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## Mediation to Resolve the Bedouin-Israeli Government Dispute for the Negev Desert

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# Mediation to Resolve the Bedouin-Israeli Government Dispute for the Negev Desert

Sarah S. Matari

## **Abstract**

In Part I, this Note elaborates on the rights that indigenous persons have to ancestral land and the sources of international law that support those rights. Part I also discusses the alternative dispute resolution process of mediation and the customary discouragement of mediation between parties with a power imbalance. Part II explores whether the Negev Bedouins and Israeli government should pursue mediation to resolve their land dispute and generally addresses techniques used to monitor mediation sessions between parties with a power imbalance. Part III explores why mediation is better suited to resolve the Israeli government-Negev Bedouin land dispute than is courtroom litigation.

# MEDIATION TO RESOLVE THE BEDOUIN-ISRAELI GOVERNMENT DISPUTE FOR THE NEGEV DESERT

*Sarah S. Matari \**

*"Inquire of your companion before choosing the route."*  
—Bedouin Proverb

INTRODUCTION .....	1091
I. LAW GOVERNING INDIGENOUS RIGHTS AND MEDIATION CUSTOM IN THE CONTEXT OF A PARTY POWER IMBALANCE .....	1094
A. Law Governing Indigenous Rights .....	1095
1. International Conventions and Treaties Support Indigenous Persons' Claims to Ancestral Land .....	1096
2. Customary International Law Supports Indigenous Persons' Claims to Ancestral Land.....	1099
3. General International Legal Principles Support Indigenous Persons' Claims to Ancestral Land .....	1103
B. Mediation Custom and Party Power Imbalance .....	1105
II. IN LIGHT OF THE POWER IMBALANCE BETWEEN THE PARTIES, IS MEDIATION A RESPONSIBLE DISPUTE RESOLUTION PROCESS? .....	1109
A. The Power Imbalance between the Israeli Government and the Negev Bedouins .....	1110

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1. CLINTON BAILEY, A CULTURE OF DESERT SURVIVAL: BEDOUIN PROVERBS FROM SINAI AND THE NEGEV 171 (2004) (compiling Bedouin proverbs that the author discovered during his twenty-five years of studying Bedouin culture).

B. Is Proposing Mediation at Odds with the Mediation Custom that Discourages Mediation between Parties with a Power Imbalance?.....	1115
C. Institutional Support for Mediation to Resolve the Israeli Government-Negev Bedouin Dispute and State-Indigenous Disputes Generally.....	1118
1. In the Public Interest Sector, the Consensus Building Institute Advocates for Mediation to Resolve the Israeli Government-Negev Bedouin Dispute.....	1118
2. Large Transnational Organizations Support Mediation for State-Indigenous Disputes.....	1120
3. State Legislative Bodies Use Mediation to Resolve State-Indigenous Disputes .....	1122
3. Transnational and State Judicial Systems Encourage State and Indigenous Parties to Pursue Mediation to Resolve Their Disputes .....	1123
III. THE ISRAELI GOVERNMENT AND THE NEGEV BEDOUINS SHOULD PURSUE MEDIATION TO RESOLVE THEIR DISPUTE FOR THE NEGEEV DESERT.....	1125
A. Courts Are Unable to Address Issues that Are Imperative to Reconciliation .....	1126
B. The Adversarial Court System Is Ill-Suited to Address Indigenous Needs.....	1126
C. Litigation Is Not Inherent to the Bedouin Community and Indigenous Way of Life.....	1127
D. Litigation Is Costly for and Often Disappoints Indigenous Communities.....	1128
CONCLUSION.....	1129

### INTRODUCTION

The United Nations (“UN”) Permanent Forum on Indigenous Issues estimates that there are more than 370 million indigenous persons worldwide.<sup>2</sup> Indigenous persons are often defined as those having traditional lifestyles and residing on ancestral land.<sup>3</sup> Though native persons reside on lands that their ancestors have passed down for generations, the states that emerge on ancestral land often create systems of land ownership in which indigenous persons are not participants. In the resulting conflict of ownership, state governments often attempt to disrupt native ways of life and unilaterally control land that indigenous persons perceive to be their own.<sup>4</sup>

State governments are naturally wealthier and more powerful than indigenous communities.<sup>5</sup> Therefore, when conflict arises between a state government and an indigenous population, the government party is able to exert control over the indigenous party and dominate the processes that adjudicate indigenous persons’ rights.<sup>6</sup>

The Negev Desert, a region in southern Israel, is home to over 50,000 Negev Bedouins who maintain villages on their ancestral land.<sup>7</sup> The Negev Bedouins have not successfully secured government-recognized land rights to

2. See *About UNPFII*, UNITED NATIONS [UN] PERMANENT FORUM ON INDIGENOUS ISSUES, <http://www.un.org/esa/socdev/unpfii/en/history.html> (last visited Mar. 13, 2011); see also Press Release, UN News Centre, United Nations Adopts Declaration on Rights of Indigenous Peoples (Sept. 13, 2007), available at <http://www.un.org/apps/news/story.asp?NewsID=23794> [hereinafter UN Adopts Declaration].

3. See *infra* Part I.A (explaining that indigenous persons have a connection to the land on which they live, preserve a sense of cultural, social, linguistic and economic identity, and descend from pre-colonial inhabitants of the land).

4. See *infra* Part I.A (referencing examples of state-indigenous land disputes in which the state government opposes indigenous claims for land).

5. See *infra* Part I.B (providing that disputes between state governments and indigenous groups are difficult to resolve due to the power imbalance between the parties).

6. See *infra* Part II.A (highlighting how the position of, and arguments advanced by, a state government are often supported by domestic legal principles that govern adjudication processes).

7. See *infra* Part II.A (discussing the struggle for land between Israel and the indigenous Bedouin Arab population, and explaining that this area has been the main grazing and habitation ground for the Bedouin Arabs for centuries).

the desert their ancestors have lived on for centuries and have passed down to them.<sup>8</sup> The indigenous Bedouin population and the Israeli government compete for the Negev Desert in the sense that each party envisions a different use for the Negev. The Bedouins wish to live, cultivate, and graze on the land, as their ancestors did; the Israeli government would prefer to develop the land into prime real estate.<sup>9</sup> Due to the actions of both parties, the conflict has escalated in recent years; particularly, the Israeli government has demolished Bedouin homes and destroyed hundreds of acres of Bedouin-grown crops in an effort to convince the Bedouin population to respect government policies and relocate from their ancestral land.<sup>10</sup>

In 2007, the Consensus Building Institute (“CBI”), after conducting field research in the region, proposed that the Israeli government and Negev Bedouin community pursue mediation to resolve their dispute for land.<sup>11</sup> Mediation is a short-term, structured, task-oriented, and participatory alternative dispute resolution (“ADR”) process in which parties and a neutral third-party mediator work toward the resolution of a conflict.<sup>12</sup> According to mediation custom, however, parties with a relationship that is characterized by hostility and an imbalance of power are discouraged from pursuing mediation<sup>13</sup> because the more powerful party may intentionally, or even unintentionally,

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8. *See infra* Part II.A (providing that Bedouins have not been successful in their land claims and have no state-recognized rights to the lands on which they reside).

9. *See infra* Part II.A (explaining the Bedouins’ desire to remain on ancestral lands and the government’s desire to develop this land into prime real estate).

10. *See infra* Part II.A (discussing the Israeli government and its recent decision to destroy Bedouin homes and crops in an effort to convince the Bedouin community to relocate from their ancestral land).

11. *See infra* Part II.B (discussing the Consensus Building Institute’s recommendation that the parties mediate their land dispute).

12. *See infra* Part I.B (defining the alternative dispute resolution process of mediation as a short term, structured, task-oriented, participatory process in which parties and a neutral third party mediator work toward the resolution of a conflict).

13. *See infra* Part I.B (discussing the negative effects of a power imbalance on mediation parties).

control the mediation process, precluding a fair and safe mediation process.<sup>14</sup>

This Note examines whether the Negev Bedouins and the Israeli government should pursue mediation to resolve their land dispute, given that the existing power imbalance begs the question of whether reaching a fair settlement is possible. For insight into the use of mediation for parties that have a deep-rooted power imbalance, this Note draws on the use of mediation in another context involving persistent power imbalances: partnerships among individuals with a history of domestic violence. Although domestic relationships are not strictly analogous to the relationship between a state and an indigenous population, victims of domestic violence and indigenous persons face similar obstacles in pursuing mediation. A victim of domestic violence, like an indigenous population, may hesitate to represent his or her true feelings and concerns in fear of the abusive party, and therefore lose bargaining power during the mediation session. However, mediation customs also reveal that if mediators are prepared to safeguard the weaker party's rights and employ pre-mediation screening and safe mediation techniques throughout the process, parties with a power imbalance need not avoid mediation.<sup>15</sup> Given that safe mediation methods are available for parties with a power imbalance and the notable inadequacies of litigation in the context of upholding indigenous population's rights, this Note encourages the Negev Bedouins and the Israeli government to pursue mediation to resolve their dispute over the Negev Desert.

In Part I, this Note elaborates on the rights that indigenous persons have to ancestral land and the sources of international law that support those rights. Part I also discusses the alternative dispute resolution process of

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14. See *infra* Part I.B (elaborating on the ways in which a party power imbalance may preclude a fair mediation process and explaining how a historically inferior and subordinate party to a mediation would be disadvantaged in mediation with the more powerful and abusive party).

15. See *infra* Part II.C (discussing the movement for mediation screening methods and safe techniques to improve mediation sessions between parties with a power imbalance).

mediation and the customary discouragement of mediation between parties with a power imbalance. Part II explores whether the Negev Bedouins and Israeli government should pursue mediation to resolve their land dispute and generally addresses techniques used to monitor mediation sessions between parties with a power imbalance. Part III explores why mediation is better suited to resolve the Israeli government-Negev Bedouin land dispute than is courtroom litigation.

### I. *LAW GOVERNING INDIGENOUS RIGHTS AND MEDIATION CUSTOM IN THE CONTEXT OF A PARTY POWER IMBALANCE*

Exploration of whether the Israeli government and Negev Bedouins should pursue mediation to resolve their land dispute rests, in part, on the legal foundations of indigenous land rights. Accordingly, Part I discusses the ways in which indigenous land rights are rooted in primary sources of international law, i.e., the sources of law that are recognized by Article 38 of the Statute of the International Court of Justice ("ICJ").<sup>16</sup> International conventions, international custom, and general principles of law<sup>17</sup> all support indigenous persons' right to land.<sup>18</sup> It follows that

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16. See Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, T.S. No. 993 (stating that the International Court of Justice ("ICJ") is to decide disputes in accordance with international law and shall apply international conventions, customary law, general principles of law, and judicial decisions to determine the outcome of disputes).

17. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102, reporters notes 1 (1987) (explaining that "Article 38(1) of the Statute of the International Court of Justice, a provision commonly treated as an authoritative statement of the 'sources' of international law" notes international conventions, international customs, and general principles of law as sources of international law).

18. See, e.g., Lillian Aponte Miranda, *Uploading the Local: Assessing the Contemporary Relationship between Indigenous Peoples' Land Tenure Systems and International Human Rights Law Regarding the Allocation of Traditional Lands and Resources in Latin America*, 10 OR. REV. INT'L L. 419, 434 (2008) ("[I]nternational law developments [suggest that] indigenous peoples are subject to special human rights protections with respect to their traditional lands and resources."); see also Russel Lawrence Barsh, *Indigenous Peoples in the 1990s: From Object to Subject of International Law?*, 7 HARV. HUM. RTS. J. 33, 33-35 (1994) (tracing the "growing acceptance of indigenous peoples' collective identity and distinct rights in international law and practice").



indigenous persons may rely on a variety of international law sources to claim rights to ancestral land.

