The quest for indigenous land rights intensifies: *Mabo (no 2)*, *Delgamuukw*, Richtersveld and now the Enderois of Kenya*

1 Introduction

Virtually all indigenous peoples share common problems resulting from an unhappy relationship between the 'conqueror' and the 'conquered'. The conquerors, *inter alia*, as seen by the indigenous peoples 'took away their land' – land the indigenous people had freely shared. Following on this the conqueror's way of life was imposed, political autonomy was drastically curtailed and in most instances the indigenous people were dispossessed of their land and impoverished. During the colonial area the colonists focussed on their quest to move from colony to nationhood. The then existing jurisprudence of the indigenous peoples was unknown in the political consciousness of the colonists and was overshadowed by the doctrine of legal positivism as exercised by the courts and legal profession. Indigenous peoples were seen to be distinctive societies with their own practices, customs and traditions that merited no special legal or constitutional status. Legal positivism rejected the concept that indigenous peoples had laws. The colonists, their lawyers and courts saw indigenous peoples as peoples who merely existed on or occupied land busying themselves with 'mindless' activities. Indigenous peoples were seen as barbarians or savages without laws, courts or government.

2 Definition

Before continuing this may be the opportune juncture to attempt to define or describe, for purposes of this article, the term 'indigenous people'. Because there is no general international law nor national law definition of 'indigenous people'

---

*Lecture presented at the Native Law Centre, College of Law, University of Saskatchewan, September 2011. I wish to express my appreciation to the law library of that College of Law for assisting me in accessing materials.

that is recognised and fully accepted, the definition of Anaya[1] will be the operative one. According to Anaya in modern terms 'indigenous' refers broadly to living descendants of pre-invasion inhabitants of lands now dominated by others. 'Indigenous' peoples, nations or communities, he states, are culturally distinctive groups that find themselves engulfed by settler societies born of the forces of empire and conquest.

It is admitted that this conceptualisation may be controversial. Wiessner[2] sees indigenous communities as peoples traditionally regarded, and self-defined, as descendants of the original inhabitants of lands with which they share a strong bond. These peoples desire to be culturally, socially and/or economically distinct from the dominant groups in society, at the hands of which they have experienced, in the past or present, a pattern of subjugation, marginalisation, dispossession, exclusion and discrimination. What could arguably be added to this is the element of indigenous peoples' strong ties to their ancestral lands, whether they are presently able to reside on these territories or not. As stated by Dodson, the Australian Aboriginal and Torres Strait Islander Social Justice Commissioner, 'above all and of crucial and fundamental importance is the historical and ancient connection with lands and territories'.[3]

3 International profile

Resistance and silence regarding indigenous rights have done little to undermine the resolve of indigenous peoples. Many of the indigenous peoples have forced themselves back to being considered actors in the international scene and in international law. The claims of indigenous peoples in their quest to be recognised, internationally and nationally, have been based on five issues: (1) traditional *lands* should be respected or restored; (2) indigenous peoples should have the right to practice their *traditions* and culture with all their implications; (3) indigenous peoples should have full access to educational and *social services*; (4) *treaties* entered into between the indigenous peoples and the conquering nations should be respected;[4] (5) the right to *self-determination* should be honoured.

This note will concentrate on the issue of *land rights.* It will however not be inopportune to briefly set out what indigenous peoples have thus far achieved on the international plane. The most visible success of indigenous peoples

---

[1] *Indigenous peoples in international law* (1996) 3.

[2] 'Rights and status of indigenous peoples: A global comparative and international legal analysis' (1999) *Harvard Human Rights Journal* 57 at 115.

[3] Working Group on Indigenous Populations, UN ECOR, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities 14th Sess, at 5 UN Doc E/CN 4/Sub/AC/4/1996/2 (1996) 15.

