The Richtersveld Cases

Aboriginal title applicable in South Africa?

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1 Introduction

With the end of apartheid in 1994 South Africa transformed into a new constitutional democracy, based on principles of justice and equality. The new black majority-led government aimed at the extend of equality of the law for all South Africans. During the *apartheid* regime over 85 percent of the South Africans did not have a vote and could not own land. The right to land and the restitution of land rights to the formerly discriminated black population was one of the main issues of the new government.[1] The new Constitution ensured equal access to land and the restoration of racially discriminatory land dispossessions.[2] In order to regulate this land redistribution new laws had to be created based on the principles outlined in the Constitution, this resulted in the *Restitution of Land Rights Act 22 of 1994* (Restitution Act). In addition the Land Claims Court (LCC) was established and people started to bring their land claims to this court in the same year.

Both the new laws and the courts brought the immediate and pressing need to redress wrongs from the past into focus[3], while the new government struggled with tensions in relation to former land dispossessions and the establishment of laws addressing these problems. The reality was that returning all land dispossessed during *apartheid* could cause instability and weaken the new peace.[4] In the shadow of these difficulties indigenous land rights began to appear as a growing concern. The descendants of indigenous communities, occupying land at time of colonization, began to seek recognition of their land rights under the promises of the new government. However, the new legislation for restoring land was aimed at people dispossessed under the apartheid regime. Consequently statutory claims were limited in two ways, the land must have been dispossessed as a result of past discriminatory laws and it must have been dispossessed after 19 June 1913. Many claimants failed to meet these requirements of the *Restitution Act*, for them the aboriginal title can provide an alternative common-law ground of action. Now a strong argument can be made that the doctrine of Aboriginal Title forms part of South African law on grounds of municipal as well as international law. In addition the doctrine is refined and ways of proving and extinguishing the title are clarified in several cases in Australia and Canada.[5] This issue gained political attention and one of the issues of land redistribution in the new South Africa became the role of the doctrine of aboriginal title under the new regime.[6]

Even though the doctrine of aboriginal title was already recognized in a number of former British colonies such as Australia, it had never been completely adopted in any country in sub-Saharan Africa.[7] The issue was raised for the first time in South Africa before the Land

[1] Richtersveld Community v Alexkor Limited 2003 (6) SA 104 (SCA) at par. 38
[2] Constitution Act 108, 1996, s 25(7)
[3] Bennett & Powell 1999, p. 449-450
[4] Hoq 2002, p. 421
[5] Bennett & Powell 1999, p. 451
[6] Chan 2004, p. 114
[7] Bennett & Powell 1999, p. 449-50

Claims Court in the *Richtersveld* case.[8] The doctrine of aboriginal title constitutes a right in land for indigenous communities who occupied the land at the time of colonization. The basic principles underlying the doctrine are justice and equality; colonization should not automatically deprive indigenous peoples of their land.[9] During apartheid this doctrine and its underlying principle was obviously not consistent with the government policy. However, after the transformation of South Africa the principles behind the doctrine, equality and redress for past wrongs, complied with the values of the new government. Therefore the Richtersveld Community decided to bring the issue to a head with the first direct challenge before the court.[10]

The Richtersveld is an area of land situated in Namaqualand, in the Northern Cape Province of South Africa, close to the border with Namibia. The Khoisan inhabited this area for time immemorial. The Richtersveld community still occupies the land in a similar way as their forefathers did. In 1847 the land was annexed by the British Crown, however the people of the Richtersveld continued to exercise their beneficial occupation, which included the right to exclude others from their land. In 1925 diamonds were found and the government claimed the land as Crown land. Since then the Richtersveld people were denied access to the land. In 2000 they brought their claim to the LCC in terms of the Restitution Act. The land claim relates to a narrow piece of land presently owned by the first appellant, Alexkor Ltd. The community claimed their land in terms of section 2 of this Act, according to this section the claimants had to prove that they had a right in land at the time of dispossession. The claimants stated that they have (a) a right to the subject land based on ownership, alternatively (b) a right based on aboriginal title giving them the right of beneficial occupation and use, alternatively (c) a right in land obtained by beneficial occupation of the subject land for a period longer than ten years prior to the dispossession.[11] The LCC held that the community did qualify as a community for purposes of the Restitution Act, however the claim was dismissed on the grounds that the claimants were dispossessed for the purpose of mining of diamonds and not because of racially discriminatory laws or practices.[12]

The claimants then decided to appeal to the Supreme Court of Appeal (SCA). The most important question to be answered by the SCA was whether the community had a right in land based on aboriginal title or ownership. The SCA found the community had a right of occupation and use of the subject land similar to Roman-Dutch law ownership, which is a customary law interest. When diamonds were discovered the community was dispossessed of this right as a result of racially discriminatory practises.[13] Thus, the SCA decided that the community had this right based on an interest protected in the Restitution Act. Again, the issue concerning aboriginal title was avoided by the Court. However, the SCA did

[8] *Richtersveld Community and Others v Alexkor Ltd and Another* 2001 (3) SA 1293 (LCC)
[9] Bennett & Powell 1999, p. 449, 451
[10] Chan 2004, p. 115
[11] Pienaar 2008 p 5
[12] Peinaar 2008 p 6
[13] Peinaar 2008 p 6

incorporate some of the key elements of the doctrine in its reasoning and they cited case-law dealing with aboriginal title.[14] The SCA decided that the community had a customary law interest in terms that was evidently similar to the doctrine of aboriginal title.[15] The appellant in this case, Alexkor appealed to the Constitutional Court (CC), the CC held that the community had a customary law interest in the subject land as protected by the Restitution Act, which is 'a right to exclusive beneficial occupation and use, akin to that held under common law ownership'.[16] The CC held that the claim was based on customary law, however the reasoning of the CC was more appropriate to an aboriginal title judgement, because the past practises prior to annexation were examined which is needless in for proving a customary law interest.[17]

Therefore, after the *Richtersveld* cases it seemed that the door to the application of aboriginal title in South African law was open. However, this is not entirely clear, the Constitutional Court did suggest the applicability of the doctrine by using certain terms and ways reasoning but avoided the term aboriginal title. The question is whether the aboriginal title really is applicable to South African law or not, and what implications this might bring.

With this thesis I will attempt to give an answer to this question. In order to do so I will examine several issues relating to this question. The next chapter will deal with the origin, the content and the ways of proving the aboriginal title in the different common law countries were the doctrine developed. I will determine the most important elements of the aboriginal title and will use these as a guideline in the rest of this thesis. In the third chapter the developments in international law concerning indigenous land rights and the doctrine of aboriginal title will be dealt with. The international context as well as some regional developments will be considered. I will examine whether the elements, as found in the second chapter, can also be found in international and regional developments. After that the three different *Richtersveld* cases, from the Land Claims Court, the Supreme Court of Appeal and the Constitutional Court will be elaborated on. The facts of the cases as well as the findings of the courts will be analysed. Again I will examine whether the South African Courts used the same elements of the aboriginal title. After that I will draw a conclusion whether the aboriginal title exists in South African law or not.

[14] Bennett & Powell 1999, p. 432
[15] Bennett & Powell 1999, p. 432
[16] *Alexkor Ltd and Another v Richtersveld Community and Others* CCT19/03 at par. 29
[17] Bennett & Powell 1999, p. 434

2 Aboriginal Title

Aboriginal title is a right to land vested in a community occupying the land at the time of annexation by colonizers. When such a title is established the claimants can claim their land or compensation. The title has been invoked in many post-colonial countries by different indigenous peoples. The individual states have their own constitutional and legal systems, which are different from each other, this has led to a divergent development in aboriginal title law. These dissimilarities in law systems together with differences in colonial history account for particularities of state law regarding aboriginal title. However the differences are small and the colonial history and common law of the individual states are alike and the judicial developments are similar and influenced by each other.[18]

The doctrine of aboriginal title has its roots in British post-colonial states, such as Canada, the United States, Australia and New Zealand. The legal systems of these states all show the reception of British law. However, the doctrine of aboriginal title is never invoked before a court in South Africa, until the *Richtersveld* cases, even though the South African legal system shows features of British common law. The aboriginal title is a feature specific for states with a large and permanent colonial history, which is the case in South Africa where colonizers dispossessed indigenous peoples of their land. However, apartheid gave the history of dispossession a different character than the dispossession in the Americas and Australia and New Zealand.[19] In the new South Africa, with a constitutional democracy, the wrongs from the past had to be redressed and the focus fell on the most immediate justice which was redress for apartheid. The *Richtersveld* community was the first to invoke the doctrine of aboriginal title before the courts in South Africa under the *Restitution Act*. The question became whether the aboriginal title created a right in land under this act.[20] In the three cases that followed, the courts dealt with the issue of the aboriginal title within South African law.

In this chapter the source, content and proof of the aboriginal title in different states will be discussed first. After that we will deal with the *Richtersveld* cases and the question whether the doctrine of aboriginal title fits into the South African legal system.

2.1 The source of the aboriginal title

In general it can be stated that the aboriginal title is a right in land as well as a right to the resources of that land. It is based on the assumption that colonial annexation of land did not automatically extinguish the right of indigenous peoples to own land.[21] Aboriginal title proposes that pre-colonial rights of indigenous peoples survive annexation by colonial powers.[22] The doctrine of aboriginal title predominates in most common law countries and was developed mostly in Australia, Canada and New Zealand. In addition it is generally

[18] Herne 2001, p. 8
[19] Bennett & Powell 1999, p. 450
[20] Chan 2004, p. 116
[21] Gilbert 2006, p. 63
[22] Bennett & Powell 1999, p 449

recognized that land rights of indigenous peoples have sources in indigenous rights and customs pre-existing colonial law systems and are based on the same principles, equality and justice. Furthermore the aboriginal has a *sui generis* character which consistently distinguishes it from other property rights; it is held communally[23], it originates in pre-colonial systems of indigenous law[24] and it is inalienable except to the Crown or state government.[25] These characteristics of the aboriginal title are developed in case-law and generally accepted in all jurisdictions applying the title. However, as stated above, in every individual state the doctrine is applied somewhat differently. Therefore there are some minor differences in the source, content and proof of aboriginal title in the different jurisdictions.

