

**THE IMPACT OF DIRECT FOREIGN AND LOCAL INVESTMENT ON INDIGENOUS COMMUNITIES IN EAST AFRICA: A CASE STUDY OF THE MAASAI OF KENYA AND TANZANIA.**

**SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS OF THE DEGREE LLM  
(HUMAN RIGHTS AND DEMOCRATISATION IN AFRICA)**

**BY:  
JAMES KINYASI MILLYA  
STUDENT NO: 27543732**

**PREPARED UNDER THE SUPERVISION OF DR. LORITE ALEJANDRO AT THE  
DEPARTMENT OF LAW, AMERICAN UNIVERSITY – CAIRO, EGYPT.**

**29 OCTOBER 2007**

## DECLARATION

I, **JAMES MILLYA KINYASI**, hereby declare that this dissertation is original and has never been presented in any other institution. I also declare that any secondary information used has been duly acknowledged in this dissertation.

Student: James Kinyasi Millya

Signature: -----

Date: -----

Supervisor: Dr. Alejandro Lorite

Signature: -----

Date: -----

## **DEDICATION**

To my Parents, Philippe Glauser, Millya Laisukula, Elizabeth Millya, Grandparents, Elders  
and the Children of Maa.

## ACKNOWLEDGMENT

I could not have achieved the completion of this dissertation without Gods love, care and grace.

A debt of gratitude is also due to Dr. Alejandro Lorite, my supervisor, for his intellectual support and consistent reminders to develop the chapters of this thesis. His significant feedback and time during difficult moments is gratefully appreciated.

To my young sisters and brothers, Seená, Rimba, Suzana, Nekijo, Muterian, Sabina, Arpakwa and Merori.

To my best friends, Yamat J, Eliamani L, Olelekaita E, Ngereze E, Alais O, Elifuraha L, Joyce S and Jackson L, your encouragement on emails and “smses” kept me strong and going.

To Patriciah Achan Okiria, Gladys Mwariri, and David Simonsz for your company in Cairo, Egypt as well as ensuring I stayed awake during the last days before submission.

To Esupat David Songoi, for the great love we share great inspiration and support all through.

I am grateful to the Centre for Human Rights, University of Pretoria, for affording me the opportunity to be part of this amazing experience and for the unswerving support I received for the duration of the study and for making me feel more than just another student.

To my family, all my friends and colleagues whom I could not mention due to the constraint of space, I am truly grateful.

God bless you all.

## TABLE OF CONTENTS

TITLE PAGE	
TABLE OF CONTENTS	2
LIST OF ABBREVIATIONS	4
ACKNOWLEDGEMENTS	5
CHAPTER 1: INTRODUCTION	7
1.1 Introductory remarks	7
1.2 Statement of the problem	8
1.3 Objectives	9
1.4 Hypothesis	9
1.5 Methodology	10
1.6 Literature review	10
1.7 Limitation of the study	12
1.8 A survey of Chapters	12
1.9 Conclusion	12
CHAPTER 2: INDIGENOUS PEOPLES' RIGHTS	13
2.1 Introduction	13
2.2 Historical context and the politics of the term 'indigenous people'	13
2.3 The Concept of Indigenism in Africa	14
2.4 International Legal Framework Protecting Rights of Indigenous People	16
2.4.1 International Human Rights law	16
2.5 Universal Human Rights Instruments	17
2.5.1 International Covenant on Civil and Political Rights	17
2.5.2 Convention on the Elimination of All Forms of Racial Discrimination (CERD)	18
2.5.3 UN Declaration on Rights of Indigenous Peoples	18
2.5.4 International Labour Organization (ILO) Convention No.169	19
2.6 Regional Instruments	19
2.6.1 The Inter-American system	19
2.6.2 The African Charter on Human And Peoples' Rights	21
2.7 The Common Law Doctrine on Indigenous Title	23
2.8 Conclusion	23

CHAPTER 3: MAASAI WAY OF LIFE AND THE LAW	26
3.1 Introduction	26
3.2 History of the Maasai people	26
3.3 Land use among the Maasai: 'A Maasai point of view'	27
3.3.1 The Maasai survival magic	27
3.3.2 Land and culture	29
3.4 Land legislation and other related laws in Tanzania	30
3.4.1 The pre-colonial and colonial periods in land law	31
3.4.2 Land law during Tanzanian independence	32
3.4.3 The <i>Ujamaa</i> 'Villagization' of the 1970s	32
3.4.4 The Land Acts, 1999	32
3.5 Natural Resource Laws in Tanzania	34
3.5.1 The Creation of National Parks	34
3.5.2 Creation of a Conservative area	36
3.6 Conclusion	37
CHAPTER 4: PRACTICAL APPLICATION OF LAND LAW AND POLICIES ON INDIGENOUS PEOPLE IN TANZANIA	38
4.1 Introduction	38
4.2 Eviction through hidden agendas	38
4.3 The Mkomazi Scandal	41
4.4 The Mkomazi case: "you belong to no where"	42
4.4.1 Facts of the case	42
4.4.2 The court's decision	43
4.4.3 Relief by the court	44
4.5 Conclusion	46
CHAPTER 5: RECOMMENDATIONS AND CONCLUSION	47
5.1 Introduction	47
5.2 Recommendations	48

BIBLIOGRAPHY

ANNEX

## LIST OF ABBREVIATIONS

CERD	Convention on the Elimination of All Forms of Racial Discrimination
OAU	Organization of African Unity
AU	African Union
OAS	Organization of American States
OSCE	Organization for Security and Cooperation in Europe
UNHCR	United Nations High Commissioner for Human Rights
UDHR	Universal Declaration of Human Rights
ILO	International Labour Convention
CAT	Convention Against Torture
IWGIA	International Working Group for International Indigenous Affairs
IACHR	Inter American Convention on Human Rights
ICCPR	International Covenant on Civil and Political Rights
HRC	Human Rights Committee
ACHPR	African Charter on Human and People's Rights
ACWG	African Commission's Working Group
NAFCO	National Agriculture and Food Cooperation

## CHAPTER 1: INTRODUCTION

### 1.1 Background of the study and the marginalization paradigm in Tanzania

We have, for instance, specific zones for crops like cotton, coffee, tobacco and sisal but nothing like that for livestock keeping. We have even special areas for zebras (national parks) but livestock keepers are hanging.<sup>1</sup>

Indigenous people in general and the Maasai in particular have been subject to unfavourable policies that made them victims of their own tradition, land and natural resource riches. This study aims at revealing how State sponsored investments in Maasai traditional land, particularly creation of national parks, game reserves and game controlled areas have changed the way of life of the Maasai as a “people” aggravating their marginalization.

This research argues in particular that, government policies in Tanzania relating to indigenous people have been inappropriate from a human rights perspective, and that the rights of the Maasai as ‘a people’ have been violated in various ways. The core argument of this research is that, the deliberate neglect of policies that could advance the indigenous peoples’ livelihood by successful regimes in Tanzania was mainly to give a way for state investments such as conservation projects, game parks and large scale farming based arguably on the notion of general interest or welfare of the population.<sup>2</sup> The administration and legal treatment of customary tenure in Tanzania over the last century to date is a root cause of sustained tenure insecurity among the Maasai in the country. In this context therefore, the primary result has been almost uniform denial of indigenous peoples’ customary land interests as having the attributes of private property ownership, condemning those interests to inferior status as temporal usufruct under the landlord-like tenure by the state. Often the entire customary sphere (unregistered land areas) have been rendered government or public land, legally entrenching customary occupancy and land use as no more than permissive use rights, existing for only so long as Government allows. The study will reveal that these legal and policy failures are the root cause of continuing marginalization of the Maasai in Tanzania, especially when the situation is considered from the angle of Tanzania’s human rights obligations towards the Maasai who constitute the “indigenous people”.

---

<sup>1</sup> J.K Nyerere, the former President of Tanzania, Morogoro, August 1981, see also J.T Mwaikusa, Community Rights and Land Use Policies in Tanzania: The Case of Pastoral Communities, *Journal of African Law*, Vol.37, No.2, Law and Environment in Africa. (Autum, 1993) 144-163 available at [http:// www. Jstor.org](http://www.Jstor.org). [Accessed on 1<sup>st</sup> March, 2007]

<sup>2</sup> This study will mainly discuss the violation of Maasai land rights through investments policies (state owned projects such as, the declaration of national parks, game reserves and Hunting blocks). Other situations, in which the indigenous land was taken through legislations, will be referred to. How far this occurred wilfully, through benign neglect, or through lack of understanding need not preoccupy us. In Africa, colonial policies, from whence subordination drives, indisputably had well-intentioned sides. A common example was to deny ‘natives’ the right to sell land, “to safeguard the ignorant and improvident peasant from selling his/her whole heritage”

## 1.2 Statement of the problem

In the name of national unity, considered as an antidote to the danger of tribalism, racism, and secession, most African political leaders have opted for 'national-states' policies.<sup>3</sup> Promoting the identity of communities continues to be regarded as an obstacle to national unity and a source of instability. As Levin puts it:

It has become a strategy of new governments to subsume the national self-determination rights of ethnic groups into the rhetoric for the betterment of all independence [demanded] cementing in solidarity for the emergence and survival of a nation of national unity.<sup>4</sup>

As an overall task of most African countries,<sup>5</sup> national building and nation development have to be understood within the international context characterised by the triumph of the free market. This imposes the need for economic growth, free movement of capital and resources and, as put by Samir Amir, 'control by the centres [the capitalist masters] of access to the natural resources of the entire Earth.'<sup>6</sup>

Lack of proper legal regimes in East Africa, specifically in Tanzania designed to protect land rights of indigenous people have negatively affected livelihoods of the Maasai and have halted the Maasai, to advance their cause as a 'people'.<sup>7</sup> Dispossession of land through state sponsored land development policies is contrary to the natural justice of the Maasai people. The Maasai are crying for respect of the due process of law, a law that will in particular take into consideration the collective nature of customary ownership, as well as acknowledge their distinct nature and characteristics.<sup>8</sup> This research intends to invoke through developing international law norms and

---

<sup>3</sup> IG Shivji 'State and Constitutionalism: Africa debate of democracy'(1991) *Southern Africa Political series*, Harare Zimbabwe 31; see generally IG Shivji 'The Right to self-determination: an Africa Perspective' (1989b), in W Twining 'Issue of self-determination, *Aberdeen University Press* 35

<sup>4</sup> See generally AK Barume 'Constitutional Protection and Aboriginal Title in Commonwealth African Countries (2002)' a paper presented at the 'Indigenous Rights in the Commonwealth Project Africa Regional Expert Meeting' on the 16-18 October 2002, Cape Town, South Africa available at <http://www.cpsu.org.uk/downloads/Albert%20Barume.pdf>. (Accessed on 23 October 2007) ; M Levin 'Group rights and discrimination in international law' (1993) Martius Nijhoff Publisher, London 128-130,

<sup>5</sup> IG Shivji (n 3 above) 60. Shivji elaborates also on the impact of the building of 'national- states' on national struggles and self-determination. Citing the case of Rwanda, Burundi, Ethiopia, Tanzania, Sudan and Nigeria, he underlines the oppression and discrimination that featured most post-political Sub Saharan African states in dealing with cultural identity of their communities.

<sup>6</sup> S Amin 'The challenges of globalization: Delinking, in the South Centre'(1993) Zed Books, London 133

<sup>7</sup> Among the Maasai land is a collective asset that defines identity and supports livelihood. Land (meaning trees, plants, animals, and that inhabit the land) are not just natural resources in the popular sense but are highly personal beings, which form part of indigenous persons' social and spiritual universe.

<sup>8</sup> See NG Tarayia 'The Legal Perspective of the Maasai Culture, Customs and Traditions' (2004) 21[1] *Arizona Journal of International and Comparative Law* 183.

jurisprudence on indigenous people in addressing the violation of the Maasai's human rights in the region.

### 1.3 Objectives

The general objective of this study is to lay out the bases for an assessment of the impact of foreign and local investment on indigenous people in East Africa.<sup>9</sup> For this purpose it will explore the current and systematic practice of violations of human rights as against the obligation of states to promote and to protect human rights and to guarantee effective remedies for victims in cases where those rights have been violated under the international human rights law jurisprudence in an African context.

Based on the strength of selected case studies in the Americas,<sup>10</sup> Australia,<sup>11</sup> and informed by relevant jurisprudence drawn from the Inter-American human rights system and elsewhere, a critical and informative analysis as to how the African Commission (and some day the African Court) should entertain issues to do with indigenous peoples' rights will be attempted. This research will also try to forge an appropriate balance between the protection of human rights and the achievement of economic objectives when implementing investment projects to ensure that such development ultimately benefit human beings, considered in their various social and cultural environments.

In an attempt to accomplish the above objectives, the study will be guided by a number of questions that include but are not limited to the following:

- i) How has the promotion of investment impacted negatively on property, social-economic and cultural rights of indigenous peoples in the country[ies] concerned?
- ii) How has the state put in place legal mechanisms in order to protect the rights of indigenous peoples in the light of the impact brought by investment?
- iii) What could be an ideal legal and policy framework borrowing from best practices and standards in other jurisdictions to ensure that the rights of indigenous peoples are not

---

<sup>9</sup> Though the focus of the study is on the Maasai people of Tanzania, this study will be referring to cases from other indigenous people who are Non-Maasai in Tanzania and other indigenous people in Kenya who share similar experiences of marginalization and dispossession within the mainstream population.

<sup>10</sup> The *Awat Tingni v. Nicaragua*, Case 11.577, Annual Report of the IACHR.OEA/Ser.LV/II.02, Doc.6 rev., (Vol.II), April 16, 199, 1067, paragraph 108; *Dann v. United States, Moiwana Village v. Suriname*, Judgement of June, 15, 2005, the Inter-American Court, H.R., (Ser. C) No. 124 (2005), and *Maya Communities v.. Belize cases* case 12.053, Report No 40/40, Inter-Am CHR, OEA/Ser.LV/II.122 Doc 5 rev 1, 727 (2004), para 107.

<sup>11</sup> The *Mabo v. Australia case*, See the High Court of Australia, *Mabo v. Queensland (No 2)* (1992) 107 ALR 1, paras 89 and 182; Supreme Court of Canada, *R v. Van der Peet* 2 SCR (1996) 507, paras 18-19 (Where Aboriginal people sued the government for recognition of wrongful dispossession of their land and compensation of the same).

compromised by the forces of globalization in particular through investment policies that are sponsored by central (African) governments.

#### **1.4 Hypothesis**

The study is premised under the following assumptions that the legal system within the East African countries has not changed within a period of six months and relocation of the Maasai land was inevitable during different regimes and further that, the countries in question have ratified most international instruments and that decisions from international quasi-judicial bodies are enforceable.

#### **1.5 Methodology**

This research shall mainly be conducted through library work to understand the literature that exists on the topic and find appropriate ways to address issues raised in the study. Analytical and comparative methods shall be implied in this research in the sense that inspiration and best practices will be adopted from other jurisdictions. As the subject under consideration is of particular pertinence to the current African experience, and the world at large, this study is not of academic interest only.

