's analysis illustrates what former Israeli Supreme Court President, Aharon Barak, has described as a 'vertical balancing formula', which means that a human right may not be fully protected because it must be balanced with a competing state interest, such as public security or public order.[96] The *Abu Massad* approach is also consistent with other Israeli Supreme Court decisions, where the Court has made clear that the rights are not absolute:[97]

> The rights of a person to his dignity, his liberty and his property are not absolute rights. They are relative rights. They may be restricted in order to uphold the rights of others, or the goals of society. Indeed, human rights are not the rights of a person on a desert island. They are the rights of a person as a part of society … [H]uman rights and the restriction thereof derive from a common source, which concerns the rights of a person in a democracy.

The decision highlights that the Israeli Supreme Court 'will do everything possible in order to find, by way of interpretation, "conformity" between the statute – including the sections conferring power on the administrative authority – and the Basic Laws'.[98] Arguably, this approach strengthens constitutional rights and encourages the legislature to aspire to respect protected rights.[99]

In applying the law to the facts of the case, the Court affirmed the decision of the Israeli Water Authority's Water Committee for three of the applicants, finding that two villagers had reasonable access to water and that, in the case of the third, the Committee had already approved the connection to the water main. As for the three other plaintiffs, the Court indicated that the record was unclear as to whether they had reasonable access to water and ordered the Water Committee to revisit the cases. According to attorneys involved in the case, the Water Committee again denied the requests and the cases were again brought before the Water Court.

It is difficult to assess from the facts of the *Abu Massad* decision, however, just what the Court believes constitutes 'reasonable accessibility to minimal quality water'.[100] The Court

[95] ibid para 54.
[96] Barak (n 76) 96.
[97] Rao (n 31) 221 (quoting HCJ 7015/02 *Ajuri v IDF Commander in West Bank* 2002 PD 56(6) 352).
[98] Bracha (n 24) 609.
[99] ibid 609–10.
[100] *Abu Massad* (n 1) para 54.

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noted that 'accessibility to water sources for basic human use falls within the realms of the right for minimal existence with dignity', and that 'water is a vital need for man, and without basic accessibility to water of a reasonable quality, man cannot exist'.[101] However, what comprises minimal existence, reasonable quality and basic accessibility? How much inconvenience is reasonable? These questions hover over this court case and remain unanswered. As recognised by the Court, the human right to water under international law could provide some additional guidance and inform the exercise of discretion by the IWA.

2.3.3 International Law

In its ruling, the *Abu Massad* Court cites the UN Committee on Economic, Social and Cultural Rights, General Comment 15 on the Right to Water, which defines the human right to water as everyone's entitlement to 'sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses'.[102] The UN Special Rapporteur for the Human Right to Safe Drinking Water and Sanitation built on Comment 15 by defining the 'normative content' of the human right to water according to five distinguishable criteria: (i) availability, (ii) quality/safety, (iii) acceptability, (iv) accessibility, and (v) affordability.[103] Each of these is discussed in turn, drawing on the literature and first-hand information gathered from site visits and interviews conducted in Israel in 2011.

1. *Availability.* Water 'has to be available continuously and in a sufficient quantity to meet the requirements of drinking and personal hygiene, as well as of further personal and domestic uses, such as cooking and food preparation, dish and laundry washing and cleaning'.[104] The field research suggests that this criterion is not currently satisfied in most unrecognised Bedouin villages because each water meter can serve dozens of individuals,[105] resulting in limited availability as well as poor water pressure and flow.
2. *Quality/safety.* 'Water must be of such a quality that it does not pose a threat to human health'.[106] Although the water may be of good quality at the point of the water meter, it is of questionable quality by the time it reaches the end user in the Bedouin villages.

[101] ibid para 23.
[102] The Right to Water (n 39).
[103] United Nations Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Catarina de Albuquerque, 'On the Right Track – Good Practices in Realising the Rights to Water and Sanitation', 34–35, http://www.ohchr.org/Documents/Issues/Water/BookonGoodPractices_en.pdf (On the Right Track); United Nations Human Rights Council, Catarina de Albuquerque, Report of the Independent Expert on the Issue of Human Rights Obligations related to Access to Safe Drinking Water and Sanitation, 1 July 2010, UN Doc A/HRC/15/31/Add.1 (Access to Safe Drinking Water and Sanitation), http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.31.Add.1_en.pdf. Although the 2010 UN General Assembly and the UN Human Rights Council resolutions recognise a human right to safe drinking water and sanitation, this discussion will focus only on water because that was at issue in *Abu Massad*.
[104] Access to Safe Drinking Water and Sanitation, ibid 6.
[105] The field researchers were told that an individual one-inch pipe can serve more than 100 people, but this assertion was not independently verified by the research team.
[106] Access to Safe Drinking Water and Sanitation (n 103) 7.

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As described earlier, the PVC pipes used to deliver the water often run for kilometres above the ground, are exposed to extreme desert conditions, and can easily be contaminated. Physicians for Human Rights has found that '[m]ost of the villagers drink Mekorot[107] water transported in containers, which may stand in the sun for many days. The water becomes hot, turbid, and ridden with algae and rust, similar to the water in the pipes laid on the ground. The water shortage causes many villagers to use well-water, which may have adverse health effects'.[108] Moreover, the poor water acquisition and storage systems have health ramifications, including dehydration, skin diseases, dysentery, Giardia lamblia, E-Coli, and high infant mortality rates'.[109]

3. *Acceptability.* Good practices relating to the acceptability of drinking water involve 'a high degree of consultation with users to fully understand their definitions of "acceptable"'.[110] The field research suggests that the current system for providing water to Bedouins is not acceptable from the standpoint of human dignity. In fact, several Bedouin leaders and NGO advocates observed that prisoners held in a nearby prison had better access to good quality water than did the Bedouin citizens of Israel who live in unrecognised villages.
4. *Accessibility.* Water facilities must be 'physically accessible for everyone within, or in the immediate vicinity of, each household, health or educational institution, public institutions and places, and the workplace'.[111] The concept of accessibility is at the core of the Court's decision. If the Court's mandate to provide 'reasonable accessibility' to water is taken seriously, then the IWA should consider constructing additional water centres and private water connection points. The water points are often located kilometres from the villages, requiring the Bedouins to invest significant time and funds in transporting the water back to their homes. Moreover, unlike many other marginalised communities in the world, in the Negev the Bedouins reside relatively close to the main water grid. As a result, from a technical standpoint, it seems likely that the IWA could readily construct additional access points to ensure that the level of accessibility is reasonable in terms of meeting the human right to water.
5. *Affordability.* '[W]ater facilities and services must be available for use at a price that is affordable to all people'.[112] Although the cost should not prevent individuals from purchasing other basic goods, like food, '[a]ffordability does not necessarily require services to be provided free of charge'.[113] The cost of the water that the Bedouins in unrecognised villages pay is higher than the costs borne by other Israeli citizens. These costs include installing and maintaining PVC water pipes to carry the water from a water centre or a private

[107] Mekorot is the Israeli national water company.
[108] Almi (n 12) 32.
[109] ibid.
[110] Access to Safe Drinking Water and Sanitation (n 103) 8.
[111] ibid 8.
[112] ibid 9.
[113] ibid 9.

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connection point back to their villages; purchasing and maintaining water tanker trucks, trailers and other storage devices; gas for the tanker trucks or trucks pulling trailers; and the opportunity cost of time spent filling water transportation tanks or other containers.

Reconsidering the *Abu Massad* decision in light of the normative criteria for the human right to water under international law, a distinction appears between how this right is understood under the Israeli Basic Law as compared to international law. As part of its proportionality analysis, the Israeli Supreme Court determined that the state's policy of not providing household water access does 'not violate the actual right of fundamental accessibility to water sources' because the damage relates only to the inconvenience and costs that are incurred by the Bedouins.[114] This analysis overlooks other significant burdens on the right to water, including its low availability, the health consequences, the opportunity cost of the time spent gathering water, and the higher costs incurred by Bedouins in unrecognised villages.