In addition, Part I raises the question of how to best address indigenous property rights and indigenous persons' claims to property by highlighting the alternative dispute resolution practice of mediation in this context. To reach the question of whether mediation practice is appropriate in the context of a state-indigenous land dispute, this Note will examine the use of established mediation customs to address disputes between parties with a history of domestic violence.<sup>19</sup>

### A. *Law Governing Indigenous Rights*

Before this Section discusses the international law that provides a basis for indigenous land rights, it will first define who qualifies as indigenous persons. The international community has yet to clearly state whom indigenous rights protect or to agree on a definition of "indigenous."<sup>20</sup>

Though the international community may not be able to rely on a unanimously agreed upon definition, commonalities arise between the various conceptions of what it means to be "indigenous." Most definitions highlight that indigenous persons (1) have a connection to the land on which they reside; (2) preserve a sense of cultural, social, and economic identity; and (3) descend from pre-colonial inhabitants of the land.<sup>21</sup> The official

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19. See *infra* Part I.B (discussing the mediation custom that discourages parties with a power imbalance from pursuing mediation).

20. See John Alan Cohan, *Environmental Rights of Indigenous Peoples under the Alien Tort Claims Act, the Public Trust Doctrine and Corporate Ethics, and Environmental Dispute Resolution*, 20 UCLA J. ENVTL. L. & POL'Y 133, 136 (2001) ("No agreed-upon definition of the term 'indigenous peoples' exists."); see also Sompong Sucharitkul, *The Inter-Temporal Character of International and Comparative Law Regarding the Rights of the Indigenous Populations of the World*, 50 AM. J. COMP. L. 3, 6 (2002) (explaining that "indigenouness" is not clearly defined, and highlighting that the UN Draft Declaration on the Rights of Indigenous Peoples did not attempt to define "indigenous peoples").

21. See, e.g., Convention Concerning Indigenous and Tribal Peoples in Independent Countries art. 1, June 27, 1989, 28 I.L.M. 1382 [hereinafter ILO Convention] (suggesting that indigenous protection be afforded to persons that have a connection to the land on which they live, preserve a sense of cultural,

United Nations' definition of "indigenous" relies on some of the above characteristics and additionally makes use of the following criterion: indigenous persons self-identify as indigenous, enjoy a historical continuity, are a non-dominant population, reside on ancestral territories, and preserve an ethnic identity.<sup>22</sup>

Using these definitions of what it means to be indigenous, the following sub-sections discuss the sources of international law that support indigenous rights to land: international conventions and treaty law, customary international law, and general international legal principles.

### 1. International Conventions and Treaties Support Indigenous Persons' Claims to Ancestral Land

A number of conventions and treaties create grounds for indigenous claims to ancestral land. These instruments either safeguard the right to self-determination, assist indigenous persons to maintain their culture and way of life, or specifically advocate for indigenous persons' right to land.<sup>23</sup> To highlight but

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social, and economic identity, and descend from pre-colonial inhabitants of the land); Cohan, *supra* note 20, at 136 (stating that most define indigenous persons as persons who "descend from pre-colonial inhabitants" of the land, have a connection to the land on which they live, and "maintain a strong sense of cultural, social, economic and linguistic identity").

22. See Special Rapporteur of the Sub-commission on Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination against Indigenous Populations*, ¶¶ 379–80, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4 (Vol. V) (1987) (by José R. Martínez Cobo); see also Carlo Osi, *Understanding Indigenous Dispute Resolution Processes and Western Alternative Dispute Resolution Cultivating Culturally Appropriate Methods in Lieu of Litigation*, 10 *CARDOZO J. CONFLICT RESOL.* 163, 172 (2008) (noting that the UN looks at the characteristics of self-identification, historical continuity, non-dominance, ancestral territories, and ethnic identity to define "indigenous"); Rachael Grad, Note, *Indigenous Rights and Intellectual Property Law: A Comparison of the United States & Australia*, 13 *DUKE J. COMP. & INT'L L.* 203, 204 (2002) (explaining that the UN uses the characteristics of historical continuity, non-dominance, ancestral territories, and ethnic identity to define "indigenous").

23. See U.N. Charter art. 1 (affirming that the right of self-determination for all people rests on their ability to freely determine their political status and freely pursue their economic, social, and cultural development); ILO Convention, *supra* note 21, art. 1 (serving as the foremost convention to specifically address the need for indigenous rights and to outline the responsibilities of governments in promoting and protecting the human rights and traditions of indigenous persons); International Covenant on Civil and

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Political Rights art. 27, Dec. 16, 1966, S. Treaty Doc. No. 95-20 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR] (creating collective rights for ethnic, religious, or linguistic minorities within states by stating that such “minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language”); International Covenant on Economic, Social and Cultural Rights art. 2, Dec. 16, 1966, S. Treaty Doc. No. 95-19 (1978), 993 U.N.T.S. 3 [hereinafter ICESCR] (“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.”); International Convention on the Elimination of All Forms of Racial Discrimination art. 1, Dec. 21, 1965, S. Treaty Doc. No. 95-18 (1978), 660 U.N.T.S. 195 (protecting against racial discrimination, and defining racial discrimination as “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”); United Nations Declaration on the Rights of Indigenous Peoples art. 10, G.A. Res. 61/295, U.N. Doc. A/61/L.67 (Sept. 7, 2007) [hereinafter UNDRIP] (“Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.”); Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities arts. 1–4, G.A. Res. 47/135, U.N. Doc. A/Res/47/135 (Feb. 3, 1993) (addressing the rights of minorities and states’ obligations to help minorities preserve “national or ethnic, cultural, religious and linguistic identity,” to ensure that minorities have the freedom of expression and the ability to develop their culture, to associate and organize among themselves, to participate in decisions regarding the minority, to exercise minority rights, both individual and in groups, and to education about minorities); Universal Declaration of Human Rights arts. 1–2, G.A. Res. 217 (III)A, U.N. Doc A/RES/217(III) (Dec. 10, 1948) (asserting the view that all human beings are equal and entitled to rights regardless of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”); International Conference on Population and Development, Sept. 5–13, 1994, *Report of the International Conference on Population and Development*, ¶ 6.27, U.N. Doc. A/CONF.171/13 (Oct. 18, 1994) (“Governments should respect the cultures of indigenous people and enable them to have tenure and manage their lands, protect and restore the natural resources and ecosystems on which indigenous communities depend for their survival and well-being and, in consultation with indigenous people, take this into account in the formulation of national population and development policies.”); World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, ¶ 20, U.N. Doc. A/CONF.157/23 (July 12, 1993) (recognizing the “inherent dignity and the unique contribution of indigenous people to the development and plurality of society and strongly reaffirm[ing] the commitment of the international community to their economic, social and cultural well-being and their enjoyment of the fruits of sustainable development. States should ensure the full

a few of these conventions, the International Covenant on Civil and Political Rights of 1976 created collective rights for ethnic, religious, or linguistic minorities within states by pronouncing that such minorities should not be denied the right, in community with the other members of their group, to enjoy their culture, including cultural practices that make use of ancestral land.<sup>24</sup> In the same year, the International Covenant on Economic, Social and Cultural Rights created collective economic and cultural rights for minority populations within a state.<sup>25</sup> More recently, the UN International Conference on Population and Development agreed that indigenous peoples should be granted rights to the land on which they reside and the natural resources and ecosystems on which indigenous persons depend.<sup>26</sup> In 2007, the Declaration on the Rights of Indigenous Peoples declared that states shall not forcibly remove indigenous persons from their lands, nor relocate indigenous persons without obtaining “the free, prior, and informed consent of the indigenous persons affected.”<sup>27</sup> The conventions and treaties described are among the number of conventions and treaties that support the claim that indigenous persons have rights to ancestral land.

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and free participation of indigenous people in all aspects of society, in particular in matters of concern to them.”).

24. See ICCPR, *supra* note 23, art. 27 (creating collective rights for ethnic, religious, or linguistic minorities within states by stating that such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language).

25. See ICESCR, *supra* note 23, art. 2 (creating economic, social, and cultural collective rights for populations within a state).

26. See *Report of United Nations International Conference on Population and Development*, *supra* note 23, ¶ 6.27 (affirming that indigenous peoples should be able to have rights to the land on which they reside, and to protect the natural resources and ecosystems on which they depend).

27. See UNDRIP, *supra* note 23, art. 10 (“Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.”).

## 2. Customary International Law Supports Indigenous Persons' Claims to Ancestral Land

In addition to international conventions and treaties, customary international law supports indigenous persons' right to land. Customary international law is governed by state practice and *opinio juris*<sup>28</sup>—the international doctrine that stipulates that a state must have acted under a legal obligation for the action to contribute to customary law.<sup>29</sup> Customary law has contributed to the development of specific rights for indigenous persons and serves as another source of protection for indigenous persons.

Setting the stage for the creation of customary international law, the UN Economic and Social Council, in 1982, established the Working Group on Indigenous Populations,<sup>30</sup> a group comprised of experts on human rights protection.<sup>31</sup> The establishment of such a group demonstrated that international institutions had an increased interest in exploring the unique predicaments of native populations and in protecting their rights. This interest to protect the rights of indigenous persons grew more explicit when the Inter-American Court of Human Rights issued a groundbreaking decision for indigenous claimants. *Mayagna Community of Awas Tingni v. Nicaragua* is a case in which the Mayagna Awas Tingni indigenous community alleged that Nicaragua failed to protect their

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28. See *Continental Shelf (Libya v. Malta)*, 1985 I.C.J. 13, ¶ 27 (June 3) (“It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States . . .”).

29. See BLACK’S LAW DICTIONARY 1201 (9th ed. 2009) (defining *opinio juris* as “[t]he principle that for conduct or a practice to become a rule of customary international law, it must be shown that nations believe that international law (rather than moral obligation) mandates the conduct or practice”).

30. See *United Nations Declaration on the Rights of Indigenous Persons*, UN PERMANENT FORUM ON INDIGENOUS ISSUES, <http://www.un.org/esa/socdev/unpfii/en/declaration.html> (last visited Mar. 13, 2011) (“In 1982 the Economic and Social Council (ECOSOC) established the Working Group on Indigenous Populations (WGIP) with the mandate to develop a set of minimum standards that would protect indigenous peoples.”).

31. See *Working Group on Indigenous Populations*, OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS, <http://www2.ohchr.org/english/issues/indigenous/groups/wgip.htm#mandate> (last visited Mar. 13, 2011) (“The Working Group is composed of five experts from the Sub-Commission on the Promotion and Protection of Human Rights.”).

indigenous rights to own ancestral land.<sup>32</sup> This case is the first international decision to recognize the communal property rights of indigenous persons.<sup>33</sup> The *Awas Tingni* court recognized that, in the absence of real title to property, indigenous persons may use possession of land as a sufficient basis for their claims to property.<sup>34</sup> Ultimately, the court held that indigenous persons may obtain state-recognized property rights even though they lack traditional real title documents.<sup>35</sup> The decision led the way for others like it, and the legal community has since relied on the *Awas Tingni* decision as persuasive legal authority in the arena of indigenous property rights.<sup>36</sup>

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32. See *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua (Awas Tingni)*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 2 (Aug. 31, 2001); see also *id.* ¶ 148 (“[I]t is the opinion of [the] Court that article 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property . . .”).

33. See Leonardo J. Alvarado, *Prospects and Challenges in the Implementations of Indigenous Peoples’ Human Rights in International Law: Lessons from the Case of Awas Tingni vs. Nicaragua*, 24 ARIZ. J. INT’L & COMP. L. 609, 609 (2007) (“*Mayagna (Sumo) Community of Awas Tingni v. Nicaragua* is the first judgment by an international tribunal to recognize the communal property rights of indigenous peoples and to also mandate a state to protect those rights. The *Awas Tingni* case has represented an important landmark for indigenous peoples in the Americas and beyond . . .”); see also Claudio Grossman, *The Inter-American System of Human Rights: Challenges for the Future*, 83 IND. L.J. 1267, 1278 (2008) (“The Court’s decision in the case of the Awas Tingni community was the first international decision to recognize the right to communal property.”).