#### **1.6 Literature review**

Literature about the Maasai and indigenous people in general abound. However amid this forest of books and articles that one can find quit easily, only a few address either the Maasai situation from a human rights perspective on 'indigenous rights' in the African context. The following titles have been useful in widening the understanding of the researcher, especially on property rights and conservation as they relate to the impact of the state development policies on indigenous populations. Mchome S.E.<sup>12</sup> provides an excellent analysis of the national and international legal instruments protecting indigenous people and their traditional lands. The author provides in-depth background information on the eviction of the Maasai in Mkomazi Game reserve, including analysis of the court case.

Stoll Peter<sup>13</sup>, discusses, among other things the meaning of indigenous people in international law. Stole admits semantic and definitional problems as a setback in the realization of indigenous

---

<sup>12</sup> See SE Mchome 'Eviction and the Right of the People in Protected Areas in Tanzania' (2000) Faculty of Law, University of Dar Es Salaam Print 134.

<sup>13</sup> SP Tobias & A Hahn 'Indigenous Peoples, Indigenous Knowledge and Indigenous Resources in International Law' in S Lewinski (ed) *'Indigenous heritage and intellectual property: genetic resources, traditional knowledge and folklore'* Kluwer Law International (2004) 163

people's rights but does not discuss in depth the problem of indigenous rights in post-colonial Africa.

Collett, David.<sup>14</sup> Traces the history of wildlife conservation in Kenya from colonial time to the present and correctly observes that Maasai pastoralists have traditionally been denied involvement based on racism, British conceptions of man vs. nature, and conception of cattle as "harmful" to the environment.

Foster, John Bellamy.<sup>15</sup> Provides an excellent "entry point" for this study to consider investments by government in the name of bringing "development", and the negative effects it brings to the Maasai as a people. The author argues that a critique of development, and of capitalist tendencies towards self-destruction, are necessary, so that a focus on people vs. profits and on having enough rather than having more becomes a driving ideological force. This provides an important background to the discussion of the state's disregard for alternative land property models, such as indigenous ways of environmental management. Francis D.P. Situma<sup>16</sup> considers the legal aspects of community involvement in natural resource management and observes that local and traditional communities who eke their living directly from the environment ought to be given prime consideration while taking any decision affecting their livelihood.

Ringo Tenga<sup>17</sup> discusses the land tenure issues in Tanzania and pastoral lands in particular. The author identifies the colonial form of land tenure which considers traditional forms of owning land to be inferior as one of the root cause problems of land tenure insecurity in Maasai land.

A survey of existing literature dealing with Maasai, developmental policies in East Africa shows a gap on the precise issue raised by this dissertation. More concretely, there is little that addresses 'indigenous rights', in particular through the African Charter on Human and Peoples' Rights in connection with land tenure regimes and development policies. The utility of the existing literature, in terms of books, articles and Internet sources can however not be gainsaid. The research is unique because it does not only appraise the impact or harm that has been inflicted upon the Maasai people, but also, it does explain in detail state's obligations in protecting the rights of 'indigenous people' specifically in considering Africa's unique historical context.

---

<sup>14</sup> D Collett. 'Pastoralists and wildlife: image and reality in Kenya Maasailand' in David & G Anderson *Conservation in Africa: people, policies and practice*, Cambridge University Press (1987) 129-148.

<sup>15</sup> FJ Bellamy 'Sustainable development of what?' *Capitalism Nature Socialism* (1996) 129-132.

<sup>16</sup> FP Situma 'Legislative and Institutional Framework for Community Based natural Resource Management in Kenya (2003) 1 *The University of Nairobi Law Journal* 55.

<sup>17</sup> R Tenga 'Pastoral Land Rights in Tanzania' (1992) 1 *International Institute for Economic Development, Land Tenure Series* available at <http://www.iied.org/pubs/search.php?a=Ringo%20Tenga&x=Y> (accessed on 15 October 2007)

## 1.7 Limitations of the study

When dealing with arguments of an historical nature one of the legal difficulties is the inherent limitation of intertemporal law. In the words of Judge Huber in the Island of Palmas arbitration stated, 'a juridical fact must be appreciated in the light of the law contemporary with it, and not the law in force at the time when a dispute in regard to it arises or falls to be settled'.<sup>18</sup> Under the doctrine of intertemporal law it is a well established legal rule that legal arguments should be assessed in the light of the rules of law that are contemporary with it.<sup>19</sup>

The reference to 'continued manifestation' and 'evolution of the law' under the intertemporal law doctrine could have far-reaching consequences when applied to indigenous peoples' land rights, as in many cases the contemporary situation that indigenous peoples are facing is a direct consequence of the laws of colonization.<sup>20</sup>

## 1.8 A Survey of the five Chapters

Chapter 1 serves as an introduction and highlight the structure of the study Chapter 2 highlights the historical context of the term 'indigenous' and draws some challenges in applying the same in Africa's context, and then in light of existing human rights norms and jurisprudence protecting rights of indigenous people, the study will underscore certain principles guiding states in protecting and promoting rights indigenous people globally. Chapter 3 will describe the Maasai way of life specifically to show how the Maasai people are more attached to land for social, cultural and biological survival compared to mainstream society and will critically and objectively describe the legal framework on property/land rights in Tanzania. Chapter 4 will look into the practical application of land policies and appraise the impact on Maasai peoples' property rights. Chapter 5, is a summary of the conclusions drawn from the whole study and makes some recommendations to address the human rights problems identified in the relationship of the Tanzanian development policy to the cultural survival of the Maasai.

---

<sup>18</sup> Island of Palmas Arbitration 2 R International Arbitration Awards (1928), 831

<sup>19</sup> See TO Elias, 'The Doctrine of Intertemporal Law' (1980) 74 (4) *The American Journal of International Law* 285.

<sup>20</sup> J Gilbert, 'Historical Indigenous Peoples' Land Claims': A comparative and international approach to the common law doctrine on indigenous title, *International and Comparative Law Quarterly* (2007), 594

## CHAPTER 2: INDIGENOUS PEOPLES' RIGHTS

### 2.1 Introduction

This chapter looks into the development of the concept of indigenous people's rights particularly by making reference to norms and principles of international human rights law governing the individual and collective interests of indigenous peoples, including consideration of any special measures that may be appropriate and necessary in giving proper effect to these rights and interests.

### 2.2 Historical context and the politics of the term 'indigenous people'

One of most widespread contemporary problems is the failure of States to recognize the existence of the indigenous land use, occupancy and ownership, and the failure to accord appropriate legal status and legal rights to protect that use, occupancy or ownership.<sup>21</sup>

The concept 'indigenous people' is increasingly popular but also highly contentious in international discourse and in international negotiations. As a sociological category it is subject to various definitions. As a legal concept it is just beginning to find its form.<sup>22</sup> However, this concept and the concern for the rights of groups who regard themselves as indigenous peoples have enjoyed extensive scholarly,<sup>23</sup> judicial,<sup>24</sup> and political attention in recent years.<sup>25</sup>

Situma and Asiema agree that, the definition of 'indigenous people' is notoriously obscure, despite the fact that, indigenous people call themselves to be distinct. It is ambiguous because a great variety and a number of communities in the world refer to themselves as indigenous persons.<sup>26</sup>

---

21 El Daes 'Indigenous peoples and their relationship to land: Final paper prepared for the UN-Sub-Commission on the Promotion and Protection of Human Rights (E/CN.4/sub.2/2001/21, 11 June 2001 para 124

22 S Saugestad 'Contested Images: Indigenous Peoples of Africa, on a paper presented during the Conference on Indigenous Peoples of Eastern, Central and Southern Africa, organised by the Pastoralists Indigenous NGO's Forum (PINGOs Forum) and IWGIA in Arusha, Tanzania from 18-22 January 1999

23 See BJ Kealeboga & GW Mkundi 'Protecting indigenous peoples in Africa: An analysis of the approach of the African Commission on Human and Peoples' Rights' (2006) 6 (2) *African Human Rights Law Journal* 384; SJ Anaya, *Indigenous peoples in international law* (2004).

24 Kealeboga & Mukundi (n 23 above) For the practice of international political bodies, see generally SC Perkins 'Indigenous peoples and international organisations: Issues and responses' 1995 23 *International Journal of Legal Information* 217

25 See S Collier & WF Sater 'A history of Chile 1808-1994'; see also (n 24 above) they argued that, the issue of indigenous peoples is not a new phenomenon. It has been a standing and challenging issue from the moment Spanish incursions into the Western hemisphere brought European explorers into contact with the native peoples of the Americas (Indians).

26 n 16 above.

According to the Oxford English Dictionary, before the mid-twentieth century the word 'indigenous' was almost exclusively used in reference to plants and livestock native to a particular region.<sup>27</sup> One of the first uses of 'indigenous peoples' in direct reference to human groups was in the International Labour Organization (ILO) in the 1953 report and it is indeed, term of very recent usage, and has, paradoxically, become a starting point for claims of distinct identity and rights based upon the principles of original occupation of land and the pursuit of traditional ways of life "from time immemorial".<sup>28</sup>

### 2.3 The Concept of Indigenism in Africa

The linguistic ambiguity of 'indigenous' in a global picture, Africa and much of Asia, represents special conceptual challenges. The colonial roots of the concept, 'indigenous peoples,' are the descendants of those who occupied a given territory that was invaded, conquered or colonized by white, colonial powers.<sup>29</sup> Some of the most complex relations are those between 'original occupants' and incoming groups in Africa. This make it not only complex to analyze Africa, but also more challenging because, the dominant position of white colonial forces left all of black Africa in subordinate position that was, in many respects, similar to the position of those who were identified as indigenous people in the Americas, Canada, Australia, New Zealand, among others.<sup>30</sup> Thus, in relation to the colonial powers, all Africans were; first comers, non- dominant and have different in culture from white intruders.

Local people were associated with 'nature' and 'traditional lifestyles', which are common indigenous attributes, thus, the black-white dichotomy in Africa tended to reinforce the notion that all native Africans were 'indigenous'.<sup>31</sup> The conceptual problems were noted in the report from the first conference on indigenous people in Africa, conducted by (IWGIA) in 1993:

The concept 'indigenous people', as applied to African setting, is complicated...but... less so when seen by those who themselves claim to be indigenous...every...discriminatory treatment accorded to indigenous people

---

27 In Brokensha, Warren & Werner (eds) (1980) *Indigenous Knowledge Systems and Development* Lanham; University Press of America, the concept 'indigenous' was used by a group around Robert Chambers at the Institute of Development Studies Sussex, in the United Kingdom to mean 'indigenous' systems of cultivation, in contrast to Western and 'scientific' farming systems and argued for a great emphasis on 'indigenous knowledge systems' in Development Programmes.

28 See R Niezen, *Digital Identity: The Construction of Virtual Selfhood in the Indigenous Peoples' Movement*, *Comparative Studies in Society & History* (2005) *Florida Journal of International Law* 532-51. The greater openness of the rights of minorities in the wake of the Holocaust, and the process of decolonization led to more inclusive elaboration of the rights of distinct peoples.

29 See generally, PG McHugh 'Aboriginal societies and common law: A history of sovereignty, status and self-determination' (2004)

30 n 22 above

31 n 22 above

by the dominating populations in the countries, not as a result of attempts to set themselves apart socially or politically but, because indigenous peoples looked different, dressed differently, behaved different from the rest. Indigenous identity was an experienced social reality whether consciously acknowledged and made part of public and political discourse or not.<sup>32</sup>

The linking of this concept with the colonial situation leaves us without a suitable term to critically analyze the same type of internal relationships that have persisted in Africa after liberation from colonial dominance.<sup>33</sup> Indigenous people have historically occupied inaccessible regions, often geographically isolated, socially marginalized, dispossessed of their natural resources, and with their cultures distinct from the national hegemonic model, they suffer various forms of exploitation and domination within the national economic and political structures that are commonly designed to reflect the interests and activities of the national dominant groups.<sup>34</sup>

The United Nations Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen on his visit to Kenya, stated that;

The contested use of the term 'indigenous'...from a human rights perspective...is not "who came first"<sup>35</sup> but the shared experiences of dispossession and marginalization. The term 'indigenous' is...rather to address historical and present-day injustices and inequalities. It is in this sense that the term has been applied in the African context...within this perspective, pastoralists and hunter-gathers are normally regarded as indigenous peoples in the international context, and they increasingly identify themselves as such in many countries, including in Africa".<sup>36</sup>

It is therefore clear that, the term 'Indigenous peoples' is a term referring to subordination, marginalization, and self identification of distinct cultures and characteristics within the mainstream community. The Maasai people as will be shown in the next chapter qualify to be identified under this group of people. However, the linking of this concept with the colonial situation leaves us

---

32 See generally, Veber, Hanne, Jens Dahl, Fiona Wilson, and Espen Wehle (eds): 1993, '...Never Drink from the Same Cup'. Proceedings of the conference on Indigenous Peoples in Africa; Tune, Denmark 1993. IWGIA, Document No. 74, Copenhagen.

<sup>33</sup> IWGIA n 32 above

34 See generally, BN Pityana, the then Chairperson of the South African Human Rights Commission and a member of the African Commission on Human and Peoples' Rights on a paper presented during the 'Indigenous Peoples of Eastern, Central and Southern Africa' between 18-22 January 1999.

<sup>35</sup> Miwana case (n 10 above) para 132 where the court despite of the N'djuka community being not the original occupants of the land in the Moiwana village had this say; 'the Moiwana community members are not indigenous to the region; according to proven facts, Moiwana Village was settled by N'djuka clans late in the 19<sup>th</sup> Century nevertheless, from that time until the 1986 attack, the community members lived in the area in strict adherence to N'djuka customs... survivors and next of kin locate their point of origin in and around Moiwana Village...their inability to maintain their relationships with their ancestral lands ...has deprived them of fundamental aspects of their identity and sense of well being.

36 See the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen report on his mission to Kenya, A/HRC/4/32/Add.3 from 4-14 December 2006 available at <http://daccessdds.un.org/doc/UNDOC/GEN/G07/110/43/PDF/G0711043.pdf?OpenElement> (accessed on 17 October 2007) para 9 &10, the report on his mission to South Africa, E/CN.4/2006/78/Add.2, paras 20-3

without a suitable term to critically analyze the same type of internal relationships that have persisted in Africa after liberation from colonial dominance.<sup>37</sup>

## **2.4 International Legal Framework Protecting Rights of Indigenous People**

### **2.4.1 International human right law**

Pertinent treaties, legislation and jurisprudence reveal the development over more than 80 years of particular human rights norms and principles applicable to the circumstances and treatment of indigenous peoples.<sup>38</sup> Special measures for securing indigenous peoples' human rights have been recognized and applied by international and domestic bodies, including the Inter-American Court of Human Rights,<sup>39</sup> the International Labour Organisation,<sup>40</sup> the United Nations through its Human Rights Committee<sup>41</sup> and Committee to Eradicate All Forms of Racial Discrimination,<sup>42</sup> and the domestic legal systems of states.<sup>43</sup> Central to these norms and principles has been the recognition of the need for special measures by states to compensate for the exploitation and discrimination to which these societies have been subjected at the hands of the non-indigenous.<sup>44</sup>

In its 1997 report of the human rights situation in Ecuador, the Inter-American Commission stated that:

[W]ithin international law generally, and inter-American law specifically, special protections for indigenous peoples may be required for them to exercise their rights fully and equally with the rest of the population. Additionally, special protections for indigenous peoples may be required to ensure their physical and cultural survival, a right protected in a range of international instruments and conventions.<sup>45</sup>

---

<sup>37</sup> IWGIA n 32 above

<sup>38</sup> For an historical overview of international human rights developments concerning indigenous peoples, see IACHR, The Human Rights Situation of the Indigenous People in the Americas, OEA/Ser.L/V/II.108, Doc. 62 (October 20, 2000) 21-25.

