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Pastoralists' Right to Land and Natural Resources in Tanzania

Introduction	43
I. An Overview of Governance System and Land Administration in Tanzania	44
A. Governance System.....	44
B. Land Administration	45
II. Wildlife Reserved Areas and Pastoralists' Land and Natural Resources Rights	46
A. The Ngorongoro Conservation Area Act	48
1. Right to Food.....	49
2. Right to Public Participation	53
B. The Wildlife Conservation Act	57
1. The Right to Housing: Eviction.....	57
2. The Right to Participation	59
Conclusion and Recommendations	60

INTRODUCTION

Land is an important natural resource without which other rights including the right to food,¹ the right to housing,² and the right to

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¹ This right is explicitly provided for under Article 11(2) of the International Covenant on Economic Social and Cultural Rights, G.A. Res. 2200 (XXI), U.N. Doc. A/RES/2200(XXI) (Dec. 16, 1966) [hereinafter ICESCR]. See also U.N. Comm. on Econ., Social, and Cultural Rights, *General Comment No. 12: The Right to Adequate Food (Art. 11)*, U.N. Doc. E/C.12/1999/5 (May. 12, 1999) (elaborating further, that the right is realized “when every man, woman, and child, alone or in community with others, has the physical and economic access at all times to adequate access to adequate food or means for its procurement”) [hereinafter CESCR].

² Int'l Covenant on Economic Social and Cultural Rights, *supra* note 1, Art. 11(2).

water³ cannot be realized. This paper reviews selected laws of Tanzania relating to land and natural resources rights for groups that make their living predominately as cattle herders, also known as pastoralists. This article shows that violation of the right to land and natural resources puts pastoralists at the receiving end of a wide range of other human rights violations.

The article enjoins Tanzania to adopt “new directions for human rights and the environment”⁴ by reforming its current laws in order to conserve wildlife and other biodiversity in a manner that does not unnecessarily abridge the full realization of human rights. The article is divided into three parts. Part one contains an overview of Tanzania’s governance and the land administration. Part two focuses on Reserved Land in relation to land rights for pastoralists. Part three offers concluding comments and recommendations.

I AN OVERVIEW OF GOVERNANCE SYSTEM AND LAND ADMINISTRATION IN TANZANIA

The objective of this part is two fold: to provide an understanding of Tanzania’s system of governance and laws, and to situate the laws that will be discussed under part two, within the with laws of Tanzania.

A. Governance System

Tanzania is a union of two formally independent African states, namely the Republic of Tanganyika (now referred to as Tanzania mainland) and the People’s Republic of Zanzibar.⁵ The two concluded a treaty of Union on April 22, 1964, and became one sovereign republic on April 26, 1964.⁶ Following this union, Tanzania established two autonomous governments, namely the Union Government and the Revolutionary Government of Zanzibar. The

³ See Michael Kidd, *The Right to Access Water in South Africa*, in POVERTY ALLEVIATION AND ENVIRONMENTAL LAW 52 (Yves Le Bouthillier et al. eds., 2012).

⁴ This was the theme of the symposium dedicated to Professor Svitlana Kravchenko who “inspired generations of students, scholars, and lawyers to make the connection between human rights and the environment.” Univ. of Or. Sch. of Law, J. of Envtl. Law and Litig., *New Directions for Human Rights and the Environment: A Symposium Inspired by Svitlana Kravchenko* (Sept. 28–29, 2012).

⁵ See UNITED REPUBLIC OF TANZANIA NATIONAL WEBSITE, <http://www.tanzania.go.tz/profile1f.html> (last visited July 11, 2012).

⁶ Sengondo Mvungi, *Legal Problems of the Union Between Tanganyika and Zanzibar*, 28–30 E. AFR. L. REV. 31, 31–50 (2003).

Union Government exercises power over the whole territory in all “union matters” within Tanganyika (Tanzania Mainland) while the power of the Revolutionary Government of Zanzibar’s is confined to “non-union matters” in Zanzibar.⁷

Union matters, which fall outside the jurisdiction of the Revolutionary Government of Zanzibar, are outlined under the second schedule to the Union Constitution.⁸ These matters include foreign affairs, research, higher education, and statistics.⁹ Land administration as well as environmental management and related issues that are covered in this paper are not considered union matters.