34. See *Awas Tingni*, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 151 (“[P]ossession of the land should suffice for indigenous communities lacking real title to property of land to obtain official recognition to that property, and for consequent registration.”).

35. See *id.*

36. See Alvarado, *supra* note 33, at 643 (describing how the *Awas Tingni* decision established international legal precedent in the domain of indigenous property rights); see, e.g., *Sawhoyamaxa Indigenous Comty. v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 128 (Mar. 29, 2006), (holding that “traditional possession of . . . lands by indigenous people has equivalent effects to those of a state-granted full property title . . . [and] traditional possession entitles indigenous people to demand official recognition and registration of property title”); *Maya Indigenous Cmty. of the Toledo Dist. v. Belize*, Case No. 12.053, Inter-Am. Comm’n H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1, ¶ 142 (2004) (holding that the “central elements to the protection of indigenous property rights is the requirement that states undertake effective and fully informed consultations with indigenous communities regarding acts or decisions that may affect their traditional territories” and ensuring that decisions affecting indigenous land are

Persistent international efforts to promote the customary land rights of indigenous persons culminated in the UN General Assembly's decision to adopt the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP").<sup>37</sup> The UNDRIP is a foundational document for indigenous rights,<sup>38</sup> and its passage revealed that an overwhelming number of states support indigenous property rights: 143 countries approved the document and only four opposed it.<sup>39</sup> Since the initial vote, however, the four opposing states have endorsed the document; in December 2010, the United States was the final country to do so.<sup>40</sup>

Though the UNDRIP does not bind states, it reinforces and supports state decisions to pursue more just standards for indigenous populations.<sup>41</sup> Affirming that indigenous persons have a right to self-determination, the UNDRIP contends that by

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"based upon a process of fully informed consent on the part of the indigenous community as a whole"); *Dann v. United States*, Case 11.140, Inter-Am. Comm'n H.R., Report No. 75/02, OEA/Ser.L./V/II.117, doc. 1 rev. 1, ¶ 129 (2002) (applying the same interpretation the Inter-American system used in *Awas Tingni* to hold that international instruments, though not yet approved by the OAS or the United States, may be called upon to apply the provisions of other human rights instruments within the context of indigenous rights).

37. See Osi, *supra* note 22, at 177 ("As part of the ongoing efforts to acknowledge and promote the rights of Indigenous or Aboriginal peoples . . . there has been a strong lobby for the UN to confront these issues. On September 13, 2007, the UN General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples."); see also UN Adopts Declaration, *supra* note 2 ("[T]he importance of this document for indigenous peoples and, more broadly, for the human rights agenda, cannot be underestimated. By adopting the Declaration, we are also taking another major step forward towards the promotion and protection of human rights and fundamental freedoms for all." (quoting UN General Assembly President Sheikh Haya)).

38. See Osi, *supra* note 22, at 177; UN Adopts Declaration, *supra* note 2 (explaining the significance of the UNDRIP for indigenous persons).

39. See UN Adopts Declaration, *supra* note 2.

40. See Press Release, UN News Centre, United States' Backing for Indigenous Rights Treaty Hailed at UN (Dec. 17, 2010), available at <http://www.un.org/apps/news/printnewsAr.asp?nid=37102> ("With its announcement, the US has now joined the other three countries in endorsing the treaty . . .").

41. See *United Nations Declaration on the Rights of Indigenous Persons*, UN PERMANENT FORUM ON INDIGENOUS ISSUES, <http://www.un.org/esa/socdev/unpfii/en/declaration.html> (last visited Mar. 13, 2011) ("[T]he [UNDRIP] will not be legally binding for Member States. Nevertheless, it will have a major effect on indigenous peoples worldwide in regards to their rights."); see also UN Adopts Declaration, *supra* note 2 (noting that the UNDRIP does not bind states but nevertheless is evident of and encourages international progress in the indigenous rights domain).

virtue of this right, indigenous persons have the right to social, economic, and cultural development.<sup>42</sup> The UNDRIP elaborates on these rights and explains that among others, indigenous persons are entitled to strengthen their own institutions and cultures, and during these processes, stay true to their indigenous traditions.<sup>43</sup> The UNDRIP prohibits discrimination against indigenous peoples and urges states to not only permit, but invite indigenous persons to participate in all matters that concern them, including land rights issues.<sup>44</sup>

Specifically, Articles 8 and 10 of the UNDRIP address indigenous persons' right to property.<sup>45</sup> Article 8 protects indigenous persons from forced assimilation or destruction of their culture, and calls for states to establish mechanisms to prevent acts that would compromise indigenous lifestyles and divest indigenous persons of their land.<sup>46</sup> Article 10 asserts that indigenous persons should not be forcibly removed from their lands, nor relocated without free, prior, and informed consent, as well as just compensation.<sup>47</sup> The committee work, legal decisions, and declaration discussed above support the notion that the international community has demonstrated an interest in protecting the land rights of indigenous persons, and

42. See UNDRIP, *supra* note 23, art. 3 ("Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.").

43. See *id.* art. 11(1) ("Indigenous peoples have the right to practice and revitalize their cultural traditions and customs.").

44. See *id.* art. 2 (stating that indigenous persons "have the right to be free from any kind of discrimination"); *id.* arts. 18, 19 (state that indigenous persons have the right to participate in processes that may affect them and their legal rights).

45. See *id.* arts. 8, 10 (asserting that states should prevent and rectify any actions that would dispossess or deprive indigenous persons of their land).

46. See *id.* art. 8(2) ("States shall provide effective mechanisms for prevention of, and redress for: (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities; (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources; (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights; (d) Any form of forced assimilation or integration; (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.").

47. See *id.* art. 10 ("Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.").



continues to create a basis for indigenous land rights within customary international law.<sup>48</sup>

### 3. General International Legal Principles Support Indigenous Persons' Claims to Ancestral Land

General international legal principles are legal principles that are common to a large number of systems of municipal law.<sup>49</sup> The Inter-American Commission, a human rights protection entity of the Organization of American States,<sup>50</sup> agrees that general international legal principles support indigenous persons' right to land.<sup>51</sup> The Inter-American Commission provided the following ruling in response to a petition for title to Shoshone Native American ancestral lands:

[T]he [Inter-American] Commission considers that general international legal principles applicable in the context of indigenous human rights to include: the right of indigenous peoples to legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property; the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied; and where property and user rights of indigenous peoples arise from rights existing prior to the creation of a state, recognition by that state of the permanent and inalienable title of indigenous peoples relative thereto and to have such title changed only by mutual consent

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48. See Lorie M. Graham, *Resolution of Claims to Self Determination: The Expansion and Creation of Dispute Settlement Mechanisms*, 10 ILSA J. INT'L & COMP. L. 385, 418 (2004) ("An abundance of activity around indigenous people's rights has unfolded at the UN and elsewhere during the last 25 years . . ."); see also Osi, *supra* note 22, at 177.

49. See ICJ Statute, *supra* note 16, art. 38 (stating that general principles of law are those that are recognized by civilized nations); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(4) ("General principles [are] common to the major legal systems . . .").

50. See *What is the IACHR?*, INTER-AM. COMM'N ON HUMAN RIGHTS,, <http://www.cidh.oas.org/what.htm> (last visited Mar. 13, 2011) ("The Inter-American Commission on Human Rights (IACHR) is one of two bodies in the inter-American system for the promotion and protection of human rights . . . Its mandate is found in the [Organization of American States] Charter and the American Convention on Human Rights.").

51. See *Dann v. United States*, Case 11.140, Inter-Am. Comm'n H.R., Report No. 75/02, OEA/Ser.L./V/II.117, doc. 1 rev. 1, ¶ 130 (2002).

between the state and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property. This also implies the right to fair compensation in the event that such property and user rights are irrevocably lost.<sup>52</sup>

Given that the Inter-American Commission represents its member states, the ruling stands for the proposition that a number of states consider general international legal principles to be a source of protection for indigenous land rights and a show of support for the notion that indigenous persons have the right to participate in government processes that effect their rights to land.

Indigenous rights to ancestral land continue to develop in, and are supported by, international conventions and treaty law, customary law, and general international legal principles. It follows that indigenous persons may rely on a variety of international law sources to claim rights to the ancestral land on which they reside. The Negev Bedouins accordingly have a strong legal basis to claim rights to ancestral land and participate in processes that affect their status as indigenous persons. Given this recognized right to ancestral land, this Note argues that the Israeli government should involve the Bedouins in decision making rather than unilaterally decide the fate of the Negev Bedouins. In this collective effort, the alternative dispute resolution process of mediation may assist the Israeli government and Negev Bedouins to communicate effectively and reach consensus on this issue. However, as will be examined in Part II, the Israeli government has arguably used its power and resources to exert control over the Bedouin population in an effort to encourage the Bedouin population to respect state policies. Given the possible imbalance of power between the state and indigenous party, the following Section discusses mediation generally and questions whether mediation is a suitable process for parties with a persistent power imbalance.

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52. *Id.*

### B. *Mediation Custom and Party Power Imbalance*

State governments often oppose land right claims by indigenous persons. Because states have more resources and power than indigenous populations, governments are in a better position to exert control over the indigenous party in a dispute, therefore the disputing parties are likely to experience a power imbalance during mediation processes.<sup>53</sup> This Section discusses whether mediation is generally suitable for parties that experience a power imbalance before reaching the question of whether to resolve the Israeli government-Bedouin land dispute by mediation.

ADR refers to a range of processes that parties may employ to resolve disputes outside of a courtroom or the adversarial system<sup>54</sup>; such processes have gained, and continue to gain, popularity among practitioners and disputants.<sup>55</sup> The benefits of ADR processes as compared to more traditional adversarial processes are many, as ADR enables parties to efficiently manage and resolve disputes at a minimal cost, and offers parties the option of avoiding contentious court processes that are likely to have adverse effects on their relationships.<sup>56</sup> Parties engaging in

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53. See Eileen Luna-Firebaugh, 'Att Hascu 'Am O 'I-oi? What Direction Should We Take?: The Desert People's Approach to the Militarization of the Border, 19 WASH. U. J.L. & POL'Y 339, 362 (advising the indigenous tribes of North America to unite to combat the power imbalance held by their respective federal governments); see generally Andrea Gaye McCallum, *Dispute Resolution Mechanisms in the Resolution of Comprehensive Aboriginal Claims: Power Imbalance Between Aboriginal Claimants and Governments*, 2 MURDOCH U. ELECTRONIC J.L. (1995), <http://www.murdoch.edu.au/elaw/issues/v2n1/mccallum21.html> (discussing how disputes between different cultures are difficult to resolve, especially when the parties consist of an Aboriginal group and a state government, as the state party is more powerful than the Aboriginal group).

54. See JACQUELINE NOLAN-HALEY, *ALTERNATIVE DISPUTE RESOLUTION IN A NUTSHELL* 2 (3d ed. 2008) (discussing how alternative dispute resolution is an umbrella term for a number of less adversarial resolution processes).

55. See, e.g., *id.* at 8 ("Over the last two decades, we have seen the beginning of a systematic implementation of ADR in the legal system . . ."); see also Christopher J. Marchand, *Arbitration and Long-Term Health Care*, 38 MD. B.J. 32, 34 (2005) ("In general, alternative dispute resolution ("ADR") is an increasingly popular process employed to resolve disputes between feuding parties who would otherwise end up embroiled in lengthier and more costly litigation in the civil courts.").