[4] Barrie 'Status of treaties entered into with indigenous peoples predating modern state practice' (2009) 34 *SAYIL* 223.

internationally is the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[5] This is a comprehensive declaration by the UN General Assembly specifying the rights and status of indigenous peoples on the international level. While not legally binding under the positive law of the UN Charter the declaration indicates a consensus among the main actors on the global scene that indigenous peoples are not only fully entitled to individual human rights, but are collective actors with distinct rights and status under international law. The UNDRIP is a milestone in the re-emergence of indigenous peoples from the *Cayuga Indians Award*[6] of 1926 which denied indigenous peoples the status of being a legal unit of international law to their present membership of the UN Permanent Forum on Indigenous Issues on an equal level with states.[7]

The UNDRIP symbolises a change of attitude of the international legal community towards indigenous peoples.[8] The UNDRIP was adopted by an affirmative vote of 143 states in the General Assembly. Eleven states abstained and four states voted against it – the United States, Canada, Australia and New Zealand. Australia reversed its opposition and endorsed the declaration in 2009, and in 2010 New Zealand announced its support for the declaration and in the same year the United States announced its intention to review its position on the UNDRIP. Also in 2010 Canada declared that it will take steps to endorse the aspirational document in a manner fully consistent with Canada's constitution and laws.[9]

Under article 12 of the UN Charter the UNDRIP is like any other General Assembly resolution, a non-binding recommendation. It must be kept in mind however that according to the Office of Legal Affairs of the UN 'a declaration is a solemn instrument resorted to only in very rare cases relating to matters of major and lasting importance where maximum compliance is expected'.[10] The preamble of UNDRIP states that, in adopting it, the General Assembly was guided by the purposes and principles of the Charter of the UN, and good faith in the *fulfilment of the obligations assumed by states in accordance with the Charter*.

Regarding firm binding obligations towards indigenous peoples the best examples are the ILO (International Labour Organisation) conventions no 107 and

---

[5]GA Res 61/295 of 2007-08-13.
[6]*Cayuga Indians (Great Britain) v United States* 6 RIAA 173 1926.
[7]UN Economic and Social Council Res 2000/22 of 2000-07-18.
[8]Barsh 'Indigenous peoples: An emerging object of international law' (1986) *AJIL* 369.
[9]Speech from the Throne, Canadian Parliament 2010-03-03. Prior to this the Canadian House of Commons passed a motion calling for parliament and the government of Canada to fully implement the standards contained in the UNDRIP – *House of Commons Debates* no 074 (2008-04-08) 4656.
[10]Economic and Social Council *Report of the Commission on Human Rights* E/366/Rev 1, para 105, 18th Session 1962-03-19 to 1962-04-14.

169.[11] These conventions include protections regarding the rights to traditional lands and cultural rights. Also deserving mention is article 27 of the International Covenant on Civil and Political Rights (ICCPR)[12] regarding the right to self-determination and article 21 of the American Convention on Human Rights[13] (ACHR) which refers to the right to property of indigenous peoples. This latter article is broadly interpreted as being a *communal* right geared towards the use of traditional lands for cultural purposes.

4 Traditional lands

It is accepted that traditional lands, territories and resources are of existential importance to indigenous peoples and that the relationship indigenous peoples have with their lands defines them.[14] In *Case of the Mayagna (Sumo) Awas Tigni Community v Nicaragua*[15] the Inter-American Court of Human Rights stressed that the close ties of indigenous peoples with their land must be recognised and understood as the fundamental basis for their culture, their spiritual life, their integrity and their economic survival. The level to which the land rights provisions of the UNDRIP were accepted by the international community is borne out by the fact that there were no amendments to the lands, territories and resources provisions of the UNDRIP during the final negotiations.

This does not however mean that these land rights provisions are without interpretational problems. Firstly, while international and domestic jurisprudence indicates a tendency to include indigenous peoples' relationship with lands, resources or territories as 'property', ('ownership', 'possession' and 'control') indigenous peoples themselves maintain that these terms do not always adequately explain their personal affiliation with the land. This personal affiliation can be described at times as symbolic space or sacred landscape.[16] Secondly the precise extent of indigenous people's rights to lands, territories and resources that they traditionally possessed and controlled, but no longer possess and control, is not clear. What is the position when such lands are now owned as a matter of national law by non-indigenous individuals or other indigenous groups? Articles 27 and 28 of the UNDRIP attempts to resolve the situation by requiring states to establish

---

[11] Convention no 107 concerning indigenous and tribal peoples in independent countries 328 UNTS 247; Convention no 169 concerning indigenous and tribal peoples in independent countries (1989) *ILM* 1382.