B. Land Administration

The National Land Policy states that all land in Tanzania is public land and is held by the President as a trustee on behalf of all Tanzanians.¹⁰ This means that the right to own land in Tanzania is not absolute; rather a landowner is only given a revocable right to occupy a given piece of land.¹¹ This right is contextually known as the “the right of occupancy.”¹²

The National Land Policy came into being following a report by the Presidential Commission of Inquiry on Land matters of 1992 (also known as the Shivji commission).¹³ The main objective of the National Land Policy is: “To promote and ensure a secure land tenure system, to encourage the optimal use of land resources, and to facilitate broad-based social and economic development without

⁷ *Id.*

⁸ See CONST. OF THE UNITED REPUBLIC OF TANZ., First Schedule, 1977.

⁹ *Id.*

¹⁰ UNITED REPUBLIC OF TANZANIA, MINISTRY OF LANDS AND HUMAN SETTLEMENTS DEVELOPMENT, NATIONAL LAND POLICY 9 (2nd ed. 1997) [hereinafter NATIONAL LAND POLICY].

¹¹ The power to revoke a right of occupancy is vested in the President of Tanzania. Factors that may lead to the revocation of a right of occupancy include an attempt to sell the land to a non-citizen, abandoning the land for not less than two years, breach of conditions listed in the certificate of occupancy, and breach of regulations made under the law. See Land Act No. 4 § 4 (1999) (Tanz.).

¹² The Land Act defines the right of occupancy to mean “a title to the use and occupation of land and includes the title of a Tanzanian citizen of African descent or a community of Tanzanian citizens of African descent using or occupying land in accordance with customary law.” *Id.* § 2.

¹³ The commission is popularly named after Professor Issa G. Shivji who was appointed by the second president of Tanzania, Ali Hasan Mwinyi, to chair it.

upsetting or endangering the ecological balance of the environment.”¹⁴

In order to implement the National Land Policy, two main land laws were enacted in 1999: the Land Act¹⁵ and the Village Land Act.¹⁶ The Land Act is the main legislation relating to the administration of land in mainland Tanzania. It provides that:

[A]ny provisions of any other written law applicable to land which conflict, or are inconsistent with any of the provisions of this Act shall to the extent of that conflict or that inconsistency cease to be applicable to land or any matter connected to land in mainland Tanzania.¹⁷

According to the Land Act all land in Tanzania falls into three categories namely General Land,¹⁸ Village Land¹⁹ and Reserved Land.²⁰ Reserved land according to the Act includes land set aside in accordance to laws governing conservation of forests, marine resources, and wildlife.²¹ Reserved land also includes areas designated as such by laws governing land acquisition as well as highways and land for town and country planning.²² This paper focuses on laws governing Reserved Areas designated for Wildlife Conservation in relation to land and natural resources rights for pastoralists.

II

WILDLIFE RESERVED AREAS AND PASTORALISTS' LAND AND NATURAL RESOURCES RIGHTS

The three categories of land discussed above indicate that the category of reserved land includes “land set aside in accordance to laws governing conservation of wildlife.”²³ In the context of this

¹⁴ NATIONAL LAND POLICY, *supra* note 10, at 5.

¹⁵ Land Act No. 4, *supra* note 11.

¹⁶ Village Land Act No. 5 § 181 (1999) (Tanz.).

¹⁷ Land Act No. 4, *supra* note 11, § 181.

¹⁸ *Id.* § 2. Section 2 defines the land Act to mean “all land which is not reserved land or village land.” In practice, it includes areas of land falling in municipalities, townships and cities and which are under the supervision of the commissioner for lands.

¹⁹ This category of land is explained in details under section 7 of the Village Land Act. *See* Village Land Act No. 5, *supra* note 16. It consists of areas of land falling within the jurisdiction of registered villages. A village is the lowest administrative unit in Tanzania. Others are a ward, a district and a region.

²⁰ *See* Land Act No. 4, *supra* note 11, § 4.

²¹ *Id.* § 6.

²² *Id.*

²³ *Id.*

paper, the term 'protected areas' as defined by the International Union for the Conservation of Nature (IUCN) is used to denote land set aside in accordance with laws governing conservation of wildlife. The IUCN defines "protected areas" as: "An area of land and/or sea especially dedicated to the protection and maintenance of biological diversity and of natural and associated cultural resources, and managed through legal or other effective means."²⁴

In addition to the above definition, the IUCN has recommended a categorization of Protected Areas in order to clarify the definition of Protected Areas as used in different countries.²⁵ It also facilitates uniform national reporting and inter-jurisdictional comparison.²⁶ In Tanzania, areas of land set aside in accordance to laws governing wildlife conservation, also known as wildlife protected areas, bear various names depending on the degree and nature of land use and resource utilization permitted in each particular area.²⁷ The terms include "national parks" where no permanent human settlements are allowed—only non-consumptive tourism, education, and research.²⁸ Other terms include "game reserves."²⁹ For example, the Ngorongoro Conservation Area, which permits the coexistence of wildlife and Maasai pastoralists, and game controlled areas.³⁰ Tanzania's legislation relating to wildlife conservation in game reserves, game

²⁴ INT'L UNION FOR CONSERVATION OF NATURE (IUCN), GUIDELINES FOR PROTECTED AREA MANAGEMENT CATEGORIES 7 (1994).