56. See 4 AM. JUR. 2D, *Alternative Dispute Resolution* § 1 (2010) ("[ADR] mechanisms may be less expensive, faster, less intimidating, more sensitive to the disputants' concerns, and more responsive to the underlying problems.").

the ADR process of mediation are more likely to maintain amicable relations in the aftermath of the dispute, due to the presence of a neutral third-party mediator who assists the parties in communicating effectively.<sup>57</sup> By definition, mediation is a “short-term, structured, task-oriented, participatory intervention process” in which parties and a neutral third-party mediator work toward the resolution of a conflict.<sup>58</sup> The mediator assists the parties to resolve their conflict, though ultimately, the parties shape the final agreement.<sup>59</sup> The presence of a neutral third-party mediator is especially useful for parties that do not share the same culture, as the parties may call on the mediator to help them communicate in culturally sensitive ways and in a manner that would resonate best with the opposing party.<sup>60</sup>

Mediation is unlike adversarial litigation in a number of ways: (1) parties who opt to resolve their disputes in court have a decision imposed on them;<sup>61</sup> (2) the parties to mediation shape

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57. See GOLDBERG ET AL., *DISPUTE RESOLUTION, NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 108 (5th ed. 2007) (“Some commentators view mediation in all contexts as valuable primarily to enhance the parties’ ‘self-determination and party interaction or engagement’ and to help the parties’ communication so that they understand and appreciate each other’s perspectives . . . and ‘bridge human differences’ . . .” (quoting ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION* 22, 95 (2005)); see also NOLAN-HALEY, *supra* note 54, at 4 ([T]he mediation process . . . is known to work well where parties have an on-going or prior relationship.”).

58. See NOLAN-HALEY, *supra* note 54, at 70 (“Mediation is generally understood to be a short-term, structured, task-oriented, participatory intervention process. Disputing parties work with a neutral third party, the mediator, to negotiate towards a resolution of their conflict.”); see also BLACKS LAW DICTIONARY 841 (9th ed. 2004) (“A method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution.”).

59. See *supra* note 58 (providing that a mediator assists the parties to shape their own agreement).

60. See GOLDBERG ET AL., *supra* note 57, at 566 (“This research suggests that negotiating effectiveness may be lost because of two effects of culture: the inability of negotiating approaches to work as well across cultures and the fact that the other negotiator may come from a negotiating culture not suited to the creation of joint gains.”); see also Ileana Dominguez-Urban, *The Messenger as the Medium of Communication: The Use of Interpreters in Mediation*, 1997 J. DISP. RESOL. 1, 49 (1997) (explaining that mediators are expected to be sensitive to cultural differences between the parties).

61. See Robert A. Baruch Bush, *Staying in Orbit, or Breaking Free: The Relationship of Mediation to the Courts over Four Decades*, 84 N.D. L. REV. 705, 753 (2008) (“The distinguishing characteristic of mediation was supposed to be that the parties themselves, rather than the third party, would hold the power to

the decision or settlement agreement;<sup>62</sup> and (3) the parties develop a relationship through mediation, and it is out of respect for this new relationship that parties are encouraged to comply with the terms of their self-crafted settlement agreement.<sup>63</sup>

Traditional conceptions of mediation involve parties that have voluntarily agreed to pursue mediation and are equal in bargaining power.<sup>64</sup> Today in the United States, this traditional approach to mediation is being challenged by court-mandated mediation sessions, as parties with a bargaining-power disparity may be improperly instructed to mediate their dispute.<sup>65</sup> Specifically in the context of family law cases in which domestic violence is present, mediation is often not regarded as a suitable

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make ultimate decisions affecting outcome. Even in emerging ethical standards for the field, a key principle was preserving party self-determination . . . ."); see also Nancy A. Welsh, *The Place of Court-Connected Mediation in a Democratic Justice System*, 5 CARDOZO J. CONFLICT RESOL. 117, 135–36 (2004) ("Mediation proponents emphasized the central role to be played by citizens in disputes. Citizens—not judges or attorneys or other professionals—would communicate and negotiate directly with each other, identify the issues to be discussed, determine the substantive norms that were legitimate and relevant (including the pursuit of harmony and reconciliation if they wished), create the options for settlement, and control the final decision regarding whether or not to settle and on what terms. The mediator's role was to facilitate and to help these disputing parties find their own voices and solutions.").

62. See *supra* note 61 (discussing that the parties to mediation set the terms of their settlement agreement).

63. See Nancy A. Welsh, *Court-Ordered ADR: What Are the Limits?*, 12 HAMLINE J. PUB. L. & POL'Y 35, 49 (1991) (categorizing mediation as a non-binding process); see also GOLDBERG ET AL., *supra* note 57, at 108 (explaining mediation as a transformative process that assists parties to empathize with one another and develop a relationship in the aftermath of a dispute (quoting ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION* 22, 95 (2005))).

64. See Andree G. Gagnon, *Ending Mandatory Divorce Mediation for Battered Women*, 15 HARV. WOMEN'S L.J. 272, 274 (1992) ("The basic elements are voluntary participation, equality or rough parity of bargaining power, neutrality on the part of the mediator, and confidentiality."); see also Gabriel H. Teninbaum, *Easing the Burden: Mediating Misdemeanor Criminal Matters*, 62 DISP. RESOL. J. 63, 64 (2007) (explaining that mediation, as opposed to litigation, offers parties an opportunity to participate in the resolution process, and is intended for parties with equal bargaining power).

65. See James A. Beha II, *Mediation in Commercial Cases Can Be Very Effective for Clients*, 74 N.Y. ST. B.J. 10, 10 (2002) (explaining that mediation is a voluntary process, but it is not unusual for courts to order parties to civil litigation to mediate their cases). See generally GOLDBERG ET AL., *supra* note 57, at 402–28 (discussing the rising trend to impose mediation on parties to cases).

dispute resolution process.<sup>66</sup> Practitioners who mediate disputes between parties with a history of domestic violence have met, and continue to meet, resistance from their colleagues.<sup>67</sup> The power imbalance that is inherent in a domestic violence relationship has the potential to interfere with the victims' ability to address their concerns while in a mediation session with the abuser.<sup>68</sup> In addition, mediation is characterized as an amicable dispute resolution process; therefore the mediation climate may discourage victims from expressing their repressed emotions, muffling victims when they attempt to express feelings of anger.<sup>69</sup>

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66. See JAY E. GREINIG, 1 *ALTERNATIVE DISPUTE RESOLUTION* (3d ed.) § 21:11 (2010) ("Mediation is generally inappropriate where one spouse has a history of abusive behavior toward the other."); see also Sarah Krieger, Note, *The Dangers of Mediation in Domestic Violence Cases*, 8 *CARDOZO WOMEN'S L.J.* 235, 242 (2002) (explaining the risks and issues associated with mediation in the context of domestic violence cases).

67. See generally Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 *YALE L.J.* 1545 (1991) (highlighting the disadvantages of mediation for women generally, and battered women in divorce proceedings); Barbara J. Hart, *Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation*, 7 *MEDIATION Q.* 317 (1990) (discussing the risk associated with mediating domestic violence cases for both women and children); Kelly Rowe, Comment, *The Limits of the Neighborhood Justice Center: Why Domestic Violence Cases Should Not Be Mediated*, 34 *EMORY L.J.* 855 (1985) (contending that domestic violence cases are not appropriate for mediation).

68. See Rowe, *supra* note 67, at 864 ("The passivity and subordination of the battered woman make it difficult for her to assert herself in a bargaining situation, negotiate for her needs, and reject solutions which do not meet those needs. She is apt to be more easily worn down, more suggestible, and less able to be confrontive than the average disputant, whether in domestic or nondomestic situations. Negotiation may also be more difficult for the victim due to her fear of the batterer."); see also Catherine F. Klein & Leslye E. Orloff, *Representing a Victim of Domestic Violence*, *FAM. ADVOC.*, Winter 1995, at 25, 26–27 (explaining mediation as "incompatible with a relationship in which there is disproportionate bargaining power due to fear or intimidation").

69. See Grillo, *supra* note 67, at 1572 ("Although mediation is claimed to be a setting in which feelings can be expressed, certain sentiments are often simply not welcome. In particular, expressions of anger are frequently overtly discouraged. This discouragement of anger sends a message that anger is unacceptable, terrifying and dangerous. For a person who has only recently found her anger, this can be a perilous message indeed. This suppression of anger poses a stark contrast to the image of mediation as a process which allows participants to express their emotions."); see also Douglas D. Knowlton & Tara Lea Muhlhauser, *Mediation in the Presence of Domestic Violence: Is It the Light at the End of the Tunnel or Is a Train on the Track?*, 70 *N.D. L. REV.* 255, 266 (1994) ("[T]he mediation process does not validate the victim's anger or emotions. They argue that there is a need for such validation in order for there to be some therapeutic gain for the victim. The critics assert that mediation may make the victim feel guilty and selfish.").

The controversy that surrounds the decision to mediate disputes between parties with a history of domestic violence is relevant to the question of whether mediation is appropriate to resolve disputes between a state government and an indigenous population. State governments often assume a position analogous to that of a domestic violence abuser, as state governments often mistreat indigenous persons and fail to respect their rights.<sup>70</sup> As applied to the subjects of this Note, this raises the parallel fear that, should the Israeli government and Bedouin stakeholders mediate their land dispute, the Bedouin stakeholders will have less bargaining power during mediation and be further disadvantaged. Being the subordinate party, Negev Bedouin stakeholders may hesitate to fully address their true concerns during mediation in fear of negative consequences. Similarly, should Bedouin stakeholders disregard the consequences of conversing candidly with the government, mediation may muffle the voices of Bedouin stakeholders, as mediators often discourage therapeutic, yet unproductive, expressions of anger and resentment. Given the possible disadvantages of mediation, Part II of this Note will consider whether the power imbalance between the Negev Bedouins and Israel stands as a barrier to employing mediation to resolve the dispute for the Negev.

## *II. IN LIGHT OF THE POWER IMBALANCE BETWEEN THE PARTIES, IS MEDIATION A RESPONSIBLE DISPUTE RESOLUTION PROCESS?*

While practitioners historically opposed mediation for parties with a history of a power imbalance, mediation disputes between such parties is growing to be an acceptable practice so long as the mediator employs pre-screening mediation and safe mediation techniques to protect the subordinate party. This growing acceptance, applied to the context of indigenous-state disputes for land, suggests that indigenous and government parties with a

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70. See *supra* note 53 (explaining that state parties exert control over and are more powerful than indigenous parties in disputes for land).

power imbalance need not avoid mediation to settle their disputes.

Section A of Part II discusses the relationship between the Israeli government and the Negev Bedouins and reveals the parties to have a power imbalance. Section B primarily discusses the institutional support to mediate the Israeli government-Bedouin land dispute. Section C discusses the state and transnational institutions that support mediation in the context of state-indigenous disputes.

A. *The Power Imbalance between the Israeli Government and the Negev Bedouins*

The history of the Negev Bedouins and their relationship with the Israeli government shed light on the question of whether the Israeli government and the Bedouins have a power imbalance, and ultimately, whether the parties should pursue mediation to resolve their land dispute.

The Negev Bedouins are indigenous persons<sup>71</sup> and identify as an ethnic minority population within the Palestinian minority in Israel.<sup>72</sup> The Bedouins reside on and cultivate Negev Desert land and have created villages that Israel recognizes as not being owned by the Bedouins but by the state.<sup>73</sup> Nevertheless, Bedouins continue to claim

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71. See *supra* note 22 (explaining that the UN uses the characteristics of self-identification, historical continuity, non-dominance, ancestral territories, and ethnic identity to define “indigenous”).

72. See Yehuda Gruenberg, Note, *Not All Who Wander Should Be Lost: The Rights of Indigenous Bedouins in the Modern State of Israel*, 34 *BROOK. J. INT’L L.* 185, 189 (2008) (documenting that the Bedouin population is a minority population within the Arab minority population in Israel); see also Yosef Ben-David, *The Bedouin In Israel*, JEWISH VIRTUAL LIBRARY, [http://www.jewishvirtuallibrary.org/jsource/Society\\_&\\_Culture/Bedouin.html](http://www.jewishvirtuallibrary.org/jsource/Society_&_Culture/Bedouin.html) (last visited Mar. 13, 2011) (noting that the Bedouin population is a minority within the Arab minority in Israel).