2.1.1 Canada

The arrival of European colonizers in Canada had a large impact on the lives of aboriginal people, who had been living there since time immemorial, in a lot of ways. The taking of land probably affected their lives the most substantial.[26] In some parts of Canada a certain level of consent was reached between the settlers and the indigenous people about the taking of land in the form of treaties. In other parts of the country land was simply taken by the settlers. This differences in treatment of indigenous peoples shows the uncertainty of colonizers in how to deal with them and their land claims. It is clear though that from the beginning of the colonization there always was some recognition of use and occupation of land by indigenous peoples.[27] Britain even recognized their land rights formally in the Royal Proclamation of 1763. Despite this document the nature of the Aboriginal land rights stayed unsettled until the Aboriginal title was defined by the Supreme Court of Canada in the *Delgamuukw* case in 1997.[28] In this case the court elaborated on the content of the doctrine and how it can be proved. The source of the aboriginal title was only shortly mentioned. At first it was thought that the source was the *Royal Proclamation 1763*, however it is now clear that this document only recognized the aboriginal title, it arises from the occupation of the land by indigenous peoples prior to colonization. There are two ways in which this prior occupation is relevant as the source of the aboriginal title.[29] Firstly, the fact of occupation is important since it derives from the common law principle that possession can be proved by occupation. Secondly, the source can be found in the relation between common law and indigenous peoples' customs and laws that existed before acquisition of sovereignty by colonizers.[30]

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[23] *Mabo v Queensland* [1988] HCA 69; (1989) 166 CLR 186 (8 December 1988) at par. 59-62, 85 and 100
[24] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at par 114
[25] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at par 113
[26] McNeil 1998, p. 4
[27] McNeil 1998, p. 4
[28] McNeil 1998, p. 4; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010
[29] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at par 114
[30] *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at par 42; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at par 81

2.1.2 United States

The treatment of indigenous peoples in the United States in somewhat similar as in Canada. When the America was colonized the acceptance of ownership of land by Native Americans was more or less accepted. The early American settlers recognized the Native American lands as independent nations and entered into treaties with the Indians.[31] Despite this early recognition the acceptance of Native American land rights diminished considerably, as the United States became bigger, more powerful and dominant over indigenous tribes.[32]

In the period between 1823 and 1832 the United States Supreme Court recognized the Indian title and established legal principles on it in the *Marshall Trilogy*.[33] Three cases of the Court, under Chief Justice Marshall, formed the foundation for the recognition of aboriginal rights in the United States, namely *Johnson v M'intosh*[34], *Cherokee Nation v Georgia*[35] and *Worcester v Georgia*[36]. In the first case Justice Marshall applied the doctrine of discovery in order to determine the rights of aboriginal people against occupiers of the land. According to this doctrine Native Americans are still entitled to occupy and use land despite that European states assumed free title to the land they discover.[37] Another principle expressed in this case as that the Native Indians could only sell their land to the United States or the Crown, which resulted in a way for the government to justify the taking the Native Indians right to their land.[38]

In the second case, *Cherokee Nation v Georgia*, the Cherokee community sought a remedy against the state Georgia, in order to prevent them from implementing state laws on Cherokee land.[39] The most important issue discussed in this case was the unique relationship between the United States and the Native Indians. The Indians were qualified as 'domestic dependent nations', Marshall described the relationship of the Indians to the United states as 'that of a ward to his guardian'.[40] The court decided that the Indians lacked the status to bring suit in a U.S. Court.[41] The third case of the Marshall Trilogy gave some more protection to the Cherokees. Justice Marshall concluded that the Native Indians' rights in the treaty with the U.S. gave them protection.[42] In this case the Indian sovereignty was recognized and requirement of legal consent from Indians to extinguish native title was established.[43] However, this decision was never implemented in Georgia.[44]

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[31] Sender 1999, p. 536
[32] Sender 1999, p. 537
[33] Herne 2001, p. 10
[34] *Johnson v M'intosh*, 21 U.S. 543 (1823)
[35] *Cherokee Nation v. Georgia,* 30 U.S. 1 (1831)
[36] *Worcester v Georgia*, 30 U.S. 515 (1832)
[37] Sender 1999, p. 538
[38] *Johnson v M'intosh*, 21 U.S. 543 (1823) at par 574
[39] Sender 1999, p. 538
[40] *Cherokee Nation v. Georgia,* 30 U.S. 1 (1831) at par 17
[41] *Cherokee Nation v. Georgia,* 30 U.S. 1 (1831) at par 18
[42] *Worcester v Georgia*, 30 U.S. 515 (1832) at par 556
[43] Sender 1999, p. 539
[44] Sender 1999, p. 539

In short it can be concluded from the first case that the source of aboriginal title in the United States is prior occupation and the doctrine of discovery.

2.1.3 Australia

In Australia the relationship between the state and indigenous peoples has never had a basis in any treaty, as in Canada. The use and occupation of land by aboriginal people was never recognized. While other countries like Canada and New Zealand have been dealing with recognition for over hundred and years, the people of Australia did not think of the existence of aboriginal title until the *Mabo* case[45]. Therefore the development of the native title in Australia is different from the development in other jurisdictions. In Australia both the legislature and the judiciary played an important role in developing the doctrine of aboriginal title. The High Court of Australia recognized the aboriginal title in the *Mabo* case, where the High Court held that native title in land derives from traditional laws and customs of aboriginal peoples and that it had survived the annexation by colonizers.[46] In addition the Court stated that the native title has been a part of Australian law since 1788.[47] Following this recognition the legislature came with the Native Title Act, which defines the native title as a right end interest that is possessed under traditional aboriginal law. Although the High Court referred to cases in other jurisdictions in the *Mabo* case, the native title law in Australia developed differently on grounds of differing styles and structures of government and a different colonial history.[48] The sources of the native title in Australia are aboriginal laws and common law principles, as in Canada. However, in Australia there is no distinction between aboriginal rights, such as fishing or hunting, and aboriginal title. Consequently, rights as fishing or hunting are legally equal to the right of ownership.[49]

2.1.4 New Zealand

The settlers in New Zealand recognized the aboriginal title from the first settlement, contrary to the settlers in Australia. This can be concluded from two things, the British government entered into treaties to obtain sovereignty with Maori and special courts were established to deal with property disputes concerning land under Maori law.[50] These are also the original sources for indigenous peoples' rights, treaties and common law native title. However both the sources were point of discussion in case-law.

The Treaty of Waitangi[51], giving sovereignty to the Queen but preserving native title for the Maori at the same time, was signed in 1840. The Treaty has an ambiguous place in New Zealand's constitutional arrangements. The Waitangi tribunal said the document is of

[45] *Mabo v Queensland* [1988] HCA 69; (1989) 166 CLR 186 (8 December 1988)
[46] Mabo v Queensland [1988] HCA 69; (1989) 166 CLR 186 (8 December 1988)
[47] Herne 2001, p. 13
[48] Leane 2006, p. 53
[49] Gilbert 2006, p. 65
[50] Herne 2001, p. 10-11
[51] This treaty was first signed on 6 February 1849 by English settlers and Maori Chiefs. The Treaty of Waitangi Act no. 114 of 1975 sets out the treaty in English and Maori language, available at <www.legislation.govt.nz>

constitutional value. On the opposite the Supreme Court stated in the *Wi Parata* case[52] that the Treaty is of no value at all because the Maori were incapable to enter into a treaty because they are 'primitive barbarians'.[53] The current point of view is that the Treaty has no legal value as long as it is not incorporated in domestic law.[54] Thus the Treaty cannot be a source for native title.

In 1847 the Supreme Court of New Zealand discussed the native title for the first time in *R. v Symonds.*[55] In this case the Court confirmed the existence of the native title in New Zealand. Thirty years later the Court reversed this recognition in the *Wi Parata* case. However, more recently the New Zealand Court of Appeal dealt with this issue again in the *Ngati Apa* case[56] and reaffirmed the potential existence of native title. In this case the Court only recognized the possibility of an unextinguished customary title.[57]

2.1.5 Other jurisdictions

Although the doctrine of aboriginal title is developed in common law countries, it is not limited to countries with a common law heritage. The aboriginal title has a *sui generis* character and therefore 'aboriginal title lies at an intersection between indigenous laws and received systems of colonial law'.[58] That the doctrine can also be applicable outside the narrow sense of the English common law is proven by the application of the aboriginal title, despite the French colonial rule, in Quebec by Canadian courts.[59] The doctrine of aboriginal title is spread out all over the world, the development is not limited to Canada and Australia, it is a larger phenomenon also happening in Africa and Asia. The evolution in Africa is illustrated by the *Richtersveld* cases in South Africa. In Asia national courts have referred to the doctrine of aboriginal title in their decisions, which is an example of application outside the English common law. The High Court of Malaysia stated that the doctrine of aboriginal title applies in Malaysia in the *Adong bin Kuwau v. Kerajaan Negeri Johor* case.[60] In this case judge Mohktar recognized that based on the common law doctrine, indigenous peoples have specific land rights. The court referred to several cases from Canada, Australia, the United States and New Zealand and confirmed that aboriginal title is a right of indigenous peoples to live on their lands.[61] Furthermore the judge stated that aboriginal common law rights exist next to other statutory rights assuring indigenous peoples' rights. These findings of the high court were confirmed by the Federal Court of Malaysia in March 2000.[62] The Sabah and Sarawak High Court followed this decisions in *Nor Anak Nyawai et al.*[63], it ruled that

[52] *Wi Parata v Bishop of Wellington* (1877), 3 N.Z. Jur. (N.S.)77
[53] *Wi Parata v Bishop of Wellington* (1877), 3 N.Z. Jur. (N.S.) 77 at par. 78
[54] Leane 2006, p. 54
[55] *R. v. Symonds* (1847) NZPCC 387
[56] *Attorney-General v. Ngati Apa* (2003) 3 NZLR 643
[57] *Attorney-General v. Ngati Apa* (2003) 3 NZLR 643 at par 34
[58] Bennett & Powell 1999, p 462
[59] Gilbert 2006, p. 65
[60] *Adong Bin Kuwau v. Kerajaan Negeri Johor*, 1997, 1 MLJ 418, AILR 2001 52
[61] Gilbert 2006, p. 68
[62] Gilbert 2006, p. 68
[63] *Nor anak Nyawai et al. v. Borneo Pulp Plantation Sdn Bhd*, 2001, 2 AILR 2001 38

common law respects custom en rights under pre-existing native law. The Court affirmed the *sui generis* character of the aboriginal title.

In short it can be stated that the different states recognized the aboriginal title in different ways, Canada recognized it from the early beginning by a treaty while Australia recognized for the first time in 1988 in the *Mabo* case. However, all jurisdictions use the same source for the doctrine; occupation prior to colonization and the pre-existing indigenous laws are the source of the aboriginal title.

2.2 The content of the aboriginal title

Another question to be answered is what the aboriginal title exactly entails. Any title at least refers to an exclusive possession of land including the right to eject trespassers from this land.[64] The descendants of the original occupants of the land annexed by colonial powers are the applicants of the doctrine of aboriginal title, which had its source in pre-colonial laws and practices of these original occupants. In this sense, it can be said that the title is essentially a *sui generis* interest in land, which is an all-encompassing right to occupy and use the land in subject.[65] Another aspect of the aboriginal title is that it is an inalienable property right. It cannot be disposed to third parties, but only to the Crown or State.[66] These are general aspect of the title, but the national courts in different jurisdictions gave different meanings to some aspects of the aboriginal title.