<sup>39</sup> Awas Tingni Case n 10 above.

<sup>40</sup> See e.g. ILO Convention, N° 169

<sup>41</sup> See UNHRC, General Comment 23, ICCPR Article 27, U.N. Doc. HRI/GEN/1/Rev.1 at 38 (1994) [hereinafter "UNHRC General Comment 23"] para. 7.

<sup>42</sup> See CERD General Recommendation XXIII (51) concerning Indigenous Peoples (August 18, 1997).

<sup>43</sup> For a compilation of domestic legislation governing the rights of indigenous peoples in numerous OAS member states, see IACHR, Authorities and Precedents in International and Domestic Law for the Proposed American Declaration on the Rights of Indigenous Peoples, OEA/Ser.L/V/II.110 Doc. 22 (1 March 2001).

<sup>44</sup> For an historical overview of international human rights developments concerning indigenous peoples, see IACHR, The Human Rights Situation of the Indigenous People in the Americas, OEA/Ser.L/V/II.108, Doc. 62 (October 20, 2000) 21-25.

<sup>45</sup> IACHR, Report on the Situation of Human Rights In Ecuador, OAS/Ser.L/V/II.96.Doc.10 rev 1, 24 April 1997, Chapter IX.

It is important to note that, indigenous peoples' rights are protected under international law in connection with a variety of other rights, including the general prohibition of racial discrimination, the right to property, the right to cultural integrity, and as part and parcel of the right to self determination.<sup>46</sup>

## 2.5 Universal Human Rights Instruments

### 2.5.1 International Covenant on Civil and Political Rights

Indigenous peoples' rights to land, territories and resources have been addressed by intergovernmental bodies under human rights instruments of general application. The UN Human Rights Committee (HRC), stated in relation to Article 1 of the International Covenant on Civil and Political Rights (ICCPR) that;

The right to self-determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence,<sup>47</sup>... the committee also recommends that the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with Article 1 of the covenant.<sup>48</sup>

The HRC similarly concluded that, states should implement and respect the right of indigenous peoples to self-determination, particularly in connection with their traditional lands. This decision was reached for instance in its Concluding Observations on the reports of Mexico and Norway issued in 1999, and Australia in 2000.<sup>49</sup> In its complaints based jurisprudence, the HRC has also related the right to self-determination to the right of individual or collective rights to culture under Article 27 of the ICCPR.<sup>50</sup> Article 27 of the ICCPR<sup>51</sup> also protects linguistic, cultural and religious rights and in the case of indigenous peoples, includes among others, rights to land and resources, subsistence and participation.<sup>52</sup> Article 27 embodies one manifestation of the general norm of international law relating to the right to cultural integrity.<sup>53</sup>

---

<sup>46</sup> See generally, F Mackay, 'Addressing Past Wrongs, Indigenous Peoples and Protected Areas: The Right to Restitution of Lands and Resources', (2002), 11 available at [http://www.forestpeoples.org/documents/law\\_hr/ips\\_restitution\\_protected\\_areas\\_oct02a\\_eng.pdf](http://www.forestpeoples.org/documents/law_hr/ips_restitution_protected_areas_oct02a_eng.pdf) (accessed on the 15 October 2007)

<sup>47</sup> ICCPR art 1(2).

<sup>48</sup> n 46 above, 11; Concluding Observations of the HRC: Canada. 07/04/99.UN Doc.CCPR/C/79/Add.105 para 8

<sup>49</sup> See the Concluding Observations of the HRC: Mexico. UN Doc.CCPR/C/79/Add.109 (1999), para 19; Norway. UN Doc.CCPR/C/79/Add.122 (1999), paras 10 & 17; and Australia. 28/07/2000. CCPR/CO/69/AUS para 8

<sup>50</sup> *Apirana Mahuka et al. v. New Zealand (Communication No. 547/1993, 15/11/2000)*, UN Doc. CCPR/C/70/D/547/1993 (2000), paragraph 9.2

<sup>51</sup> Art 27(3)

<sup>52</sup> *Bernard Omiyanak, Chief of the Lubicon Lake Band v. Canada*, Report of the HRC, 45 UN GAOR Suppl. (No.43), UN Doc. A/45/40, Vol. 2 (1990); see also, *Kitok v. Sweden*, Report of the HRC, 43 UNGAOR Suppl. (No.40) UN Doc.

For instance, in 1994, the HRC elaborated upon its interpretation of Article 27 by stating that:

With regard to the exercise of cultural rights protected under Article 27, the committee observes that, culture manifests itself in many forms, including a particular way of life associated with the use of land resources, specifically in the case of indigenous peoples. That right may include such traditional activities such as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.<sup>54</sup>

## 2.5.2 Convention on the Elimination of All Forms of Racial Discrimination (CERD)

Under this Convention, states parties are obligated to recognize, respect and guarantee the right 'to own property alone as well as in association with others' without discrimination. The principal provisions of CERD, include the right to property, are declaratory of customary international law.<sup>55</sup> In its 1997 General Recommendation, the UN Committee on the Elimination of Racial Discrimination elaborated on indigenous peoples' rights under CERD in particular the committee called upon states parties to recognize and protect the rights of indigenous peoples to own, develop, control, and use their communal lands, territories and resources and where they have been deprived, without their free and informed consent, to take steps to return these lands and territories.<sup>56</sup>

## 2.5.3 UN Declaration on Rights of Indigenous Peoples

The newly adopted Declaration on Indigenous Peoples<sup>57</sup> is a landmark step towards protecting and promoting indigenous peoples' rights through a comprehensive document<sup>58</sup> by the United

---

A/43/40, Although not decided under Art 27; see also, *Hopu v. France*, Communication No. 549/1993: France. 29/12/97. UN Doc. CCPR/C/60/D/549/1993/Rev.1.

<sup>53</sup> HRC: General Comment No. 24 (1994) para 8; SJ Anaya 'Indigenous Rights Norms in Contemporary International Law'(1991) 8 (1) *Arizona Journal of International and Comparative Law* 15

<sup>54</sup> n 48 above, 3

<sup>55</sup> n 46 above 12; see also T. Meron, 'Human Rights and Humanitarian Norms as Customary Law' (1989) Oxford: Clarendon Press 21.

<sup>56</sup> General Recommendations XXIII (51) concerning Indigenous Persons Adopted at the Committee's 1235<sup>th</sup> Meeting, on the 18 August 1997. UN Doc. CERD/C/51/Misc.13/Rev.4.

<sup>57</sup> The Declaration on Indigenous Rights was adopted on the 13 September 2007 by the United Nations General Assembly through Resolution A/RES/61/295 available at <http://daccessdds.un.org/doc/UNDOC/GEN/G07/110/43/PDF/G0711043.pdf?OpenElement> members voted for the were 143 and those against 4 members (accessed on 15 October 2007).

<sup>58</sup> The declaration is advocate for instance Art 3, right to self-determination, Art 10, a right to consent', Art 11, a right to maintain, develop, protect culture and traditions', Art 26 right to property' (land), they have a right to lands, resources and territories which they have owned, occupied and used...., among others

Nation's community.<sup>59</sup> The Declaration establishes a universal framework of minimum standards for the survival, dignity, well-being and rights of the world's indigenous peoples. The Declaration addresses both individual and collective rights; cultural rights and identity; rights to education, health, employment, language, and others. It outlaws discrimination against indigenous peoples and promotes their full and effective participation in all matters that concern them. It also ensures their right to remain distinct and to pursue their own priorities in economic, social and cultural development. The Declaration explicitly encourages harmonious and cooperative relations between States and indigenous peoples.

#### **2.5.4 International Labour Organization (ILO) Convention No.169**

The ILO Convention 107 was replaced by the ILO Convention on Indigenous and Tribal Populations Convention 169 was adopted in 1989 and was the only concrete document at the international level on indigenous peoples' rights.<sup>60</sup> The new Convention represented a major paradigm shift on the subject because it adopted an attitude of respect for cultures and ways of life of indigenous people.<sup>61</sup>

### **2.6 Regional Instruments**

#### **2.6.1 The Inter-American system**

It is well established in the Inter-American system that special measures are required for indigenous peoples' full enjoyment of their human rights. These special measures include protections for indigenous languages, cultures, economies, ecosystems and natural resource base, religious practices, ancestral and communal lands and the establishment of an institutional order that facilitates indigenous participation through their freely chosen representatives.<sup>62</sup>

According to the Inter-American Commission and the Court on Human Rights, indigenous peoples' property rights derive from their own laws and traditional occupation and use and exist even

---

<sup>59</sup> In her speech on adoption on the declaration day, the UN General Assembly President Sheikh Haya Rashed Al Kahlifa had this to say, 'The importance of this document for indigenous peoples and more broadly, for human rights agenda, can not be underestimated' (n 37 above)

<sup>60</sup> See n 23 above

<sup>61</sup> L Swempston 'The Indigenous and Tribal Peoples in post-colonial development discourse in Africa' (2002) 20 *Wisconsin International Law Journal* 298, art 4 (measures to safeguard property, cultures, labour and environment of indigenous peoples), art 5 (respect for cultural and religious values of indigenous peoples). See also n 23 above

<sup>62</sup> See, among others, Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, OEA/Ser.L/V/II.62, doc 26. (1984), 76-78, 81; Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96 doc.10, rev.1 (1997), 103-4; Third Report on the Situation of Human Rights in the Republic of Guatemala OEA/Ser.1/V/II.67, doc.9 (1986, 114

without formal recognition by the State,<sup>63</sup> and as a product of customary law, possession of land should suffice to entitle indigenous people without officially sanctioned title to their land to obtain official recognition and registration of their rights of ownership.<sup>64</sup> In the *Awat Tingni* case, the court ordered among others, the state to adopt measures of legislative, administrative, and other steps necessary to create an effective mechanism for official delimitation, demarcation, and titling of the indigenous communities properties, in accordance with the customary law, values, usage, and customs of these communities.<sup>65</sup>

The Inter-American system, has also made it clear that, advancement of indigenous human rights and freedoms, the right to property included are frequently exercised and enjoyed by indigenous communities in a collective manner, in the sense that they can only be properly ensured through their guarantee to an indigenous community as a whole.<sup>66</sup>

Organs of the inter-American human rights system have particularly acknowledged that, indigenous peoples enjoy a particular relationship with the lands and resources and considered them to be owned and enjoyed by the indigenous community as a whole<sup>67</sup> and, according to which the use and enjoyment of the land and its resources are integral components of the physical and cultural survival of the indigenous communities and the effective realization of their human rights more broadly.<sup>68</sup>

As observed by the Inter-American Court of Human Rights in its seminal judgment in the Case of the Mayagna (Sumo) Community of *Awat Tingni v. Nicaragua*<sup>69</sup>

---

<sup>63</sup> *Awat Tigni* case n 10 above

<sup>64</sup> n 48 above, para 151; see also the *Moiwana* case n 10 above paras 122, 130-131.

<sup>65</sup> n 48 above, para 164

<sup>66</sup> See, *Mary and Carrie Dann v. United States* (2001) para 128, citing IACHR, The Human Rights Situation of Indigenous Peoples in the Americas 2000, OEA/Ser.L/V/II/108, Doc. 62 (October 20, 2000) 125; See also ILO Convention (Nº 169) art 13

<sup>67</sup> *Awat Tingni* (n 10 above) para 149 the IACHR observed that '[a]mong indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community'.

<sup>68</sup> The Ecuador Report (n 62 above) 115. The Commission has observed, for example, that continued utilization of traditional collective systems for the control and use of territory are in many instances essential to the individual and collective well-being, and indeed the survival of, indigenous peoples and that control over the land refers to both its capacity for providing the resources which sustain life, and to the geographic space necessary for the cultural and social reproduction of the group.

<sup>69</sup> *Awat Tingni* case (n 10 above). On 4 June 1998, the Commission submitted to the Inter-American Court an application in the case of the Mayagna (Sumo) Community of *Awat Tingni* against the State of Nicaragua in which it requested the Court to decide that the State had violated arts 1, 2, 21, and 25 of the Convention, because Nicaragua had not demarcated the communal lands of the Mayagna (Sumo) Community of *Awat Tingni*, had not taken effective measures to ensure the property rights of the *Awat Tingni* Community in respect of their ancestral lands and natural resources.

For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generation.<sup>70</sup>

In the *Moiwana case*,<sup>71</sup> the Inter-American Court of Human Rights in relation to indigenous peoples' property rights stated that:

The reparation of harm caused by a violation of an international obligation requires, whenever possible, full restitution (*restitutio in integrum*), which consists in restoring the situation that existed before the violation occurred...*inter alia* payment of indemnity as compensation for the harm caused...and the obligation to provide reparations, which is regulated in all aspects (scope, nature, modalities and designation of beneficiaries) by international law, and cannot be altered or eluded by the state's invocation of provisions of its domestic law".<sup>72</sup>

## 2.6.2 The African Charter on Human and Peoples' Rights

The adoption of the African Charter on Human and Peoples' Rights (African Charter)<sup>73</sup> and the subsequent establishment of the African Commission on Human and Peoples' Rights (the African Commission),<sup>74</sup> heralded a new dawn for a continent ravaged by civil wars, dictatorships and notorious human rights violations.<sup>75</sup>

One of the mandates of the African Commission's Working Group of Experts on Indigenous Populations<sup>76</sup> (ACWG) was to study the implications of the Africa Charter and wellbeing of indigenous populations/communities with regard to specific articles.<sup>77</sup> The ACWG, therefore, analysed these provisions and the jurisprudence of the African Commission with regard to the

---

<sup>70</sup> n 10 above, para 149.

<sup>71</sup> n 15 above

<sup>72</sup> See the *Moiwana Case* n' 35 above, para 170; see also the *Case of the Serrano-Cruz Sisters*, Judgement of 1 March 2005. Series C.120, para 27.

<sup>73</sup> The African Charter on Human and Peoples' Rights, adopted 27 June 1981 in Nairobi, Kenya, OAU Doc CAB/LEG/67/3 Rev 5, entered into force 21 October 1986.

<sup>74</sup> The Africa Commission (established under art 30 of the African Charter) was inaugurated on 2 November in 1987 in Addis Ababa, Ethiopia and is based in Banjul, The Gambia.