While the Israeli Supreme Court gave great deference to the Israeli Water Authority's exercise of discretion in the *Abu Massad* case, it is certainly not a complete vindication of the Authority's current approach. Notably, the Court had the opportunity to determine the *Abu Massad* case on the narrower grounds. It did not need to invoke Israeli Basic Law: Human Dignity and Freedom or international law. The Court could have decided the case under the Israeli Water Law, which states that 'every person is entitled to receive water and to use it subject to the provisions of this law'.[115] As a review of ordinary administrative law, the Court would have employed a similar test of reasonability and proportionality. However, the recognition of a right to water under the Israeli Basic Law results in a higher level of scrutiny.[116] By looking to international human rights law, the Court also implies that the normative criteria of the human right to water outlined above are relevant to the exercise of discretion. Even under the Israeli Water Authority's existing policy, a strict application of these criteria suggests that the number of water centres and private water connections in the unrecognised villages across the Negev should be increased.

With respect to the right to water, Israeli law also differs from international human rights law in another key way, namely in the relevance of land tenure. The *Abu Massad* Court is clear that the illegality of the unrecognised Bedouin villages is a relevant factor in the exercise of administrative discretion,[117] which influences the Court's balancing of the state's interests and the protected rights, and impacts upon its discussion of accessibility. Yet, despite concerns that the Bedouins are engaging in 'trespass' and violating the 'the foundations of the governance of law', the Court concluded that 'reasonable accessibility to minimal quality water, even if not through private connections to homes in illegal settlements' must still be ensured.[118]

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[114] *Abu Massad* (n 1) para 45.
[115] The Water Law, 1959 (Israel), s 3.
[116] See Bracha (n 24) fn 216 ('when reference is made to the basic rights of the individual, the test of reasonableness becomes even more strict – namely, the evidence required to persuade a statutory authority of a justification for denying a fundamental right must be clear, unequivocal and convincing') (internal citations omitted).
[117] *Abu Massad* (n 1) para 42.
[118] ibid paras 53–54.

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Under international human rights law, the right to water is to be realised in full regardless of land tenure.[119] Because it stems from the basic principle of human dignity, the human right to water should not be conditioned on the illegal status of a settlement.[120] This is particularly true for indigenous communities, like the Bedouins,[121] whose legal rights are often not recognised or are contested by the state.[122] The conditioning of the human right to water on land tenure could be understood to violate the principles of progressive realisation and non-discrimination, which are codified in Article 2 of the ICESCR.[123] The obligation of state parties under Article 2 is not to realise the human right to water overnight; rather, states must use maximum available resources to ensure that the right to water, along with all of the other rights recognised within the ICESCR, is realised progressively.[124] This concept of 'progressive realisation', which is unique to the ICESCR, acknowledges the constraints arising from the limits of available resources.[125] At the same time, 'progressive realisation' is not an excuse for inaction; nor does it mean that the obligations are not binding.[126] The

[119] On the Right Track (n 103) 58 (noting that around the world, '[a]uthorities frequently resist allowing people with insecure tenure to connect to the water and sanitation networks because such connections can confer legal rights over the land that they occupy, and thus be seen to encourage the development of informal settlements').
[120] ibid 125 ('This discrimination of the individual based on where he or she lives is particularly pervasive in informal settlements, which can be home to hundreds of thousands of families, most if not all of whom cannot produce a legal title. Service providers and municipal authorities may use the ambiguous legal status of these settlements as an excuse to delay or even deny the provision of adequate water and sanitation services').
[121] UN Human Rights Council, Report by the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, UN Doc A/HRC/18/35/Add.1 (2011) 24–31; UN Human Rights Committee, Consideration of Reports submitted by States Parties under Article 40 of the International Covenant on Civil and Political Rights, Concluding Observations of the Human Rights Committee, UN Doc CCPR/C/ISR/CO/3 (2010); Gruenberg (n 49).
[122] On the Right Track (n 103) 125.
[123] ICESCR, art 2 states in part:

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
>
> The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

[124] Henry Steiner, Philip Alston and Ryan Goodman (eds), *International Human Rights in Context: Law, Politics, Morals* (3rd edn, Oxford University Press 2007) 275.
[125] United Nations General Assembly, 'Human Rights Obligations related to Access to Safe Drinking Water and Sanitation, Note by the Secretary-General', UN Doc A/65/254 (2010) 10 ('The notion of progressive realization relates not only to progressively achieving universal access to water and sanitation, but also to meeting these standards. Human rights do not settle for minimum standards, such as basic access to water and sanitation, but ultimately require achieving a higher standard that guarantees an adequate standard of living'); Committee on Economic, Social and Cultural Rights, General Comment 3 (The Nature of States Parties' Obligations), 27 May 2008, UN Doc HRI/GEN/1/Rev.9 (Vol. I) para 1. See also MA Salman and Siobhan McInerny-Lankford, *The Human Right to Water: Legal and Policy Dimensions* (Law, Justice and Development Series, The World Bank 2004) (noting that '[t]he history and institutional apparatus of the ICESCR is inextricably linked to the concept of "progressive realization" at the heart of the ICESCR's implementation').
[126] Matthew CR Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development* (Clarendon Press 1995) 16 (noting that 'the nature of international law is such that the question of enforceability has never been conclusive as to the existence of international rights or duties').

main water pipes in the Negev usually run very close to the locations of the unrecognised Bedouin villages, which suggests that it would not be costly to improve access to water for the individuals living there. In other words, it is not a lack of resources that prevents Israel from expanding access to water, but a policy decision, as discussed by the Israeli Supreme Court in the *Abu Massad* case.

The concept of non-discrimination, also found in Article 2 of the ICESCR, seeks to ensure that everyone has the same ability to access economic, social and cultural rights, including access to adequate amounts of safe drinking water.[127] In the *Abu Massad* decision, the Court stated that '[n]o claims were raised before us that these actually create a situation of discrimination of the residents' right for the supply of minimal water, as water is available for all at the abovementioned centers'.[128] As a result, the Israeli Supreme Court did not engage in a discussion of equality, which is an additional ground for examining administrative discretion under Israeli law.[129] '"This unwritten principle" of equality has been described by the Israeli Supreme Court as "the soul of our entire constitutional regime"'.[130]

The plaintiffs in *Abu Massad*, however, had originally raised a claim of discrimination. At the time of filing, Jewish settlements known as 'solitary farms' had been provided with infrastructure (water, electricity, telecommunications and roads), even though they did not have the proper building or planning permits.[131] As a result, they could be considered illegal in the same way that the Bedouin settlements were deemed illegal. In between the original filing of the *Abu Massad* petition and the hearing of the case by the Supreme Court, the Knesset retroactively granted planning approval for the solitary farms.[132] As a result, the Court in *Abu Massad*