2.2.1 Canada

In Canada the content of the aboriginal title was rather vague prior to the Supreme Courts' decision in the *Delgamuukw* case. The Courts were hesitant to say what aboriginal title actually entails, therefore the question of what indigenous people exactly were entitled to, remained unanswered. In the *Delgamuukw* case the Supreme Court stopped avoiding the matter and gave a clear view of the aboriginal title's nature.[67] In the case the Court affirmed the *sui generis* character; the title is an interest in land in a class of its own. The title is unique in different aspects, it cannot be sold or transferred and due to its collective nature it can only be held by a community and not by individuals. Furthermore its source, prior occupation and pre-existing laws, also distinguishes the title from other land title, which are normally granted by the Crown.[68]

The Court also elaborated on the issue in which manners the Aboriginal peoples can make use of their land. This is not restricted by the *sui generis* character of the title, it is right to the land itself. The title is not a collection of rights to use the land in certain ways that were pursued by aboriginal peoples before colonization.[69] The title includes more than a right to practice traditional culture, therefore the Court approved use rights which were quite

[64] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, par. 117
[65] Ülgen 2002, p. 147
[66] Pienaar 2006, p. 4
[67] McNeil 1998, p. 7
[68] McNeil 1998, p. 8
[69] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at par. 140

unusual activities for aboriginal cultures, such as exploitation of minerals. However, the Court did impose a limitation on the purposes for which the aboriginal title lands can be used. The lands may not be used in a way that is irreconcilable with the nature of the attachment to this land, which is the basis for the aboriginal title.[70] The relationship with the land is not one of ownership but one of possession, use and occupation. [71] Thus the essential point is that the content of title is not based on rights in a identifiable legal system, but it is based on practices and customs showing the connection with the land. Therefore it can be said that both traditional and non-traditional use of land can be included in the aboriginal title, however this is limited by the requirement that the kind of use in question should be consonant with the nature of the attachment to the land.[72] For example, the occupation of the land, needed for establishing the title, can be proven by showing that the land was used as hunting ground. When this is the case, the land may not be used today in a way that would destroy its value for hunting.[73]
Furthermore the Court declared the aboriginal title is an exclusive right to use and occupy land. This means that aboriginal people are not only free to use their land but also to prevent others from intruding on and using their lands without their consent, like any other landholder.[74]

2.2.2 United States

Aboriginal, or Indian, title is a right of occupancy, granted to aboriginal possessors of land and their descendant, by the federal government.[75] From *Johnson v M'Intosh*, it becomes clear that the aboriginal possessors are asserted to be rightful occupants of the land, with a just and legal claim to possession of it. They are allowed to use it in a way of their own discretion, but they do not have a right to complete sovereignty. In addition they may not dispose their land to their own will, but only to the state.[76]
Later the courts described aboriginal title as a mere possession not specifically recognized as ownership. It is only a right of occupancy and not a property right, granted by the sovereign who protects it against intrusion by third parties.[77] This right may be terminated by the United States without any legal obligation to compensate the Indian people.[78]

2.2.3 Australia

The *Mabo* case was a landmark decision and could be used as binding precedent for land claims of aboriginal people in the future. However, the decision was to some extent unclear about the specific entitlements of the aboriginal peoples. The Australian government passed the Native Title Act of 1993 (NTA) in reaction to the *Mabo* case. In *Western Australia v.*

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[70] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at par. 128
[71] Ülgen 2002, p. 149
[72] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at par. 125-129
[73] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at par. 128
[74] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at par. 155
[75] Briscoe 2003-2004, p. 3
[76] *Johnson v M'Intosh* 21 U.S. 543 (1823)
[77] Briscoe 2003-2004, p. 4
[78] Briscoe 2003-2004, p. 5

Ward[79] the High Court decided that this act, and not the common law, should be starting point for any decision concerning native title.[80] The Court stated that the NTA regulates the determination and protection of the native title when an application under this Act is lodged.[81] Section 223(1) of the NTA gives a definition of native title:

> 1) The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
>
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
>
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
>
> (c) the rights and interests are recognized by the common law of Australia.

However, this definition leaves the question of what the native title exactly entails unanswered. Therefore the High Court determined the content of the native title in several cases, one of the cases is *Hayes v Northern Territory of Australia*[82] In this case the court determined the following:

> 1. Native title exists in relation to the land and waters …
>
> 2. The persons who hold … native title … are those Aboriginals who are descended (by birth or by adoption) from the original Arrernte inhabitants of the Mparntwe, Antulye and Irlpme estates who are recognised by the respective *apmereke-artweye* and *kwertengerle* of those estates under the traditional laws acknowledged and the traditional customs observed by them as having communal, group or individual rights and interests in relation to such estates.
>
> 3. The nature and extent of the native title rights and interests in relation to the determination area are:
>
> a) the right to possession, occupation, use and enjoyment of the land and waters of their respective estates within the determination area;
> b) the right to be acknowledged as the traditional Aboriginal owners of the land … ;
> c) the right to take, use and enjoy the natural resources found on or within the land .. ;
> d) the right to make decisions about the use of the land … ;
> e) the right to protect places and areas of importance in or on the land … ;
> f) the right to manage the spiritual forces and to safeguard the cultural knowledge associated with the land
>
> 4. The nature and extent of other interests in relation to the determination area are:

[79] *Western Australia v. Ward* (2002) 191 A.L.R. 1
[80] Strelein 2005, p. 251
[81] Strelein 2005, p. 251
[82] *Hayes v Northern Territory of Australia* [2002] FCA 671

a) rights and interests validly granted by the Crown pursuant to statute or by any valid executive or legislative act affecting the native title of the common law holders; and
b) other rights and interests of members of the public arising under the common law.

5. The rights referred to in paragraph 4:

a) continue to have effect and may be exercised notwithstanding the existence of the native title rights and interests referred to in paragraph 3; and
b) an activity done in exercise of such rights will prevail over the native title rights and interests referred to in paragraph 3.

6. The native title rights and interests of the common law holders do not confer possession, occupation, use and enjoyment of the land and waters of the determination area on the common law holders to the exclusion of all others.[83]

However in other jurisdictions there are more restrictions on ownership and rights to alienate, transfer or use land. In the United States for example the right to occupy land is to plenary power of extinguishment of the Congress and in New Zealand the aboriginal title is a right of exclusive possession but subject to the Crown's right of appropriation.[84]
The way in which the land is used, from extensive occupation of land to limited use of a specific part of land, is defined by the aboriginal traditions, laws, practices and customs. For aboriginal populations their occupation of land is inextricably linked with their customary law and oral traditions of their relationship with land.

The different jurisdictions use different ways to describe the exact content of the aboriginal title. In the U.S. the aboriginal title is very strictly defined, it is only a right of occupancy and it can only be disposed to the state. However, in Australia the basis of the aboriginal title is the Native Title Act, which does not define the title that narrowly. Despite these differences some elements can be found in every jurisdiction. In general it can be said that the title can only be held collectively, has a *sui generis* character, includes the right of occupancy and different ways of using the land and is exclusive.

2.3 Proof of aboriginal title

From both foreign and international law general ways to determine the components of proof of aboriginal title emerged. At least claimants have to proof that they are a distant community and descendants from an indigenous community that occupied the land at the time of annexation by colonizers. Aspects to take into account include occupation at the time of colonization, period of occupation, social organization, continuity on land exclusivity and traditional customs and laws with respect to the land.[85] Furthermore the right to land must not be extinguished for the claim to be successful.[86]

[83] *Hayes v Northern Territory of Australia* [2002] FCA 671
[84] Ülgen 2002, p. 149
[85] Chan, 2004, p. 118-119
[86] Chan, 2004, p. 119

2.3.1 Canada

The Canadian Supreme Court established a test to prove the existence of aboriginal title in the *Van der Peet* case[87]. In the *Delgamuukw* case the governments of Canada and British Columbia asked the Supreme Court to rely on this test when dealing with the aboriginal title.[88] The test as laid down by the Court establishes the existence of the aboriginal title in three steps.

First the claimants have to prove that the land was occupied prior to sovereignty, the date of the Crown's declared sovereignty is relevant. When proving the occupation, both the aboriginal perspective and the common should be taken into account. The common law requires any act in relation to the land that shows the intention to hold the land for one's own purpose.[89] Thus, the occupation can be proven by both physical presence and by Aboriginal law. Secondly the occupation must be continuous. In the D*elgamuukw* case it is said that 'an unbroken chain of continuity' is not needed, 'a substantial maintenance of the connection between people and the land' is what the notion of continuity requires[90], which is affirmed by both Canadian and Australian courts is several cases.[91] Disruptions in continuity do not necessarily affect the current aboriginal title, especially when this disruption is caused by European violation of aboriginal rights.[92] Lastly the occupation must have been exclusive at sovereignty, because the aboriginal title is exclusive as well.[93] The common law perspective as well as the aboriginal perspective should be taken into account when dealing with this issue. This exclusivity refers to the intention and ability to maintain exclusive control over the land; it does not necessarily include the absence of other groups.[94] Furthermore it is possible to share the land with another community; joint aboriginal title can be applied by the concept of shared exclusivity.[95]

2.3.2 United states

In the United states the Courts did not establish a test to prove aboriginal title as explicit as the Supreme Court in Canada did, however some requirements are formulated. Indian title, as it named in the United States, refers to the factual proof of ownership of the subject land, it requires the difficult proof of immemorial possession.[96] The requirements to this are more or less the same as in Canada; the claimant has to prove actual, continuous and exclusive possession.[97]

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[87] *R. v. Van der Peet*, [1996] 2 S.C.R. 507
[88] Gilbert 2006,p. 70
[89] McNeil 1998, p 13.
[90] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at par. 153
[91] Gilbert 2006, p. 71
[92] McNeil 1998 p 14.
[93] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at par. 143
[94] Gilbert 2006, p. 71
[95] McNeil 1998 p 14.
[96] Briscoe 2003-2004, p 4-5
[97] Briscoe 2003-2004, p 5

2.3.3 Australia

According to the *Mabo* case the aboriginal people in Australia have to prove that they have a continuing connection in the form of occupation with the land in subject and that they have rights and interests in the land according to traditional law and custom.[98] In addition the connection with the land should be exclusive. The Australian courts have confirmed that it is possible to share the land with other communities and still have exclusive occupation.[99]

In the *Western Australia v. Ward* case however, the High Court stated that the NTA and not the common law, should be starting point for any decision concerning native title, as mentioned above. From section 223 (1) of the NTA it can be derived that two material facts need to be proven in order to establish native title, which are based on the founding of the Court in the *Mabo* case. Firstly, the relevant traditional laws and customs need to be identified.[100] The claimants should have a right in land according to these laws and customs. According to the *Yorta Yorta* case[101] in this context 'traditional' means that the rules must have their origins prior to sovereignty and they must have a continuous existence and vitality since sovereignty. The second material fact requires that the traditional rules from the first requirement establish a connection with the land. The connection should exist continuously form prior to sovereignty until present.[102]

There are no clear requirements or tests established in the Unites States in order to prove aboriginal title. In Canada, on the contrary, the Supreme Court created a comprehensive test with several requirements. It is presumed that the conditions in the United States are more or less the same. In Australia the test is similar as well, although it is formulates a bit more narrowly. In Canada both physical occupation and traditional laws can be used to establish aboriginal title, while in Australia the title can only be established by traditional laws and customs. In short the following elements of proof can be found in all three jurisdictions; continuous and exclusive occupation since prior to colonization. In the next chapter I will discuss indigenous peoples' land rights in international law and after that the *Richtersveld* cases will be discussed. In both chapters the existence of these elements will be examined.