<sup>75</sup> See Kealegoba & Mukundi (n 23 above); J Oloka-Onyango 'Reinforcing marginalized rights in an age of globalization: International Mechanisms, non-state actors and the struggle for peoples' rights in Africa' (2003) 18 *American University International Law Review* 912.

<sup>76</sup> See ACPR/Res 51 (XXVIII) 00 Resolution on the Rights of Indigenous People's Communities in Africa (2000), adopted by the African Commission at its 28<sup>th</sup> Ordinary session held in Cotonou, Benin in October [http://www.achpr.org/english/resolutions/resolutions70\\_en..htm](http://www.achpr.org/english/resolutions/resolutions70_en..htm) (accessed 18 April 2007)

<sup>77</sup> n 48 above, paras 1-5. The African Charter Art. are: arts 2 & 3, which provide for the right to equality; Art. 5, which provides for the right to dignity; art.19, which provides for protection against domination; Art 20, which provides the right of self-determination; and Art. 22, which provide for the promotion of cultural development and identity.

concept of 'peoples'. This analysis guided the ACWG in deciding as to whether the African Charter protects rights of indigenous peoples.

In order for groups that identify themselves as indigenous peoples to be entitled to the protection under the African system of human rights, they must qualify as 'peoples'.<sup>78</sup> The ACWG commenced by noting that, the Africa Charter expressly recognize and protect collective rights under Articles 19, 20, and 21.<sup>79</sup> This express recognition of collective rights served as a clear intention to draw a distinction between traditional individual rights from the rights that can only be enjoyed in a collective manner.<sup>80</sup> However, the ACWG noted that despite the use of the term 'peoples', the African Charter does not define the concept of 'peoples'.<sup>81</sup>

However, though the African Commission shield away from interpreting the concept of 'peoples' in recent years it considered communications in which specific sector or group of population has invoked collective rights against the state.<sup>82</sup>

In the *Katangese Peoples' Congress v. Zaire*,<sup>83</sup> though the communication alleging violations of the right to self-determination of the Katangese people under Article 20(1) of the African Charter, was dismissed for want of clear evidence of denial to participate in government, the ACWG has interpreted the communication in a positive manner. It noted that:

By recognizing the right of a section of a population to claim protection when their rights are being violated, either by the state or by others, the Africa Commission has paved the way for indigenous people to claim similar protection. In particular, this case confirms that, all peoples under Article 20(1) of the Charter are entitled to internal self-determination.<sup>84</sup>

In *Jawara v. The Gambia*,<sup>85</sup> the Africa Commission seemed to interpret Article 20(1) as providing for a right that accrues to the entire population. In *Social and Economic Rights Action Centre and*

---

<sup>78</sup> Kealegoba and Mukundi (n 23 above), 401

<sup>79</sup> See ACHPR/Res 65 (XXVIII) 03 Resolution on the Adoption of the Report of ACWG on Indigenous Communities/Populations Rights of indigenous in Africa (2000) adopted by the African Commission, 87

<sup>80</sup> n 79 above, 73.

<sup>81</sup> n 74 above, 72

<sup>82</sup> Kealegoba & Mukundi (n 23 above) 401

<sup>83</sup> *Katangese Peoples' Congress v. Zaire* (2000) ACHRLR 72 (ACHPR 1995)

<sup>84</sup> n 73 above, 79

<sup>85</sup> See 2000 AHRLR 107 (ACHPR 2000). In this communication, the Africa Commission held that the military *coup d'état* was a violation of art 20(1) of the African Charter.

*Another v Nigeria*,<sup>86</sup> the African Commission held that, the act of the Nigerian military government of allowing oil consortiums to exploit oil reserves in Ogoniland without their involvement was a violation of Article 21 of the Africa Charter. In this communication, the African Commission explicitly stated:

The survival of the Ogonis depended on their land and farms that were destroyed by the direct involvement of the Government. These and similar brutalities not only persecuted individuals in Ogoniland but, also the community as a whole. They affected the life of the Ogoni as a whole.<sup>87</sup>

Therefore, the Ogonis under the African Charter qualified as 'peoples' in terms of Article 21 and it was also found that the Nigerian government violated the right of 'peoples' to satisfactory environment in terms of Article 24 of the African charter<sup>88</sup>.

## 2.7 The Common Law Doctrine on Indigenous Title

The above is an emerging and comprehensive common law doctrine on indigenous peoples' land rights. In regard to indigenous peoples' land rights, national jurisdictions in Australia, Canada and New Zealand have developed a high level of comparative analysis through a common law reference to 'aboriginal' or 'native' title.<sup>89</sup> Hence, in recent years, when addressing indigenous peoples' land rights, there has been a large focus on the jurisprudence emerging from these three countries.<sup>90</sup>

The common law under the doctrine of 'acquire rights,' a change in sovereignty either by conquest or acquisition does not affect the acquire property rights of the inhabitants.<sup>91</sup> The crucial point of the doctrine of aboriginality or native title is a collective right to land of indigenous communities that has its source in the occupation of land prior to the Crown's assertion of sovereignty.<sup>92</sup>

---

<sup>86</sup> The *SERAC case* (2001) AHRLR 60 (ACHPR 2001); See J Oloka-Onyango 'Reinforcing marginalized rights in an age of globalization: International Mechanisms, non-state actors and the struggle for peoples' rights in Africa' (2003) 18 *American University International Law Review* 912

<sup>87</sup> *SERAC case* (n 86 above) 14 para 67

<sup>88</sup> n 87 above, 11, para 54

<sup>89</sup> In general see, K McNeil, 'Common Law Aboriginal Title', (OUP, Oxford, 1989)

<sup>90</sup> P. Haveman (ed), 'Indigenous Peoples Rights in Australia, Canada and New Zealand', (OUP, Oxford, 1999)

<sup>91</sup> See, for example the US Supreme Court in 1833 case of the *United States v. Percheman* affirmed that when there is change of sovereignty, 'the people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their right to property, remain undisturbed' available at <http://teaching.law.cornell.edu/faculty/drwcasebook/docs/U.S.%20v.%20Percheman.edited.pdf> (accessed on the 10 August 2007)

<sup>92</sup> n 22 above paras 89 & 182.

While the concept originated mainly from the jurisprudence of the High Court of Australia and Supreme Court in Canada, recent decisions from other national jurisdictions in the Commonwealth countries have referred to the same concept as a common law reference. For example, in a case involving some members of the Orang Asli community in Malaysia, the High Court of Malaysia referred to the leading cases from Australia and Canada, and affirmed that, 'native title' is the right of the natives to live on their land. Judge Mokhtar Sidin stated;

I believe this is a common law right which the natives have and which the Canadian and Australian courts have described as native title. I would agree that in Malaysia the aborigines' common law includes, *inter alia*, the right to live on their land as their forefathers had lived and this would mean that even the future generations of the Aboriginal people would be entitled to this right.<sup>93</sup>

In the *Maya community's* case in the IACHR a referral to the doctrine of aboriginal title was made as applicable within the national context of Belize.<sup>94</sup> In December 2006, the High Court of Botswana ruled that the removal of the Basarwa San community living in the Central Kalahari Game Reserve was unlawful.<sup>95</sup> In this case, the indigenous community notably argued their right to remain on their land based on their pre-existing rights recognized by under the common law.<sup>96</sup>

The common law doctrine on aboriginal or native title has also been developed in ongoing litigations in Guyana,<sup>97</sup> and Cameroon.<sup>98</sup> Following the fall of the apartheid regime a crucial issue in South Africa was the question of land restitution, as the previous racist regime was based on discriminatory land distribution the Richtersveld Community, an indigenous community, during the proceedings of the case in the Constitutional Court of South Africa, relied on the doctrine of aboriginal title as part of the common law of South Africa.<sup>99</sup>

The court found that the Richtersveld Community's customary right of ownership had survived the annexation by the British Crown, as 'these rights constituted a "customary law interest' and

---

<sup>93</sup> See *Adong bin Kuwau v. Kerajaan Negeli Johor* [1997] 1 MLJ 418, [1998] 2 MLJ 158.

<sup>94</sup> Maya case (n 10 above) para 107.

<sup>95</sup> High Court of Botswana, *Roy Sesana & Ke/wa Setlohobogwa v The Attorney General, Misca No. 52 of 2002* (13 December 2006).

<sup>96</sup> See generally n 56 above to learn that, Justice Phumaphi among the three justices who presided in this case, referred several precedents from the Privy Council and the High Court of Australia on the common law doctrine of on 'native title' which were applicable in Botswana.

<sup>97</sup> See the case filed in 1998 by six leaders from the Akawaio & Arecuna communities, for references: see also n 66 above.

<sup>98</sup> For references, see *The Bakweri Land Claims Committee (BLCC) v. The Republic of Cameroon*, Case No. 260/2002, African Commission on Human and Peoples' Rights.

<sup>99</sup> Note that, South Africa possesses a pluralist legal system based on Roman-Dutch law and English Common Law.

consequently a “right to land”...<sup>100</sup> Though the doctrine of aboriginal or native title was not imported as such, the exact same core principles on which the common law doctrine on indigenous title is based; namely that colonization of indigenous territories did not amount to full extinguishment of the rights, and courts ought to recognize indigenous customary laws as a source of land title.<sup>101</sup>

We argue that, if the trend on the development of this doctrine does not constitute a customary international law, it may be the basis for the emergency of general principles of law regarding the protection of indigenous land rights in accordance with Article 38(1) (c) of the Statute of the International Court of Justice.<sup>102</sup>

## 2.8 Conclusion

The foundation of the international norms and principles as discussed in this chapter should be a clear side mirror or a reflection and form a basis under which states respond to their international obligations through treaties and through customary international law on the rights of indigenous peoples within the United Nations community. The next chapter will illustrate mechanisms of law in place for which one would be able to draw a conclusion on the commitment of the country in question on the protection and promotion of indigenous peoples' right in the country and it will help us to attempt to answer the very principle questions of this study discussed in the previous chapter

---

<sup>100</sup> The *Richtersveld Community v. Alexkor Limited and the Government of the Republic of South Africa*, Case No. 488/2001, *Supreme Court of Appeal of South Africa* (24<sup>th</sup> March, 2003) para 8.

<sup>101</sup> n 52 above, 589.

<sup>102</sup> art 38(1)(c) of the Statute of the International Court of Justice which states that: The Court,...shall apply the generally principles of law recognized by civilized nations.

## CHAPTER 3: MAASAI WAY OF LIFE AND THE LAW

### 3.1 Introduction

In order to understand the contemporary issues that the Maasai people as a whole is facing,<sup>103</sup> primarily evolving from the confiscation of their land, it is crucial to understand their culture, tradition, and lifestyle. As such this chapter will provide in a summarized manner accurate insight into the culture, traditions, and history of the Maasai, on the one hand, and the surrounding legal system on property rights that affects them on the other hand. The understanding arising from this survey is aimed at allowing the reader to better comprehend the social, political, economic and legal issues in this study. In the first part concerned with Maasai history, culture and worldview, I myself being a Maasai will rely in my account on my personal knowledge to explain our life style.

### 3.2 History of the Maasai people

Within the traditional system, pastoralists had ways to mitigate negative consequences on the environment. There were mechanisms in place to avoid degradation, and to allow regeneration if and when it occurred. It is the gradual atrophy of this management, and land tenure systems that are making this fallacy to come true.<sup>104</sup>

The origin of the Maasai remains a subject of debate.<sup>105</sup> One school of thought maintains that they came from the Arabian Peninsula, yet another insists that their origin is southern Sudan. It is asserted that, Maasai slowly moved down the Rift Valley that cuts through central Kenya and Tanzania. Today, the Maa-speaking pastoral Maasai inhabit dry or semi-arid grazing lands in the lowlands of the Great Rift in east Africa. The Maasai land stretch from the Kenyan Loita-Mara plains in the south-west across the Serengeti to Crater Highlands and toward the southern plains of Tanzania. The *maa* speaking population numbers about 350,000 in Tanzania and 400,000 in Kenya, and belong to an ethnic group known as Eastern Nilotic pastoralists.<sup>106</sup>

---

<sup>103</sup> The Africa Commission Jurisprudence in the Katangese' communication (n 63 above) brought hope to Africans who could now claim their rights not only as individuals but as a collective entity. The interesting part specifically in reference to this study is the Commission use of the words 'all peoples have a right to self determination'. To elaborate that, divergence of the African Charter in the protection of collective rights, in the SERAC communication it interpreted the word a 'people' to mean the Ogoni people as a whole.

<sup>104</sup> Food & Agriculture Organisation (1990) 'Community Forestry, Herder's Decision Making in Natural Resources Management in Arid and Semi Arid-Arid Africa', Rome-Italy 44

<sup>105</sup> n 8 above

<sup>106</sup> See generally (n 104 above), S Ojalammii (2006) 'Contested Lands: Land Disputes in Semi-arid Parts of Northern Tanzania'.

The Maasai are one of the five ethnic groups which all speak varied forms of the Maa language. Other groups are the Parakuyo (*Ir-Parakuyo*), Arusha, (*Il-Larusa*), Samburu, (*Il-sambur*) and Njems (*Il-Tiamus*).<sup>107</sup>

Maasai are polygamous and generally live on scattered homesteads (*enkang'* pl. *inkang'itie*). On the savanna plains in which the Maasai live, land has been considered to be a collective property of all the Maasai, and thus, all Maasai people have the right to use land (pasture) and natural resources. Property rights over grazing lands and water resources can be claimed by different Maasai communities.<sup>108</sup>

### **3.3 Land use among the Maasai: 'A Maasai point of view.'**

The Maasai people are tied to and are very much dependent on land and livestock for their upkeep and livelihood. The livestock depend on the land for sustenance. The people's movement is dictated by livestock's needs (i.e., the pasture, water, and salt licks).<sup>109</sup> The availability of these requirements determines how long people remain settled in a given place. The Maasai use their land principally for pasturing livestock.

The principal land use activity of the Maasai is livestock production, appropriately described as general economic and social system known as "pastoralism". Mobility is an essential management strategy geared toward, allowing maximized forage and ecosystem productivity. Periodic, controlled pasture burning ensures that diseases are kept under control and livestock have fresh, lush grass during different seasons. Wildlife grazing along livestock enriches pasture composition and variety. Nutrients are exchanged by the mixture of grazers and browsers, both domestic livestock and wildlife. Undoubtedly, this mode of land use is most sustainable and pastoralists are aware of this benefit.<sup>110</sup>

#### **3.3.1 The Maasai survival magic**

As pointed above, pasture is central to the Maasai way of life. It is such in deed because livestock is the economic fountain of the pastoralists and therefore pasture which provide for the upkeep of the animals, is maintained very carefully through a number of methods. The Maasai maintain pasture first of all by the practice of transhumance which requires large geographical land areas to make it practical. Transhumance is a traditional practice that consists in moving with livestock from

---

<sup>107</sup> See A Hurskainen (1984) 'Cattle and Culture, the Structure of Pastoral Parakuyo Society'.