²⁵ *Id.*

²⁶ *Id.* at 1.

²⁷ Patricia Kameri-Mbote, *Sustainable Management of Wildlife Resources in East Africa: A Critical Analysis of the Legal, Policy and Institutional Frameworks*, 31–34 E. AFR. L. REV. 143, 152 (2004). The tendency in Tanzania is to associate the term "protected areas" to only areas in which laws do not permit human settlements such as national parks and game reserves. This association; however, is erroneous given how land is categorized in the country and also based on the IUCN definition referred to here.

²⁸ The principle legislation relating to the administration of national parks in Tanzania is the National Parks Act NAT'L PARKS ACT, § 21 (2002) (Tanz.) (It states in part: "[I]t shall not be lawful for any person other than (a) the trustees, and the officers within the national Park and his servant to enter or be within a National Park except under and in accordance with a permit in that behalf issued under regulations made under this Act.").

²⁹ Permissible uses in the Game Reserves are the same as those in the National Parks, namely non-consumptive tourism, education, and research. The practice is to the effect that once infrastructural development is effected in a game reserve, it is declared a national park. See Emmanuel L.M. Severre, *Tourism Gateway to Poverty Reduction* (Int'l Inst. For Peace through Tourism (IIPT) 2nd Afr. Conf. on Peace Through Tourism, Presented Paper, 2003), available at <http://www.iipt.org/conference>.

³⁰ THE WILDLIFE CONSERVATION ACT 2009, available at <http://polis.parliament.go.tz/PAMS/docs/5-2009.pdf>. Before the coming to force of the new Wildlife Conservation Act, human settlements were permitted in the game Controlled Areas.

controlled areas, and the Ngorongoro Conservation Area undermine the rights to land and natural resources for pastoralists as highlighted by two important laws: the Ngorongoro Conservation Act 1959 and the Wildlife Conservation Act 2009, respectively. Each of these laws is discussed in detail below in relation to pastoralists' right to land and natural resources.

A. The Ngorongoro Conservation Area Act

The Ngorongoro Conservation Area Act³¹ is the main law controlling entry into and residence within the Ngorongoro Crater Highland Area (also called the Ngorongoro Conservation Area), and for making provisions for the conservation of natural resources within the area.³² The Ngorongoro Conservation Area (NCA) was created in 1959 and designated as a "multiple land use area."³³ The term "multiple land use" implies the co-existence of the Maasai pastoralists and Wildlife.³⁴ Most of the Maasai pastoralists who live in Ngorongoro were systematically relocated from the Serengeti area when the Serengeti National Park was established in 1959.

Implementation of the concept of multiple land use makes Ngorongoro Conservation Area a unique Protected Area because it integrates the conservation of soils, vegetation, wildlife and watersheds in tandem with the development of Pastoralists and the tourist industry. Ngorongoro Conservation Area (NCA) is also particularly important because it is home to the famous archaeological and paleontological site called Olduvai George, a depository of fossil evidence of the earliest beginnings of the human race.³⁵ NCA is a World Heritage site having been inscribed as such by UNESCO in 1979.³⁶ NCA has also been recognized as a biosphere reserve under UNESCO'S Man and Biosphere Program.³⁷

³¹ Ngorongoro Conservation Act (2002) (Tanz.).

³² *See id.* at Preamble.

³³ *See* U.N. ENVIRONMENT PROGRAMME AND WORLD CONSERVATION CENTER: NGORONGORO CONSERVATION AREA TANZANIA, *available at* <http://whc.unesco.org/en/list/39/> (last visited Sept. 30, 2012); *see also* IBRAHIM HAMISI JUMA, WILDLIFE CONSERVATION VERSUS CUSTOMARY LAND USE: LESSONS DRAWN FROM MZOMAZI GANE RESERVE CASE (1999).