[12] 999 UNTS 171 (1967) *ILM* 368.

[13] 1144 UNTS 123.

[14] Cobo 'Study of the problem of discrimination against indigenous populations' UN Doc E/CN 4 Sub 2/1986/7/Add 4, 1983-06-28 para 379.

[15] IACtHR Ser C no 79, judgment of 2001-08-31 para 149.

[16] Erueti 'The demarcation of indigenous people's traditional lands: Comparing domestic principles of demarcation with emerging principles of international law' (2006) *Arizona Journal of International and Comparative Law* 543.

processes to adjudicate disputes arising from the above situation. Thirdly, the precise extent of indigenous peoples' rights to natural resources remains unclear. The UNDRIP provisions do not wholly clarify this issue.[17]

Article 26 of the UNDRIP is arguably the most contentious provision dealing with lands, territories and resources. Article 26(1) expresses the general right of indigenous peoples to lands, territories and resources which they have traditionally *owned*, *occupied* or otherwise *use or acquired* in the past. Article 26(2) expresses their right to *own*, use, develop and *control* the lands, territories and resources they currently possess. Article 26(3) obliges states to give *legal recognition and protection to these lands,* territories and resources referred to in article 26(1) and 26(2). Article 26(3) also declares that state recognition shall be conducted with due respect to the customs, traditions and *land tenure systems* of the indigenous peoples concerned.

An ordinary and purposive interpretation of article 26(2) unambiguously expresses indigenous peoples' right to own, use, develop and control the lands, territories and resources that they possess, including communally-held lands, territories and resources under indigenous customary law norms. Article 26(2) appears to be confirmed in, and reflected not only in other international instruments such as ILO Convention 169 but also in recent jurisprudence

Here reference can be made to the decisions of the Inter-American Commission of Human Rights (IACHR) (*Case of the Sawhoyamaxa Indigenous Community v Paraguay*);[18] the African Commission on Human and Peoples' Rights (ACHPR) (*Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of the Endorois Welfare Council v Kenya*)[19] and the UN Human Rights Council (HRC) (*Bernard Ominayak, Chief of the Lubicon Lake Band v Canada*).[20] Reference can also be made to domestic decisions such as *Mabo v Queensland (no 2)*[21] (Australia); *Delgamuukw v British Colombia*[22] (Canada); *Ngati Apa v Attorney General of New Zealand*[23] and *Alexkor Limited v Richtersveld Community*[24] (South Africa). These domestic

---

[17]See Report of the 74th Conference of the International Law Association, The Hague, (2010) 835, 865.

[18]10 IHRR 758 (2003).

[19]20 IHRR 254 (2011).

[20]Communication no 167/1984 of 1990-03-26, Report of the Human Rights Committee, vol II (1990), UN Doc A/45/40.

[21]1992 175 CLR 1. See Barrie 'Aboriginal land rights in Australia remains an unruly horse' (2009) *TSAR* 155.

[22]1997 3 SCR 1010. This case is considered to be the Canadian equivalent of *Mabo (no 2).*

[23]2003 3 NZLR 643 (CA).

[24]2003 12 BCLR 1301 (CC). See Du Plessis, Olivier and Pienaar 'Expropriation, restitution and land redistribution: An answer to land problems in South Africa' (2003) 28 *SAPL* 491 at 496 for an incisive exposition of this Constitutional Court decision. The Constitutional Court case was an appeal against the Supreme Court of Appeal's decision *Richtersveld Community v Alexkor Limited and the Government of the Republic of South Africa* 2003 6 BCLR 538 (SCA). The latter case was

decisions would appear to support the mandate of article 26(3) of UNDRIP that states must legally demarcate and delimit indigenous peoples land rights. To illustrate this, the decisions of *Mabo (No 2)*, *Delgamuukw*, *Richtersveld* and the *Endorois Welfare Council* will be discussed.