[127] Access to Safe Drinking Water and Sanitation (n 103) 10–11.
[128] *Abu Massad* (n 1) para 45.
[129] See Bracha (n 24) 639.
[130] ibid (quoting HCJ 98/69 *Bergman v Minister of Finance* 1969 PD 23(1) 693, 698).
[131] Adalah, 'Adalah Petitions Supreme Court to Cancel Wine Path Plan for Individual Settlements in the Naqab', April 2006, http://www.adalah.org/newsletter/eng/apr06/1.php (noting that 'individual families live in the settlements, often without permits and in violation of the planning and building laws and regulations … While the [Jewish] individual settlements are afforded official status and provided with all basic services, the unrecognized [Bedouin] villages are denied this status and its inhabitants are forced to live without basic services'); Adalah, 'Israeli Supreme Court Upholds Planning Authority Decision to Establish Individual Settlements in the Naqab as Part of its "Wine Path Plan" despite Discrimination against Arab Bedouin Unrecognized Villages', 28 June 2010, http://www.old-adalah.org/eng/pressreleases/pr.php?file=27_06_10_2 (describing the Supreme Court's refusal to intervene in the planning authorities' decision to approve the 'Wine Path Plan', which retroactively legalised individual Jewish settlements in the Negev).
[132] Erez Tsfadiya, 'The Difference Between a Solitary Farm and an Unrecognized Village', 18 July 2010, http://www.ynet.co.il/articles/0,7340,L-3920404,00.html (translated from Hebrew); The Negev Development Authority Law (Amendment No 4), 2012 (Israel) (translated from Hebrew). See also Negev Coexistence Forum for Civil Equality and the Regional Council for the Arab Unrecognized Villages of the Negev, Recognition Forum, Physicians for Human Rights – Israel, 'The Arab-Bedouin in the Negev-Naqab Desert in Israel: Shadow Report submitted to the UN Committee on the Elimination of Racial Discrimination (CERD)', May 2006, 15 (Negev Coexistence Forum Report), http://www2.ohchr.org/english/bodies/cerd/docs/ngos/NCf-IsraelShadowReport.pdf ('Most of the farms are established without outlined plans and building permits are granted retroactively'); Adalah, 'Israeli Supreme Court Upholds Planning Authority Decision' (n 131) (noting that in a case brought to challenge the retroactive approval, the Israeli Supreme Court 'did not address the petitioners' arguments concerning the disparate impact of the plan, specifically the unequal distribution of land and the discrimination against the Arab Bedouin unrecognized villages, which would result from the approval of the plan').

determined that the comparison between Bedouins in unrecognised villages and solitary farms was no longer valid, and no claim of discrimination could move forward on that basis.[133]

In the context of a judicial review of administrative discretion, the Court's refusal to consider a discrimination claim based on a comparison with the solitary farms is understandable as a matter of law. Yet, the Knesset's retroactive approval of the solitary farms highlights the disparate treatment between Jewish and Bedouin settlements – evidence of Israel's highly divided and politicised environment. Similarly, the underlying Bedouin land disputes, which influenced the Court's discussion of illegality in *Abu Massad*, illustrate the challenge of viewing legal cases in a political vacuum. The next section reviews the history of these land disputes in order to place the *Abu Massad* decision in its proper historical and political context.

3. THE POLITICAL AND HISTORICAL CONTEXT: LAND DISPUTES IN THE NEGEV

Land ownership is an incredibly contentious and politically volatile issue in Israel, and especially in the Negev, which is geographically situated between the West Bank and the Gaza Strip.[134] For both Jews and Arabs in Israel, land is tied to identity, history and security. Jews generally refer to it as the Negev, which is the official name given by the government of Israel, while Arabs call it the Naqab, the name of the area prior to 1948. During our interviews, it appeared that the choice of the name was controversial, reflecting a particular perspective on the ongoing political disputes in Israel.[135]

In *Abu Massad*, the Supreme Court alluded to the underlying land dispute problems, noting '[t]he fate of the Bedouin community in southern Israel is a first-class national problem'.[136] Although the Court did not grapple with the underlying land claims, these underlying issues clearly coloured and influenced its analysis. To 'bridge existing gaps in the Israeli society', the *Abu Massad* Court stated that it hopes 'that the process of integrating the Bedouin community in permanent settlements will be accelerated in favor of the community'.[137] It encouraged the government to move more expediently on a plan to address the underlying land disputes.[138] The Court observed that, in 2008, a committee headed by former Chief Justice Eliezer Goldberg had issued recommendations to the government regarding the Bedouin settlements, but that a subsequently appointed operational team had not yet completed its recommendations.[139]

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[133] *Abu Massad* (n 1) para 12.
[134] For an in-depth look at the challenges of resolving these land claims, see Amara, Abu-Saad and Yiftachel (n 58); Nili Shchory, Jonathan Kowarsky, Abdessalam Najjar, Judith Karp and Efrat Geri, 'Conflict Assessment Report: Development Disputes in Kseife and Um Batin', December 2006, http://cbuilding.org/sites/default/files/Final%20Negev%20Conlict%20Assessment%20English.pdf; Consensus Building Institute, 'Resolving Conflicts between the Israeli Government and Bedouin Stakeholders', http://cbuilding.org/publication/case/resolving-conflicts-between-israeli-government-and-bedouin-stakeholders-kseife-and- .
[135] See also Gruenberg (n 49) 186 ('The terminology used to describe Israel's Arab citizens is in itself "highly politicized" and infuses the legal inquiry with biases and preconceptions').
[136] *Abu Massad* (n 1) para 52.
[137] ibid.
[138] ibid paras 13–14.
[139] ibid paras 13–14.

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The Supreme Court's decision in the *Abu Massad* case was issued in June 2011, several months before the implementation committee submitted its draft, which is known as the Prawer Plan. This plan has proved to be very controversial and the extent to which it will be implemented is unclear. To understand how the current debate over the Bedouins in the Negev is unfolding, it is first critical to appreciate the long history of these land disputes, which trace back to the days of the Ottoman Empire.

3.1 The History of the Bedouins to the Present Day

From the Israeli government's perspective, the current disputes over land in the Negev Desert stem largely from the fact that most Bedouins did not register their land with the governing authorities prior to 1948. From the perspective of the Bedouins, the dispute is caused by the fact that the Israeli government does not recognise their traditional land claims.[140] The extent to which the lack of official documentation matters is a hotly contested subject, and the story is further complicated by the displacement of Bedouins that occurred after the State of Israel was created.

3.1.1 Pre-1948: The Ottoman Empire and British Mandate

The Bedouins are indigenous groups of semi-nomadic Arab tribes who have roamed the desert areas of the Middle East and North Africa since the fifth century. Some tribes were semi-nomadic, cultivating crops in the northern Negev while also moving around with their herds for grazing.[141] Many tribes also lived further south as nomads in the heart of the desert, where they grazed herds of goats, sheep and camels along the same annual circuitous routes.[142] Land was an important resource for the Bedouins and ownership had historically been passed down from one generation to the next in accordance with tribal laws and customs.[143]

In 1858, the Ottoman Empire passed a law that required the names of landowners to be recorded officially, but most Bedouins did not register their land claims. As a result, most of the land in the Negev was categorised as *mawat*, which translates as 'wasteland unsuitable for cultivation' and implied that the land was available for registration as state land.[144] Then, in 1921, the British Mandate enacted a Land Ordinance which provided a two-month window for the Bedouins to acquire ownership rights on land that had been considered *mawat*.[145] However, once again, most did not register their land. As a result, when Israel inherited the British land registry in 1948, the majority of Bedouin lands were not officially

[140] eg Abu Rabia (n 20) 480 ('During the military rule from 1949–1966, Israel passed laws to enable it to confiscate land previously owned or used by the Bedouin population and to then register it in the name of the Israeli State. The Bedouin's ancestral land was declared a military zone that the Arab-Bedouin could not enter').
[141] Abu-Saad (n 5) 121; Meallem, Garb, and Cwikel (n 5).
[142] Shmueli and Khamaisi (n 3) 111.
[143] Suhad Bishara and Haneen Naamiih, *Nomads Against Their Will* (Adalah 2011) 5.
[144] Shmueli and Khamaisi (n 3) 111–12.
[145] Ronen Shamir, 'Suspended in Space: Bedouins under the Law of Israel' (1996) 30 *Law and Society Review* 231–57, 243.

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registered.[146] Thus, the Israeli government takes the position that land that was classified as *mawat* at the time the state was created in 1948 is available for registration as state land. According to the Israel Land Law of 1969:[147]

> Lands which at the time of the enactment of this law were classified as *'mawat'* will be registered in the name of the State; however, holders of Land title deeds according to Paragraph 103 of the Ottoman Land Law of 1274 in the Hijrah calendar or according to the Land Transfer Order are entitled to register the land in their name.