3 Indigenous Land Rights in International Law

International public law as well as foreign law must be considered by the Courts in South Africa, therefore both are relevant. Since international law is part of South African national law, the doctrine of aboriginal title is enforceable in South African courts to the extent that it is recognised internationally.[103]

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[98] French 2001-2002 p 144
[99] Gilbert 2006, p. 71
[100] Carter 2008, p 307
[101] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at par. 46-47
[102] Carter 2008, p 309
[103] Bennett & Powell 1999, p 451

Indigenous rights have been an important subject in international law in the past decade. There were a lot of developments in this area, amongst others the *United Nations Declaration on the Rights of Indigenous Peoples* in 2007.[104] Next to this Declaration there are several conventions, declarations, and developments in international and regional case-law recognising land rights of indigenous peoples, for example the Indigenous and Tribal Peoples Convention 169 of the ILO and case law from the Inter American Court of Human Rights and the Human Rights Committee. These sources of international will be considered below in relation to the doctrine of aboriginal title.

3.1 Indigenous and Tribal Peoples Convention 169 of the ILO (1989)

In the past decade the ILO increased its efforts to spread and implement the provisions of this Convention. Almost all Latin American states with significant indigenous populations have ratified the convention. Additionally the ILO has gained trust from indigenous populations by supporting their rights in an active way through different projects.[105] Furthermore the convention proved to be useful ammunition for indigenous claims and is used for this purpose in national systems. For example in Australia the court has referred to the convention as 'an indication of the direction in which the international law is proceeding'.[106] The Convention has a binding character, it is drafted as a treaty and therefore binding upon the states that have ratified it. Only 20 states have ratified it so far, however it serves as a set of minimum standards for all states, until it is ratified.[107]

This convention is the successor of Convention 107 on Indigenous and Tribal Populations of the International Labour Organisation (ILO). Convention 107 recognised indigenous peoples' right to ownership of lands they traditionally occupied.[108] One of the main critics on this convention was that it failed (a) to protect indigenous peoples' rights to continue the use of resources on lands they did not occupy, (b) to recognize claims on land previously occupied but dispossessed by force and (c) legitimise expropriation based on national security, health or economic development.[109] Redressing these shortcomings and redefining land rights caused a lot of problems. One of the central questions in drafting the new convention was the legal nature of the land rights to be recognised, whether it should be ownership, occupation, use, or all three. The drafting committee was finally able to adopt a right of ownership *and* possession, additionally the use of land was included as a additional right.[110] In addition, measures need to be taken in appropriate cases to ensure the right of indigenous peoples to use land not exclusively occupied by them, but to which they had traditionally access.[111] Thus the Convention no 169 provides for indigenous peoples

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[104] Xanthaki 2009, p 27
[105] Xanthaki 2009 p 29
[106] *Police v Abdulla* (1999) 74 SASR 337 at par. 37
[107] Report of the Eight Session UNPFII, New York, 18-19 May 2009, E/C.19/2009/CRP.7 available at < http://www.un.org/esa/socdev/unpfii/en/EGM_DCI.html> p 11
[108] ILO Convention 107 art. 11
[109] Barsh 1990 223
[110] Barsh 1990 225
[111] ILO Convention 169 art 14

management of natural resources, including the lands they do not occupy but use. This implies that the occupation or use of land by the community does not have to be exclusive. Article 14(1) also uses the term traditionally, meaning that it is important that the indigenous peoples not only occupy or use the land or territories today, but that they have done so for a long period of time.[112] The Convention does not further define or explain this, however it is clear that the peoples should use or occupy the land for a period of time long enough to be able to see it as a custom. Another element developed in national case law was the continuity of the occupation. In Article 14 (1) the phrase "...the lands they traditionally *occupy*... to which they *have* traditionally *had* access..." is used. This provision implies that indigenous peoples need to be in possession of traditional lands at present, which might suggest that peoples that have been dispossessed of their lands will not qualify under this section.[113] The convention furthermore respects the right of indigenous peoples to maintain their own systems of land tenure[114], it highlights the collective aspect of their right to land and the use of resources of the land is protected.[115] Furthermore it is regulated that indigenous peoples should be informed and consulted and have to consent in matters concerning the land they occupy, for example with relocation or activities such as mining on the subject land.[116]

In short, the continuous occupation since a long period of time can also be found in the ILO Convention 169. However the Convention does not require exclusiveness of the occupation or use, since use of land not exclusively held by the indigenous peoples is also protected.

3.2 Human Rights Committee

The Human Rights Committee is established by part IV of the International Covenant on Civil and Political Rights (ICCPR) amongst others to given guidance in interpreting the various articles of this covenant. Additionally the HRC has to consider communications from individuals claiming to be victims of violations of one of the rights set out in the covenant.[117] Article 27 is relevant for indigenous land rights, because it deals with the protection of minorities, it reads as follows:

> "In those states in which ethnic, religious of linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

In its general comments the HRC emphasized that culture manifests itself in many forms, including the use of land resources, especially in the case of indigenous peoples. This right may include hunting and living in certain areas of reserves protected by law and may

[112] Report of the Eight Session UNPFII, New York, 18-19 May 2009, E/C.19/2009/CRP.7 available at < http://www.un.org/esa/socdev/unpfii/en/EGM_DCI.html> p 23
[113] *idem* p 25
[114] ILO Convention 169, art 17.1
[115] ILO Convention 169, art. 15.1
[116] ILO Convention 169, art 15.2, 16.2 and 17.2
[117] Barrie 2005, p. 385

require positive legal measures to ensure protection and effective participation of member of the indigenous communities.[118] As a result of this general comment various indigenous communities have approached the HRC when conflicts occurred between indigenous peoples traditional land use activities and state authorised resource projects, for example the *Ilmari Lansman v Finland* communication.[119] In this communication there was a conflict between the Sami people and Finland. The Sami stated that Finland had violated article 27 ICCPR by authorising transportation activities in an area which was of particular importance for the Sami because of herding activities and spiritual significance.[120] The HRC stated that economic activities should be performed in a way that authors can still benefit from reindeer husbandry, in order be in compliance with article 27, otherwise this may constitute a breach of the right of the Sami to enjoy their own culture.[121] Thus, Article 27 ICCPR can be relevant in cases dealing with land rights of indigenous communities.
The communication of the HRC is based on Article 27 ICCPR, which has the right to culture and minorities as starting point instead of the right to land and indigenous peoples. As a result of this different basis, the elements of aboriginal title cannot be found in this communication.

3.3 The Declaration on the Rights of Indigenous Peoples

The adoption of the Declaration is perhaps the greatest development on indigenous rights in the last decennium. The drafting process took a lot of time; however the final version is satisfying to most of the indigenous representatives.[122] It was adopted by the UN General Assembly in September 2007, with 144 votes in favour, 11 abstaining and 4 against (Australia, Canada, New Zealand and the United States).[123] Strictly speaking the Declaration is a non-binding document, however there are several factors mitigating this. For example, the Permanent Forum on Indigenous Issues is overseeing this instrument, which makes it more likely that it will maintain a prominent place in the international field.[124] The human rights standards in the Declaration are internationally accepted as minimum standards on rights of indigenous peoples over the world, therefore it can be argued that its influence stretches out over the states that voted against because of its almost universal acceptance.[125]

The Declaration deals with specific issues concerning indigenous peoples and focuses on collective rights. It also includes a wide variety of land rights, including the right to pursue traditional activities and the right to use natural resources.[126]

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[118] Barrie 2005, p. 386
[119] Communication No 511/1992
[120] Barrie 2005, p.386
[121] Barrie 2005, p.386
[122] Xanthaki 2009, p 29
[123] Report of the Eight Session UNPFII, New York, 18-19 May 2009, E/C.19/2009/CRP.7 available at < http://www.un.org/esa/socdev/unpfii/en/EGM_DCI.html> p 9
[124] *idem*
[125] *idem*
[126] Art. 26 Declaration

Land rights are a grey area in international law, because the right to property is not as strongly protected as other rights. Before the adoption of the declaration land rights of indigenous peoples were only protected by *ILO Convention 169*, which was not ratified by a lot of states. Therefore the inclusion of strong protection of land rights in the Declaration is a very positive development for both international law and indigenous peoples. Article 26(1) of the Declaration recognizes "the right to the lands, territories and resources ... traditionally owned, occupied or otherwise used or acquired". Consequently this right includes the power to use, develop and control the lands as well as to own them.[127] Some of the aspects of control are explained in Article 32 as "the right to determine and develop priorities and strategies for development or use" of the lands. It also includes the right to name places.[128] Article 32(2) furthermore mentions resources in relation to the principle of free prior and informed consent. Indigenous peoples should be informed "particularly in connection with the development, utilization of exploitation of mineral, water or other resources". Noteworthy is also that Article 26 protects the rights of indigenous peoples over areas which are traditionally owned, occupied or used. Therefore it covers indigenous peoples who have been forced off their lands traditionally owned or occupied, and who resettled in different areas.[129]

In article 28(1) of the Declaration indigenous peoples' right to land from which they were dispossessed is recognized, however it is still vague what this exactly entails.[130] Article 28 does not specify whether indigenous peoples have the right of ownership or the right of possession. It is more likely that it adopts a broader approach that includes both ownership and possession. Furthermore the provision comprises the right to develop and control land, which is only a right to use the land which fails the standards of the right to land. Despite the vague formulation the right to 'own, use, develop and control'[131] indigenous land and its resources it is a landmark provision, since this was formerly a monopoly of the state.[132]

3.4 Inter-American Court of Human Rights

A major development in international law concerning indigenous rights can be found in the Inter-American jurisprudence. Both the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights (IACHR) are a point of reference in this manner.[133] The Inter-American Convention does not specifically address restitution of ancestral lands, however it does protect the right to property in Article 21(1). The Court interpreted and used this is right in cases concerning the restitution of ancestral lands.[134]

The IACHR was the first international tribunal dealing with collective land and resource rights of indigenous peoples, the first significant case in this area was *Awas Tingni*