73. See CONSENSUS BUILDING INST., *CONFLICT ASSESSMENT REPORT: DEVELOPMENT DISPUTES IN KSEIFE AND UM BATIN 5* (2006) (on file with author) [hereinafter CBI REPORT] (“[The Bedouins] date their ownership claims back to before the establishment of the state of Israel”); see also Oren Yiftachel, *Bedouin Arabs and the Israeli Settler State: Land Policies and Indigenous Resistance*, in *THE FUTURE OF INDIGENOUS PEOPLES: STRATEGIES FOR SURVIVAL AND DEVELOPMENT* 21–47 (Duane Champagne & Ismael Abu-Saad eds., 2003) (discussing the struggle for land between the state of Israel and the indigenous Bedouin Arab



ownership to this land, and the Bedouins have an interest in gaining state-recognized legal rights to the land on which their ancestors have resided and cultivated. Bedouins have brought their land claims to the Israeli judicial system, and all have been denied redress for lack of sufficient documentation in accordance with Israeli land law.<sup>74</sup>

The Israeli government and the Negev Bedouins have a turbulent relationship that is characterized by mistrust,<sup>75</sup> which has increased as a result of a policy response to the Bedouin land dispute, known as the “Sharon five-year plan.”<sup>76</sup> The Israeli government arguably developed this

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population in the south of Israel and explaining that, for centuries, this area was the main grazing and habitation ground for the Bedouin Arabs).

74. See HUMAN RIGHTS WATCH, *OFF THE MAP: LAND AND HOUSING RIGHTS VIOLATIONS IN ISRAEL'S UNRECOGNIZED BEDOUIN VILLAGES* 25 (2008), available at <http://www.hrw.org/en/reports/2008/03/30/map> (“Despite attempts over the years, including appeals to the Israeli High Court of Justice, no Bedouin has ever succeeded in registering land in his/her own name, for lack of a *tabu* ownership deed that is needed to prove ownership under Israeli law. Many Bedouin have other documentation proving long-term possession and use of the land—some, for example, showed Human Rights Watch tax receipts paid to Ottoman and British authorities, tribal land court documents, or sales contracts with other Bedouin bearing official Ottoman or British stamps. The failure of the courts and litigation to redress the land rights of the Bedouin has led some to suggest that a different approach is needed.”); see also SHLOMO SWIRSKI & Yael HASSON, ADVA CENTER, *INVISIBLE CITIZENS: ISRAELI GOVERNMENT POLICY TOWARD THE NEGEV BEDOUIN* 4 (2006), available at <http://www.adva.org/uploaded/NegevEnglishSummary.pdf> (“As early as 1950, Bedouin took their land claims to court. For its part, the state contended that the Bedouin had no proof of ownership; moreover, it contended that the certificates of tax payment cited as proof of ownership had gotten lost in the state archives.”).

75. See CBI REPORT, *supra* note 73, at vii (“Across the Negev . . . relationships between Bedouin communities and the State are extremely poor, characterized by a substantial mutual mistrust, and fueled by perceptions of discrimination on the one hand, and defiance of the laws of the State on the other.”); see also Talia Berman-Kishony, *Bedouin Urbanization Legal Policies in Israel and Jordan: Similar Goals, Contrasting Strategies*, 17 *TRANSNAT'L L. & CONTEMP. PROBS.* 393, 393 (2008) (“Disputes between the indigenous Bedouins in Israel's Negev Desert and the Israeli government are rooted in a clash between traditional nomadic lifestyle and the moves of modern society. These conflicts involve complex intertwined legal issues of property, land, identity, culture, and equity.”).

76. See Jonathan Cook, *Bedouin in the Negev Face New “Transfer,”* MIDDLE EAST REPORT ONLINE, (May 10, 2003), <http://www.merip.org/mero/mero051003> (explaining that the Bedouin population considered Sharon's five-year plan as “a declaration of war on the Bedouin community of the unrecognized villages” as the “plan was never discussed with any of the population or their representatives” (quoting the Regional Council for the Unrecognized Villages, the primary Bedouin lobbying group)); see also SWIRSKI & HASSON, *supra* note 74, at 9 (“The Regional Council of Unrecognized Villages in the Negev perceived

plan to encourage the Bedouins to move from their self-created villages to government-planned and recognized villages,<sup>77</sup> freeing up the Negev for new real estate developments.<sup>78</sup> The Bedouins perceived the Israeli government to have created this plan unilaterally and without adequately consulting representatives of the Bedouin community.<sup>79</sup> The Sharon Plan created a number of incentives to encourage Bedouins to comply with the plan's terms.<sup>80</sup> The incentives originally included provisions that aimed to subsidize land, create compensation packages for the loss of land outside the government-recognized villages, involve the Bedouin population in the planning of new settlements, create employment opportunities in

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the Sharon plan as a 'declaration of war' on residents of unrecognized villages, primarily because of its emphasis on law enforcement.").

77. See David Kovick et al., *Resolving Conflicts between the Israeli Government and Bedouin Stakeholders in Kseife and Um Batin*, CONSENSUS BUILDING INST., (2006), <http://cbuilding.org/publication/case/resolving-conflicts-between-israeli-government-and-bedouin-stakeholders-kseife-and-> (explaining that half of the Bedouin population resides in seven government-planned towns, and the remainder live on traditional Bedouin land and therefore receive almost no public services); see also SWIRSKI & HASSON, *supra* note 74, at 7 ("Israel's desire to strengthen its position in the Negev, primarily by setting up Jewish settlements . . . underpinned the Israeli government's decision to transfer the few Bedouin remaining in the Negev area from the northwestern part of the Negev to the confines of a smaller area in its northeastern part.").

78. See Cook, *supra* note 76 (suggesting that former Israel Prime Minister Ariel Sharon had an interest to offer Negev land to Jewish immigrants and to develop ranch estates, similar to his own, in the Negev Desert); see also SWIRSKI & HASSON, *supra* note 74, at 7.

79. See Berman-Kishony, *supra* note 75, at 402 ("[T]his process was undertaken, as perceived by Bedouins, without adequately consulting representatives of the Bedouin community."); Cook, *supra* note 76 (explaining that the Bedouins perceived the plan to be a declaration of war, as they were not part of the planning process).

80. See Havatzelet Yahel, *Land Disputes between the Negev Bedouin and Israel*, 2 ISRAEL STUD. 1, 13 (2006) ("According to this government plan, more than [sic] NIS [Israeli New Shekel] 1 billion are to be invested in the expansion and improvement of the Bedouin towns, as well as in the land title settlement process, law enforcement, and other important issues relating to the Bedouin. A special budget of hundreds of millions of shekels was allocated to compensate Bedouin moving into towns."); see also Berman-Kishony, *supra* note 75, at 402 ("The five-year plan also set aside a considerable budget to support numerous incentives: subsidized land, compensation packages for the loss of land outside the recognized villages, a stated intention to involve the Bedouin population in the planning of these settlements, the creation of sources of employment in Bedouin communities, and educational activities.").

Bedouin communities, and offer educational activities.<sup>81</sup> The plan also introduced a number of penalties for those Bedouins who chose not to accept and comply with the plan.<sup>82</sup> These penalties have made living in the unrecognized villages extremely uncomfortable and have materialized in the form of home demolitions and crop destruction.<sup>83</sup> The Israeli government continues to impose these penalties.<sup>84</sup> In July 2010, it was reported that the

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81. See *supra* note 80 (describing the incentives of the Sharon five-year plan).

82. See Berman-Kishony, *supra* note 75, at 402–03 (“[T]he plan introduced several legal penalties aimed at making the lives of Bedouins in the remaining unrecognized villages extremely uncomfortable in an effort to convince them to move to the planned towns. These penalties are being applied in the courts, villages, and fields. The government decided to protect its perceived land rights by filing counter-claims against Bedouin disputants. This litigation means a loss of Bedouin control over lands they perceive as their own due to the lack of registration of Bedouin-claimed land in the official land registry. Systematic demolition of houses outside the planned towns, as well as crop destruction, is taking place in the unrecognized villages.”); see also Cook, *supra* note 76 (“The crop spraying and new wave of demolitions indicate that Sharon is likely to show little mercy in his battle to clear the Negev.”).

83. See NEGEV COEXISTENCE FORUM FOR CIVIL EQUALITY, *THE ARAB-BEDOUINS OF THE NAQAB-NEGEV DESERT IN ISRAEL* 30–32 (2006), available at [http://dukium.org/modules/coppermine/albums/userpics/pdf\\_files/CERD\\_ENG\\_web.pdf](http://dukium.org/modules/coppermine/albums/userpics/pdf_files/CERD_ENG_web.pdf) (discussing the state attempts to drive out the Bedouins through early morning raids, home demolition, and crop destruction); see also Press Release, Arab Ass’n for Human Rights, *Israel’s Poisonous Aerial Spraying of Negev Crops Illegal, Endangers Health of Bedouin Villagers* (July 6, 2004), available at <http://electronicintifada.net/v2/article2871.shtml> (“On seven occasions, over a period of two years, the Israeli government has sent planes to the Negev to spray the crops of Bedouin farmers with toxic chemicals. Some 7,500 acres of Bedouin fields have been destroyed since February 2002. The last such incident occurred as recently as March 2004 at Qtamat and Abeida villages, ruining some 750 acres of crops shortly before the harvest.”); Nir Hasson, *An Entire Village in the Balance*, HAARETZ (Tel Aviv), Dec. 20, 2004, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=516503> (“[B]uilding inspectors from the Ministry of the Interior came to . . . an unrecognized Bedouin village . . . circulated among the 70 tin shacks in the village and pasted court demolition orders on each of them bearing the heading: ‘The State of Israel versus Unknown.’”); Am Johal, *The Bedouin Dilemma*, WORLDPRESS.ORG, (Nov. 17, 2004), [http://www.worldpress.org/print\\_article.cfm?article\\_id=2098&dont=yes](http://www.worldpress.org/print_article.cfm?article_id=2098&dont=yes) (“Over 150 homes have been demolished and 30,000 dunams of crops have been sprayed and destroyed in the Negev since 2002. Many consider the spraying to be a form of pressure on the Bedouin to move from their current locations.”).

84. See Berman-Kishony, *supra* note 75, at 403 (explaining how the Bedouins are continuously penalized and not invited to participate in government planning efforts); see also Israel Police Raze “Illegal” Bedouin Village in Negev, BBC NEWS, (July 27, 2010), <http://www.bbc.co.uk/news/world-middle-east-10777040> (“Around 300 Bedouins living in Israel’s Negev desert have been made homeless after police raided

Israeli government was responsible for the razing of a Negev village, Al-Arakib, which was home to over 300 Bedouins.<sup>85</sup> The conditions in which Negev Bedouins live and the treatment they receive from the Israeli government likely perpetuate the mistrust the Bedouins have for the state.

Additionally, the Negev Bedouins are Israeli citizens but do not receive rights that are available to other Israeli citizens: Bedouins are not permitted to construct permanent housing, their villages do not appear on Israeli maps, they cannot vote, and they do not receive basic services such as running water, electricity, garbage collection, roads, schools, and health clinics.<sup>86</sup> These services would be available to the Bedouins if they complied with the government and relocated from their ancestral home. It follows that the Israeli government has effectively alienated the Bedouins who reside on their ancestral lands and continues to deny the Negev Bedouins of their indigenous rights.

Bedouins who have been persuaded to relocate to government-created towns from their ancestral land also struggle with poor living conditions, as they experience high unemployment rates and fall into the lowest income bracket in Israel.<sup>87</sup> The government-created Bedouin communities have poor educational facilities,<sup>88</sup> which will likely make it

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their village and razed their homes.”); Neve Gordon, *Ethnic Cleansing in the Israeli Negev*, *GUARDIAN* (London), July 28, 2010, <http://www.guardian.co.uk/commentisfree/2010/jul/28/ethnic-cleansing-israeli-negev?intcmp=239> (explaining that the recently razed village was home to 300 Bedouins).