Historians offer numerous historical and cultural explanations for why most Bedouins did not register their land with either the Ottoman Empire or the British Mandate. Predominantly illiterate, they may not have registered their land because they were not familiar with the Ottoman institutions of government or the registry process.[148] They may not have wanted to create a written record of their land holdings because doing so would acknowledge foreign rule and obligate them to pay taxes.[149] Yet others may have feared that land registration would result in forced army conscription.[150] Moreover, as a distinct cultural group, the Bedouins had historically enjoyed a degree of autonomy under the Ottoman Empire and during the British Mandate period.[151] The Ottoman and British recognition of the tribal ownership mechanism 'created the impression among the Bedouin that registration in the government Land Registry was unnecessary for the recognition and preservation of their land rights'.[152] Indeed, from the Bedouins' perspective, official land registration was not necessary because their rights had historically been recognised and honoured by the successive governments that had ruled Palestine until the end of the British Mandate.[153] As a result, the Bedouins believe that they are the rightful owners of the land.

3.1.2 POST-1948: RELOCATION AND URBANISATION

The story of the Bedouin land claims in the Negev is further complicated by the forced displacements that occurred after the State of Israel was created in 1948. Prior to the establishment of the State of Israel, the Negev was solely inhabited by over 90,000 Bedouins, who were members of 96 different tribes. During and after the 1948 war, many Bedouins fled or were expelled from

[146] Abu Rabia (n 20) 481. ('The 1953 Land Acquisition (Validation of Acts and Compensation) Law gave the Israeli State the right to register previously confiscated land under certain conditions. One of these conditions rested on whether the owner was in possession of the property on April 1, 1952. If not, then the Israeli State could register the land in its name').
[147] Goldberg Committee, 'Recommendations to the Israeli Ministry of Construction and Housing' (Goldberg Report), para 42, http://www.moch.gov.il/SiteCollectionDocuments/odot/doch_goldberg/Doch_Vaada_Shofet_Goldberg.pdf (citing Land Law, 1969 (Israel), s 155).
[148] Association for Civil Rights in Israel, 'Principles for Arranging Recognition of Bedouin Villages in the Negev', May 2011, s II(3), http://www.acri.org.il/en/wp-content/uploads/2011/09/Prawer-Policy-Paper-May2011.pdf.
[149] Shmueli and Khamaisi (n 3) 111.
[150] Association for Civil Rights in Israel (n 148) 12.
[151] ibid.
[152] ibid.
[153] Bishara and Naamiih (n 143) 5.

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their lands during what the Palestinians refer to as *Nakba*, or the Catastrophe. The Bedouin population in Israel was reduced to about 10,000.[154] For geopolitical military considerations, Israel used martial law to relocate the remaining Bedouins to an area in the northern part of the Negev known as the Siyag,[155] which was governed by military law, as was the rest of the Arab population living in newly founded Israel. Under the control of a military governor, Bedouins were not allowed to move outside the Siyag region without a permit.[156] Many Bedouins were told by the government that they would be able to return to their land after a few months.[157] However, lands outside of the Siyag were converted to closed military zones.[158] Although the military law was abolished in 1966, the Bedouins were neither permitted to return to their lands, nor given property rights to the lands to which they were relocated.[159]

By the end of the military rule, the Israeli government initiated a shift in policy towards urbanisation and resettlement of the entire Bedouin population into townships. The construction of the first town, Tel Sheva, was complete by 1968 and was inhabited almost entirely by Fellaheen – landless Bedouins who worked on other peoples' land.[160] Following Tel Sheva, six more permanent townships were constructed, including Rahat, Kaseifa, Hura, Segev Shalom, Arara and Laqiya. Until the end of the 1990s the governmental policy was consistent, and was aimed at concentrating the entire Arab-Bedouin population of the Negev into those seven towns.[161]

Simultaneous with the urbanisation scheme, in 1971 a short window of opportunity opened for the Bedouins to file land ownership claims with the state under the Land Rights Settlement Order, which required the registration of all lands in the Northern Negev in the names of their owners. The Bedouins sought to submit claims for 1.5 million dunams[162] but the state allowed claims to go forward on only 900,000 dunams. According to figures reported by Habitat International Coalition, Bedouins had submitted 3,220 claims by 1979, covering 776,856

[154] Shmueli and Khamaisi (n 3) 111.
[155] 'Siyag' or 'Syag' means 'fence area'.
[156] Shmueli and Khamaisi (n 3) 113.
[157] Negev Coexistence Forum for Civil Equality, Michal Rotem, Haia Noach, Nuri Al-Ukbi, 'Response to the Report of the State of Israel on Implementing the Covenant on Economic, Social and Cultural Rights (ICESCR), October 2010, 4, http://www.phr.org.il/uploaded/Final_Shadow_report_ESCR_1Nov_10.pdf. See also Goldberg Report (n 147) paras 19–20 ('The Bedouin who were brought, against their wishes, to the *siyag* are classified as "internally evacuated", and remained in the area without "tribal territory" as opposed to the tribes that were in this area previously. So two classes were created: that of "landowners" and that of "landless". We heard from invitees who appeared before the Committee that the internally evacuated, or a part of them, were told by the bodies that transferred them to the siyag that their transfer was temporary').
[158] Association for Civil Rights in Israel (n 148) s I.
[159] ibid.
[160] Haia Noach, *The Existent and the Non-Existent Villages* (Pardes 2009) 49.
[161] Negev Coexistence Forum Report (n 132) 7; Shmueli and Khamaisi (n 3) 113; Abu Rabia (n 20) 482 (noting that the Israeli state established seven Bedouin townships in 1962 and that the purpose of this plan was 'to secure land suitable for settling Jews, for setting up Israel defense force bases, and to remove the Bedouin population from key Naqab routes').
[162] Habitat International Coalition, 'The Goldberg Opportunity: A Chance for Human Rights-based Statecraft in Israel', iii, http://www.hic-net.org/document.php?pid=3832 (noting that one dunam is equivalent to 10,000 hectares).

dunams; in response, the government submitted counterclaims to many of these. Approximately only 18 per cent of all claims, made by 12 per cent of the claimants, had been settled as of 2010.[163] The state has prevailed in all of the 190 cases decided to date.[164] According to the Goldberg Commission, which is described in more detail below, there are an estimated 2,749 claims still pending, which cover approximately 571,186 dunams.[165]

3.1.3 The Current Situation

Today, there are an estimated 193,000 Bedouins living in the Siyag region of the Negev.[166] They comprise 20 to 30 per cent of the total population of people living in the Negev,[167] but they currently reside on approximately 3 to 5 per cent of the land there.[168] Of the 193,000 Bedouins living in the Negev, a little less than half, or 90,000, have been relocated to the planned townships.[169] However, urbanising a semi-nomadic population that has been dependent for generations on agricultural subsistence presents many challenges, and the fabric of the Bedouin social structure has suffered as a result. Moreover, because there are no industries near the planned cities, the rates of unemployment are high and the townships are economically depressed.[170]

The other half of the existing Bedouin population in the Negev, however, has resisted relocation to the planned townships by continuing to reside in 'unrecognised villages' that are deemed 'illegal' by the state.[171] These are generally families who have land claims pending in the Siyag region and who have been reluctant to move for fear of relinquishing these rights. In fact, parts of the planned

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[163] ibid 5.

[164] As noted in the Goldberg Report (n 147), discussed below:

> Since the start of the land settlement procedure, the Beer Sheva district court has handed down 80 judgments, covering 50,050 dunam, in claims the Settlement Officer placed before the courts (223 cases). Thirteen of these judgments have been given as compromises reached with the claimants, and 67 judgments rejected the claims, either because the claimant did not appear in court or because they did not pursue their claim, and the land was registered in the name of the State. None of [the] judgments given to date has held up the Bedouin claimants' ownership of the land. The Hawashleh precedent effectively invalidates 'the possibility that the Bedouin's historical land claims will be recognised. … We can conclude that, so far as the legal disagreement over land ownership is concerned, the Bedouin will also lose their case in the future, given the State's claim that most of the land in the Negev is of the *mawat* category, and they should therefore be registered in the name of the State. In order to make this point, the State has even introduced counter claims, in order to warn the Bedouin what fate awaits them if they do not reach a compromise agreement.