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[127] Art 26(2) Declaration
[128] Article 13(1)
[129] Report of the Eight Session UNPFII, New York, 18-19 May 2009, E/C.19/2009/CRP.7 available at < http://www.un.org/esa/socdev/unpfii/en/EGM_DCI.html> p 24
[130] Xanthaki 2009, p 31
[131] Article 26(2) United Nations Declaration for Rights of Indigenous Peoples
[132] *idem*
[133] Xanthaki 2009, p 33
[134] Pasqualucci 2006, p 295

Community v Nicaragua.[135] Awas Tingni, an indigenous community living on the Atlantic coast of Nicaragua, claimed that Nicaragua violated article 21(1), the right to property, of the American Convention on Human Rights (ACHR) by failing to distinguish and title Awas Tingni traditional lands. Nicaragua had granted timber concessions to a Korean company without consulting the community. This concession to the Korean logging company was also awarded without regard to the earlier efforts of the community to obtain legal recognition of its ancestral lands and despite the existence of national legislation protecting the rights of indigenous communities in the Atlantic Coast.[136] Therefore the community presented a petition to the Inter-American Commission of Human Rights and this commission pursued the case before the IACHR.[137]

The Court stated that, because the ACHR used the term 'property' and not 'private property', communal property rights are included and the convention does not only protect the individual property right but also the 'the rights of members of the indigenous communities within the framework of communal property'.[138] Additionally the Court recognized the customary law and land tenure systems of indigenous communities by stating that 'possession of the land should suffice for indigenous communities lacking real title to property of land to obtain official recognition of that property, and for consequent registration ... '[139] As a result it can be concluded that the property rights of Awas Tingni originate in traditional occupation and use and are independent from current recognition by the state.[140] Thus the Court holds that the ACHR supports the indigenous title based on customary law.[141] Consequently the community had a property right to the lands it occupied, without detriment to the rights of other indigenous communities. Furthermore the boundaries of the territory were not effectively demarcated by the state, which caused uncertainty among the members of the community. The Court held that Nicaragua had the obligation to delimit, demarcate and title the communal property geographically in order to create legal certainty.[142] The delimitation and demarcation is necessary, otherwise the juridical recognition of indigenous lands does not make sense, since indigenous communities should be able to prevent third parties to trespass their lands.[143]

In the *Yakye Axa* case[144] the Court expanded on its earlier decision by stating that it would be necessary to restrict private, individual property rights and let communal traditional land rights prevail in order to preserve the cultural identity and pluralistic society.[145] This case concerned a small group of people no longer living on the subject land. The people had traditionally lived on the land, which was communally owned by them. In the late 19th century the land was sold to British business owners and due to the changes circumstances

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[135] *Awas Tingni community v Nicaragua,* 2001 IACHR No. 79
[136] Alvarado 2007, p. 610
[137] Barrie 2005, p. 388
[138] *Awas Tingni community v Nicaragua,* 2001 IACHR No. 79 at par. 146
[139] *Idem*, at par. 151
[140] Alvarado 2007, p 612
[141] Xanthaki 2009, p 32
[142] *idem*
[143] Pasqualucci 2006, p 302
[144] *Yakye Axa Indigenous Community v Paraguay* IACtHR Series C 125 (2005)
[145] Pasqualucci 2006 p 284

after this the indigenous community was forces to leave the subject land.[146] The community claimed that their right to property was violated. The Court established certain guidelines to determine permissible restriction to the right to property and human rights in general. The restrictions have to be established by national law and should be proportional, necessary and have a legitimate goal.[147] Furthermore, when the restrictions affect indigenous peoples it should be taken into account that indigenous territorial rights include a more braid concept related to collective rights and the survival of the community. The control over their traditional lands is necessary for the reproduction of their culture, their development and the realization of their live plans.[148] It is important to note that the Court does not consider itself competent to indentify the traditional lands. The Court only determines whether the state has violated the right of indigenous peoples to their communal property. If so, it is then to the state to delimit, demarcate, title and return the lands to the indigenous community, since the state had the technical and scientific capabilities to do so.[149]

In short it can be concluded that the Inter-American Court uses the right to property as basis for the protection of indigenous land rights. Some of the elements of aboriginal title are also used in this context; Inter-American case law also concerns traditional occupation, thus occupation for a long time or since time immemorial. The Court also states that the subject land needs to be delimited and demarcated in order to prevent third parties from trespassing. This may imply that the occupation needs to be exclusive, although the Court does not mention this specifically. The element of continuous occupation is not mentioned at all. Thus, some elements are similar, however not all of them are to be found in Inter-America case law.

3.5 The African Commission on Human Rights

The African Charter on Human and Peoples' Rights (African Charter) is the key treaty in Africa concerning human rights. This Charter does not explicitly refer to indigenous peoples', however the embodiment of it could be read as dealing with their rights.[150] The African Commission is the main institution for implementing the African Charter. The issue of indigenous peoples in Africa has been raised sitting of the African Commission by representatives of indigenous peoples and both national and international organisations.[151] At first the African Commission was not very keen on dealing with this issue, because it thought of the term 'indigenous peoples' as not applicable to African conditions. The underlying argument for this point of view was that all Africans are indigenous to Africa and that no specific group can claim indigenous status.[152] However in 2000, the African Commission adopted a resolution, which established a Working Group of Experts on the Rights of Indigenous Populations in Africa (Working Group), to examine the issue of

[146] *Idem,* p 297
[147] *Yakye Axa Indigenous Community v Paraguay* IACtHR Series C 125 (2005), at par. 144
[148] Pasqualucci 2006, p 299
[149] *Idem*, p 302-303
[150] Bojosi 2006 p. 382
[151] Bojosi 2006 p. 388
[152] Bojosi 2006 p. 390

indigenous peoples in Africa.[153] The Working Group came with a report in 2003.[154] In this report the Working Group did not define the term 'indigenous peoples' but came with three characteristics; marginalisation, discrimination and exclusion from developmental processes, cultural distinctiveness and self-identification. These criteria are interdependent, thus a group cannot claim to be indigenous just because they are cultural distinctive. Additionally it is important to note that self-identification should go together with recognition as a distinct group by other groups.[155] African states have always been reluctant to adopt the concept of indigenous peoples, stating that this concept is irrelevant to Africa. This report of the Working Group and the adoption of it by the African Commission is a step forward in the recognition of indigenous peoples in Africa. Nevertheless it is not a true recognition, and without this recognition it is almost impossible for indigenous peoples to exercise other rights, such as land rights.

However, on Februray 4, 2010, the African Commission came with a landmark ruling on indigenous land rights in Kenya. Despite the earlier attitude towards de concept of indigenous peoples' the African Commission ruled that the expulsion of the Endorois people from their ancestral lands for tourist development was a violation of their rights.[156] CEMIRIDE and Minority Rights Group International brought the case on behalf of the Endorois people to the African Commission. In the 1970s the Endorois people, a traditional pastoralist community were evicted from their ancestral lands at lake Bogoria in central Kenya. The government wanted them to make way for tourist facilities and a national park. The Commission found that this deprivation of land with minimal compensation, was a violation of the Endorois people rights to property, culture, religion, health and natural resources, it therefore was a violation of their right to development. The Kenyan government was ordered to restore the Endorois to the subject land a to give them a compensation. This is the first ruling deciding on who are indigenous peoples in Africa and what their rights to land are.[157]
The subject land is the area around Lake Bogoria, which is known for its hot springs and wildlife, including one of the largest population flamingos of Africa. The area is also the centre of religion and culture for the Endorois, their ancestors are buried nearby this area. After the eviction by the Kenyan government, the community had to move from the fertile land around the lake to arid land. As a result many of the Endorois' cattle died.[158] At first they tried to convince the local and national government to reverse the eviction, later they

[153] Resolution on the Rights of Indigenous Peoples' Communities in Africa (2000) ACHPR/Res 51 (XXVIII) adopted by the African Commission at its 28th ordinary session held in Contonou, Benin October 2000
[154] IGWIA, *The 38th ordinary session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia,* 21 November to 5 December 2005.
[155] Bojosi 2006, p. 397
[156] C. Morel 'Kenya : landmark ruling on indigenous rights' <http://www.hrw.org/en/news/2010/02/04/kenya-landmark-ruling-indigenous-land-rights>
[157] C. Morel 'Kenya : landmark ruling on indigenous rights' <http://www.hrw.org/en/news/2010/02/04/kenya-landmark-ruling-indigenous-land-rights>
[158] C. Morel 'Kenya : landmark ruling on indigenous rights' <http://www.hrw.org/en/news/2010/02/04/kenya-landmark-ruling-indigenous-land-rights>

tried to get an adequate share of the benefits from the tourism industry on the subject land. The Endorois' proposals were rejected by the government and the Kenyan courts refused to address their case.[159] The Endorois then brought their case to the African Commission.
In the ruling of the African Commission, several important statements can be found. Firstly, the Commission determined that the Endorois are a distinct indigenous community, with a clear historic attachment to the subject land.[160] This is remarkable since some African countries still contest this terminology arguing that all Africans are indigenous, as states above. Secondly it was found that the Endorois traditionally occupied and used the land, even though it was not on formal title. The African Commission found that the government still relied on a colonial law, preventing certain communities from holding land rights, and allowing other parties, such as local authorities, to own traditional land as 'trust' for these communities. This prevented the Community from having a formal title of ownership. The court also referred to the *Awas Tingni* case, stating that occupation without formal title can lead to ownership.[161] The Commission accepted the claim and evidence of the community that they have lived on and occupied the subject land since time immemorial.[162] Consequently the Endorois Community had a right to property with regard to their traditional land.[163]
In short it can be said that the African Commission granted the Endorois Community a right in land based on traditional occupation and use of the subject land since time immemorial. The Kenyan government had to restitute the traditional lands and pay compensation for suffered losses.[164]

It can be concluded from the above that at both international and regional level the same developments can be found as at national level. The trend is to take indigenous peoples land rights in consideration and in some cases even redistribute traditional lands. Generally, the exclusive and continuous occupation of land since prior to colonization or since time immemorial are important aspects in dealing with cases concerning indigenous land rights. These aspects cannot be found in every case, and not every case deals with all these items. However, these criteria for aboriginal title find their way at international and regional level as well.

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[159] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, 276/2003, African Commission on Human and Peoples' Rights, 4 February 2010, available at: http://www.unhcr.org/refworld/docid/4b8275a12.html [accessed 27 March 2010] at par. 11-12
[160] *idem* at par. 162
[161] *idem* at par. 207
[162] *idem* at par. 184
[163] *idem*
[164] *idem* at par. 1 of the Recommendations.