<sup>108</sup> See J Markakis (2004) Exploring the Intricacies of Land Tenure in Pastoral Areas: Issues of Policy & Law Reform.

<sup>109</sup> See (n 104 above) The author argues; In Maasai culture, 'Land and a Male Child' are the two things a Maasai cannot compromise on because, among the Maasai, land is a collective asset that defines identity by distinguishing the extent of ethnic territory from others and supports livelihood. It is not transferable nor is it for speculative investment.

<sup>110</sup> Ojalampi (n 106 above)

one area of land to another in search of pasture, water and salt licks. Therefore, mobility for the pastoral Maasai can be considered as an ecological strategy of survival in the savanna rangelands.<sup>111</sup> As Ndagala explains:

Unpredictable environment has forested a long history of risk spreading strategies which die hard. Reciprocity in land access is explained by the Maasai as an essential risk avoidance strategy in their pastoral enterprise.<sup>112</sup>

There are different kinds of pastoral areas and communal access to them have been important for Maasai livestock production. The grazing areas used as exploitation zones may change from season to season, and year to year, but their location and use will depend on where the Maasai families in past years have resided and maintained a long-term use of the same area.<sup>113</sup> The council of elders regulate and supervises the daily land use through the attribution of three different kinds of ecological zones, which are of different climatologically and forage characteristics.

1. *Orpukell* is an area with pastures that are hot, lowland, and short grass dominated by species of grasses such as *Artistisda keniensis*, *Sporobulus ioclados*, *Digitaria abyssinica* and *Cyndon dactylon*. These pastures, which are the same all year round, are used mainly by temporary camps with livestock. 2. *Osupuko* pastures are cool, upland, and highland pastures with medium and moist grass often open patches within forest areas in the mountains. In order to improve the productivity of pastures in highland areas, grasses are burnt at the end of each dry season. The fire prevents both encroachment of the bush growth and limits the number of emerging ticks. It also speeds up the growth of new leaves and stems.<sup>114</sup> Maasai people live in these lands during the rainy season. 3. *Olorishirsha* pastures cover pockets of bush and medium-heights grasses, which dry up later than the lowland pastures and the Maasai make use of these areas during dry season.

In a nutshell, this explains that in order for the indigenous zebu to thrive best, specific land is prerequisite for the maintenance of the Maasai people livelihood and identity. That land can not be any other but the Maasai ancestral lands.

---

<sup>111</sup> K Kimani & J Pickcard (1998) 'Recent Trends & Implications of group Ranch Sub-Division and Fragmentation in Kajiado District, Kenya', *The Geographical Journal* 164-204.

<sup>112</sup> K Homewood (1995) 65 (3) *Journal of International African Institute* 331-350.

<sup>113</sup> Ojalammi (n 106 above)

<sup>114</sup> Maasai burn grass because by doing so it realises nutrients and stimulates a flush of new growth and controls bush expansion. It also eradicates dormant and free-living stages of livestock parasites and ticks (that have accumulated in the heavily used dry season refuge highland areas).

### 3.3.2 Land and culture

The Maasai people set certain lands for cultural practices and ceremonial occasions. An example of the former is the *Edonyo-Ormoruak* in the west of the Kilimanjaro area of Tanzania, which was used for *Eunoto*, a ceremony to terminate warriorhood and free young adults for junior elder status. Men may settle and marry after this rite is observed. They are also absorbed into the decision-making structures of the society, sitting in conflict resolution fora and decide on customary norms in marriage according to traditional legal mechanisms. *Enkutoto-E-Purko* in the Kinonop area and the *Nainmina Enkiyio* area of *Loita* in Kenya are also reserved for religious and cultural rituals.<sup>115</sup>

The forests and trees are used for a multitude of rituals, and importantly, as a pharmacy. Trees and certain plants are used to extract medicines that have assisted the community in healing a wide array of ailments since long before the arrival of western medical science in Maasailand and a number of the aged among the Maasai depend entirely on the use of traditional herbs from the forest and the community is proud of its herbal medicinal knowledge.<sup>116</sup> The Maasai have a wealth of experience in determining which plant is suitable for certain ailments and basic medical skills are shared by Maasai of all ages and both genders, and a majority of them can correctly prescribe treatments for simple disease. Cultural wisdom requires men and women of all ages to possess these basic skills in case of unforeseen emergencies.

In times of prolonged and severe droughts spiritual rituals were, and still are organized by both men and women. Delegations (*alama*) of men and women of high moral standing, criss-crossed Maasai land to make their intention known of offering sacrifices to God (*Engai*). Ritual experts would be identified and they would then schedule events according to a traditional calendar and hold a ceremony to ask *Engai* for peace, and tranquillity, rain, and prosperity, and thus, social stability. This cooperative ritual illustrates the Maasai understanding of the forces of nature and the limitations of human ability in controlling natural resources. This type of activity could only be performed in very specific areas in Maasailand.

Traditional conservation was performed through various taboos and beliefs which were inculcated and entrenched in human behaviour to enhance environmental and natural resource protection. Tales of trees that 'bleed milk' or forests that would 'eternally swallow adults' (the forest of the lost child), among others, are testimony of conservation ethic in the Maasai culture.

---

<sup>115</sup> n 8 above pg 187.

<sup>116</sup> n 104 above

From this perspective, State protection of wild flora and fauna is subsidiary to the integral way that the Maasai people practice conservation and the morality that goes with it.<sup>117</sup>

### 3.4 Land legislation and other related laws in Tanzania

The link between law and society ...are indissoluble since as law is drawn from society it is also reproduces society<sup>118</sup>

The Tanzania legal system is based on two different sources; customary law and State statutory law. In 1923, during the British colonial period, the first Land Ordinance was passed. A significant portion of the land was declared 'Public Land'. The first game control ordinance were enacted at the same time. Through the Land Ordinance, the land was alienated either directly by appropriation by the State or set aside for private commercial interests. Since then, Tanzanian statutory law, together with the land Act<sup>119</sup>, has recognized two kind of land ownership; that is to say granted rights of occupancy (GRO) and deemed rights of occupancy (DRO).<sup>120</sup>

The concept of property has also been based on different property rights systems; traditional customary rights and state domain and state statutory rights have been held either under the direct control of the government or under granted rights of occupancy.<sup>121</sup> Still today, the main emphasis in Tanzanian rights to land and land law is put upon the old colonial Land Ordinance of 1923,<sup>122</sup> and this explain how the ultimate state domain of land has a significant effect on the land administration and the standing of land rights in Tanzania. Public ownership of land, as initiated by the colonial administration, is at the root of the post-colonial and contemporary system of land control in Tanzania.

---

<sup>117</sup>Awasi Tingni case ( n 10 above); Conservation ethic is a focus of the Maasai because, Land and environment as a whole form an integral part of their culture, their spiritual life, their integrity, and it is not only a matter of possession but a material and spiritual element of their life.

<sup>118</sup> C Gordon 'the Geography of Law' in R Peet & Thift, Nigel (eds) (1989) 329 *New Models in Geography. The Political-Economy Perspective. Vol. 1*, Unwin Hyman: London.

<sup>119</sup> Land Act No.4, 1999

<sup>120</sup> S Ojalamm ( n 106 above)

<sup>121</sup> United Republic of Tanzania (URT) (1994) 1 'Report of the Presidential Commission into Land Matters 'Land Policy and Land tenure Structure' 350.

<sup>122</sup> n 17 above. Property rights were discriminatory from the beginning of colonialism because land that was governed by statutory grants were given to non-natives and customary tenure for the later. It is from this point that, the colonial power started treating customary rights as inferior compare to statutory grants.

### 3.4.1 The pre-colonial and colonial periods in land law

Prior to the colonial period, the Maasai territorial rights arrangement was characterized by a policy of open access to common lands to situations where landless people were governed by overlords.<sup>123</sup> Property rights to land were mainly an ethnic oriented agenda and land was owned communally by all people belonging to a certain cultural group.<sup>124</sup> Opposed to the indigenous peoples' property rights based on communal ownership of land early colonial laws were motivated primarily by the colonial regime's interest in exploiting raw materials and in order to control resources colonial masters had to control the land.<sup>125</sup> The Imperial Land Ordinance (Kronland Verordnung) of 1895 granted the colonial State the exclusive right to occupy "ownerless land."

The British colonial regime for example declared all land as Crown property and the Governor became the custodian of Crown property. The Governor under the Land Ordinance<sup>126</sup> could allocate the land as he wishes.<sup>127</sup> During the German period, a wildlife and forest administration based on the Game Preservation Ordinances of 1908 and 1911 was introduced. This ordinance established control over wildlife in the German colony.<sup>128</sup> It is imperative to note that, the German colonial law and the dual system of the British property rights laws did not establish the principle of protecting native rights to land,<sup>129</sup> and this as a result perpetuated the alienation of land in the areas inhabited by indigenous people with abundant wildlife resources.<sup>130</sup>

---

<sup>123</sup> RW James (1971) 'Land Tenure Policy in Tanzania' 375, *East African Literature Bureau*, Dar Es Salaam. Landholding was influenced by traditional laws of settlement and land use and they were administered by traditional institutions like family, tribe, or clan.

<sup>124</sup> See Ole Nangoro (1998) Words such as Uchaggani, Umaasaini, Uheheni (meaning Chagga land, Maasai land and Hehe land) were used, and they indicated the existence of the ethnic nations as entities, each with a system of rulers and governed territorial rights to land. It is clear, Maasai had their own land (as territory).

<sup>125</sup> n 106 above, 28. This is to show you how both the German (1885-1919) & the British (1919-1961) adopted land policies identical to those in other colonies to control the land resources in East Africa, the German colonial State introduced a dual system of territorial rights (legal rights and customary rights) (see also URT 1994).

<sup>126</sup> Land Ordinance of 1923

<sup>127</sup> n 17 above. As Tenga puts it, since all land was declared Crown land and the Governor was entrusted on behalf of the Crown, all land simply meant his person property and he had powers to sell it, confiscate or alienate from the rightful owners.

<sup>128</sup> n 8 above noting that vast areas of the Maasai in Ngorongoro Highlands and the Serengeti open plains were designated as Game Reserves and when the British colonial administration took over of German East Africa in 1919, they created the territory known as Tanganyika and continued to use state domain of GRO to alienate land; see generally, Olenangoro (n 124 above) who argued that 1954, the British administration had alienated a total of 2,132,000 acres.

<sup>129</sup> R Newman (1995), *Locally Challenges to Global Agendas: Conservation, Economic Liberalization and the Pastoralists' Rights Movement in Tanzania*: Antipode 27, 363-382; IG Fimbo (1992) 'Essay in Land Law in Tanzania' Dar Es salaam University Print 138. It was noted that there were 4,744 Europeans in Tanganyika in 1912, including 758 planters and settlers, and that nearly 1.3 million acres of land had been alienated in the form of conveyances of land ownership specifically because indigenous peoples' production was considered subsistence sector with no legal rights to land.

<sup>130</sup> Ojalammii n 106 above, argue that, in the 1940s the British passed the *Game Ordinance of 1940* and the *National Parks Ordinance of 1948* both laws played a significant role in the demarcation of conservation areas and the

### 3.4.2 Land law during Tanzanian independence

Tanzania became independent in 1961. Tanzania, under the new Government inherited the radical title and superior power to govern all land in the country, under the control of and subjected to the dispossession of the President. The Land Ordinance of 1923, with its concept of “public land” and President as a trustee,<sup>131</sup> was taken over by the new administration. The Convention to Government Leases Act, of 1963 and later the Government Leases Act of 1969 empowered the government to convert all free holds lands into government leaseholds and this had enormous effect on indigenous people because the law included the State’s power to extinguish customary rights in the country.

In 1964, the Range Development and Management Act <sup>132</sup> was passed. The Act aimed to regulate land use in pastoral areas and to find “a more effective use of grazing land through total communization of the land and supervision of the Scheme by Ranching Associations (RAs)”.<sup>133</sup> The registered RAs, in their traditional territories, were to change the communal sharing of land and resources by giving the residing Maasai people a 99-year leasehold right (GRO) to their ranching land to the exclusion of the others.<sup>134</sup>

### 3.4.4 The *Ujamaa* Villagization of the 1970s

Between 1974 and 1975, the government under Nyerere’s leadership started an ambitious land reform called Villagization through the Rural Land Act of 1973 and Villages and Ujamaa Villages Act of 1975. The traditional settlement pattern changed drastically as the government forced<sup>135</sup> people to form communal co-operatives under newly registered as Ujamaa villages.<sup>136</sup> These laws explicitly gave the state the power to force people to vacate their homes and ancestral lands to “Specified Area”. The government relocated people without their own will. The land

---

preservation of wildlife in rangelands of Maasai people. They both prohibited a cohabitation of both human beings and wildlife in the park

<sup>131</sup> See n 21 above para 37. Giving an example of Canada and United States stated that, resources of indigenous peoples’ resources held in trusteeship have been mismanaged and abused. She concludes by saying, such systems of trusteeship are reminiscent of abuses that were typical overseas colonies in the past century.

<sup>132</sup> The Range Development Management Act, 1964

<sup>133</sup> See Ojalammii (n 106 above), 31

<sup>134</sup> See, Arthem (1895), 22; see also Tenga n 17 above, 27. This law introduced a paradigm shift of the Maasai of communal property rights.

<sup>135</sup> See generally, Shaidi (1985); Williams (1992), Shivji n 3 above where they argued that, force was used directly in the form of arbitrary administrative action and policy directions.

<sup>136</sup> I Shivji n 3 above pg 12.

commission<sup>137</sup> stated that, 'one major feature of the operation stands out above all was total disregard of the existing customary land tenure systems'.<sup>138</sup> Based on research conducted in the Tarangire-Manyara ecosystem of Tanzania, Sachedina argues that:

The process of villagization in Tanzania during which Maasai were relocated, against their will reminds the Maasai people of traumatic *bomas* (*Maasai villages*) being burnt and families and livestock being driven by law enforcers offices to different locations.<sup>139</sup>

The establishment of National Agriculture and Food Cooperation in the 70s involved the forceful alienation of some 100,000 acres, nearly a quarter of the best grazing land belonging to Barbaig (one of the indigenous peoples group in Tanzania) and as a result, important water sources, ancestral places of worship and some of the best land was nationalized.<sup>140</sup>

### 3.4.5 The Land Acts, 1999

During the 1990s, a mixture of state and customary rights still existed side by side in Tanzania. These multi-claims to village land have created several land dispute problems and also promoted large-scale land alienation.<sup>141</sup> For instance, The Land Tenure Established Villages Act, 1992 extinguished all rights to occupy or use land in accordance with any customary rule in village land and those affected by *Ujamaa Villagilization* policy were denied compensation through this law.<sup>142</sup>

The Tanzanian Parliament approved two new Acts, the Village Land Act and the Land Act of 1999 that came into force in May 2001. This law recognizes traditional customary land rights,<sup>143</sup> and communal ownership of land is recognized with a certificate of customary right of occupancy.<sup>144</sup> However, the state retained the colonial notion of land control<sup>145</sup> and this has been much misused by the President and those to whom the powers have been delegated to in violation of indigenous

---

<sup>137</sup> Kisanga's Commission was a Presidential Commission formed to investigate on Violations of Human Rights in National Agriculture Food Cooperation (NAFRCO) Wheat Farms Hanang District, 1993.