[165] ibid; Habitat International Coalition (n 162) 16.

[166] Thabet Abu Ras, 'The Arab-Bedouin Population in the Negev. Transformations in an Era of Urbanization' (The Abraham Fund Initiatives 2012) 72, http://www.abrahamfund.org/img/upload/0/0_3821.pdf; Meallem, Garb, and Cwikel (n 5) 4.

[167] Abu Ras, ibid; Meallem, Garb, and Cwikel (n 5); Adalah, 'The Arab Bedouin of the Naqab: Myths and Misconceptions', 2, http://adalah.org/Public/files/English/Publications/myths%20flyer%20campaign.pdf

[168] Association for Civil Rights in Israel (n 148) 5.

[169] Association for Civil Rights in Israel (n 148).

[170] See Goldberg Report (n 147) paras 57, 152 (noting that the Bedouins' 'problems cannot be solved without finding a solution to the problems Bedouins are facing in such matters as employment, welfare and education (even though much has been done and large funds have been invested in this field)').

[171] Abu Rabia (n 20) 481 (noting that 'even the few currently recognized villages cannot receive a building permit. The zoning law also criminalized existing villages by categorizing them as illegal or unrecognized').

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townships are constructed on land that is in dispute, which has caused additional conflicts. Moreover, most of these Bedouins prefer to maintain their rural and pastoral lifestyle and culture rather than move to planned urban townships that are economically depressed and lack social support structures.

Bedouins who reside in these 'unrecognised villages' face major legal and bureaucratic problems. The Israeli Master Plan, prepared in accordance with the Planning and Building Law of 1965, designates the northern Negev for agriculture, industry, military and related purposes, and prohibits residential construction in these areas.[172] As a result, Bedouins in unrecognised villages have no ability to obtain building permits legally.[173] Because the houses in the unrecognised villages do not have the requisite permits, the residents live under constant threat of home demolition.[174] Moreover, because of the constant demolition threat,[175] most buildings consist of non-permanent structures made with relatively inexpensive materials, such as tin walls and roofs that can easily be replaced; these materials do not provide adequate living conditions, and result in the houses being too cold in the winter and too hot in the summer.[176] The villages also do not have access to basic infrastructure facilities and services, such as electricity, household water, roads, health care and schools.[177]

The Regional Council for Unrecognised Villages of the Negev (RCUV) was established in 1996 as an association to represent local communities and to act as a democratically elected representative body for all the unrecognised villages.[178] At the time, there were 45 unrecognised villages. Despite having between 600 and 4,000 residents per village, these villages were not depicted on any official map. One of the RCUV's efforts bore fruit when the State of Israel agreed to recognise ten of these villages.[179] Although the villages are not in one contiguous region, they are all served by one municipality known as the Abu Basma Regional Council.[180] The ten Abu Basma villages, however, are all in the midst of planning processes and many still do not have appropriate building permits or services.[181]

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[172] ibid (noting that the land was zoned as agricultural).
[173] Association for Civil Rights in Israel (n 148) 8.
[174] Abu Rabia (n 20) 481 ('The State of Israel prohibits permanent construction in the unrecognized villages; those who do construct permanent structures risk heavy fines and the demolition of their permanent structures'); Ruth Pollard Al-Sira, 'Bedouin Face Bulldozers as Israel Reshapes the Desert; A People Demolished – "You are denying their right to exist"', 5 November 2011, http://www.smh.com.au/world/bedouin-face-bulldozers-as-israel-reshapes-the-desert-20111104-1n01y.html.
[175] For example, the village of El Arakib, which is west of Route 40, has been demolished approximately 32 times since the summer of 2010. In addition, while the research team was in Israel, several villages received demolition orders and the villagers, along with their legal advocates, filed emergency motions in court to try to halt the demolition orders.
[176] Centre on Housing Rights and Evictions (COHRE), Submission to the Goldberg Committee regarding Violations of the Human Right to Water and Sanitation in the Unrecognized Villages of the Negev/Naqab, February 2008, 5, http://www.internal-displacement.org/8025708F004CE90B/(httpDocuments)/6248B673A93BEFF3C125741200626 11E/$file/COHRE+Submission+to+Goldberg+Committee+Feb-1.pdf.
[177] See Goldberg Report (n 147) para 63; Association for Civil Rights in Israel (n 148) s I.
[178] RCUV, 'About the RCUV', http://rcuv.wordpress.com/about-the-rcuv/.
[179] Association for Civil Rights in Israel, 'Towards Recognition', 26 May 2011, http://www.acri.org.il/he/?p=11958. These villages are: Abu Kurinat, Um Batin, Mulada, Makhoul-Marit, Ksar A-Sir-Hawashleh, A-Said, Tarabin, BirHadaj, Khoula and Darijaat.
[180] Shmueli and Khamaisi (n 3) 113–114.
[181] See Shchory and others (n 134).

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Considered 'illegal' and without any official status, the 35 unrecognised villages are governed by a number of Israeli agencies or committees established for them, though none have Bedouin representation at the policy-making level.[182] These agencies include, most notably, the Bedouin Advancement Authority (which is now called the Authority for the Formalization of Bedouin Settlement in the Negev), the Bedouin Education Authority, and the Green Patrol. The Green Patrol was established to protect open spaces owned by the government from a variety of illegal squatters, or – in the views of critics – 'to fight so-called Bedouin infiltration into national Israeli land'.[183] The Israeli Water Authority also has a special Water Committee that decides requests for new water sources by Bedouins in unrecognised villages.[184] This process is explained by the Supreme Court in *Abu Massad*:[185]

> [In a previous Supreme Court case] it was determined that the most suitable way to clarify the rights of residents in the unrecognised villages in the Negev to have their private homes[186] connected to the main water pipes, was for them to submit individual and specific requests by groups of at least ten families to the Water Committee, which is authorized to recommend private water connections to the head of the [Israeli Water] Authority. If this procedure does not suffice their needs, those submitting the applications will be able to appeal the decisions of the Authority head before the qualified court.

3.2 THE GOLDBERG REPORT AND THE PRAWER PLAN

As noted by the Supreme Court, the Bedouin situation in Israel 'is an issue that has been crying for a solution for a very long time'.[187] In October 2007, the state established a committee 'for the purposes of examining this issue and suggesting a systematic solution'.[188] This committee, led by former Supreme Court Judge Eliezer Goldberg and known as the Goldberg Committee, was the latest in a long line of committees that had been established by the government to resolve the issues pertaining to the Bedouins.[189]

As noted in the Goldberg Report, each prior committee had failed in its mandate:[190]

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[182] Abu-Saad (n 5) 124.
[183] Ghazi Falah, 'How Israel Controls the Bedouin in Israel' (1985) 14 *Journal of Palestine Studies* 35–51, 43; Abu-Saad (n 5) 124; Alon Tal, *Pollution in a Promised Land: An Environmental History of Israel* (University of California Press 2002) 347, http://publishing.cdlib.org/ucpressebooks/view?docId=kt6199q5jt;brand=ucpress.
[184] *Abu Massad* (n 1) para 4.
[185] Ibid para 6.
[186] As explained above, the research team learned while in Israel that this does not mean private household connections. Rather, it means roadside access to a water pipe; the Bedouins must then use their own funds to install pipes to bring the water close to their homes.
[187] *Abu Massad* (n 1) Concurring Opinion of Justice Arbel.
[188] ibid.
[189] Goldberg Report (n 147) para 49.
[190] ibid para 46.

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> We shall refrain from enumerating all the committees which have, in the past, proposed solutions for the resettlement of the Bedouin in the Negev. Most of these committees have 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. Not only have the struggles over the land and resettlement not diminished, they have indeed intensified over the years for reasons related to the rapid changes which are taking place in Bedouin society.