4 The Richtersveld Cases

4.1 Background

4.1.1 The Richtersveld Community

The Richtersveld is an area of land, which is part of Namaqualand, situated in the Northern Cape Province of South Africa. Namaqualand is a dry region nearby the Kalahari Desert, originally inhabited by the Khoikhoi, San, and the merged Khoisan people.[165] They have inhabited this land from time immemorial, even before the Dutch colonized the Cape in 1652. The hunter-gathering and pastoral activities are still the main occupation of the people, who remained on the land until today. Today these people are known as the Richtersveld community.[166] In the nineteenth century other people, such as white missionaries and farmers, settled in the area as well. In 1847 the British Crown annexed a large part of Namaqualand including the Richtersveld area.[167]

The Crown held sovereignty over the annexed land; however the restrictions of private property ownership rights were not clear. The Richtersveld Community continued to practice their hunter-gatherer and pastoral activities. In addition they maintained their exclusive beneficial occupation over the land, with the right to lease the land to or exclude others.[168] Due to the annexation by the British Crown the land was declared inalienable Crown land, when the South African government took over in 1910. This entitled the government to award claims for mining after diamonds were discovered in 1925.[169] Between 1925 and 1927 mining rights were awarded by the government, later the mining rights were exclusively held by Alexander Bay Development Corporation, a state-owned company which was later converted into a private company, Alexkor.[170] These developments affected the ability of the people to continue their traditional livelihood on the claimed land. During this period the state ignored the property rights of the community by granting mining rights to private entities.[171]

4.1.2 South African law

In 1994 South Africa changed from an *apartheid* state into a constitutional democracy based on principles of equality and justice. During the apartheid black South African, 85% of the population, could not legally own land. The right to land and land reform were critical aspects of South Africa's transformation. The drafters of the new Constitution promised equitable access to land and restoration of racially discriminatory land dispossessions.[172]

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[165] Chan 2004 p. 116
[166] Hoq 2002 p. 422
[167] Pienaar 2008 p. 5
[168] Chan 2004 p. 116
[169] Chan 2004 p. 116
[170] Brink 2005 p. 177
[171] Hoq 2002 p. 423
[172] Chan 2004 p. 117

This resulted in section 25(7) of the Constitution of South Africa, of which the relevant part reads:

> [a] person or community disposed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or equitable redress.[173]

As mandated by this section, the Parliament passed the *Restitution Act*, of which the appropriate part reads:

> A person Shall be entitled to restitution of a right in land if –
>
> d) it is a community or a part of a community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices, and
> e) the claim for such restitution is lodged not later than 31 December 1998.[174]

This means that claimants have to prove five elements to succeed their claim for restitution under this act; community, a 'right in land' prior to dispossession, dispossession after 19 June 1913, as a result of past racially discriminatory laws or practices and a claim lodged not later than 31 December 1998.[175] The second element, a 'right in land', raised the discussion about the aboriginal title in South Africa. According to the *Restitution Act* a right in land is: 'any right in land whether registered or unregistered, … , a customary law interest, …'[176] The question raised in the Richtersveld case was whether aboriginal title created a 'customary law interest' and thus a 'right in land' under the *Restitution Act.*[177]

The members of four communities living in the Richtersveld area are the applicants in the first Richtersveld case. They claimed restitution of their rights in their ancestral lands under the Restitution of Land Rights Act 44 of 1994 before the Land Claims Court (LCC).[178]

4.2 The decision of the Land Claims Court

In 2000, the Richtersveld Community lodged two different claims to get hold of the subject land; one in the LCC of South Africa under the Restitution Act and the other in the Cape High Court of South Africa, requesting a declaration of land rights based on aboriginal title.[179] With the latter process, the community decided not to proceed until the LCC came with a final decision concerning the claim under the Restitution Act.[180]

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[173] South African Constitution (Constitution Act 108, 1996 s. 25(7).
[174] Restitution of Land Rights Act, No. 22, s. 2(1) (1994).
[175] Chan 2004 p. 117
[176] Restitution of Land Rights Act, No. 22, s. 1 (1994).
[177] Chan 2004 p. 117
[178] Hoq 2002 p. 423
[179] Chan 2004 p. 119
[180] *idem*

4.2.1 The Claim

In the LCC, the applicants brought their claim under Chapter IIIA of the Land Rights Act and more precisely under S 2(1). According to this section the applicants had to prove that they were a community, who themselves or the ancestors were deprived of their rights in the subject land after 19 June 1913 as a result of past racially discriminatory laws, according to s 2(1) of the Restitution Act.[181] The claimants incorporated the doctrine of aboriginal title in their claim by stating that they were a community holding (a) a right to the subject land based on ownership, alternatively (b) a right based on aboriginal title giving them the right of beneficial occupation and use, alternatively (c) a right in land obtained by beneficial occupation of the subject land for a period longer than ten years prior to the dispossession.[182] The LCC dismissed the claim in its entirety and stated that the applicants were not entitled to restitution of the land in subject. The LCC had several arguments underlying this decision.

4.2.2 A right based on ownership

Firstly, the applicants did not have a right in the land based on ownership. The law in force at the time of annexation did not recognize the community's right to the land, because indigenous people were 'insufficiently civilized'[183] and were therefore not worthy the right of ownership.[184] As a result the land in subject was considered *terra nullius* and thus belonged to the Crown. [185] The Court did acknowledge that this could be regarded as an infringement of the rights of the community at the time of the dispute. However the court applied the majority principle of intertemporal law, meaning that the consequences of colonial annexation of the subject land have to be examined on basis of the law in force at the time of colonial annexation, not at the time of the dispute.[186] The LCC reasoned that it was bound by that law to deny the claim of the community, irrespective of the modern judicial norms.[187] The wrong against the community could therefore not be remedied.

4.2.3 A right based on aboriginal title

The LCC further reasoned that the minority principle of intertemporal law was not applicable. This principle states that changes in law over time can be a reason for establishing a right to land derived from the doctrine of the aboriginal title.[188] According to the LCC this principle was not applicable because such change had not taken place in South Africa, although it did occur in other states in the form of aboriginal title. In South Africa such a change could only take place through the development of common law, which fell outside the competence of the LCC.[189] The Court emphasized that, although it was a

[181] Hoq 2002 p. 423
[182] Pienaar 2008 p. 5
[183] *Richtersveld Community v Alexkor,* 2001 (3) SA 1293 (LCC) at par 93.
[184] Hoq 2002 p. 424
[185] Brink 2005 p. 178
[186] *idem*
[187] Hoq 2002 p. 424
[188] Dugard 2000 p. 114; Hoq 2002 p. 424
[189] Hoq 2002 424

specialized court of expertise in land law and established with the intention to interpret the Restitution Act and additional land law, the adoption of the doctrine of aboriginal title into municipal law was an issue for courts of general jurisdiction.[190] The court furthermore held that no effect can be given to a constitutional right by the development of common law, when the right is already given effect by legislation, such as the right to restitution n s 25(7) of the Constitution given effect by the *Restitution Act*.[191]
The LCC was not entirely clear about its reasons not to deal with the aboriginal title; however it gave some insight into its anxieties. It held that when aboriginal title would be become applicable the extension of land claims would be enormous and even disastrous, the entire surface of South Africa would become subject to claims and ethnic tensions would intensify.[192] Furthermore the court stated that it was too complex to reverse past colonial land dispossessions, given the demographic shifts over time and the lack of written documentation of those shifts.[193] After that the LCC shortly raised the idea that the community's claim would be better interpreted as a customary law interest. The court immediately dismissed this idea, because such an interest would have to be recognized by the courts or state at the time of dispossession. The LCC interpreted a customary law interest narrowly and stated that there was no such recognition of indigenous laws at that time.[194]

4.2.4 A right based on beneficial occupation

Finally the LCC did accept the claim that the applicants had a right in land based on beneficial occupation, because the community did continuously occupy the land in subject for more than ten years before the dispossession. However, the LCC found that the land was not dispossessed as a result of past racially discriminatory laws or practices, instead the dispossession was aimed at improving the security surrounding the diamond mines on the subject land. The LCC interpreted the Restitution Act purposively, by stating that restitution of land can only be granted if the dispossession was a result of laws or practices aiming at *apartheid*.[195] In conclusion, the LCC dismissed the applicants' claim and held that the community was not entitled to restitution of land under the Restitution Act, because the land was not dispossessed as a result of racial discrimination.

The court did not make any decision about the applicability of the aboriginal title, but stated that such a decision fell outside the scope of the jurisdiction of the LCC. Consequently the applicants decided to appeal to the Supreme Court of Appeal.

[190] Chan 2004 120
[191] Hoq 2002 425
[192] *Richtersveld Community v Alexkor,* 2001 (3) SA 1293 (LCC) at par 94.
[193] *Richtersveld Community v Alexkor,* 2001 (3) SA 1293 (LCC) at par 90.
[194] Chan 2004 121
[195] Brink 2005 178

4.3 The decision of the Supreme Court of Appeal

4.3.1 Summary of the judgment

In 2003 the Richtersveld Community appealed against the dismissal by the LCC of their claim for restitution of the land in subject in terms of s2(1) of the *Restitution Act.* The LCC decided that the community had a right of beneficial occupation. However the Community found that, with respect to a 'right in land', they also possessed rights based on indigenous law, which were recognized and protected under the common law of South Africa.[196] Alternatively the Community, as appellants, stated that the rights in land based on indigenous law constituted a 'customary law interest' and as a result the appellants held a right in land as mentioned in the *Restitution Act*, apart from the common law.[197]
In order to qualify for restitution of the subject land, the Community must meet the requirements as set out by s 2 of the *Restitution Act*. By agreement between the parties in this case, the Court only decided on the requirements of sub-section 2(1)[198], of which the relevant part reeds:

> A person shall be entitled to restitution of a right in land if —
> (a) …
> (b) …
> (c) …
> (d) it is a community or part of a community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices, and
> (e) the claim for such restitution is lodged not later than 31 December 1998.

Thus, a community claimant has to prove (a) that it is a (part of) a community, (b) that the community had a right in the subject land as defined in the act, (c) that they were disposed of such right after 19 June 1913, (d) as a result of past racially discriminatory laws or practices and (e) that the claim was lodged not later than 31 December 1998. [199] The first and the last requirement were never point of discussion before the SCA, however the other issues were dealt with by the SCA again.