<sup>138</sup> See generally, the report of the Presidential Commission of Inquiry into Land Matters (1994).

<sup>139</sup> See H Saachedina (2006) 'Conservation, Land Rights and Livelihoods in the Tarangire Ecosystem of Tanzania' 12.

<sup>140</sup> I Shivji n 3 above pg 10

<sup>141</sup> See Ojalammi (n 106 above) 32

<sup>142</sup> IG Shivji (n 3 above) 10

<sup>143</sup> Sec 14 of the Village Land Act, 1999.

<sup>144</sup> n 147 above Sec 25.

<sup>145</sup> See El Daes (n 21 above); Land Act, 1999 under sec 4 (1) states that, 'All land in Tanzania shall continue to be public and remain vested in the President as trustee for and on behalf of all the citizens'. Sub-section 2, the President may delegate his powers to any person...who shall exercise those powers ...so as to advance ...the economic and social welfare of the citizens'.

peoples rights.<sup>146</sup> State ownership of public land has been at the core of perpetual alienation of land from the Maasai people because under section 2 of the Land Act, 1999 'general land' has been defined to mean, all public land which is not reserved or village land and includes "unoccupied or unused village land". In consideration with the Maasai mode of life and their land use pattern have always be seen as vacant and liable to be relocated since it falls under the definition of 'general land'.<sup>147</sup>

### 3.5 Natural Resource Laws in Tanzania

Protected Areas in Tanzania are wide ranging and they have different names depending on the land use pattern in that particular area. National Parks are Protected Areas where no human settlements are allowed. Conservation Areas which so far constitute only of the Ngorongoro Conservation Area (NCA) is a Protected Area in which Maasai pastoralists are allowed to co-exist with wildlife. There are four types of protected Areas in Tanzania which are created by various laws as discussed hereunder.

#### 3.5.1 Creation of a National Park

The main law relating to the creation of National parks in Tanzania is the National Parks Act,<sup>148</sup> of 1959 which was enacted by the British Colonial government. The independent government inherited the above legislation, and made very minor amendments such as, to substitute the word 'Governor' with 'President' and 'legislative council' with 'the National Assembly' or 'Parliament'.<sup>149</sup> The National Parks Act of 1959 repealed and replaced the previous National Parks Ordinance.<sup>150</sup> Earlier on, the latter had repealed and replaced the Game Ordinance<sup>151</sup> which regulated both National Parks and Game Reserves.<sup>152</sup> Though this discussion will focus on the law that is in force today 'the National Parks Act of 1959,' reference will be drawn from the two repealed legislation for purposes of clarity.

---

<sup>146</sup> I Shivji (n 3 above), 34. The Loliondo corridor which lies adjacent to the Serengeti national Park, a land belonging to the Maasai was licensed to the Kingdom of Saudi Arabia by between 1985/1995 during President Ali Hassan Mwinyi time in office.

<sup>147</sup> IG Shivji (n above 3).

<sup>148</sup> Cap 282 R.E 2002.

<sup>149</sup> According to sec 8(b) of the 1962 Republic of Tanganyika (Consequential transition and Temporary Provisions) Act, Cap 500, all pre-independence laws that contained the words 'Governor' and 'Legislative Assembly' shall be read as 'President' and 'the Parliament' respectively.

<sup>150</sup> CAP. 253 of 1948

<sup>151</sup> CAP 159 of 1940.

<sup>152</sup> The repeal aimed at, *inter alia*, separating the administration of Game Reserves from National Parks.

According to this Act;

A National Park is created when the President with the consent of the National Assembly makes a declaration in the Government Gazette to the effect that [a]ny part of land is to be a National Park.<sup>153</sup>

Legally speaking, once an area is declared a National Park under this law, all rights over that land, except mineral rights become obsolete and all property rights become automatically transferred to the State.<sup>154</sup>

The establishment of the famous Tarangire National Park, 1970 is one outstanding example in which the tragic eviction of the Maasai people is a living bad memory in their minds to date:

The gazettement of Tarangire National Park in 1970, evokes painful memories for the Maasai in Simanjiro. They have been excluded from a *Silalo* swamp in the Eastern part of the national park, a swamp with extensive grasslands and an important drought refuge for pastoralist. The eviction as by force using light aircrafts to herd cattle out of the park, and parks staff on the ground who burned shelters and drove people and livestock out of the Park.<sup>155</sup>

Thus, there is an automatic extinguishment of all rights of those residing on that land. The law in force today is contrary to its colonial predecessors for two main reasons:

1. The Game Ordinance of 1940<sup>156</sup>, made an exception to acquire permits pertaining entry of persons who were ordinarily residents or whose place of birth was within the Park or a Game Reserve.<sup>157</sup>
2. Under the Game Ordinance<sup>158</sup> indigenous peoples had the right to be consulted by the Governor for possibilities of acquiring their customary land rights whenever the colonial government wanted to expand either a national park or a game reserve primarily from lands that are under use, occupied or owned by local people.<sup>159</sup>

---

<sup>153</sup> The National Parks Act, S. 3.

<sup>154</sup> The National Parks Act, Cap. 282 [R.E 2002] S.6 and 7.

<sup>155</sup> n 143 above, 13.

<sup>156</sup> n 154 above.

<sup>157</sup> See LI Elifuraha (2007), 'A Comparative Study of Legislation Relating to the Establishment and Management of Wildlife Protected Areas in South Africa and Tanzania' 40 (unpublished). An LL.M dissertation. Pietermaritzburg: University of Kwazulu Natal; See n 12 above, 'Eviction and the Rights of People in Conservation Areas in Tanzania' 7, Faculty of Law: University of Dar-es Salaam.

<sup>158</sup> The Game Ordinance of 1940

<sup>159</sup> n 162 above, Sec 5.

Contrary to the current legislation, the 1948 National Parks Ordinance<sup>160</sup> that established and managed National Parks and Game Reserves partially recognised customary land rights in both National Parks and Game Reserve.<sup>161</sup>

### 3.5.2 Creation of a Conservation Area

Ngorongoro is the only Conservation Area<sup>162</sup> in Tanzania. Ngorongoro Conservation Area (NCA) was established in 1959<sup>163</sup> when it was annexed from the Serengeti National Park and designated as a multiple land use area.<sup>164</sup> It is a multiple land use area in the sense that, its original driving philosophy was to accommodate the co-existence of the Maasai pastoralists who were moved from the Serengeti National Park with wildlife.<sup>165</sup>

Ngorongoro is one of the foreign currency generating engines for the Tanzania's economy due to several historical reasons namely; UNESCO has accepted that Ngorongoro be inscribed in the world heritage list in 1979 the area has moreover been recognized as a biosphere reserve under UNESCO's Man and Biosphere Program and it constitutes the famous archaeological and palaeontological site called Olduvai George which is a depository of fossil evidence of the earliest beginnings of the human race.<sup>166</sup>

Natural endowment of Ngorongoro is rather a plight rather than a blessing to indigenous people in the area for a number of reasons. Most importantly, however, 1974, and despite of the legal environment of the NCA which permit human habitation in the area as explained above, Maasai people were evicted from the floor of the crater, an area with permanent water sources and salt licks favourable for livestock production.<sup>167</sup>

---

<sup>160</sup> The National Parks Ordinance 1948

<sup>161</sup> n 164 above Sec 11.

<sup>162</sup> The term is used in its restricted meaning as contextually used in Tanzania to mean a wildlife Protected Area with multiple land uses including human habitation.

<sup>163</sup> Through the Ngorongoro Conservation Act, 1959 as Repealed in 2002, (CAP 284)

<sup>164</sup> See IH Juma (1999) 104

<sup>165</sup> See generally, Chanley, S. (2005), 'From Nature Tourism to Ecotourism? The Case of the Ngorongoro Conservation Area in Tanzania'. This is available at <http://www.findarticles.com> (Accessed on the 5 March 2007) .It should be pointed out however, that apart from those who were moved from Serengeti National Park, other Maasai pastoralists have been residing in the Area with their herds of cattle and flocks of sheep and goat for some two thousand years.

<sup>166</sup> AS Kauzeni, (1999) 'Experience in Community Conservation in Protected Areas: The case of Ngorongoro Conservation Area'. A paper presented during Wildlife Policy Round Table Discussion at Bagamoyo ( withheld by the author).

<sup>167</sup> n 143 above, 13

### 3.6 Conclusion

Although African state have sometimes recognized customary law systems based on traditional land rights, legacies of colonial law have produced inequalities power relations, the diversion of resources, land alienation, marginalization, in the case of Tanzania, more particularly, these have resulted in a range of social and economic concerns within the Maasai people as a whole.<sup>168</sup> Particularly due to that, unequal power relations and the transformation of property have taken place especially during processes of colonization or under a capitalistic land market.<sup>169</sup> I agree with Sanna Ojalammi when he argues that:

The changes in law and property rights have taken place with force and violence ever since the colonial period began the process of modifying and reconstructing the local system of customary land tenure or customary law from the 1920s onwards.<sup>170</sup>

A good example of this is the first Tanzanian land law, the *Land Ordinance of 1923*. A radical right (state ultimate land control) was vested in the State and the tenure rights of people were mostly diverted in their existing territories. The *Land and Village Acts of 1999*, do not explicitly guarantee, secure, nor established legalized customary titles and rights, especially for commoners in common lands.<sup>171</sup>

---

<sup>168</sup> See Howitt 2001:242; Johnsen 2000: 150.

<sup>169</sup> Blomley 1998:570.

<sup>170</sup> N 106 above.

<sup>171</sup> IG Shivji n 3 above, The violation of property rights of indigenous people is still continuing with independence and the new land Acts of 1999 in their letter or application continue what the colonial law of 1923 started.

## CHAPTER 4: PRACTICAL APPLICATION OF LAND LAW AND POLICIES ON INDIGENOUS PEOPLE IN TANZANIA

### 4.1 Introduction

This chapter will examine a case study of a declared 'Mkomazi Game Reserve,' an area traditionally belonging to indigenous people in Tanzania. The aim is to ascertain the application of pieces of legislation as discussed in the preceding chapter and the impact on indigenous communities' property rights. To establish a minimum core obligation of the state in question on indigenous peoples' rights, international law and decisions from case studies in other jurisdictions will be referred to.

Tanzania is a union between Zanzibar and mainland Tanzania (formerly Tanganyika).<sup>172</sup> According to the Constitution of the United Republic of Tanzania,<sup>173</sup> Zanzibar exercises autonomy over certain issues referred to as 'non union matters' whereas Tanzania mainland deals with 'non union matters' pertaining to Tanzania mainland and 'union matters' under the auspices of the office of the President of the United Republic of Tanzania.<sup>174</sup> This chapter is centred on Tanzania mainland.

Tanzania has signed and ratified key international human rights instruments including, but not limited to; the Universal Declaration of Human Rights 1948, The two covenants; International Covenant on Civil and Political Rights, 1966 and the International Covenant on Social Economic and Cultural Rights, 1966 and the International Covenant on the Elimination of All forms of Discrimination Against Women (CEDAW), 1979, Convention on the Elimination of all Forms of Racial Discrimination, 1965 (CERD) and the African Charter on Human and Peoples' Rights, 1981.<sup>175</sup>

### 4.2 Eviction through hidden agendas

The challenge of environmental history is to explain how and why environments have changed. But it is a demanding task. It is often easier to explain how particular interpretations of the environment formed, why they persisted and how they have been contested and reproduced by administrators, politicians and residents. Accounts of this type cannot always determine whether the interpretation

---

<sup>172</sup> Kabudi, Palamagamba John. 1985 The Union of Tanganyika and Zanzibar: Examination of the Treaty of a Political-Legal Union. *Mawazo* [Kampala] 6(2):1-17.

<sup>173</sup> Constitution of the United Republic of Tanzania, 1977 as amended from time to time commonly referred to as the Union Constitution.

<sup>174</sup> The list of non Union matters is provided in the first schedule of the Union Constitution

<sup>175</sup> n 12 above.

in question was right or wrong. Ultimately, asking how a view came to be, and how it varied or struck, does not tell us how correct it was.

In one sense it is not a useful exercise to discern whether a particular theory portrays the truth about the environment. Because, groups construct images of environment and environmental change that work for them which are not really within the realm of *Popperian* refutation.<sup>176</sup>

Dire prophecies have been made about the consequences of pastoralism in justifying indigenous peoples' eviction from their ancestral lands. A case study of the Mkomazi National Park an area alienated by force from the Maasai will illustrate this allegation.

Since it was cleared, Mkomazi has come to local and international attention both as a conservation triumph and as the focus of human rights concerns. It is the site of an ambitious programme to rehabilitate a wilderness and reintroduce black rhinoceros by the United Kingdom and the United States of America conservation organizations.<sup>177</sup> It has been the focus of an international research effort, under the aegis of the Royal Geographical Society, which explores and documents the biodiversity of the reserve.<sup>178</sup>

I wish to examine some of the claims and reasons made about Mkomazi's environment. The goal is to test and if possible refute some of the hypotheses on vegetation change and overgrazing by Maasai people as this has been a common phenomenon to evict them from their ancestral lands in preference of wildlife not only in Mkomazi National Park but in all other national parks in which they have been evicted from.

The eviction and prohibition resource use to the Maasai people in 1988 by the government was justified by one principal reason: That, Maasai people were destroying the reserve's environment.<sup>179</sup> The large livestock herds are seen as excluding wildlife and the damage to vegetation as depleting avifaunal and insect life.

This view unfortunately underpinned the decision to evict the Maasai in Mkomazi:

Habitat destruction, as a result of overgrazing, led to chocking of dams with silt, and change in vegetation composition and structure. No dams, except Dindira, could now hold water for the entire dry season period. Settlements increased around waterholes denying access by wildlife. These circumstances forced most of the

---

<sup>176</sup> D Brockington & K Homewood (2001) 71(3) *Journal of the International African Institute* 449.

<sup>177</sup> The George Adamson Wildlife Preservation Trust (GAWPT), a British charity, and the US-based Tony Fitzjohn/George Adamson African Wildlife Preservation Trust (TW/GAAWPT)

<sup>178</sup> n 182 above, 451.

<sup>179</sup> M Mangubuli (1991) Mkomazi Game Reserve: a recovered peal' Kakaukona 4: 11-13

wild animals out of Mkomazi into Tsavo National Park. Wildfires, often started by pastoralist, became an annual phenomenon, destroying and opening woodlands and montane forces.<sup>180</sup>

The ecological principle behind this view is that stocking rates are crucial to plant dynamics.