5 *Mabo (no 2)*

In *Mabo (no 2)* the Australian High Court made a historical about-turn regarding the historical denial of aboriginal land rights. *Mabo (no 2)* became a catalyst for a renewed assessment of aboriginal land rights in Australia. The impact of *Mabo (no 2)* was seismic on the Australian legal system. The High Court found for the first time in 200 years of White settlement, that native title is recognised by common law and that the indigenous peoples have rights to their traditional lands. The High Court held that the British Crown's acquisition of the Australian colony did not extinguish customary/native/indigenous title. The common law, said the High Court, could, and did, accommodate native title. This native title, said the High Court, survived the establishment of the colony. By so finding the High Court decisively destroyed the doctrine of *terra nullius* in so far as it may have been thought to apply to Australia's colonisation. The High Court held that the concept of *terra nullius* was a totally inappropriate foundation for the Australian legal system. Justice Brennan held that the fiction by which the rights and interests of the indigenous people in the land were treated as non-existent, was justified by a policy which had no place in the contemporary law of Australia.[25] The High Court was of the view that aboriginal rights and interests were not stripped away by the operation of the common law on the first settlement by British colonists in 1788.[26] That aboriginal jurisprudence remained intact until it was clearly altered by the Crown in exercising its prerogative jurisdiction. This alteration by the Crown did *not* take place, said the High Court.

It is important to note however that the High Court also held that the Crown as ultimate owner could extinguish native title. But, said the court, it was up to the Crown to show that aboriginal title had been extinguished. The onus, said the court, rests with those claiming that traditional title does not exist. The intention by the government to extinguish aboriginal interest, the court held, must be plain and clear.

In effect the High Court held that the aborigines became British subjects on the assumption of sovereignty and that the common law recognised their property rights, based on native title and prior occupation. The approach was followed by

---

an appeal against the Land Claims Court decision *Richtersveld Community v Alexkor Ltd* 2001 3 SA 1293 (LCC).

[25] See (n 21) 29. The doctrine of *terra nullius* entailed that settlement was a valid ground for acquiring 'uninhabited' countries. Under this doctrine colonisers were permitted to regard land as uninhabited if the indigenous people did not meet the requirement of 'sufficient civilisation'. No clear standards existed according to which 'sufficient civilisation' could be determined. In modern times the doctrine is seen to be arbitrary and racist.

[26] *Id* 58.

Lord Denning in *Adeyinka Oyekan v Musendiku Adele*[27] where he held that the courts can assume that the British Crown intended that rights of property of the conquered inhabitants were to be fully respected.[28]

The High Court also found that native title could be held *communally*. The initial theory that the indigenous inhabitants could never have had any proprietary interest was seen by the High Court as being dependent on a discriminatory denigration of the indigenous inhabitants.

6 *Delgamuukw*

In *Delgamuukw*'s case the Canadian Supreme Court saw 'aboriginal title' as a right in land, as a special legal interest aboriginal people possess. The aboriginal title, the Supreme Court found, came down to exclusive use and occupation. In further defining this aboriginal title the Supreme Court stated that aboriginal title was inalienable – except to the Crown. It also reaffirmed that the Crown could extinguish aboriginal title. This was previously held in *Calder v Attorney-General for British Columbia*[29] and *Sparrow v R*.[30] Such extinguishment must have been voluntarily or, as per the Crown's sovereignty, but only if the intention to do so was clear and plain.

Aboriginal title was found to be a *collective right* held by all members of the specific aboriginal community. According to Chief Justice Lamer:

> A further dimension of aboriginal title is the fact that it is held *communally*. Aboriginal title cannot be held by individual aboriginal persons. It is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community.[31]

7 *Richtersveld*

The *Richtersveld* case represented the first time that a claim for restitution of land based on aboriginal or indigenous title had been brought in South Africa. This ground-breaking decision concerned a 3,000 strong Nama subgroup of Khoikhoi peoples living in the Northern Cape Province. They had always lived in the Richtersveld area until the South African government evicted them in the 1950s to make way for a diamond mine. The indigenous community took the government and the mining company to court, claiming ownership of the 85,000 hectares of land and the minerals therein. They lost their case at the Land Claims Court but appealed. They won on appeal to the Supreme Court of Appeal. The

---

[27] 1957 1 WLR 876 at 880.
[28] See Reynolds *The law of the land* (1992) 197.
[29] 1973 SCR 313.
[30] 1990 SCR 1075.
[31] See (n 22) at para 115 (emphasis in original).