³⁴ *Id.*

³⁵ *See* U.N. ENVIRONMENT PROGRAMME CONSERVATION MONITORING CENTRE: NGORONGORO CONSERVATION AREA, <http://whc.unesco.org/en/list/39> (last visited Oct. 12, 2012).

³⁶ *Id.*

³⁷ *Id.*

Although Tanzania implemented major land reforms in the 1990s as describes above, such arrangements did not benefit Pastoralists living in the Ngorongoro Conservation Area (the NCA). Like most parts of Tanzania, the NCA is divided into registered villages, but village authorities have no control over the land.³⁸ This law vests control of the land to the Ngorongoro Conservation Area Authority (NCAA)³⁹ and as a result undermines pastoralists' right to their ancestral land and natural resources therein. Similarly, the law bestows the NCAA the power to make regulations on where grazing can take place within the area without consulting Pastoralists. Because of such tenuous land rights, Maasai pastoralists have found themselves at the receiving end of a wide range of human rights violations, as discussed below.

1. Right to Food

The right to food is one of the human rights that has been codified under international human rights law. Accordingly, many international human rights Instruments such as the Universal Declaration on Human Rights⁴⁰ as well as the Convention on the Rights of the Child (CRC)⁴¹ contain explicit provisions on right to food. In this context, the most pertinent instrument is the International Covenant on Economic Social and Cultural Rights (the ICESCR)⁴² because the committee that monitors its implementation has elaborated what the right to food entails. The ICESCR provides in part that: "State parties to the present Covenant realize the right of everyone to an adequate standard of living for himself and his family, including the right to adequate food."⁴³

³⁸ See generally Francis Stolla, *Wildlife Management Areas: A Legal Analysis*, Tanzania Natural Resource Forum (TNRF) Occasional Paper No. 5, available at http://www.pulp.up.ac.za/pdf/2010_17/2010_17.pdf (last visited Nov. 20, 2012).

³⁹ Ngorongoro Conservation Act, *supra* note 31. The long title states categorically that it is "[a]n Act to control entry into and residence within the Ngorongoro Crater highlands Area, to make provision for conservation and development of natural resources therein and for related matters."

⁴⁰ Universal Declaration of Human Rights, art. 25, 1948, available at <http://www.un.org/en/documents/udhr/index.shtml> (last visited Sept. 10, 2012). Article 25(1) provides in part that "[e]veryone has a right to a standard of living adequate for the health and well-being of himself and his family, including food."

⁴¹ See G.A. Res. 44/25, art.24, 27, U.N. Doc. A/RES/44/25 (Sept. 2, 1990).

⁴² ICESCR, *supra* note 1.

⁴³ ICESCR, *supra* note 1, art. 11(1).

In its General Recommendation 12 of 1991, the Committee on Economic Social and Cultural Rights (CESCR) elaborated further that the right to food is realized “when every man, woman, and child, alone or in community with others, has the physical and economic access at all times to adequate food or means for its procurement.”⁴⁴

In regards to state obligation in ensuring and enforcing the right to food, the CESCR General recommendation describes three obligations, those being the obligation to respect, the obligation to protect and the obligation to fulfill.⁴⁵ Regarding the obligation to respect, state parties are obliged “to respect existing access to adequate food [by not taking] any measures that result in preventing such access.”⁴⁶ Tanzania is a signatory to the International Convention on Economic Social and Cultural Rights and has been taking various measures in compliance with the treaty obligations.⁴⁷

However, despite being a signatory to the ICESCR, Tanzania is implementing the Ngorongoro Conservation Act, which essentially prohibits cultivation. This law provides the Ngorongoro Conservation Area Authority with the power to make general orders to prohibit the use of land for any agricultural purposes.⁴⁸ In so doing, Maasai pastoralists are denied the right to a self-sustaining livelihood through farming which exacerbates the problem of food insecurity in their area, making Maasai pastoralists particularly vulnerable and susceptible to deaths caused by hunger-related ailments.

Pursuant to the law above, in 2009,⁴⁹ the NCAA issued a General Management Plan that prohibits cultivation at the time when “the pastoralists had lost almost 80% of their livestock due to the worst drought in the Tanzania’s history.”⁵⁰ Since no alternative livelihood

⁴⁴ CESCR, *supra* note 1, para. 6.

⁴⁵ *Id.*, para. 15.