The Goldberg Committee's mandate was clear: to 'submit recommendations for an expansive, comprehensive, and realisable programme that sets guidelines for Bedouin settlement arrangements in the Negev, including compensation levels, alternative land allocation arrangements – and that includes recommendations for legislation, as needed'.[191]

Over one year later, on 11 December 2008 the Goldberg Committee released its findings in a widely publicised report. The Goldberg Report advocates a clear shift in approach for the government in its handling of the unrecognised villages by calling for the recognition of these villages: 'The only way to prevent the continuation of the present intolerable situation, with all its negative consequences, is to recognise the unrecognised villages, according to the limitations to be described, and formally to incorporate them'.[192] The Goldberg Report also calls for the retroactive legalisation of most buildings built by the Bedouins, recognising that the buildings are illegal only because it had been impossible to obtain building permits in unrecognised villages.[193]

The Goldberg Report begins by recognising that the Israeli government has two conflicting attitudes with regard to its Bedouin citizens. On the one hand, Israel recognises the need to 'reward and invest' in the Bedouin communities in honour of their 'demonstrated identification with, and loyalty to the State, primarily by massive enlistment in the security services and [Israeli Defense Forces]'.[194] On the other hand, the government is fearful of the Bedouins 'as a nomadic society that threatens the territoriality of the new State'.[195]

The Goldberg Report then underscores the need to resolve the land issues:[196]

> Even though the Bedouin insist that they have land ownership rights in the Negev, the State refuses to recognise these claims, arguing that they are not backed up by sufficient documentary proof, and that the land referred to is of a character and category that makes it ineligible for assertion of ownership. This struggle over land ownership rights, ongoing for many years, casts a long shadow over relations between Bedouin and the State, especially as it comes on top of a long list of other grievances. In the opinion of this committee, it is no longer possible to circumvent this issue and leave it unresolved. The Bedouin's belief in the State has been seriously compromised, and it cannot be re-established until a solution is found for this problem … We cannot ignore the fact that the struggle over land rights is the dominant factor which blocks progress towards normalised settlement.

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[191] Shmueli and Khamaisi (n 3) 115 (quoting Cabinet Resolution No 1999, Establishment of an Authority for Bedouin Settlement Arrangements in the Negev, 15 July 2007).
[192] Goldberg Report (n 147) para 108.
[193] ibid para 63, 67.
[194] ibid para 17.
[195] ibid.
[196] ibid para 26.

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The Goldberg Report directly addresses the conflicting narratives in land ownership by stating:[197]

> Most of the Bedouin do not have any documents and their claim rests on the tribal code and, so it is claimed, on their having held the land and worked it for tens or even hundreds of years. On the other hand, the State's refusal to recognize Bedouin claims in the absence of documentary proof of ownership, is based on legal claims of law and precedent.

To break the stalemate, the Goldberg Committee recommended conducting a process for regulating lands for the Bedouin, out of consideration for their historical affinity with the area, as opposed to a legal right to the land.[198] The Supreme Court in the *Abu Massad* case succinctly summarised the Goldberg Report's key recommendations as follows:[199]

> The committee consolidated a general proposal for policy in regard to the settlement of Bedouins in the Negev, including in the unrecognized settlements. Amongst others, the committee recommended conducting a process for regulating lands for the Bedouin, out of consideration for their historical affinity to the area, as opposed to a legal right to the land. The Goldberg Committee also recommended recognizing, as much as possible, the unrecognized villages, and including them amongst the existing clusters of settlements. During the interim period and until full recognition, it was recommended to recognize these villages as 'settlements in transit', and to provide them with services via an 'anchoring settlement' for each cluster, as stated above, in lieu of city tax payments and a change of address. No new construction will be permitted in the transit settlements (Goldberg Committee Report, Paragraphs 108–109).

The Goldberg Report concludes with a dire assessment of the challenges faced by the government in resolving the issues with its Bedouin citizens:[200]

> Our recommendations are interdependent, like the links of a chain. The settlement problem cannot be solved without solving the land problem; the land problem cannot be solved without solving the settlement problem; and both these problems cannot be solved without finding a solution to the problems Bedouins are facing in such matters as employment, welfare and education (even though much has been done and large funds have been invested in this field). These problems cry out for a solution, as part of the complex of issues that need to be settled.

In January 2009, the government accepted the Goldberg Committee recommendations, stating that the Goldberg Committee plan would be a basis for formalising Bedouin settlement in the Negev.[201] To implement the recommendations of the Goldberg Report the Israeli government

[197] ibid para 29.
[198] ibid paras 108–18.
[199] *Abu Massad* (n 1) para 13.
[200] Goldberg Report (n 147) para 152.
[201] Prawer Committee, 'Recommendations of the Committee for the Implementation of the Goldberg Report for Formalization of Bedouin Settlements in the Negev', 31 May 2011, English translation by Itamar Haritan on file with authors; Government of Israel, Decision 4411: Regulation Policy for Bedouin Settlement in the Negev (The Goldberg Committee), 18 January 2009, http://www.pmo.gov.il/Secretary/GovDecisions/2009/Pages/des4411.aspx.

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formed a new committee headed by Ehud Prawer, former deputy chairman of the National Security Council and current head of the Policy Planning Department in the Prime Minister's Office.[202] This Committee released its report, known as the 'Prawer Plan', in September 2011. On 9 November 2011, the Israeli Cabinet approved the Plan, although an announcement on the website of the Prime Minister's Office only refers to it as being based on the Goldberg Committee recommendations.[203] It states that the plan is based on 'four cornerstones':[204]

> 1) Providing for the status of Bedouin communities in the Negev; 2) Economic development for the Negev's Bedouin population; 3) Resolving claims over land ownership; and 4) Establishing a mechanism for binding, implementation and enforcement, as well as timetables.

The extent to which the Prawer Plan actually follows the Goldberg recommendations is currently being debated in Israel. While the government believes that the Plan merely implements the Goldberg recommendations, many argue that the intention of the Plan is to back away from the key findings of the Goldberg Report.[205] Even Justice Goldberg has publicly acknowledged that the Prawer Plan contradicts or ignores his most critical recommendation:[206]

> We suggested [leaving] as many unrecognized villages in their current location to the extent that is possible so long as they don't contradict the Master Plans … this formula I did not find in the Prawer Plan. In this realm there is a real divergence from my recommendations.

As a result, many are concerned that the Prawer Plan will result in the forced relocation of over 30,000 Bedouins from their homes in unrecognised villages into government townships.[207]

When the research team conducted its interviews in Israel in December 2011, it was clear that the Bedouin community and its allies were preparing a campaign against the Prawer Plan. On 11 December 2011 a large demonstration by hundreds of Bedouins and their supporters took place in front of the Prime Minister's Office in opposition to the government's reported intention of passing the Prawer Plan into law. The research team saw numerous signs and stickers in English which simply read 'No to the Prawer Plan'.

In January 2012 Prawer's recommendations were presented as a memorandum law to the Israeli government by the Ministry of Justice as the Law of Regulation of the Bedouin Settlement in the Negev.[208]

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[202] Jack Khoury, 'Israel's Contentious Bedouin Relocation Plan Passes PM's Office Panel', *Ha'aretz*, 28 March 2012, http://www.haaretz.com/news/national/israel-s-contentious-bedouin-relocation-plan-passes-pm-s-office-panel-1.421136.
[203] Israel Ministry of Foreign Affairs, 'Cabinet Approves Plan for the Bedouin Sector in the Negev', 11 September 2011, http://www.mfa.gov.il/MFA/Government/Communiques/2011/Cabinet_approves_plan_Bedouins_Negev_11-Sep-2011.htm.
[204] ibid.
[205] Rotem, Noach and Al-Ukbi (n 157) 21.
[206] Aviv Lavie, 'Goldberg Speaks', *Ma'ariv*, 4 December 2011.
[207] Mansour Nasara, 'Before you Expel the Bedouins', *NCF Newsletter*, October 2011, 1; Oren Yiftachel, 'Housing for Bedouins' *Ha'aretz*, 27 September 2011, http://www.haaretz.co.il/opinions/1.1484336.
[208] Negev Coexistence Forum for Civil Equality (NCF), 'Position Paper regarding the Prawer Plan', 23 March 2012, http://www.dukium.org/eng/?p=1517.