mining company further appealed to the Constitutional Court. In upholding the property rights of the Khoikhoi community the Constitutional Court established the principle that indigenous communities have a customary indigenous law right to their land that was not extinguished by British annexation in 1847 as submitted by the mining company. The Constitutional Court held:

> The undisputed evidence in this case shows that at the time of annexation the Richtersveld people had enjoyed undisturbed and exclusive occupation of the subject land for a long period of time. The right was rooted in the traditional laws and customs of the Richtersveld people. The right inhered in the people inhabiting the Richtersveld as their common property, passing from generation to generation. The right was certain and reasonable. The inhabitants and strangers alike were aware of the right and respected and observed it.
>
> I accordingly conclude that at the time of annexation the Richtersveld people had a single 'customary law interest' within the definition of 'right in land' in the act (the Land Restitution Act 1994). The substantive content of the interest was a right to exclusive occupation and use, akin to that held under common-law ownership.[32]

Similarly to the findings in the *Mabo (no 2)* and *Delgamuukw* cases the Constitutional Court held[33] that the character of the title the Richtersveld community possessed in the subject land was right of *communal ownership* under indigenous law. That the content of that right included the right to exclusive occupation and use of the land by *members* of the community

The Constitutional Court ordered that the Richtersveld community is entitled to restitution of the right of ownership of the subject land (including its minerals and precious stones) and to the *exclusive* beneficial use and occupation thereof. The case was referred back to the Land Claims Court (the initial court seized with the case) for the restitution. This court decided that the community will get 200,000 hectares of land including 85,000 hectares of farms belonging to the mine; the right to mine the land-based diamond resources and monetary compensation amounting to R400 million, including R190 million for the diamonds taken from the land over the decades. Future mining has to be conducted in a joint venture with Alexkor Ltd, the mining company involved.[34]

---

[32]See (n 24) para 28.

[33]*Id* para 62. Further similarly to *Mabo (no 2)* both the South African Supreme Court of Appeal and the Constitutional Court rejected the doctrine of *terra nullius*. The Supreme Court of Appeal (n 24 – para 35) held that the Land Claims Court erred in initially finding that the Richtersveld region was *terra nullius* and was so regarded by the colonial government. According to the Land Claims Court the Richtersveld was *terra nullius* at the time of the British Annexation in 1847 because the inhabitants were insufficiently civilized ((n 24) paras 37-41). The Constitutional Court (n 24) agreed with the Supreme Court of Appeal.

[34]Odendaal and Suich *Richtersveld, the land and its people* (2007) 157.

8 *Endorois*

Being of most recent vintage the *Endorois Welfare Council*[35] case will be discussed in more detail. This case concerned displacement from ancestral lands and the alleged violation of *inter alia* article 14 of the African Charter on Human and Peoples' Rights (African Charter).[36] Article 14 of the African Charter states:

> The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

Complainants argued that the Endorois community had a right to property with regard to their ancestral land. They argued that these property rights were derived from Kenyan law and the African Charter which recognised indigenous peoples' property rights over their ancestral land.

The Endorois were a community of approximately 60,000 people who had lived in the Lake Bogoria area for centuries. Following Kenyan independence in 1963 the British Crown's claim to the Endorois' land was passed on to county councils, which, under article 115 of the Kenyan Constitution, held the land in trust for the Endorois community. In 1973 the land was re-gazetted, and in 1978, a game reserve was created around Lake Bogoria. The Endorois' elders were told that the families would be compensated with plots of fertile land; 25% of the tourist revenue from the game reserve and 85% of the employment generated. They were also promised cattle dips and fresh water dams to be provided by the state. The complainants claimed that none of these promises were implemented and that the community was forced to live around the periphery of the game reserve. They claimed further that parts of their ancestral land were sold to third parties and mining concessions were granted which threatened to cause pollution to the waterways they used.