85. See *Israel Police Raze “Illegal” Bedouin Village in Negev*, *supra* note 84; Gordon, *supra* note 84.

86. See NEGEV COEXISTENCE FORUM FOR CIVIL EQUALITY, *supra* note 83, at 33 (noting that the Bedouins who refuse to relocate from their ancestral lands are denied basic services and infrastructure, including access to paved roads, water, garbage collection, and electricity); see also SWIRSKI & HASSON, *supra* note 74, at 2 (explaining that Bedouins in the unrecognized villages do not have access to the public services to which citizens of Israel are entitled).

87. See NEGEV COEXISTENCE FORUM FOR CIVIL EQUALITY, *supra* note 83, at 8 (“Consequently, the forced urbanization of this population has been disastrous: unemployment is high, and the Arab-Bedouin towns rank among the country’s 10 poorest municipalities.”).

88. See HUMAN RIGHTS WATCH, *SECOND CLASS, DISCRIMINATION AGAINST PALESTINIAN ARAB CHILDREN IN ISRAEL’S SCHOOLS* 21 (2001), available at <http://www.hrw.org/en/reports/2001/09/30/second-class-0> (“Compared with Jewish

difficult for future Bedouin generations to lift themselves from these disparate conditions.

It is conceivable that the daily hardships with which the Negev Bedouins live serve as a frequent reminder of the damaged relationship the Bedouins have with their government. In addition, the region's on-going Israeli-Palestinian conflict<sup>89</sup> exacerbates the power imbalance, as the Bedouin population is an Arab minority within the Arab population in Israel.<sup>90</sup> By and large, the relationship between the Negev Bedouins and the Israeli government is marked with a power imbalance, and the parties are at a deadlock in their dispute for the Negev Desert.<sup>91</sup>

B. *Is Proposing Mediation at Odds with the Mediation Custom that Discourages Mediation between Parties with a Power Imbalance?*

Having outlined the relationship between the Israeli government and the Negev Bedouins, this Section returns to the discussion of mediation to determine whether it is an appropriate dispute resolution mechanism for the parties, given their power imbalance. As previously discussed, the use of mediation between parties with a power imbalance raises concerns and is considered controversial among some practitioners. Though some advocates who work on domestic violence legal cases argue that traditional

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students, Palestinian Arab students are more likely to drop out of school, less likely to pass the matriculation examination (*bagrut*), and less likely to qualify for university admission if they do pass. Among Palestinian Arabs, these differences are much greater for Negev Bedouin."); Gruenberg, *supra* note 72, at 188–89 ("[A]s Israel developed into a modern industrialized nation, the institutional discrimination against Israeli Arabs, and in particular Bedouins, continued virtually unabated in areas ranging from education, health care, water, and land rights to herding and grazing rights.").

89. See generally *History of the Question of Palestine*, UN INFORMATION SYSTEM ON THE QUESTION OF PALESTINE, <http://www.un.org/depts/dpa/qpai/ngo/history.html> (last visited Mar. 13, 2011) (outlining the Israeli-Palestinian Conflict).

90. See Gruenberg, *supra* note 72, at 189 (explaining that the Bedouin population is a minority within the Arab minority in Israel).

91. See Berman-Kishony, *supra* note 75, at 403 ("[T]he penalties stimulated increasing mistrust of the Israeli government, Bedouin resistance, and radicalization, including a rapid growth of the Islamic movement. The Bedouins and the Israeli government are now at a deadlock."); see also CBI REPORT, *supra* note 73, at v (explaining that the Israeli government and Bedouin parties have reached an impasse).

mediation is not appropriate for parties with a power imbalance,<sup>92</sup> practitioners sometime support mediation for parties with a history of domestic violence, so long as mediators screen parties in advance of the mediation and employ safe mediation techniques to counteract and monitor the power imbalance.<sup>93</sup>

During pre-mediation screening in domestic violence cases, the mediator and the victim would privately discuss the victim's participation in the mediation process and what the victim feels the consequences would be should the victim fail to consent to mediation.<sup>94</sup> The screener would also examine the mindset of the victim and ask questions that would better enable the mediator to oversee a mediation process that would empower the victim and minimize the effects of the power imbalance.<sup>95</sup> By candidly discussing the victim's fears and apprehensions during pre-

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92. See *supra* note 67 and accompanying text (explaining that mediation should be discouraged between parties with a history of domestic violence to protect the victim).

93. See generally Jane C. Murphy & Robert Robinson, *Domestic Violence and Mediation: Responding to the Challenges of Crafting Effective Screens*, 39 FAM. L.Q. 53, 70 (2005) (discussing how proper screens and protocols will help victims of domestic violence reap the benefits of mediation and avoid the pitfalls that a party power imbalance may create); René L. Rimelspach, *Mediating Family Disputes in a World with Domestic Violence: How to Devise a Safe and Court-Connected Mediation Program*, 17 OHIO ST. J. ON DISP. RESOL. 95, 110–11 (2001) (“There does not seem to be a clear case to reject mediation for family disputes, despite the prevalence of domestic violence. . . . However, this is not to say that court-connected mediation programs can be unmindful of the special difficulties that the prevalence of domestic violence in our society presents. . . . With proper planning, thorough training, and special safeguards, court-connected mediation programs can provide high quality, safe service to their constituents.”); Alexandria Zylstra, *Mediation and Domestic Violence: A Practical Screening Method for Mediators and Mediation Program Administrators*, 2001 J. DISP. RESOL. 253 (2001) (discussing how practitioners should be trained to assess when a power imbalance has affected the weaker party's ability to express his or her views and negotiate freely, so that the mediation process does not further harm the weaker party).

94. See Laurie S. Kohn, *What's so Funny about Peace, Love, and Understanding? Restorative Justice as a New Paradigm for Domestic Violence Intervention*, 40 SETON HALL L. REV. 517, 582 (2010) (“In this meeting, the screener would also need to examine the victim's reasons for seeking a restorative justice intervention and what she feels might happen to her if she fails to consent. Though the frequent power imbalance between the parties could render any bargaining that might take place in the conference insincere, a screener could try to determine if such an imbalance exists in this relationship and if the victim could be supported in a way to reduce the effects of the imbalance.”).

95. See *id.*

mediation screening, the mediator becomes better equipped to take measures that will protect and empower the victim. Ultimately, becoming familiar with the victim's mindset during pre-mediation screening enables the mediator to maintain a safe mediation environment and detect when a weaker party is unable to freely express its opinions and the mediation process is no longer productive.<sup>96</sup>

The mediator's focus would be different when screening the abuser in preparation for mediation.<sup>97</sup> Instead of focusing on ways in which the mediation may empower the abuser, the screener would discuss matters of responsibility and encourage the abuser to admit responsibility for certain abusive actions and to make these admissions throughout the course of mediation.<sup>98</sup> Such admissions may assist the parties to find a power equilibrium, disarming the abuser and empowering the victim.

Pre-mediation screening results may lead the mediator to ask that the attorney for the weaker party be present throughout all mediation sessions; the attorney can enhance the weaker party's power by speaking on its behalf and evaluate proposed concessions and solutions with the weaker party.<sup>99</sup> It follows that mediation may be structured and monitored to ensure that the weaker party to the mediation will not lose bargaining power during the mediation process. The evolution of screening, and the actions that mediators may take as a result of screening,

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96. See *supra* note 93 and accompanying text (describing the techniques mediators may use to protect the victim of a domestic violence relationship during mediation sessions).

97. See Kohn, *supra* note 94, at 582 ("Although the screening meeting with the victim would focus on issues of coercion and voluntary consent, the meeting with the offender might focus more so on his admission of responsibility.").

98. See *id.*

99. See Murphy & Robinson, *supra* note 93, at 66 ("[L]awyers can have a crucial role to play in preparing for and attending the mediation sessions themselves. In so doing, lawyers act as power enhancers and equalizers: they can speak on behalf of clients, evaluate proposed solutions in light of applicable legal norms and the specific experiences of the client, and, if necessary, suggest opting out of the mediation itself if it is not serving the interests of clients."). See generally Craig McEwan et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317 (1995) (describing how lawyers may advocate on behalf of their clients during mediation to ensure a fair mediation process in a non-threatening environment).

suggests that parties with a power imbalance need not reject mediation as a viable dispute resolution process.

Given the promise of screening techniques and the ways in which mediators may counteract the power imbalance between parties, the subjects of this Note need not rule out the possibility of using mediation to resolve their dispute for the Negev Desert. Though the Israeli government and Negev Bedouins do not hold equal amounts of power and Bedouins have been made victim to abusive state acts, screening will allow mediators to craft a safe mediation program—one that will restore bargaining power to the Negev Bedouin party. Mediators will be tasked with monitoring the mediation closely to ensure that safe techniques effectively enable the Bedouin party to speak freely and minimize the threats involved with negotiating with a party with more power. Through proper screening and planning, mediators may create a safe mediation environment for the Negev Bedouin party.

*C. Institutional Support for Mediation to Resolve the Israeli Government-Negev Bedouin Dispute and State-Indigenous Disputes Generally*

Having addressed pre-mediation screening and the ways in which mediators may assist parties with a power imbalance to safely use mediation, this Section demonstrates that there is support for mediation in the context of resolving state government-indigenous disputes and, specifically, the Israeli government-Negev Bedouin land dispute. This Section discusses the support given to state government-indigenous mediation by groups within the public interest sector, domestic-state court systems, domestic-legislative bodies, and international judicial systems.

1. In the Public Interest Sector, the Consensus Building Institute Advocates for Mediation to Resolve the Israeli Government-Negev Bedouin Dispute

Despite the mediation custom that discourages mediation for parties with a power imbalance—and despite the presence of a party power imbalance between the Israeli government and the



Negev Bedouins—a well-known international alternative dispute resolution group has proposed that the Israeli government and Bedouin representatives explore non-adversarial options to resolve their dispute for land.<sup>100</sup> The Consensus Building Institute, a not-for-profit organization that resolves disputes world-wide through alternative dispute resolution practices,<sup>101</sup> has developed a mediation plan for the Israeli government and Bedouin stakeholders<sup>102</sup> and has explored whether mediation would be fruitful in this context.<sup>103</sup> The CBI has devoted many years to a process it refers to as “trust building,” in an effort to make the climate ripe for mediation in the Negev.<sup>104</sup> In 2007, CBI drafted its findings in a report and presented this report to the Israeli government and Negev Bedouin stakeholders.<sup>105</sup> Though

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100. See generally CBI REPORT, *supra* note 73 (documenting the CBI’s research and fieldwork in the Negev to encourage the parties to mediate their dispute for the Negev Desert).

101. See *Mission and History*, CONSENSUS BUILDING INST., <http://cbuilding.org/mission> (last visited Mar. 12, 2011) (“The Consensus Building Institute (CBI) is a not-for-profit organization created by leading practitioners and theory builders in the fields of negotiation and dispute resolution. CBI works with leaders, advocates, experts, and communities to promote effective negotiations, build consensus, and resolve conflicts.”).

102. See Kovick et al., *supra* note 77 (“For the past several years, CBI has engaged in an effort to explore whether mediation might provide a more effective way of resolving disputes over land and development in the Negev. In January 2005, after many years of trust-building with all parties, CBI received a mandate to conduct a comprehensive Conflict Assessment Process—a systematic mapping of the conflict, leading to recommendations for design[ing] an effective negotiation process mediated by neutrals.”).