⁴⁶ *Id.*

⁴⁷ See “United Republic of Tanzania: Statement by Hon. Angellah Jusmine Kariuki, Deputy Minister for Constitutional and Legal Affairs at the 49th Session of the Committee on Economic Social and Cultural Rights, Geneva-Switzerland 13th to 14th November 2012,” available at <http://pubs.iied.org/pdfs/G03065.pdf> (Accessed on 25/11/2012).

⁴⁸ S. 9(1) Ngorongoro Conservation Act No. 14 of 1959, available at <http://faolex.fao.org/docs/pdf/tan17716.pdf> (last visited Nov. 22, 2012).

⁴⁹ A ban on cultivation was introduced for the first time in 1975. However, in 1992 the ban was suspended following a realization on the part of the government that the Maasai could not meet dietary needs owing to the death of their livestock. See Elifuraha Laltaika & Edward Porokwa, *Tanzania: Policy Developments*, in *THE INDIGENOUS WORLD* 497 (C. Mikkelsen ed., 2010), available at www.iwgia.org/iwgia_files_publications_files/0001_I_2010_EB.pdf.

⁵⁰ *THE INDIGENOUS WORLD*, *supra* note 49, at 497.

option was available the Maasai pastoralists, they have become dependent on food relief from the Tanzanian government.⁵¹ For reasons unclear, the government gives the Maasai only nine (9) kilograms of maize per family for six months, which is hardly a week's worth of food for a large family. As a result, many families consume far below the recommended daily caloric intake, and thus are exposed to deaths caused by hunger.

Based on the discussion above, there is no doubt that by signing and ratifying the ICESCR, Tanzania has declared its commitment to respecting and ensuring the right to food. The Ngorongoro Conservation Act, however, in infringing upon Maasai pastoralists' right to cultivate, clearly violates the obligation outlined in the ICESCR that requires state members of the ICESCR to refrain from taking any measures that result in undermining the right to food.⁵² Two subsequent questions that emerge from a case like this are whether the right to food is a justiciable right in Tanzania, and whether it can be used to secure natural resources rights for pastoralists. In response to the latter question raised, Ringo Tenga warns: "[P]aradoxically, food security arguments may be used not only to secure pastoral resource rights, but also to undermine them."⁵³

With regards to the first question there are two barriers. The first difficulty is that under the current constitutional dispensation, Tanzania is a dualist State.⁵⁴ This means that in addition to signing and ratifying a convention, the parliament of the United Republic of Tanzania must enact an enabling legislation for the Convention in

⁵¹ This, among other reasons, is due to the fact that the NCAA has control over the land; it also receives all economic benefits the land generates in the form of Foreign Direct Investments in the area. See PETER J. ROGERS, *HISTORY AND GOVERNANCE IN THE NGORONGORO CONSERVATION AREA, TANZANIA, 1959–1966*, available at <http://www.globalenvironment.it/rogers.pdf>.

⁵² International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI) A, U.N. Doc. A/RES/2200(XXI) (Jan. 1, 1967).

⁵³ LORENZO COTULA ET AL., *THE RIGHT TO FOOD AND ACCESS TO NATURAL RESOURCES USING HUMAN RIGHTS ARGUMENTS AND MECHANISMS TO IMPROVE RESOURCE ACCESS FOR THE RURAL POOR* 59 (Lorenzo Cotula ed., 2008), available at <http://www.fao.org/docrep/016/k8093e/k8093e.pdf>. The author supports this conclusion by a court case involving alienation of pastoralists' land in Hanang District, northern Tanzania for cultivation. In that case, it the court asserted that food production is in line with public interest.

⁵⁴ See B.T. Mapunda, *Treaty Making and Incorporation in Tanzania* 28–30 *EASTERN AFRICA L REV.* 156–70 (2003). See also J. Osogo Ambani, *Navigating Past the 'Dualist Doctrine': The Case for Progressive Jurisprudence in the Application of Human Rights Norms in Kenya*, in *INTERNATIONAL LAW AND HUMAN RIGHTS LITIGATION IN AFRICA* (Magnus Killander ed., Pretoria Univ. Press, 2010).

question to have a legal force or justiciability in a domestic court of law.⁵⁵ Unfortunately, Tanzania does not have a good track record in enacting enabling legislation for the enforcement of International Human Rights Conventions. However, a window of opportunity is available in the regional human rights system. For example, in addition to ratifying the optional protocol on the establishment of the African Court,⁵⁶ Tanzania has made a declaration accepting the jurisdiction of the African Court on Human and Peoples Rights (AFCHPR) to entertain cases filed by individuals and Non-Governmental Organizations.⁵⁷