In presenting arguments that article 14 of the African Charter had been violated, complainants argued that for centuries the Endorois cultivated the land around Lake Bogoria, lived there and enjoyed unchallenged rights to the pasture, grazing and forest land which sustained their livelihoods. They argued that in so doing they exercised an indigenous form of tenure, holding the land through a *collective* form of ownership. Such behaviour, they argued, indicated traditional African land ownership understood through mutual recognition and respect between landholders. This position they argued also pertained during colonial rule and continued *after* the creation of the independent Kenya in 1963.

Complainants submitted that indigenous property rights have been legally recognised as communal property rights and that indigenous property rights surviving annexation and colonialism have been recognised not only by

---

[35]See (n 19).
[36]21 *ILM* 58 (1982).

international tribunals (*Awas Tingni* case),[37] the Canadian Supreme Court (*Calder v Attorney-General of British Columbia*),[38] the High Court of Australia (*Mabo (no 2) v Queensland*)[39] and the South African Constitutional Court (*Richtersveld v Alexkor*).[40]

The respondent state (Kenya) did not dispute that the Lake Bogoria area was the ancestral land of the Endorois. Nor did it challenge the submission that the Endorois had been accepted by all neighbouring tribes, including the British Crown, for hundreds of years as *bona fide* owners of the land. The African Commission on Human Rights consequently held that:

> the only conclusion that could be reached is that the Endorois community has a *right to property* with regard to its ancestral land, the possessions attached to it, and their animals.[41]

The African Commission then entered into a discussion as to what exactly 'protected property rights' entail, in the context of property rights of indigenous peoples.[42] Here the African Commission cast its net wide. It analysed the *Awas Tingni*[43] case of the Inter-American Court of Human Rights; its own previous decisions (*Malawi African Association v Mauritania,*[44] the *Ogoni*[45] case and *Huri-Laws v Nigeria);*[46] *Dogan v Turkey*[47] of the European Court of Human Rights and *The Saramaka People v Suriname*[48] and *Yakye Axa v Paraguay*[49] both of the Inter-American Court of Human Rights.

After an incisive discussion of these decisions the African Commission concluded:

(1) traditional possession of land by indigenous people has the equivalent effect as that of a state-granted full property title;
(2) traditional possession entitles indigenous people to demand official recognition and registration of property title;
(3) the members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights

---

[37] See (n 15) para 140(b).
[38] 34 DLR (3d) 145 (1973).
[39] See (n 21).
[40] See (n 24).
[41] See (n 19) para 184 (italics supplied).
[42] *Id* para 190-208.
[43] See (n 15).
[44] 8 IHRR 285 (2001).
[45] *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* 10 IHRR 289 (2003).
[46] 9 IHRR 240 (2002).
[47] Apps 8803-8811/02, 8813/02 and 8815-8819/02 (2004).
[48] 16 IHRR 1045 (2009).
[49] 15 IHRR 926 (2008).

thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith; and

(4) the members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality.[50]

The African Commission recommended *inter alia* that Kenya:

(a) Recognise rights of ownership to the Endorois (ie communal ownership) and restitute Endorois ancestral land.
(b) Pay adequate compensation to the community for all loss suffered.
(c) Pay royalties to the Endorois from existing economic activities.

The outcome of the Endorois case resonates strongly with that of the *Richtersveld* case. The former held that the rights, interests and benefits of (indigenous) communities in their traditional lands constitute *de iure* property as a collective right.[51] The latter case held that 'The substantive content of the interest (in the land) was a right to exclusive occupation and use, akin to that held under common law ownership'[52] and that 'the real character of the title that the Richtersveld community possessed in the subject land was a right of communal ownership'.[53] The compensation order in the *Endorois* case is also very similar to that made by the Land Claims Court in the *Richtersveld* case. (The Constitutional Court in the *Richtersveld* case referred the matter back to the Land Claims Court for the necessary restitution)[54]. As in *Mabo (no 2)*,[55] *Delgamuukw*[56] and *Richtersveld*,[57] the *Endorois* decision also held that the right to property of the Endorois community was held 'within the framework of a communal property system'.[58]

Rights of groups go against the grain of traditional Western legal thought on rights which are in essence based on the paradigm of pitting the individual against the state on the basis of a fictional social contract theory. However, in the minds of most, if not all, indigenous peoples clan, kinship and family identities are integral parts of one's personal identity and rights and obligations exist only within these networks. As explained by Wiessner 'members of tribal communities are existentially tied to each other in a network of deeply committed horizontal