The proposed law has stirred criticism from human rights organisations.[209] In particular, Articles 71 to 73 of the proposed law grants the Authority for the Formalization of Bedouin Settlement in the Negev the power to render a certain area to be cleared out immediately, to demolish all buildings and to evacuate people, all without a court injunction as is required by law today.[210] Furthermore, the government decision would grant the Bedouin Authority permission to begin deploying security officers in the unrecognised villages and the Southern District Police would be responsible for evacuations and demolitions.[211]

Meanwhile, the Israeli Cabinet has appointed Minister Benjamin Begin (son of former Prime Minister Menachem Begin) to coordinate public and Bedouin population comments on the Prawer Plan, and to submit a report prior to legislation in the Knesset.[212] Alongside Begin, Major-General (ret) Doron Almog was appointed as the head of the Prawer implementation staff.[213] Representatives of the Bedouin Authority, including Begin and Almog, will begin outreach missions, visiting unrecognised villages to provide information on the content of the Prawer Law and to gather feedback from the community. The Bedouin Authority claims it will pass the feedback on to the planners. Such governmental efforts are proving to be ineffective in reducing Bedouin opposition as demonstrations are increasing and communities are mobilising against the proposed law.[214]

As this article was going to press, the Israeli cabinet approved recommendations made by Minister Begin, which proposed to recognise 'as much as possible' unrecognised villages that met certain criteria.[215] The plan has been criticised by Bedouin supporters as perpetuating 'discriminatory planning'[216] and by pro-Jewish settlement opponents as 'an historic mistake'.[217] Events continue to unfold. The plan must still be submitted to the 19th Knesset and much remains to be seen.

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[209] eg, Adalah 'The Prawer Plan and Analysis' October 2011, http://www.adalah.org/upfiles/2011/Overview%20and%20Analysis%20of%20the%20Prawer%20Committee%20Report%20Recommendations%20Final.pdf; NCF, ibid.

[210] Alternative Information Center, 'Bill Will Turn Bedouin Dispossession into Israeli Law', 2 February 2012, http://www.alternativenews.org/english/index.php/component/content/article/28-news/4109-bill-will-turn-bedouin-dispossession-into-israeli-law.

[211] Yair Yagna, 'Israel Police Establishes Unit to Enforce Demolition of Bedouin Homes', *Ha'aretz*, 17 April 2012, http://www.haaretz.com/news/national/israel-police-establishes-unit-to-enforce-demolition-of-bedouin-homes-1.424805.

[212] Prime Minister's Office, 'Cabinet Approves Plan to Provide for the Status of Communities in, and the Economic Development of, the Bedouin Sector in the Negev', 11 September 2011, http://www.pm.gov.il/PMOEng/Communication/Spokesman/2011/09/spokenegev110911.htm.

[213] Khoury (n 202).

[214] Rami Shani, 'The Controversial Plan of the Negev', *Walla News*, 4 February 2012, http://news.walla.co.il/?w=/90/2505877.

[215] Israel Ministry of Foreign Affairs, 'Cabinet Approves Plan for the Bedouin Sector in the Negev', 27 January 2013, http://www.mfa.gov.il/MFA/Government/Communiques/2012/Cabinet_approves_status_Bedouin_settlement_Negev_27-Jan-2013.htm.

[216] Association for Civil Rights in Israel, 'Begin Plan for Negev Bedouin Continues Racist Policy of Dispossession', 28 January 2013, http://www.acri.org.il/en/2013/01/28/begin-plan-bedouin-dispossession.

[217] Gil Ronen and David Lev, 'Govt Sneaks Through Huge Land Giveaway for Bedouin', *Arutz Sheva 7*, 27 January 2013, http://www.israelnationalnews.com/News/News.aspx/164618#.UQqvY2fLeVo.

3.3 RESPONSE FROM THE INTERNATIONAL COMMUNITY

The international community has been critical of the planned relocations of Bedouins in the Negev and the continued destruction of unrecognised villages. In a report issued in September 2010 regarding Israel's obligations under the International Covenant on Civil and Political Rights,[218] the UN Human Rights Committee expressed its concern over 'allegations of forced evictions of the Bedouin population' and 'of inadequate consideration of traditional needs of the population in the State party's planning efforts for the development of the Negev, in particular the fact that agriculture is part of the livelihood and tradition of the Bedouin population'.[219] In addition, the Committee noted that Bedouins living in unrecognised towns had difficulty in accessing 'health structures, education, water and electricity'.[220]

In August 2011 the UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, submitted a detailed report to the UN Human Rights Council in which he voiced concern over the Israeli government's failure to recognise the Bedouins' indigenous rights to land together with the continued destruction of unrecognised villages and the forced removal of the Bedouin people.[221] In response, the government of Israel issued a letter stating that it does not accept the classification of its Bedouin citizens as an indigenous people.[222] In a further response, the UN Special Rapporteur noted the 'longstanding presence of Bedouin people throughout a geographic region that includes Israel'.[223] He further observed that:[224]

> 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

[218] Entered into force 23 March 1976, 999 UNTS 171 (ICCPR).
[219] UN Human Rights Committee (n 121) 24.
[220] ibid.
[221] UN Human Rights Council (n 121) paras 4–22. See also James Anaya, 'Indigenous Peoples' Participatory Rights in Relation to Decisions about Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Land and Resources' (2005) 22 *Arizona Journal of International and Comparative Law* 7, 7 (noting that it is a 'generally accepted principle in international law that indigenous peoples should be consulted as to any decision affecting them'); S James Anaya, 'Symposium: Lands, Liberties, and Legacies: Indigenous Peoples and International Law. Keynote Address: Indigenous Peoples and their Mark on the International Legal System' (2006) 31 *American Indian Law Review* 257, 260–61 (noting that the International Labor Organization Convention No 169 on Indigenous and Tribal Peoples recognizes indigenous peoples' land rights); cf International Labor Organization, 'Ratifications of C169 – Indigenous and Tribal Peoples Convention, 1989 (No 169), http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314 (showing that Israel is not one of the 22 countries that have ratified ILO Convention No 169).
[222] UN Human Rights Council (n 121) para 23.
[223] ibid para 25. See also S James Anaya, 'European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society by Paul Keal' (2005) 99 *American Journal of International Law* 306, 306 (noting that the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (now the Sub-Commission on the Promotion and Protection of Human Rights) defines indigenous peoples as those groups that have '(1) a historical continuity with precolonial societies whose presence predated that of now dominant groups living on the same territory or in close proximity, (2) a distinctive cultural or ethnic identity that is connected with ancestral land, and (3) the desire to transmit that identity to future generations').
[224] UN Human Rights Council (n 121) para 25.

> those of majority populations. Further, the grievances of the Bedouin, stemming from their distinct cultural identities and their connection to their traditional lands, can be identified as representing the types of problems to which the international human rights regime related to indigenous peoples has been designed to respond. Thus, the Special Rapporteur considers that the concerns expressed by members of the Bedouin people are of relevance to his mandate and fall within the ambit of concern of the principles contained in international instruments such as the United Nations Declaration on the Rights of Indigenous Peoples.

In March 2012 the UN Committee on the Elimination of Racial Discrimination (CERD)[225] characterised the proposed Law for the Regulation of the Bedouin Settlement in the Negev, which is based on the Prawer Plan, as 'discriminatory',[226] stating that it 'would legalize the ongoing policy of demolitions and forced displacement of the indigenous Bedouin communities'.[227] The Committee also expressed concern 'about the current situation of Bedouin communities, particularly with regard to the policy of demolitions, notably of homes and other structures, and the increasing difficulties faced by members of these communities in gaining access on a basis of equality with Jewish inhabitants to land, housing, education, employment and public health'.[228] This was not the first time that CERD had commented on the Bedouins in Israel. In 2007, it issued a report expressing concern 'about the relocation of inhabitants of unrecognized Bedouin villages in the Negev/Naqab to planned towns' and about 'the lack of basic services'.[229]

In mid-May 2012 a Bedouin representative presented a statement on behalf of the Negev Coexistence Forum at the 11th Session of the Permanent Forum on Indigenous Issues at the UN. The statement called on the international community to intervene in preventing the Israeli government from implementing the Prawer Plan which, according to them, will 'undermine the delicate social fabric of the area and inflame Arab-Jewish relations'. The representative also met with

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[225] See Anaya, 'Indigenous Peoples and their Mark on the International Legal System' (n 225) 259 ('CERD's function is to promote compliance with the International Convention on the Elimination of All Forms of Racial Discrimination, and this Convention, of course, is constructed upon the fundamental human rights norm of equality and non-discrimination in the context of combating racial discrimination').