4.3.2 A right in land

In the *Restitution Act* a 'right in land' is defined as

> any right in land whether registered or unregistered, and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust

[196] Chan 2004 p. 121
[197] *Richtersveld Community v Alexkor,* 2003 (6) SA 104 (SCA) at par 11.
[198] *Richtersveld Community v Alexkor,* 2003 (6) SA 104 (SCA) at par 4.
[199] *Richtersveld Community v Alexkor,* 2003 (6) SA 104 (SCA) at par 4.

arrangement and beneficial occupation for a continuous period of not less than 10 years prior to dispossession in question.[200]

This list of specified interests in land was interpreted by the LCC as exhaustive. The LCC examined whether the Community would qualify for any of the specified interest listed in the *Restitution Act*. However, according to the SCA the words 'may include' should be interpreted in a way that the list could be extended. The SCA stated that 'any right in land, whether under common law, statute or customary law, is included in the definition'.[201] The SCA found that a right in land based on a customary law interest is a right in land under the *Restitution Act* and with that it rejected the LCC findings that a claimants first have to prove that their customary law is adopted or sanctioned by the state.[202] This test established by the LCC was reframed by the SCA to a test that looked at whether a right in land existed at time of colonization under indigenous law, irrespective of recognition by state, Crown or court.[203] In addition the SCA noted that '[the Community's] right is rooted in the traditional laws and custom of the Richtersveld People. The right inhered in the people inhabiting the Richtersveld as their common property, passing from generation to generation'.[204] The Court concluded that the Richtersveld Community had a right in land based on customary law interest at the time of colonization.[205] The community furthermore enjoyed beneficial occupation until the 1920s; therefore the right was not extinguished before 19 June 1913, the cut-off date under the *Restitution Act*.[206]

4.3.3 Past racially discriminatory laws and practices

Additionally the extinguishment in the mid 1920s was the result of past racially discriminatory laws of practices.[207] The state ignored all the rights of the community while granting mining rights. As stated above, according to the LCC this dispossession did not aim as spatial *apartheid*, therefore it was not a result of racial discrimination. However, the SCA found that the LCC was wrong in looking at the aim of the dispossession instead of the result of the dispossession.[208] According to jurisprudence of the Constitutional Court regarding equality, indirect discrimination falls within the scope of racially discriminatory practices. Thus the dispossession of the land was a result of racially discriminatory practices and did fall within the scope of the Restitution Act.[209] The SCA granted the Community restitution of the right to beneficial occupation of the subject land under the *Restitution Act.*[210]

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[200] Restitution of Land Rights Act No 22 1994, s 1
[201] *Richtersveld Community v Alexkor,* 2003 (6) SA 104 (SCA) at par 9.
[202] Chan 2004 p. 122
[203] *Richtersveld Community v Alexkor,* 2003 (6) SA 104 (SCA) at par 26.
[204] *Richtersveld Community v Alexkor,* 2003 (6) SA 104 (SCA) at par 28.
[205] *Richtersveld Community v Alexkor,* 2003 (6) SA 104 (SCA) at par 29.
[206] *Richtersveld Community v Alexkor,* 2003 (6) SA 104 (SCA) at par 67.
[207] *Richtersveld Community v Alexkor,* 2003 (6) SA 104 (SCA) at par 109-110.
[208] *Richtersveld Community v Alexkor,* 2003 (6) SA 104 (SCA) at par 102.
[209] *Richtersveld Community v Alexkor,* 2003 (6) SA 104 (SCA) at par 90-102.
[210] *Richtersveld Community v Alexkor,* 2003 (6) SA 104 (SCA) at par 111.

4.3.4 Discussion

This decision of the SCA was a triumph for the Community in the sense that they won land rights, however these rights were not rights of ownership. In this case the SCA struggled with the recognition of rights of ownership under aboriginal title and therefore settled with the uncomfortable fit of a customary law interest. The tension between these concepts becomes clear when examining the way in which the SCA tries to fit a customary law interest into the doctrine of aboriginal title.[211] The SCA granted a right based on a 'customary law interest', which the court described as 'akin to that held under common law ownership'.[212] The adding of 'akin to that held under common law ownership' implies that the rights under a customary law interest may include non-common law land rights such as communal land rights based on indigenous law and custom, which comes close to aboriginal title.[213]

The SCA also used standards of aboriginal title in order to prove the existence of a customary law interest. For example by looking at the existence of a right in land under indigenous law at the time of colonization, which also needs to be done in order to prove aboriginal title. The SCA took a similar approach in establishing a customary law interest; the court examined the indigenous laws and custom at time of annexation.[214] The Court held that 'like the customary law interest that [the court] found was held by the Richtersveld Community, aboriginal title is rooted in and is the creature of traditional laws and customs'.[215] Furthermore the SCA pointed out certain elements of aboriginal title as examples in order to prove a customary law interest. The Court referred to articles and landmark cases concerning aboriginal title, such as the *Delgamuukw* case, and used this to prove the claim of the Richtersveld Community. The Court proved that the community was an ethnic group, who 'occupied the subject land for a long time'[216] prior to and at time of colonization, that they enjoyed 'exclusive beneficial occupation'[217] and that they had a 'social and political structure'[218]. The SCA thus proved all elements of aboriginal title but did not find a right under aboriginal title, instead it concluded that such facts establish a customary law interest'.

The SCA decided not to apply the aboriginal title in the South African context, because the doctrine does not fit 'comfortably into our common law'[219]. One of the reasons for this is the *sui generis* character of the aboriginal title, it is a proprietary right held collectively by the community. According to the SCA it could not be defined under the common law concepts of

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[211] Chan 2004 p 123.
[212] *Richtersveld Community v Alexkor,* 2003 (6) SA 104 (SCA) at par 8, 26, 29 and 111.
[213] Bennett & Powell 1999 449, 462.
[214] Chan 2004 p. 123.
[215] *Richtersveld Community v Alexkor,* 2003 (6) SA 104 (SCA) at par 37.
[216] *Richtersveld Community v Alexkor,* 2003 (6) SA 104 (SCA) at par 14 and 22.
[217] *Richtersveld Community v Alexkor,* 2003 (6) SA 104 (SCA) at par 18, 22 and 24.
[218] *Richtersveld Community v Alexkor,* 2003 (6) SA 104 (SCA) at par 15,18 and 19.
[219] *Richtersveld Community v Alexkor,* 2003 (6) SA 104 (SCA) at par 43.

property because it is not an individual right.[220] In addition, the SCA stated that it is not necessary to elaborate further on the matter of developing aboriginal rights in South Africa since the Restitution Act provides for the customary law interest.[221] Before the SCA decided that aboriginal title was not applicable in South Africa, it gave a lengthy and clear description of the doctrine of aboriginal title, in the middle of the case. This description was not used in the final conclusion, the SCA itself stated that its discussion about aboriginal title was unnecessary in the context of this case. The SCA opinion shows a tension between the intent to recognize a right in land based on aboriginal title and the caution to settle with safer concept of a customary law interest. As a result both concepts were elaborated on by the Court, however the SCA remains confusing with respect to rights in land, the content and nature thereof and aboriginal title.[222] It was up to the Constitutional Court to create more clarity with reference to the adoption of the aboriginal title.

4.4 The decision of the Constitutional Court

4.4.1 Case Summary

Alexkor and government appealed the opinion of the SCA to the Constitutional Court (CC), which is the highest court of South Africa on constitutional matters. Alexkor stated that the SCA was wrong in holding that the Community had customary law interest in the subject land. Alexkor requested the CC to set aside the order of the SCA to restitution of the right of exclusive beneficial occupation and use of the subject land to the Community. [223] In response to this appeal the Community held the same positions as they did in the SCA appeal; they stated that they had the right of beneficial occupation and additionally rights in the subject land based on their indigenous law.[224] The Community contended that these rights include communal ownership, the right to beneficial occupation and use of the subject land and all its resources and they introduced this as a form of aboriginal title named 'indigenous law ownership'.[225] Furthermore they argued that this indigenous law ownership constituted a right in land or no less than a customary law interest within the definition of the *Restitution Act*. On appeal, the fact as pointed out by the LCC and SCA were adopted by the CC. Additionally the Court adopted several positions of the SCA, however the SCA's finding of a right in land based on a customary law interest was overruled.
Several issues were argued, such as the nature of rights in land prior to annexation and the legal consequences of the annexation.[226] The most relevant issues will now be summarized.

4.4.2 Issues that fall within the jurisdiction of the Court

The Court started with determining what issues exactly fell under the jurisdiction of this Court and used s 2(1)(d)(e) as starting point. Again it was pointed out what needed to be

[220] Brink 2005 179
[221] *Richtersveld Community v Alexkor,* 2003 (6) SA 104 (SCA) at par 43.
[222] Chan 2004 p. 124-125
[223] Chan 2004 p. 125
[224] *Alexkor v Richtersveld Community*, 2003 (12) BCLR 1301 (CC) at par 11.
[225] *Alexkor v Richtersveld Community*, 2003 (12) BCLR 1301 (CC) at par 11.
[226] *Alexkor v Richtersveld Community*, 2003 (12) BCLR 1301 (CC) at par 18.

proven in order to be entitled to restitution of land; (a) that the Richtersveld community is a (part of) a community, (b) that the community had a right in the subject land as defined in the act, (c) that this right in land continued to exist after 19 June 1913 (d) that they were disposed of such right after 19 June 1913, (e) as a result of past racially discriminatory laws or practices and (f) that the claim was lodged not later than 31 December 1998.
The Court stated that issues a and f were no point of discussion since these are common cause. With regard to the other issues, the court concluded that the CC had the jurisdiction to decide in these matters since the right to restitution of land is laid down s 25 of the Constitution. The CC is the highest court to decide in constitutional matters and issues connected with a decision on constitutional matters[227], therefore the Court has jurisdiction in all these issues.[228]

4.4.3 The nature of rights in land of the Richtersveld Community prior to annexation

The CC started its reasoning by concluding that the rights the community held under the *Restitution Act* depend on whether they held rights under their indigenous law at the time of colonization.[229] Unlike the SCA the CC pointed out that this should not be limited to just rights under indigenous law recognized by state, Crown or court and stressed that the South African Constitution expressly recognizes and validates indigenous law if it is not irreconcilable with the purposes and values of the Constitution.[230] The Court furthermore stated that indigenous law could only by determined through evidence, since it is often not written or recorded in another way. The SCA applied a 'custom' test in order to prove the content of the indigenous law, however the CC only looked at the evidence of the indigenous law of the community in order to determine the type of rights the Community held and the Court should recognize and protect.[231] The Court concluded that in order to find out the real character of *indigenous title* to land the history of a particular community and its customs should be looked at. The Court applied this standard of proof to the community and the subject land and concluded that the Richtersveld Community had a right of communal ownership under indigenous law at the time of annexation.[232]

4.4.4 The legal consequences of the annexation in 1847

Alexkor stated that after annexation British law was applicable to the subject land. The subject land was not been granted under any form of tenure, as a result the British Crown became owner. Thus the community lost its title in 1847 as a result of the annexation and therefore the claim had to fail because this happened prior to 19 June 1913. [233] However, the Court accepted the conclusion of the SCA that the indigenous right to private property was recognized and protected after annexation and the rights of the community were not

[227] S 167(3) Constitution
[228] *Alexkor v Richtersveld Community*, 2003 (12) BCLR 1301 (CC) at 22-30
[229] *Alexkor v Richtersveld Community*, 2003 (12) BCLR 1301 (CC) at par 50.
[230] *Alexkor v Richtersveld Community*, 2003 (12) BCLR 1301 (CC) at par 51.
[231] Chan 2004 p.126
[232] *Alexkor v Richtersveld Community*, 2003 (12) BCLR 1301 (CC) at par 62.
[233] *Alexkor v Richtersveld Community*, 2003 (12) BCLR 1301 (CC) at par 65.

extinguished by the annexation. [234] After that, the Court concluded that this right was not extinguished prior to 19 June 1913.