103. See *id.* (“To conduct the assessment, CBI assembled a multi-cultural team of Jewish and Arab-Israeli mediators and planning professionals, supported by American colleagues. The team conducted over 250 confidential interviews with Bedouin and government stakeholders, leading to a new understanding of the conflict. The Assessment outlines the parties that need to be part of any negotiated resolution, the issues that need to be addressed, the interests of the different parties, and the concerns and obstacles to such a process. It also offers recommendations on how such a conversation ought to be structured in order to achieve sustainable, lasting resolution.”); see also Berman-Kishony, *supra* note 75, at 410 (“CBI prepared a conflict assessment report. The report summarizes the different views of the stakeholders, provides an analysis of the opportunities and obstacles to resolving disputes, and offers recommendations regarding the kind of dialogue process that might lead to a resolution of differences. In the report, CBI has suggested moving ahead with a formal mediation process . . .”).

104. See Kovick et al., *supra* note 77.

105. See *id.* (“The CBI team formally presented its report to Government and Bedouin stakeholders in January 2007.”); see also CBI REPORT, *supra* note 73.

the stakeholders responded favorably to the report,<sup>106</sup> the Israeli government has not yet agreed to begin the mediation process. As is more fully discussed below, the CBI is joined by a number of other institutions that also advocate for mediation to resolve state government and indigenous disputes.

## 2. Large Transnational Organizations Support Mediation for State-Indigenous Disputes

In the past, large transnational organizations have used mediation to resolve land disputes between state governments and indigenous persons. The Inter-American system calls on alternative dispute resolution processes to resolve abuses of human rights in order to enable the nonstate actor to participate in the resolution process and to decide what sort of relationship it will have with the state in the aftermath of the conflict.<sup>107</sup> The Inter-American system has sought to provide recourse for indigenous persons to help them assert their right to land and has shown great interest in mediating disputes between indigenous parties and member states throughout this process.<sup>108</sup>

Additionally, the United Nations recognizes mediation as a viable process with which to resolve disputes; its Charter recommends that member states use mediation when peace and

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106. See *id.* (noting that Israel and Bedouin stakeholders responded positively to the CBI report).

107. See Patricia E. Standaert, *The Friendly Settlement of Human Rights Abuses in the Americas*, 9 DUKE J. COMP. & INT'L L. 519, 536 (1999) ("The Inter-American Commission's friendly settlement mechanism gives the individual the opportunity to attain a broader sense of healing than that achieved by monetary compensation. The mediation model provides the victim a chance to be heard and actually to control the outcome of its relationship with the state."); see also Mike Perry, *Beyond Dispute: A Comment on ADR and Human-Rights Adjudication*, DISP. RESOL. J., May 1998, at 50, 53 ("Mediation allows the parties to explain their perspectives on the dispute and focuses on reaching a settlement that addresses the interests of each party. Mediation provides privacy to the parties and, when voluntary, permits the complainant a great measure of control over the process.").

108. See Graham, *supra* note 48, at 410 ("[T]he Inter-American system has been utilized by indigenous peoples of the Americas to assert their rights to cultural integrity, land and resources, non-discrimination, and greater political autonomy—all key norms associated with the right of self-determination. . . . In addition, the Commission has shown a strong interest in mediating disputes between indigenous peoples and member states.").

security are threatened.<sup>109</sup> Therefore, member states of the UN, bound by the UN Charter, recognize mediation as an alternative to the adversarial system.<sup>110</sup> The UN likely advocates for ADR processes because it has recognized that mediation is more likely to foster dialogue that is rooted in fundamental human rights rather than restrictive domestic legal principles.<sup>111</sup> A dialogue governed by human rights law rather than domestic law is more likely to benefit an indigenous group, as the position of a state government is often supported by its own state law and domestic legal principles.<sup>112</sup> Therefore, it is not surprising that international systems, like the Inter-American system and the United Nations, support mediation to resolve disputes of this nature.

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109. See U.N. Charter, *supra* note 23, art. 33 (“The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.”); see also Ian Brownlie, *The Peaceful Settlement of International Disputes*, 8 CHINESE J. INT’L L. 267, 272 (2009) (explaining how the United Nations has often either recommended or conducted mediation between disputing parties).

110. See U.N. Charter, *supra* note 23, art. 2 (stating that all member states are bound to the provisions of the Charter).

111. See William Jonas, *2000 Native Title Report Summary*, AUSTRALIAN HUMAN RIGHTS COMM’N (2000), [http://www.hreoc.gov.au/social\\_justice/nt\\_report/ntreport00/nt2000\\_report.html](http://www.hreoc.gov.au/social_justice/nt_report/ntreport00/nt2000_report.html) (supporting the notion that court decisions are not likely to acknowledge nonlegal principles such as the importance of ancestral land to the Bedouin lifestyle); see also Carlos Scott Lopez, *Reformulating Native Title in Mabo’s Wake: Aboriginal Sovereignty and Reconciliation in Post-Centenary Australia*, 11 TULSA J. COMP. & INT’L L. 21, 52–53 (2003) (“The ultimate question of which takes precedence renders the entire system lifeless, since any legislation must deny Native Peoples of their rights due to the fact that the legislation cannot theoretically meet the needs of external constituencies.”).

112. See Paul Chartrand, *Foreword* to *INTERCULTURAL DISPUTE RESOLUTION IN ABORIGINAL CONTEXTS* ix (Catherine Bell & David Kahane eds., 2004) (“In the eyes of some critics, the courts are the government gizzard, which grinds up Aboriginal interests. Even the courts themselves have recently been at pains to emphasize that negotiation is better than adjudication to resolve disputes.”); see also Osi, *supra* note 22, at 219 (“[F]oreign-imposed court systems provided some relief in the past, but they also frequently disappointed Indigenous or Aboriginal peoples.”).

### 3. State Legislative Bodies Use Mediation to Resolve State-Indigenous Disputes

State legislatures also contribute to the international support for mediation in this context. State legislatures have passed laws in support of indigenous land rights and have required state actors and indigenous parties to comply with state-mandated conflict-resolution processes to protect these rights. For example, in the United States, the Navajo-Hopi Land Settlement Act of 1996 emerged from a court's decision to order the US government and indigenous tribes to mediate a settlement rather than decide the indigenous land dispute case before it.<sup>113</sup> The Nicaraguan General Assembly passed Law 445, which requires the state to demarcate indigenous land and utilize dispute resolution processes to assist with the demarcation process.<sup>114</sup> Similarly, Australia's Native Title Amendment Act of 1993 tries to validate past state action by recognizing and protecting native title.<sup>115</sup> The Native Title Amendment Act protects indigenous rights to land and relies on alternative dispute resolution processes to settle the issue of compensation for the destruction of native land and interests.<sup>116</sup> In Papua New Guinea, the Land

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113. Navajo-Hopi Land Dispute Settlement Act of 1996, Pub. L. No. 104-301, 110 Stat. 3649 (1996); see Erin Ruble & Gerald Torres, "Perfect Good Faith," 5 NEV. L.J. 93, 110 (2004) ("On appeal the Ninth Circuit, instead of deciding the case, ordered the tribes and the United States to enter into mediation. Out of this mediation emerged the Navajo-Hopi Land Settlement Act of 1996."); see also Eric Cheyfitz, *Theory and Practice: The Case of the Navajo-Hopi Land Dispute*, 10 AM. U.J. GENDER SOC. POL'Y & L. 619, 629 (2002) ("In 1991, the Ninth Circuit Court of Appeals, in lieu of hearing an appeal of the *Manybeads* case, ordered all the groups involved into mediation in an attempt to resolve the dispute. The result of this mediation was the Navajo-Hopi Land Settlement Act of 1996 . . .").

114. Ley No. 445, 13 Dec. 2002, Ley del Régimen de Propiedad Comunal de los Pueblos Indígenas y Comunidades Étnicas de las Regiones Autónomas de la Costa Atlántica de Nicaragua y de los Ríos Bocay, Coco, Indio y Maiz [Law of the Communal Property Regime of Indigenous Peoples and Ethnic Communities of the Autonomous Regions of the Atlantic Coast of Nicaragua and of the Bocay, Coco, Indio, and Maiz Rivers], La Gaceta, Diario Oficial [L.G.], 23 Jan. 2003 (Nicar.); see Alvarado, *supra* note 33, at 623–24 (noting that "in response to the *Awas Tingni* decision, the Nicaraguan General Assembly enacted a land demarcation law, Law 445, which ordered the adoption of a specific legislative or administrative mechanism for demarcation of indigenous lands in Nicaragua" and discussing how a conflict resolution process was part of the guidelines under Law 445).

115. See *Native Title Act 1993* (Cth) ss 31, 33 (Austl.) (providing that negotiations occur between the government and claimants, and stipulating issues to be negotiated).

116. See *id.*

Disputes Settlement Act created a mediation system to resolve indigenous land disputes and requires claimants to bring their suits before a panel of mediators.<sup>117</sup> These examples highlight some of the legislative bodies that have called on mediation to process and resolve indigenous claims for land.

### 3. Transnational and State Judicial Systems Encourage State and Indigenous Parties to Pursue Mediation to Resolve Their Disputes

In addition to large transnational organizations' and legislative bodies' efforts to employ mediation to resolve disputes between state and indigenous parties, judicial systems contribute to this support for state-indigenous mediation. Judicial systems worldwide employ collaborative methods, like mediation, to resolve state and indigenous disputes to solicit indigenous participation and repair relations between state governments and indigenous parties.

The Inter-American Court of Human Rights, in the context of state-indigenous disputes, has ordered state parties to demarcate and title indigenous land and to work with the indigenous community during these processes.<sup>118</sup> This call for more inclusive and problem-solving processes, in the context of state-indigenous disputes, demonstrates the judicial system's appreciation for non-adversarial processes, like mediation, over more adversarial processes.

The High Court of Australia supported the principle that indigenous persons should have the right to claim land and participate in the land demarcation process in *Mabo v. Queensland*, a landmark case that recognized native title.<sup>119</sup> The

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117. See *Land Dispute Settlements Act 1975* pt. III (Papua New Guinea); see also Robert Cooter, *Inventing Market Property: The Land Courts of Papua New Guinea*, 25 *LAW & SOC'Y REV.* 759, 781 (1991) ("[The Land Disputes Settlement Act] provides for the creation of a system of mediators and courts to resolve disputes involving land under customary ownership.").

118. See *Awas Tingni*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶¶ 164, 173–74 (Aug. 31, 2001) (ordering Nicaragua to demarcate and title Awas Tingni land "with full participation by the [c]ommunity . . . taking into account its customary law, values, customs and mores.").

119. *Mabo v. Queensland (No. 2)* (1992) 175 CLR 1, 58 (Austl.); see Gary D. Meyers & Sally Raine, *Australian Aboriginal Land Rights in Transition (Part II): The Legislative Response to the High Court's Native Title Decision in Mabo v. Queensland*

court addressed the internationally recognized right of indigenous persons to actively participate in alternative dispute resolution processes to resolve land disputes and supported the notion that indigenous persons have a legal right to the land on which they reside.<sup>120</sup>

The Supreme Court of Canada advocates for mediation in this context as well. In *Delgamuukw v. British Columbia*, the court offered that “it is through negotiated settlements, with good faith and give and take on all sides that we will achieve . . . ‘the reconciliation of . . . aboriginal societies with the sovereignty of the Crown.’”<sup>121</sup> *Delgamuukw* stands for the principle that problem solving is key to reconciling state and indigenous disputes for land.<sup>122</sup> The Canadian court likely recognized that alternative dispute resolution processes are more conducive to resolving complex disputes and preventing future conflict.<sup>123</sup> It follows that the Supreme Court of Canada would encourage state and indigenous parties to resolve future disputes that may develop.