---

[50]See (n 19) para 209.
[51]*Id* para 187, 205.
[52]See (n 24) para 29
[53]*Id* para 62.
[54]See (n 34).
[55]See (n 21).
[56]See (n 22).
[57]See (n 24).
[58]See (n 10) para 96.

relationships'.[59] In practice the relevant group rights protect culture, internal decision-making, and, in particular, control and use of land. Whatever one calls the rights of the 'group', or the 'aggregate' or the 'persons belonging to the group', the fact remains that *in practice* the collective will trumps individual aspirations. Such group or communal rights in the context of indigenous peoples must be seen as complementary to the individual rights members of the community have. Properly conceived such collective rights are not exclusive of, and do not displace, individual rights but must be seen to supplement individual rights.[60]

9 Conclusion

It would appear from above discussion that there is a highly significant *international* practice developing of recognising land rights of indigenous peoples. This is confirmed by a practice developing at the *domestic* level in various countries where significant populations of indigenous peoples live.[61]

The *Mabo (no 2)*, *Delgamuukw*, *Richtersveld* and *Endorois* litigation in Australia, Canada, South Africa and Kenya respectively has not only been a battle of indigenous peoples toward *state* acceptance of indigenous title to land, it has also been a crusade for human rights and human dignity. It has been a crusade for those who harbour a 'longing to live in a fair world'.[62] In all honesty it cannot be denied that since the initial European-indigenous meetings in North America, Australia, New Zealand, Canada and Africa, the prize has been lands and their resources. Indigenous peoples lived on these lands and resources which European colonizers coveted.[63] Once comfortably installed on the indigenous lands the sovereign preceded to ensure that it sat atop of the hierarchy of rights and power in these newfound lands.

Such an approach however reflects the biases and prejudices of another era and is indeed inconsistent with a growing sensitivity to indigenous rights, especially indigenous *land rights* as has been illustrated by article 26 of the UNDRIP[64] which affirms that indigenous peoples have the right to the lands,

---

[59]See (n 2) 9.
[60]Edger 'Collective rights' (2009) *Saskatchewan Law Review* 1.
[61]Van Genungten 'Protection of indigenous peoples on the African continent' (2010) *AJIL* 29; Porter 'Pursuing the path of indigenisation in the era of emerging international law governing the rights of indigenous peoples' (2000) *Yale Human Rights and Development Law Journal* 123; Charters 'Developments in indigenous peoples' rights under international law and their domestic implications' (2005) *New Zealand University Law Review* 511; Stevenson 'Indigenous land rights and the Declaration on the Rights of Indigenous Peoples' (2008) *Fordham International Law Journal* 298.
[62]Ignatieff *The rights revolution* (2007) 2.
[63]Hutchins 'Power and principle: State indigenous relations across time and space' in Knafla and Westra (eds) *Aboriginal title and indigenous peoples* (2010) 214, 216.
[64]For an extensive discussion of UNDRIP see Hartley, Joffe and Preston *Realizing the UN Declaration on the Rights of Indigenous Peoples* (2010).

territories and resources[65] which they have traditionally owned, occupied or otherwise used or acquired and as has been illustrated by the *Mabo (no 2)*, *Delgamuukw*, *Richtersveld* and *Endorois* decisions.

GN Barrie
Special Professor
Faculty of Law
University of Johannesburg

[65]It is of interest to note that the Constitutional Court in the *Richtersveld* decision (n 24 para 60) held that the indigenous title *included* the right to the minerals. The full court of the Federal Court in *State of Western Australia v Ward* (2000) 99 FCR 316, 455 however held that any aboriginal right to resources *excluded* petroleum and minerals. The Constitutional Court in the former decision held that there was undisputed *evidence* of a history of the Richtersveld community prospecting in minerals. In the latter decision the Federal Court found that minerals and petroleum were not incidents of indigenous or native title because there was no evidence of any aboriginal community ever having carried on mining. See Hunt 'The legal implications of Mabo for resource development' in Bartlett (ed) *Resource development and aboriginal land rights in Australia* (1993) 86.