But, studies done shows that livestock do not exclude wildlife because, the greatest concentration of wildlife in East Africa are found in the grazing Maasailand<sup>181</sup> and the basis for this challenge is the theory which holds that vegetation dynamics in dry lands are not driven primarily by grazing pressure but rather, vegetation change is stochastic, non-linear and primarily dependent upon precipitation and the physical environment, rather than simply multiple biophysical interactions.<sup>182</sup> In addition, prolonged dry season and frequent droughts mean that herd numbers are continually checked, they rarely approach the concentrations necessary to affect vegetation.<sup>183</sup>

Basing on the above analysis I concede with views by Sullivan who argued that:

The disputes are about more than the impact of cattle on the environment or how nature should be conceived: they have a strong political dimension.<sup>184</sup> The proposition that pastoralists degrade or do not degrade the environment is integral to beliefs about what East African landscapes should look like and what people's proper place in nature is. They have different political and social agendas for use of the reserve's resources.<sup>185</sup>

Therefore, claims that the environment was degraded by overstocking are often general, vague, or made for ill defined areas. Degradation proved to be a convenient platform on which to lobby for the agendas to evict the Maasai people not only in Mkomazi but in many other parts of Tanzania. However, does the persistence of increased livestock numbers invalidate them?

It was therefore, from that brief factual background that, two Legal Aid Committee of the Faculty of Law, University of Dar Es Salaam, filed a suit in the High Court of Tanzania in trying to challenge

---

<sup>180</sup> n 152 above.

<sup>181</sup> D Western (1982) 'Amboseli National Park: enlisting landowners to conserve migratory wildlife', *Ambio 11: 302-8*; K Homewood & W Rogers (1992) *Maasai Ecology: pastoralist development and wildlife conservation in Ngorongoro, Tanzania*. Cambridge: Cambridge University Press.

<sup>182</sup> See F Clements (1916), *Plant succession: an analysis of the development of vegetation*, *Carnegie Institute Publications 242*: 1-512. He argues variation in livestock numbers on a given range would drive vegetation communities up or down known *seres* in predictable ways. The theory comes from Clements' succession theory which holds that in a given eco-system bare ground will be colonised by successive assemblages of plants, each altering the environment in preparation for its successor until the most suitable vegetation for this climate, the climatic climax, is reached

<sup>183</sup> Ellis and Swift (1988) ; S Sullivan (1996) 'Towards non-equilibrium ecology: perspectives from an arid land', *Journal of Biogeography* 23, 1-5

<sup>184</sup> See generally S Sullivan (2000) 'Getting the science right, or introduction science in the first place?'

<sup>185</sup> N 182 above

the very inhuman treatment accorded to the Maasai people in the Mkomazi Game Reserve as discussed here in below.<sup>186</sup>

### 4.3 The Mkomazi scandal

Mkomazi is a 3200 square kilometres area stretching from the Kenya/Tanzania border to the north-eastern slopes of the Pare and Usambara mountains, Same district, and within the region of Kilimanjaro between latitudes 3° 45' - 4° 30' south and longitude 37° 45' - 38° 45' east.<sup>187</sup> Mkomazi lies within the Somali-Maasai regional centre of endemism<sup>188</sup> where dominant vegetation is *Accacia-Commiphora* bush, woodland and wooded grassland. It is an area recognized as an outstanding centre for plant diversity,<sup>189</sup> and a centre of endemism for other species.<sup>190</sup>

Basing on the existing literature, the Maasai people lived in Mkomazi beyond 1776 until their when they were evicted.<sup>191</sup> When Mkomazi was declared a national park in 1951, 'gentlemen agreement' was concluded between the Maasai and colonialists for the Maasai to remain in the park.<sup>192</sup> However, in 1974, when the new government enacted a new legislation, the Wildlife Management Act, of 1974 the Maasai people were automatically required by law to vacate the Park.<sup>193</sup> The government never enforced that law but following the usual pressure from international conservationists to exclude human inhabitation the Maasai had to be evicted by force in 1988.<sup>194</sup> The East African Wildlife Society, the Frankfurt Zoological Society and African Wildlife Foundation were among the donors who insisted the Maasai to be evicted.<sup>195</sup>

---

<sup>186</sup> N Ndaskoi (2001) Maasai Wildlife Conservation and Human Rights: The Myth of Community Based Management', available at <http://www.ogiek.org/faq/article-ndasoki-mas.htm> (Accessed on 20th September 2007) 21; see also S Kivasis (1953), *Maisha ya Sameni ole Kivasis yaani Justine Lemenye*, Kampala, Dar Es Salaam & Nairobi: The Eagle Press.

<sup>187</sup> n 6 above 304.

<sup>188</sup> F White (1983) *The vegetation of Africa. A descriptive memoir to accompany the UNESCO-AETFAT-UNSO vegetation map of Africa*, 356. UNESCO, Paris

<sup>189</sup> S Davis, V Heywood, & A Hamilton (eds) (1994) 1 Centre of plant diversity. A guide and strategy for their conservation, Europe and Africa, IUCN, Cambridge 354

<sup>190</sup> W Rogers & K Homewood (1982) *Species and endemism in the Usambara Mountain forests. Tanzania*. Biol.J. Linn. Soc. 18, 197-224

<sup>191</sup> n 192 above. see also S Kivasis (1953), *Maisha ya Sameni ole Kivasis yaani Justine Lemenye*, Kampala, Dar Es Salaam & Nairobi: The Eagle Press

<sup>192</sup> n 182 above.

<sup>193</sup> n 152 above.

<sup>194</sup> n 192 above.

<sup>195</sup> M Saningo & A Heidenreich (1996) 5 (4) 'Rare Land Rights Victory Brings New Hope to The Maasai', *Eco News Africa*, April.

#### 4.4 The Mkomazi case: you belong to no where

This case<sup>196</sup> concern an appeal made by Lekengele Faru Faru Kamunyu and 52 others (the Maasai people) hereinafter referred to as the appellants against a judgement of Mr. Munuo, a Judge of the High Court of Tanzania at Moshi District Registry on 19<sup>th</sup> June 1998, Civil case No. 33 of 1994 hereinafter (the High Court) in which a legal action was instituted at the Court of Appeal of Tanzania<sup>197</sup> (the Court) versus the Ministry for Tourism, Natural Resources and Environment, The Director of Wildlife Division, Ministry of Tourism, Natural Resources and Environment-Project Manager Mkomazi Game Reserve and the Attorney General hereinafter to be referred as respondents. The suit filed is based on wrongful interference of the appellant's legal rights by the respondents on three grounds: the first ground was forceful eviction of the appellants and their families from their ancestral lands. Secondly, burning down homesteads and dwellings and destroying livestock and property thereby and thirdly, breaking down of the Maasai peoples' customary way of life and causing forceful emigration of their numbers to Kenya and in other towns in the country.

This study will mainly consider the decision of the Court of Appeal since, it is the final decision from the apex court in the country issued on 29<sup>th</sup> March, 1999 at Arusha.

##### 4.4.1 Facts of the case

In 1988, a group of Maasai people/herders were evicted by force from *Alalailil Lemwazuni* (The Mkomazi Game Reserve) following the state need to conserve natural vegetations and wildlife in the Mkomazi Game Reserve. The decision by the government was mainly due to the reasoning that, the park can not support both the Maasai livestock and the wildlife therefore Maasai people should be evicted.<sup>198</sup> This action was sanctioned by the Wildlife Conservation Act of 1974,<sup>199</sup> which restricted human activities within the game reserve once declared by the state for that purpose. Force was used to evict the Maasai<sup>200</sup> that led to the destruction of the Maasai peoples' homes, destructed their cultural values, loss of livestock and in a bigger picture loss of their land.<sup>201</sup>

---

<sup>196</sup> *Lekengere Faru Parutu Kamunyu and 52 others v Minister for Tourism, Natural Resources and Environment and 3 others* Civil Appeal No. 53 of 1998 at Arusha (unreported).

<sup>197</sup> Under sec 5 of the Magistrates Court Act, 1967 declares that the apex court in Tanzania is the Court of Appeal.

<sup>198</sup> n 152 above.

<sup>199</sup> n 192 above.

<sup>200</sup> See Lekengele (n 202 above) 11. The respondents argue that, 'having given a reasonable time and notice and communicated the same to the Maasai people, when the period of the notice expired, force was used by the government to expel those who had not vacate on their own will' ( submission of respondent arguments during the hearing of the appeal)

<sup>201</sup> n 143 above

#### 4.4.2 The court's decision

Herein under are a few legal arguments by the Court of Appeal of Tanzania that led to the dismissal of the appeal in the present case.

The first issue that the court considered was to whether it is correct in law for the 53 appellants to sue not only on their behalf but also on behalf of every member of the Maasai community affected by the eviction.<sup>202</sup>

In considering the above issue Justice Nyalali stated:

Any individual may institute legal action on his own behalf and on behalf of 'everyone in the country,' only if there is non-compliance of the Constitution or any other law.<sup>203</sup> Therefore, the court is of the opinion that, the action by the respondents was in accordance to the laws of Tanzania and for this reasons, we are satisfied that it was not correct for the appellants to sue on behalf of every member of the Maasai community who was evicted from the Mkomazi Game Reserve.<sup>204</sup>

The other contentious issue was to ascertain as to whether evicted Maasai people who did not give evidence were entitled to compensation. The court in interpreting and translating Order 17 Rule 2(1) and (2) of the Tanzania Criminal Procedure Code (CPC) of 1966 Order 17 Rule 2 which states (1) On the day fixed for hearing of the suit or any other day for which the suit is adjourned for hearing, the party shall state his case and produce his evidence in support of the issues which he is bound to prove, (2) the other party shall then state his case and produce his evidence (if any) and may then address the court generally on the whole case.<sup>205</sup>

In this issue the court reasoned that, since the requirements under the burden and standard of proof of facts under the above provisions require a person to present his case and produce evidence in court, those absent failed to meet this threshold and hence they will not receive any compensation.<sup>206</sup> The third issue that the court determining was to whether the Maasai community of which the appellants are members, had any ancestral customary land title over the disputed land since they were not the first in the place

---

<sup>202</sup> n 182 above, 13

<sup>203</sup> Article 26 (2) of the United republic of Tanzania Constitution, 1977 (as amended)

<sup>204</sup> n 182 above, 15

<sup>205</sup> Order I Rule 17(2) (1) and (2) of the CPC, 1966

<sup>206</sup> n 182 above, 16

The court stated that:

The Maasai community or tribe in question was not the first to arrive in this geographical area. They were new arrivals in the area preceded by other tribes such as the Pare, Sambia, and being nomadic, their presence was still scanty at the time when the Mkomazi Game Reserve was established in 1951 and that explains why they were not involved in the consultations which preceded the creation of the Game Reserve. That being the position, we are bound to hold that, the Maasai did not have ancestral customary title over the Mkomazi Game Reserve.<sup>207</sup>

Furthermore, the court dismissed the case by referring to section 3 of the Land Ordinance, CAP 113,<sup>208</sup> and argued:

All land on the mainland Tanzania is 'public land' and the land is vested in the President on trust for the benefit of the Tanzania indigenous population because of this legal position of land...no individual person or group can have rights in land which are superior to the public title the nature of title available to an individual or group can not be anything but a right to use public land.<sup>209</sup>

Therefore, appellants were using the Mkomazi Game Reserve as beneficiaries of public land, subject to legal regulations made by proper land use. The Wildlife Conservation Act, 1974 is such a regulation.<sup>210</sup>

#### **4.4.3 Relief by the court**

The court in determining the kind of relief to the Maasai people stated:

The unlawful eviction is against 27 Maasai people and not 53 as claimed by the appellants in this case and in that regard, it is contrary to Article 24 of the Constitution of and to provisions of the Land Acquisition Act, 1967.

The case was dismissed and the following orders were made:

- a) Each successful appellant is to be paid a sum of Tshs. 300,000/= (Equivalent to \$250)
- b) The respondents to provide an alternative land "comparatively" the same with other lands used by pastoralists in the country

---

<sup>207</sup> n 182 above, 17

<sup>208</sup> As amended by the Land Act, 1999 which retained the *status quo* under section 2 and that defines 'general land' as 'public land'; see generally previous chapter for the discussion.

<sup>209</sup> n 182 as above, 17

<sup>210</sup> n 182 above.

- c) Each party to bear its own costs

The first issue that arose in this case was of procedure of whether the Maasai people who were victims in this case and who did not give evidence could also benefit from the judgement the court and eventually beneficiaries of the remedies. The learned Judge overlooked the issue for the following reasons; Order 17 Rule 2(1) and (2) of the Tanzania Criminal Procedure Code (CPC) of 1966 in which the decision to deny victims to benefit from the ruling is not applicable and not practical when a person alleging a violation of a right is represented in by a competent legal officer under the Tanzania *Advocates Ordinance*. Secondly, under international law, the case of *Moiwana Village v. Suriname* above, deliberated on this issue and we are of the opinion that, the same is applicable in this situation. The IACHR in this case held as follows:

The reparation of harm caused by a violation of an international obligation requires, whenever possible, full restitution (*restitution integrum*) and a state can not invoke provisions of its domestic legislation to avoid, elude or alter obligations arising through international law.<sup>211</sup>

In this case, considering both the Tanzanian Law and the obligation of states under international law, the court misled itself on the issue. In the Ogoniland communication, the African Commission on Human and Peoples' Rights, found the Nigerian in violation of the collective rights of the Ogoni people, therefore, individual and collective rights were interfered with. The *Mkomazi case* like in *Dan v United States case* where the Inter-American Court concluded that:

Governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.<sup>212</sup>

The collective nature of exercising rights among indigenous people is unique to them and it is their culture, Awarding *petit* an equivalent of US\$250 as compensation per family for the loss they have suffered and the moral torture they have gone through is a sign of disrespect for the Maasai people as a whole by the State and its institutions and a clear sign of marginalisation by the mainstream society.

---

<sup>211</sup> *Moiwana case* (n 10 above para 170). The Court in this case basing on the objection by Suriname on payment of compensation to Maroons in *Moiwana village* who did not possess national identity cards, the courts holds; the compensation that correspond to each one shall be awarded in the same manner as those properly identified by State documents-as long as they appear before an appropriate State within 24 months. What is important on the issue of identity cards, the court had this to say; adequate identification in the case of indigenous people who normally live in remote area shall be (1) a statement before a competent state official by a recognized leader of the *Moiwana community members* (2) that many Maroons do not possess formal identity documents, and were never inscribed in the national registry.

<sup>212</sup> n 66 above para 128

The substantive issue that arose from the judgement is the issue of 'who was the first to the land' and therefore, 'who is an indigenous person'. I wish to make it clear that, from its literal translation of the word will mislead us however, from a human right angle, the term is used to a particular situation of power relations that are both of historical nature and of contemporary situation specifically due to 'continuous violation of rights.

It suffices to say, the community at Mkomazi given the characteristics above makes them to have special attachment to the land for which the State and its institutions (the court) ought to consider before taking a any action that will negatively affect their life.

Secondly, from the *Moiwana* case above, the IACHR dealt with a similar issue in determining whether, the *N'djuka* people where the indigenous to the land. Here was the finding of the court.