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and Wik V. Queensland, 9 TULSA J. COMP. & INT’L L. 95, 141 (2001) (“In the leading judgement in *Mabo*, Justice Brennan (with Justices Toohey and McHugh in agreement) notes that native title has its origins in and is given its content by the traditional laws acknowledged by and traditional customs observed by the indigenous inhabitants of a territory. Arguably, in accordance with this principle, the right to negotiate is an incident of common law native title. The right to negotiate acknowledges that indigenous peoples have an attachment to land which includes not only economic but also cultural and spiritual attachments.”). See generally Gerard Brennan, Chief Justice of Austl., Seventh Int’l Appellate Judges Conference: Aboriginal Land Claims—An Australian Perspective (Sept. 25–29, 1995), available at [http://www.hcourt.gov.au/assets/publications/speeches/former-justices/brennanj/brennanj\\_canada.htm](http://www.hcourt.gov.au/assets/publications/speeches/former-justices/brennanj/brennanj_canada.htm) (explaining that, in accord with the *Mabo* decision, the Australian parliament adopted legislation that provided ways in which native land rights should be addressed and advocated for mediation and negotiation processes).

120. See *supra* note 119 (noting the High Court’s support for indigenous land rights and indigenous participation in titling and demarcation processes).

121. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, ¶ 186 (Can. B.C.) (quoting *R. v. Van der Peet*, [1996] 2 S.C.R. 507, ¶ 31 (Can.)).

122. See *id.*

123. See GOLDBERG ET AL., *supra* note 57, at 518 (“The courts, for their part, are primarily concerned with determining past facts rather than shaping future possibilities. This favors the innocent, not the less powerful. Moreover, the courts are singularly unconcerned about future relationships. The distributional cases that wind up in court are handled pretty much like criminal cases—winners and losers are identified—because that is what the courts are equipped to do.” (quoting L. SUSSKIND & J. CRUIKSHANK, *BREAKING THE IMPASSE* (1987))).

The judicial systems discussed above emphasize the value of ADR and mediation for state-indigenous land disputes. The degree of support for mediation in this type of dispute is not surprising, as the process fosters healthy relations between parties and may create viable solutions in this context.<sup>124</sup> Mediation is also beneficial to indigenous parties because it allows mediators to consider oral testimony in place of tangible land deeds and documents and therefore better understand the position of the indigenous party and challenges it faces.<sup>125</sup> In such land disputes, courts often restrict the information that indigenous parties may submit and must also apply stringent evidentiary burdens on indigenous testimony.<sup>126</sup> In addition, court processes are generally more costly than mediation, burdening the poorer indigenous party.<sup>127</sup> In light of such advantages, it is clear why the international community recognizes alternatives, such as mediation, as superior to courtroom litigation for resolving state-indigenous disputes.

### III. *THE ISRAELI GOVERNMENT AND THE NEGEV BEDOUMS SHOULD PURSUE MEDIATION TO RESOLVE THEIR DISPUTE FOR THE NEGEEV DESERT*

Given the advantages of mediation, the ways in which mediators may employ screening and safe mediation techniques to assist the parties to safely pursue mediation, and the support for mediation in this context, Part III argues that the mediation table is a more appropriate venue than the courtroom for Negev Bedouin claims. Section A of Part III discusses why courts are not the proper forum to consider issues imperative to reconciliation. Section B addresses why the adversarial court system is ill-suited

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124. See *supra* note 57 (discussing mediation as a process that will afford the parties an opportunity to develop a viable solution and repair their relationship).

125. See NONIE SHARP, NO ORDINARY JUDGMENT: MABO, THE MURRAY ISLANDERS' LAND CASE 103–14 (1996) (discussing the challenges of admitting hearsay in *Mabo*).

126. See *id.* (describing the importance of oral evidence to native parties to land disputes, as written evidence is often not available to support native claims).

127. See Cohan, *supra* note 20, at 181 (discussing the costs of mediation as “relatively minor” in comparison to court costs); see also Osi, *supra* note 22, at 228 (“If an Indigenous or Aboriginal community decides to step into the judicial fray, their national government should support or subsidize their costs. This may be the only way they can mount a successful suit.”).

to protect indigenous needs. Section C contends that litigation processes are not inherent to the Bedouin community. Finally, Section D maintains that litigation is costly and often yields disappointing results for indigenous communities.

A. *Courts Are Unable to Address Issues that Are Imperative to Reconciliation*

Courts are equipped to address broad legal issues but are often ill-suited to address non-legal issues, such as how the Israeli government and the Bedouin community may begin to repair their relationship and learn to peacefully coexist.<sup>128</sup> Regardless of whether the Israeli government and the Bedouin community select mediation or litigation, the parties must work to repair their relationship, as the parties will continue to coexist in the region. Mediation would better serve this interest, as court decisions emphasize past facts and not the ways in which parties may move forward in the aftermath of a controversy.<sup>129</sup> Therefore, mediation will offer the Israeli government and Bedouin community the chance to mend their relationship and would better position the parties to comply with the terms of a settlement agreement.

B. *The Adversarial Court System Is Ill-Suited to Address Indigenous Needs*

The court system is fundamentally unfit to address the special needs of indigenous persons. Courts are often structured to benefit the majority population and consequently are unable to adequately address minority needs.<sup>130</sup> Similarly, the law is often unable to conform to the special needs of indigenous

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128. See GOLDBERG ET AL., *supra* note 57, at 518 (arguing that courts only address broad legal issues and are unable to provide the parties with insight as to how they might learn to coexist).

129. See *id.* ("The courts, for their part, are primarily concerned with determining past facts rather than shaping future possibilities. This favors the innocent, not the less powerful. Moreover, the courts are singularly unconcerned with future relationships. The distributional cases that wind up in court are handled pretty much like criminal cases—winners and losers are identified—because that is what the courts are equipped to do.").

130. See *supra* note 111 and accompanying text (discussing the legislature and judiciary's inability to address the unique needs of indigenous populations).



communities because laws generally do not meet the needs of external constituencies, like the Bedouin community.<sup>131</sup>

Court decisions, therefore, are not likely to acknowledge the degree to which the preservation of land-based Bedouin traditions depends on rights to their ancestral land.<sup>132</sup> For this to occur, the judiciary would need to acknowledge that Bedouin litigants are in need of special legal attention and carve out exceptions in property law for Bedouin litigants.<sup>133</sup> The courts are not in a position to do this, as is evident by the Bedouins' previous failed attempts to claim title to ancestral land through the Israeli court system.<sup>134</sup> Given both the inability of the Bedouins to provide the Israeli court system with official documentation and the court's refusal to accept tribal documentation, the Bedouins have repeatedly failed to gain title to lands on which they live and their ancestors have lived.<sup>135</sup> Therefore, the Bedouins would benefit from mediation processes that would allow them to play a substantial role in reaching the agreement, and not have a decision imposed on them by a court system that is unable to recognize their unique evidentiary needs.

### C. *Litigation Is Not Inherent to the Bedouin Community and Indigenous Way of Life*

Litigation is not inherent to indigenous communities like the Negev Bedouin community. Members of these communities are often inexperienced in and unfamiliar with traditional court proceedings.<sup>136</sup> To achieve maximum

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131. See *supra* note 111 and accompanying text (discussing how court systems are ill-equipped to address many minority groups' needs, like those of indigenous communities).

132. See *supra* note 111 and accompanying text (explaining that court decisions are unlikely to acknowledge non-legal principles, such as the importance of ancestral land to the Bedouin lifestyle, and cannot address indigenous needs because courts are suited to accommodate majority, as opposed to minority, claimants).

133. See *supra* note 111 and accompanying text (describing the court system as ill-equipped to carve out special exceptions for minority groups, as courts are created to address the needs of the majority).

134. See *supra* note 74 (discussing how Bedouins have repeatedly failed to be granted land title given their inability to provide official documentation and the Israeli court system's inability to accept tribal documents).

135. See *supra* note 74.

136. See Chartrand, *supra* note 112, at ix ("In the eyes of some critics, the courts are the government gizzard, which grinds up Aboriginal interests. Even

results through litigation, the Negev Bedouins must first accept, and learn to communicate in, the dominant judicial system before they can effectively formulate claims that have merit and meet litigation standards. Naturally, understanding and utilizing any foreign system is a time-consuming process and should not be the exclusive means of seeking justice when other non-adversarial processes, such as mediation, exist and are better-suited for indigenous claims.

D. *Litigation Is Costly for and Often Disappoints Indigenous Communities*

In addition to the inflexibility of court processes, litigation may not be financially feasible for Bedouin litigants, and given the inadequacies of courtroom litigation in this context, the judiciary is likely to disappoint indigenous parties on a quest to gain legal title. Alternative dispute resolution processes, like mediation, are significantly less expensive than litigation processes.<sup>137</sup> In the Israeli government-Negev Bedouin land dispute, the Bedouin community might not be able to launch a successful suit unless the Israeli Government subsidizes the costs of litigation.<sup>138</sup> In addition, a judicial decision may not provide the parties with a sustainable solution, as courts are unlikely to resolve practical issues or repair the relationship of the parties. This decreases the chances of party compliance.<sup>139</sup> Decisions issued by US courts support this notion; some US courts, conceding that they are unable to hand down the appropriate solution for a dispute between state and indigenous

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the courts themselves have recently been at pains to emphasize that negotiation is better than adjudication to resolve disputes.”); *see also* Osi, *supra* note 22, at 219 (explaining indigenous persons’ frustration with foreign judicial systems by stating that “foreign-imposed court systems provided some relief in the past, but they also frequently disappointed Indigenous or Aboriginal peoples.”).

137. *See* Cohan, *supra* note 20, at 181 (discussing the costs of an ADR process as “relatively minor” in comparison to court costs); *see also* Osi, *supra* note 22 (noting the high costs of litigation and the financial hardship indigenous communities would endure to launch a successful suit).

138. *See supra* note 137 (describing the high cost of litigation).

139. *See supra* note 123 (discussing how courts tend to address broad legal issues and are unlikely to provide the parties with insight as to how they might learn to coexist).

party, have directed parties to pursue mediation.<sup>140</sup> The Israeli government and Negev Bedouin should embrace the developing trend to mediate disputes between government and indigenous parties and engage in problem-solving approaches that are more conducive to developing a viable solution.

In light of the advantages of mediation, the promise of screening and safe mediation techniques, the support for mediation to be used to resolve state-indigenous disputes, and the disadvantages of court room processes, the Israeli government and Negev Bedouins should pursue mediation to resolve their dispute for the Negev Desert.

### *CONCLUSION*

The Israeli government and Negev Bedouins should employ mediation to resolve the Negev Desert land dispute. This conflict is unlikely to resolve itself naturally, as the Bedouin population reproduces at a rate that is among the highest in the world.<sup>141</sup> It is in the best interest of both parties to work toward a sustainable solution in a mutually safe and comfortable environment to increase the chances of party compliance. The ADR process of mediation will enable the parties to work toward a resolution together and may simultaneously help the parties begin to repair their historically contentious relationship.

The international community should encourage Israel, and all other nations who neglect to uphold the rights of their indigenous populations, to mediate pressing indigenous issues and resolve these conflicts before they risk becoming grave human rights issues. Given that the Consensus Building Institute has expended valuable time and resources in the region to assess the Israeli government-Negev Bedouin conflict and prepare the parties for mediation, the Israeli government and the Negev Bedouins are uniquely situated to begin mediation and develop a

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140. See *supra* note 113 (noting that, in the past, the US court system has refrained from ruling on government-native tribe cases, and has ordered the native tribes and the government to enter into mediation to resolve their dispute).

141. See Ruth Sinai, *For the Bedouin, Freedom Means Having Nothing Left to Lose*, HAARETZ (Tel Aviv), Mar. 6, 2002, <http://www.haaretz.com/print-edition/features/for-the-bedouin-freedom-means-having-nothing-left-to-lose-1.51170> ("They have one of the highest birth rates in the world: about 5 percent a year in the cities, and about 5.8 percent in the villages.").

viable solution for their dispute over land. Given its position of power, the Israeli government is better able to initiate action and this Note therefore encourages the Israeli government to pursue safe mediation to resolve the dispute for the Negev Desert and work toward creating a lasting peace together with the Negev Bedouins.