[226] See S James Anaya, 'International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State' (2004) 21 *Arizona Journal of International and Comparative Law* 13, 37 (noting that 'the fundamental norm of non-discrimination requires recognition of the forms of property that arise from the traditional or customary land tenure of indigenous peoples, in addition to the property regimes created by the dominant society'); Anaya, 'Indigenous Peoples and their Mark on the International Legal System' (n 225) 260 ('This notion of equality does not treat indigenous peoples as though they were like everyone else in society. Equality instead means that indigenous peoples get to keep their languages and to live within their long-standing, self-governing institutions. Equality means that their property rights, their connection with territory, have to be valued just as much as the dominant society's connection with its property').

[227] UN, Committee on the Elimination of Racial Discrimination (CERD), 'Consideration of Reports Submitted by States Parties under Article 9 of the Convention, Concluding Observations of the Committee on the Elimination of Racial Discrimination', UN Doc CERD/C/ISR/CO/14-16 (2012) (CERD, 'Consideration of Reports') para 20. See also Dana Weiler-Polak, 'UN Panel Urges Israel to Shelve 'Racist' Bedouin Relocation Plan', *Ha'aretz*, 26 March 2012.

[228] CERD, ibid 20.

[229] UN, CERD, Consideration of Reports Submitted by States Parties under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination, Israel, UN Doc CERD/C/ISR/CO/13 (2007) para 25.

James Anaya, the UN Special Rapporteur on the Rights of Indigenous Peoples to further discuss the situation of Bedouin displacement in the Negev.[230]

In August 2012, the UN Human Rights Committee reviewed Israel's compliance with its obligations under the International Covenant on Civil and Political Rights, assessing the submissions of several NGOs and the responses of the state.[231] With respect to policies in the Negev, the Committee's evaluation was as follows:[232]

> Apart from including Bedouin members in the Goldberg Committee, no measures have been described that ensure the respect of the right of the Bedouin to their ancestral land and their traditional livelihood based on agriculture, and to otherwise take into account the interests of the Bedouin. The measures taken do not guarantee the Bedouin population's access to health structures, education, water or electricity.

If Israel moves forward with the relocation plans, the Bedouin issue will no doubt continue to receive heightened attention and scrutiny, both from international institutions and from the global press.[233]

3.4 Revisiting the Israeli Water Authority Policy in the Unrecognised Bedouin Villages

It could be many years before a final resolution is reached on the underlying Bedouin land issues. Once those issues are resolved, it could be still more years before the resulting villages and towns obtain the proper building and infrastructure permits. In light of the history and current political context, it may be prudent for the Israeli Water Authority to re-assess the effectiveness of its existing policy in unrecognised Bedouin villages in the Negev. The stated purpose of the Israeli Water Authority's policy for these villages is to create incentives for the inhabitants to settle in government-planned towns.[234] In *Abu Massad*, the Court noted that '[t]his incentive is vital in order to prevent the perpetuation of illegal settlements, and it is important to avoid providing indirect encouragement to illegal settlements through direct provision of unlimited consumer services, directly to the residents' homes'.[235]

The Bedouin leaders and NGO advocates with whom the research team spoke made clear that, although the Bedouins in unrecognised villages would like better access to water, they

[230] Negev Coexistence Forum for Civil Equality, 'NCF Statement at UN Permanent Forum on Indigenous Issues', 16 May 2012, http://www.dukium.org/eng/?p=1689.
[231] UN, ICCPR, Human Rights Committee, 'List of Issues Prior to the Submission of the Fourth Periodic Report of Israel (CCPR/C/ISR/4) adopted by the Human Rights Committee at its 105th Session, 9–27 July 2012', 31 August 2012, UN Doc CCPR/C/ISR/Q/4; Human Rights Committee, 105th session, 9–27 July 2012, Geneva, http://www2.ohchr.org/english/bodies/hrc/hrcs105.htm (providing links to all relevant documents, including NGO submissions).
[232] UN, ICCPR, Human Rights Committee, 'Interim Report of the Special Rapporteur for Follow-up on Concluding Observations of the Human Rights Committee adopted at its 105th Session, 9–27 July 2012', 31 August 2012, UN Doc CCPR/C/105/2, http://unispal.un.org/UNISPAL.NSF/0/ACC0FEECBC1B9B2785257A71004F6E8D.
[233] eg, 'More than Mere Squatters', *The Boston Globe*, 3 January 2012, http://www.boston.com/bostonglobe/editorial_opinion/editorials/articles/2012/01/03/more_than_mere_squatters/.
[234] *Abu Massad* (n 1) paras 40, 45.
[235] ibid para 45.

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are not willing to relinquish their land claims and move to a planned town simply to obtain better access to water. They do not believe that the government of Israel is presenting them with a fair choice. Several even observed that water was being used 'as a weapon' against them. This anecdotal evidence suggests that the Israeli government's position of using water as a method to coerce the Bedouins into the established townships and buildings may not be working. In fact, it may have the opposite effect. For example, the government of Israel has demolished the unrecognised village of Al Arakib 34 times in the last two years, only to find that the villagers keep returning and rebuilding. The resistance and strength of the Bedouins living in unrecognised villages does not seem to be waning. Many Bedouins feel marginalised by the state's policies and there is some evidence that this is encouraging Bedouins to identify more and more with the broader Palestinian and Islamic causes.[236]

4. CONCLUSION

Over 60 years after the State of Israel was created, the government of Israel is still grappling with how to ensure that the human rights of all its citizens can be upheld. Water access in the Negev is tied to land ownership, which is at the heart of most disputes between the Bedouins and the government of Israel. The Bedouins believe that water is being used as a weapon against them, to coerce them into relinquishing their indigenous land claims and to force them into moving to planned townships. On the other hand, the government steadfastly believes that because the Bedouins did not register their land during the Ottoman rule or the British Mandate, they do not have legal title to the land. Moreover, the Bedouins have housing options available to them in the planned townships with better access to municipal services that include water, schools, electricity and medical care.

The Israeli Supreme Court ruling in *Abu Massad* is yet another chapter in the relationship between the Bedouin citizens and the State of Israel. In its ruling, the Court avoided a quick disposition of the case and instead conducted an extensive and thoughtful analysis of the Bedouins' right to water under both Israeli and international law. Although the Court acknowledged the government's right, in principle, not to provide direct water connections to unrecognised villages because they are 'illegal', it used a proportionality analysis to balance the state's interest against the Bedouins' right to water. By imposing a higher level of judicial scrutiny and introducing normative criteria for assessing the government's water policies, the Court's decision could be understood as setting a legal precedent that may be applied in future cases involving the Bedouins' access to water. Regardless of the underlying land disputes, it is critical that the human right to water is realised and that Bedouins, like all Israeli citizens, have access to sufficient, safe, acceptable, physically accessible and affordable water.

[236] See Oren Yiftachel, 'Critical Theory and "Gray Space" – Mobilization of the Colonized' (2009) 13 *CITY* 240, 251, http://www.geog.bgu.ac.il/members/yiftachel/new_papers_2009/City%202009.pdf. ('… most recently Palestinian varieties are gaining popularity, thereby creating the foundation for a new subjectivity which gradually draws away from any normative attachment to Israeli citizenship').