4.4.5 The right in land held by the Community after 19 June 1913

In addition the Court ruled that the right in land of the Community were also not extinguished in the period between annexation and 19 June 1913. The government did not take any steps in order to extinguish the rights of indigenous ownership. No certificate of occupation or grant with the effect of limiting indigenous ownership over the subject land was issued. No law was passed to make the indigenous ownership unlawful. Therefore the Richtersveld Community in fact, occupied the subject land, used it, let it and exercised all other rights to which it was entitled under indigenous ownership.[235]
From 1926 onwards the position of the Community began to change, with the discovery of diamonds on the subject land. The Community states that it was dispossessed of the land by a series of legislative and executive measured by the State. Ultimately the land was closed for the public, including the Community and mining rights and full ownership was granted to Alexkor.[236]

4.4.6 Racially discriminatory laws or practices

The right in land was dispossessed in the 1920's by the government acting, which was racially discriminatory. The dispossession was the result of the Precious Stone Act 44 of 1927 and Proclamation 58 of 1928. The Court found that neither the Act nor the Proclamation had spatial *apartheid* as main aim; however both failed to recognise the indigenous law ownership of the Community.[237] The inevitable result of this was to deprive the Community of its rights in the land based on indigenous laws, while recognizing rights of registered owners. According to the Court this is racially discriminatory.[238] The Constitutional Court thus accepted the conclusion of the SCA and declared that the Community is entitled to restitution of the right to ownership of the subject land and to the exclusive beneficial occupation thereof, in terms of s 2(1) of the Restitution of Land Rights Act 22 of 1994. [239]

4.5.7 Discussion of the decision

The decision of the Constitutional Court was a victory for the Richtersveld Community and it was an important legal development in implementing a form of aboriginal title in South African law. The SCA created a tension with forcing the right to land of the Community to fit into a customary law interest. The CC adopted a lot of facts and findings of the SCA but concluded that the community's right to land was based on indigenous law ownership instead of a customary law interest. This concept of indigenous law ownership created by

[234] Mostert 2004 p.4
[235] *Alexkor v Richtersveld Community*, 2003 (12) BCLR 1301 (CC) at par 81.
[236] *Alexkor v Richtersveld Community*, 2003 (12) BCLR 1301 (CC) at par 83.
[237] *Alexkor v Richtersveld Community*, 2003 (12) BCLR 1301 (CC) at par 92.
[238] *Alexkor v Richtersveld Community*, 2003 (12) BCLR 1301 (CC) at par 99.
[239] *Alexkor v Richtersveld Community*, 2003 (12) BCLR 1301 (CC) at par 103.

the CC is substantively identical to the doctrine of aboriginal title developed in comparative case law of other states.

Firstly, the purpose of both aboriginal title and indigenous law ownership is the acknowledgement of a right outside the theory of statutory or common law property rights. The right created by indigenous law ownership is the right of an indigenous community who occupied land at time of and prior to colonization. This right is based on principles such as equality and justice, it survives annexation and changes in regime as long as it is not clearly extinguished by law or act of Crown, state or court.[240] Secondly the requirements of evidence of indigenous law ownership are similar to those of aboriginal title. For example the court should look at history and customs of the indigenous community at the time of annexation in order to see whether there was a right in land at that time based on indigenous law. The CC adopted this criterion for indigenous law ownership, while the same standard is used for proving aboriginal title.[241] The court also used other key elements of aboriginal title as requirement of proof for indigenous law ownership; it should regard a distinct community occupying land at time of annexation, a period of occupation should result in communal ownership and this should be exclusive.[242]

Thus is can be said that for all purposes regarding a right in land the doctrine of aboriginal title and the doctrine of indigenous law ownership are very similar. The Constitutional Court used the theory of aboriginal title to define and prove indigenous law ownership and did not point any distinction between the two.[243]

[240] Chan 2004 127
[241] Bennett & Powell 1999 p. 468 and Case at par. 56, 57
[242] Bennett & Powell 1999 p. 463-469
[243] Chan 2004 128

5 Conclusion

As explained in the introduction of this thesis I attempted to analyze what the doctrine of aboriginal title exactly entails and to determine the most important elements of this doctrine in order to examine whether the aboriginal title is applicable to South African law or not and what implications this might bring.

Recent developments show that different courts are still dealing with the doctrine of aboriginal title, there is new increased attention for it. This can be seen at both national and international level. The aboriginal title has its roots in the common law countries, such as the United States, Canada and Australia. The issue was first dealt with by the United States' courts in the Marshall Trilogy in the period between 1823 and 1832. In New Zealand the aboriginal title was recognized from the beginning of colonization, however this was reversed by the *Wi parata* case[244] in 1877. In the last decade of the 20th century, the doctrine became an issue again. The Australian High Court came with *Mabo* decision[245], recognizing and developing the doctrine in Australia for the first time. After that there were more important cases in Australia concerning aboriginal title, such as the *Yorta Yorta* case[246] and the *Ward* case[247]. With respect to the doctrine Australia also has the Native Title Act, handling this issue. In Canada the *Delgamuukw* case[248] and the *Van Der Peet* case[249] were landmark cases. The Supreme Court of Canada discussed the source and content of the aboriginal title and in the latter case criteria for proof were established.
Recent developments also show that the aboriginal title is making its way outside the common law countries, for example in the *Nor Anak Nyawi* case[250] in Malaysia and the *Richtersveld* cases in South Africa. Indigenous land rights and the aboriginal title are also making way in international law. The Inter-American Court of Human Rights as well as the African Commission of Human Rights developed landmark cases, such as *Awas Tingni* case[251] and the *Endorois* case.[252] Additionally the Universal Declaration on the Rights of Indigenous Peoples' was finally adopted by the United Nations.
Old characteristics are point of discussion again and new elements are being developed. Certain elements are used by every court and generally speaking the aboriginal title has standard criteria everywhere. The most important aspects, that return in every case dealing with indigenous peoples' land rights are the occupation of the land in subject and the continuity and exclusivity thereof since prior to colonization of the land. Furthermore there should be a right in land since prior to annexation based on traditional laws and customs.

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[244] *Wi Parata v Bishop of Wellington* (1877), 3 N.Z. Jur. (N.S.)77
[245] *Mabo v Queensland* [1988] HCA 69; (1989) 166 CLR 186
[246] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422
[247] *Western Australia v. Ward* (2002) 191 A.L.R. 1
[248] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010
[249] *R. v. Van der Peet*, [1996] 2 S.C.R. 507
[250] *Nor anak Nyawai et al. v. Borneo Pulp Plantation Sdn Bhd*, 2001, 2 AILR 2001 38
[251] *Awas Tingni community v Nicaragua,* 2001 IACHR No. 79
[252] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, 276/2003, African Commission on Human and Peoples' Rights, 4 February 2010, available at: http://www.unhcr.org/refworld/docid/4b8275a12.html [accessed 27 March 2010] at par. 11-12

Every court has its own way of interpreting and how to fulfil these elements, however the same elements keep coming back in the different cases.

As stated above, these elements come back in the *Richtersveld* cases as well. The Constitutional Court ruled that the Richtersveld Community was entitled to restitution of the subject land, since they had a right in the land based on their traditional laws and customs. Furthermore the Community had lived there since prior to annexation and continued to live there ever since. They had exclusive occupation of the land, as others were prevented to trespass the subject land. The Court thus used a lot of the criteria as known from the doctrine of aboriginal title in order to develop the concept of indigenous law ownership. Indigenous law ownership has the same purpose, characteristics and nature as aboriginal title as developed in other jurisdictions. Therefore it was clear that the Constitutional Court formally recognized a form of aboriginal title under South African law. Moreover, the Court awarded restitution of land, based on this indigenous right to land. With this decision the Court faced the challenges the new South African state by acknowledging the rights of indigenous communities under the new laws.

Despite this breakthrough, a closer look at the opinion shows limitations to the current form of aboriginal title as adopted by the Court. Indigenous law ownership is developed within the context of the *Restitution Act*, which means that additional conditions are to be fulfilled. A finding of a right in land based on indigenous ownership can only have beneficial consequences when all other requirements of this Act are met.[253] Thus dispossession of land can only be redressed on basis of aboriginal title when the right in land was dispossessed after 19 June 1913 as a result of past racially discriminatory laws or practices and the claim had to be lodged before1998. It is not made clear whether the finding of indigenous law ownership can be transposed to another context in the future, however the Court this leave this door open. The question that arises is here is why the Constitutional Court chooses to do it this way. Why did the Court avoid answering the question whether aboriginal title is applicable in South Africa or not, and came with a new concept in the context of the Restitution Act instead? The Court acted under pressure, the case came in the media and South Africa was waiting for the decision, wanting to know what the Court would do. On the one hand the Court needed to recognize the applicability of the aboriginal title, based on justice and equality as the pillars of the new constitutional South Africa. On the other hand, if the aboriginal title was recognized, a lot of new claims would appear. Because of the limitations and requirements of the Restitution Act a lot of people were not able to claim restitution of their traditional lands, when the aboriginal title is recognized they might be able to claim their land after all. The Court must have been afraid for this. It can be argued that 'indigenous law ownership' as equivalent of aboriginal title within the context of the Restitution Act is a political compromise.

The full impact of the South African *Richtersveld* case in other sub-Saharan African countries remains to be seen. The decision of the Constitutional Court does change the legal landscape

[253] Chan 2004 p 129

significantly and is does increase the changes of redress for deprived indigenous communities. Other Southern African states, such as Namibia, Botswana and Zimbabwe, have a similar legal system as South Africa, based on Roman-Dutch common law, therefore the decision in the *Richtersveld* cases may especially have an impact in these countries.

It is clear that the restitution of land to the Richtersveld Community is a victory for indigenous communities in South Africa and for all indigenous communities in Africa believing in justice and equality, the cornerstones of the doctrine of aboriginal title. However, it can still be argued whether this development is desirable or not. On the one hand it is a victory for justice and equality. Indigenous peoples have often been, and often still are, discriminated, marginalized minorities. Those peoples wanting their land, culture and life, which they were previously dispossessed of, only makes sense in the light of justice and equality. Therefore it will be no point of discussion that the Richtersveld cases as well as the Endorois case are victory for them. On the other hand it can also be dangerous to give the land back to indigenous peoples and to give them control over their territory. One of the consequences may be that countries will be cut up into different pieces and different peoples control parts of the same country. This may cause problems in leading the countries as one nation, in sub-Saharan Africa in particular, since a lot of countries are already politically instable.

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