The *Moiwana* community members are not indigenous to the region; according to the proven facts. *Moiwana* village was settled by *N'djuka* clans in late the 19<sup>th</sup> Century. Nevertheless, from that time, till 1986, the community members lived in the area in strict adherence to the *N'djuka* custom. Many of them locate their point of origin in and around *Moiwana* village. Their inability to maintain their relationships with their ancestral lands and its sacred has deprived them of their fundamental aspect of their identity and sense of well being, they are unable to practice their culture and religious traditions, further more detracting from their personal and collective security and well being.

#### **4.5 Conclusion**

This chapter has shown that the Tanzanian government's investment policies have resulted into the violation of the rights of the Maasai as an indigenous group. The policies have ignored and rejected the territorial claim over the Maasai ancestral land. The eviction and subsequent alienation of the land has been justified by the Tanzanian Government as being for conservation purposes. However, the Government has not compensated the Maasai, and in cases where compensation has been done, the compensation has been inadequate.

Accordingly, the Tanzanian Government is in violation of its obligation under international human rights law. The violations range from the breach of the right to life, right to property, right to enjoy once culture and to participate in the cultural life of the community to the right to dispose freely the natural resources. According to the Maasai, land is not just property. It has also a connection to the spiritual well being of the community as a whole and forms the basis of the Maasai culture.

## **CHAPTER 5: CONCLUSION AND RECOMMENDATIONS**

### **5.1 Conclusion**

The situation of indigenous people in Tanzania, as illustrated by this study, should serve as a reflection of the situation and mistreatment of indigenous people within East Africa. When a certain community reaches a point in which those in control of the policies and economic power consider them inferior beings, then humanity needs to be defined to take into account of the new situation. Indigenous people all over the world are made slaves, on their own lands by the “powerful” among ourselves. They create uniform laws and policies that on their outlook, they seem to create equality but the truth is, there is no equality if historical patterns of marginalisation, subordination, land alienation. When the right to consent is denied, then the term “independence” should be defined, what it means to indigenous people in their respective countries, because for the indigenous people independence is yet to be attained. This is based on the fact that their human rights have continued to be violated even after the creation of new “independent” states.

### **5.1 Recommendations**

From the above Chapters it is clear that the Tanzanian Government has violated the rights of the Maasai people and has a case to answer. Accordingly, legal proceedings, in form of a communication, should be brought against the Tanzanian Government. The orders sought should be to the effect that the Maasai people should be allowed access to their ancestral lands taken from them and the State should be sanctioned to facilitate that return.

The Tanzanian Government must adopt measures, whether legislative or administrative, necessary to create an effective mechanism for official delimitation, demarcation, and titling of the indigenous communities' properties, in accordance with the customary law, values, usage, and customs of these communities.

The Tanzanian Government should be required to reinstate the Maasai people evicted from their ancestral land and where that is not possible, adequate compensation should be paid to them.

**Word Count= 17,826**

## **BIBLIOGRAPHY**

### **Books**

- A. Barume (2002), 'Constitutional Protection and Aboriginal Title in Commonwealth African Countries
- Amin S (1993), *The challenges of globalization: Delinking*, in the South Centre, Zed Books, London,
- F.J Bellamy. (1996) "Sustainable Development of What?" *Capitalism Nature Socialism* 7,
- Fimbo G, (1992) *Essay in Land Law in Tanzania*, Dar Es salaam University Print.
- M. Levin (1993), *Group rights and discrimination in international law*, Martius Nijhoff Publisher, London,
- Rawls, J, (1999) *A theory of justice, the Revised Edition*, Oxford University Press, Unity.
- S Davis, V Heywood, & A Hamilton (eds) (1994 ) *1 Centre of plant diversity. A guide and strategy for their conservation, Europe and Africa*, IUCN, Cambridge
- Shivji I (1989), *The Right to self-determination: an Africa Perspective*.
- Shivji I (1991), *State and Constitutionalism: Africa debate of democracy*, Southern Africa Political series, Harare Zimbabwe,
- T. Meron, 'Human Rights and Humanitarian Norms as Customary Law', Oxford: Clarendon Press 1989, 21

### **Contributions/ Articles**

- B Kingsbury "Indigenous peoples" in international law: A constructivist approach to the Asian controversy' (1998) 92 *American Journal of International Law* 414;
- Bayone-Ba-Meya is quoted by Julie Cassidy: Cassidy, J (1998) *Sovereignty of Aboriginal peoples*, in 9 *Indiana International and Comparative Review*, 65 (1998), LexisNexis, n'16
- BJ Kealeboga and G Wachira, 'Protecting indigenous peoples in Africa: An analysis of the approach of the African Commission on Human and Peoples' Rights', *African Human Rights Law Journal* Vol.6, No.2, 2006;
- Collett, David. "Pastoralists and wildlife: image and reality in Kenya Maasailand." In David and Grove Anderson *Conservation in Africa: people, policies and practice*, 129-148. Cambridge: Cambridge University Press, 1987.
- D Brockington & K Homewood (2001) 71(3)*Journal of the International African Institute* 449.

D Sanders 'The re-emergence of the indigenous question in international law'(1983) Canadian Human Rights Tear Book 3; C Tennant 'Indigenous Peoples, international institutions, and international legal literature from 1945-1993' (1994) 16 Human Rights Quarterly 1;

D.Western (1982) 'Amboseli National Park: enlisting landowners to conserve migratory wildlife', *Ambio 11: 302-8*; K Homewood & W Rogers (1992) *Maasai Ecology: pastoralist development and wildlife conservation in Ngorongoro, Tanzania*. Cambridge: Cambridge University Press.

Erica-Irene Daes, Indigenous peoples and their relationship to land. Final paper prepared for the UN-Sub-Commission on the Promotion and Protection of Human Rights (E/CN.4/sub.2/2001/21, 11th June 2001

F White (1983) *The vegetation of Africa. A descriptive memoir to accompany the UNESCO-AETFAT-UNSO vegetation map of Africa*, 356. UNESCO, Paris

Francis D.P. Situma 'Legislative and Institutional Framework for Community Based natural Resource Management in Kenya 1 *The University of Nairobi Law Journal at* (2003) 55

Hurskainen, A. (1984). *Cattle and Culture, 'The Structure of Pastoral Parakuyo Society'*.

In Brokensha, (1980) Warren and Werner (eds) *Indigenous Knowledge Systems and Development* Lanham; University Press of America,

J Oloka-Onyango 'Reinforcing marginalized rights in an age of globalization: International Mechanisms, non-state actors and the struggle for peoples' rights in Africa' (2003) 18 *American University International Law Review* 912.

J.T Mwaikusa, *Community Rights and Land Use Policies in Tanzania: The Case of Pastoral Communities*, *Journal of African Law*, Vol.37, No.2, *Law and Environment in Africa*. (Autum, 1993),

Jeremie Gilbert, 'Historical Indigenous Peoples' Land Claims': A comparative and international approach to the common law doctrine on indigenous title, *International and Comparative Law Quarterly* (2007), 594

JK Asiemu and DP Situma, 'Indigenous Persons and the Environment: The case study of the Pastoral Maasai (1994) *Colorado Journal of International Environmental law and Policy*;

Kabudi PJ, "The State of Human Rights in Tanzania: Challenges in the Twenty first Century" in Sifuni E. Mchome (ed) *Taking Stock of Human Rights in Tanzania*, Dar es Salaam; Faculty of Law; University of Dar es Salaam (2002) 110

M Saningo & A Heidenreich (1996) 5 (4) 'Rare Land Rights Victory Brings New Hope to The Maasai', *Eco News Africa, April*.

Mchome S.E. (2000) *Eviction and the Right of the People in Protected Areas in Tanzania* Faculty of Law University of Dar Es Salaam

Newman R, (1995a), Locally Challenges to Global Agendas: Conservation, Economic Liberalization and the Pastoralists' Rights Movement in Tanzania, *Antipode* 27, 363-382,

P. Haveman (ed), 'Indigenous Peoples Rights in Australia, Canada and New Zealand', (OUP, Oxford, 1999)

PG McHugh 'Aboriginal societies and common law: A history of sovereignty, status and self-determination (2004)

R Niezen, *Florida Journal of International Law December, 2005*, Digital Identity: The Construction of Virtual Selfhood in the Indigenous Peoples' Movement, *Comp. Stud. in Society' & History.* (2005), 532-51,

R Torres "The rights of indigenous populations: The emerging international norm"(1991) 16 *Yale Journal of International Law* 127

Ringo Tenga (1992) " Pastoral Land Rights in Tanzania" IIED Land Tenure Papers No 1

Russell LB, 'Indigenous Peoples, an Emerging Object of International Law, (1986) *Journal for International Law*

S Saugestad, 'Contested Images: Indigenous Peoples in Africa,' *International Working Group for Indigenous Affairs (IWGIA) Newsletter, No. 2, May-June, 1999, 7*

Saugestad S, *Contested Images: Indigenous Peoples of Africa*, on a paper presented during the Conference on Indigenous Peoples of Eastern, Central and Southern Africa, organised by the Pastoralists Indigenous NGO's Forum (PINGOs Forum) and IWGIA in Arusha, Tanzania from 18th to 22nd, of January, 1999.

Stoll Peter-Tobias and Anja von Hahn "Indigenous Peoples, Indigenous Knowledge and Indigenous Resources in International Law" in Silke von Lewinski (Ed) *Indigenous heritage and intellectual property: genetic resources, traditional knowledge and folklore* (London: Kluwer Law International 2004) at 163

Tarayia GN, The Legal Perspective of the Maasai Culture, Customs, and Traditions, *Arizona Journal of International and Comparative Law (2004), Vol 21, No.1, 184*, for detailed discussion on migration and expansion of the Maasai, see works by John L. Berntsen and Richard D. Walter

Tarayia N.G, in her article 'The Legal Perspective of the Maasai Culture, Customs and Traditions', *Arizona Journal of International and Comparative Law Vol.21, No.1, 2004*,

Tenga R.W (1991) Tanzania Land Law. A paper presented in Proceedings of the Arusha workshop on Land Policy, August 27-29, 1991 (own paper).

Veber, Hanne, Jens Dahl, Fiona Wilson, and Espen Wehle (eds): 1993, '...Never Drink from the Same Cup'. Proceedings of the conference on Indigenous Peoples in Africa; Tune, Denmark 1993. IWGIA, Document No. 74, Copenhagen.

## Reports

African Charter on Human and Peoples' Rights, adopted 27 June 1981 in Nairobi, Kenya, OAU Doc CAB/LEG/67/3 Rev 5, entered into force 21 October 1986.

Concluding Observations of the HRC: Canada. 07/04/99.UN Doc.CCPR/C/79/.

Concluding Observations of the HRC: Mexico. UN Doc.CCPR/C/79/Add.109 (1999), paragraph 19; Norway. UN Doc.CCPR/C/79/Add.122 (1999), paragraphs 10 and 17; and Australia. 28/07/2000. CCPR/CO/69/AUS.

IACHR, Report on the Situation of Human Rights In Ecuador, OAS/Ser.L/V/II.96.Doc.10 rev 1, April 24, 1997, Chapter IX.

## General Comments/Resolutions

CERD General Recommendation XXIII(51) concerning Indigenous Peoples (August 18, 1997).

General Recommendations XXIII (51) concerning Indigenous Persons Adopted at the Committee's 1235<sup>th</sup> Meeting, on the 18<sup>th</sup> August 1997. UN Doc. CERD/C/51/Misc.13/Rev.4.

HRC General Comment No. 24 (1994), paragraph 8; see also S. James Anaya, 'Indigenous Rights Norms in Contemporary International Law', *8 Arizona Journal of International and Comparative Law* 1, 15 (1991)

UNHRC, General Comment 23, ICCPR Article 27, U.N. Doc. HRI/GEN/1/Rev.1 at 38 (1994) [hereinafter "UNHRC General Comment 23"].

## International Human Rights Instruments

African Charter on Human and Peoples' Rights O.A.U. Doc.CAB/LEG/67/3/Rev.5 (1982) (entered into force, 21/10/1986).

International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS (entered into force 4/01/1969), Art 2.

International Covenant on Civil and Political Rights, adopted 16/12/1966; G.A. Res 2200 (XXI), UN. Doc A/6316 (1966) 999 UNTS 171 (entered into force, 23/03/1976).

International Covenant on Economic, Social and Cultural Rights, adopted 16/12/1966; G.A. Res 2200 (XXI), UN. Doc A/6316 (1966) 993 UNTS 3 (entered into force 3/01/1976).

Rome Statute on the International Criminal Court (Rome Statute) adopted 17/07/98 (entered into force 1/07/02).

Universal Declaration on Human Rights, adopted 10/12/1948; UN.G.A Res 217 A (III), UN.GAOR, 3d Sess, UN. Doc. A/810 (1948).

### **Case Law**

*Apirana Mahuka et al. v. New Zealand* (Communication No. 547/1993, 15/11/2000), UN Doc. CCPR/C/70/D/547/1993 (2000)

*Bernard Omiyanak, Chief of the Lubicon Lake Band v. Canada*, Report of the HRC, 45 UN GAOR Suppl. (No. 43), UN Doc. A/45/40, Vol. 2 (1990)

H Saachedina (2006) 'Conservation, Land Rights and Livelihoods in the Tarangire Ecosystem of Tanzania', 12

High Court of Botswana, *Roy Sesana and Ke/wa Setlohobogwa v The Attorney General*, Misca No. 52 of 2002 (13<sup>th</sup> December, 2006)

*Hopu v. France*, Communication No. 549/1993: France. 29/12/97. UN Doc. CCPR/C/60/D/549/1993/Rev.1.

*Kitok v. Sweden*, Report of the HRC, 43 UNGAOR Suppl. (No.40) UN Doc. A/43/40, Although not decided under Article 27

*Mabo and others v. Queensland* (No. 2) (1992) 175 CLR 1 F.C 92/014, per Brennan J, 40

*Maya Communities v Belize* case 12.053, Report No 40/40, Inter-Am CHR, OEA/Ser.L/V/II.122 Doc 5 rev 1, 727 (2004).

*Moiwana Village v. Suriname*, Judgement of June, 15, 2005, the Inter-American Court, H.R., (Ser. C) No. 124 (2005)

*Ntiyahela Boneka v. Kijiji cha Ujamaa Mutala*, (1988) TLR 158

*The Bakweri Land Claims Committee (BLCC) v. The Republic of Cameroon*, Case No. 260/2002, African Commission on Human and Peoples' Rights.

*The Richtersveld Community v. Alexkor Limited and the Government of the Republic of South Africa*, Case No. 488/2001, Supreme Court of Appeal of South Africa (24<sup>th</sup> March, 2003)

### **Constitutions**

Constitution of the Republic of Tanzania, 1977.

The Constitution of Cameroon

## **Legislations/ Policies**

Land Ordinance of 1923

National Parks Act, 1959

Rural Land Act, 1973

The Land Acquisition Act, 1967

The Village Land Act, 1999

Villages and Ujamaa Villages Act, 1975