The second barrier is that the right to food is not explicitly provided for in the Constitution of the United Republic of Tanzania. The right to life, the right to a just remuneration as well as the right to own property can however be interpreted as embodying the right to food.⁵⁸ Experiences in other common law jurisdictions can shed light on this. For example, the Supreme Court in India has interpreted the right to life to include the right to food in the case of case of *Peoples Union for Civil Liberties v. Union of India and Others*.⁵⁹ A Public Interest Organization called Peoples Union for Civil Liberties filed the civil case. Tanzanian organizations such as the Association for Law and Advocacy for Pastoralists (ALAPA) and other Public Interest Non-Governmental Organizations can therefore file a similar case at the high court of Tanzania.⁶⁰ Although not by way of any

⁵⁵ See Elifuraha Laltaika, *Should Tanzania Opt to Embrace Monism?*, THE CITIZEN (May 7, 2011, 10:36 PM), <http://www.thecitizen.co.tz/magazines/32-political-platform/11021-should-tanzania-opt-to-embrace-monism.html>.

⁵⁶ PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHTS ON THE ESTABLISHMENT OF AN AFRICAN COURT ON HUMAN AND PEOPLES RIGHTS, available at <http://www.african-court.org/en/images/documents/Court/Court%20Establishment/african-court-humanrights.pdf> (last visited Oct. 1, 2012).

⁵⁷ *Id.* Section 34(6) of the protocol, read together with Section 5(3) is to the effect that the court cannot receive cases filed by Non Governmental Organizations (NGOs) as well as individuals from a State party that have not made a separate declaration accepting such arrangement. Until June 2012, only Tanzania and four other countries (Bukina-Fasso, Malawi, Ghana, and Mali) have made such a declaration, out of 26 countries that have ratified the protocol. See Guardian on Sunday Correspondent, *Foreign Donors Cant Influence the Decisions of the African Court*, June 10, 2012, <http://www.ippmedia.com/frontend/index.php/arch/function.mysql-select-db?l=42445>.

⁵⁸ International Covenant on Economic, Social and Cultural Rights, *supra* note 52 at 61.

⁵⁹ See Lauren Birchfield & Jessica Corsi, *The Right to Life is the Right to Food: Peoples Union for Civil Liberties v. Union of India & Others*, available at <http://www.wcl.american.edu/hrbrief/17/3corsi.pdf> (last visited Oct. 10, 2012).

⁶⁰ One of the objectives of ALAPA is,

lawsuit, some pastoralists through their organizations have persistently vocalized their discontent over the decision to ban cultivation in the Ngorongoro region, arguing that this decision was reached without involving the pastoralists.⁶¹

2. Right to Public Participation

The principle of public participation in decision-making has been described as a right in both the Rio Declaration⁶² and in Agenda 21.⁶³ Apart from these “soft laws,” public participation provisions are also included in a number of other international conventions such as the United Nations Framework Convention on Climate Change (UNFCCC),⁶⁴ the United Nations Convention to Combat Desertification (UNCDD),⁶⁵ the Convention on Biological Diversity (UN-CBD)⁶⁶ and the Cartagena Protocol on Biosafety.⁶⁷

At the regional level, the most robust instrument is the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, also known as the

To use law as a tool for regulating important aspects of economic development processes affecting pastoralists such as conservation and investments through supporting litigation in courts of law as well as through lobbying for the amendment of unfriendly laws (both principal and subsidiary) by the parliament of the United Republic of Tanzania and other subsidiary bodies such as local authorities.

See ASSOCIATION FOR LAW AND FOR PASTORALISTS, <http://alapa.or.tz/alapa> (last visited Oct. 19, 2012).

⁶¹ See, e.g., Zephania Ubwani, *Ngorongoro Residents, NCAA at Loggerheads with Authority*, THE CITIZEN (Oct. 12, 2011, 10:06 PM), <http://www.thecitizen.co.tz/news/4-national-news/16057-ngorongoro-residents-nca-at-loggerheads-with-authority.html>.

⁶² UNESCO, THE RIO DECLARATION ON THE ENVIRONMENT AND DEVELOPMENT (1992), http://www.unesco.org/education/information/nfsunesco/pdf/RIO_E.PDF. Principle 10 provides in part that: “Environmental issues are best handled with the participation of all concerned citizens at the relevant level. . .” It also provides that “[a]t the National level, each individual shall have the opportunity to participate in decision making.”

⁶³ See AGENDA 21—UNITED NATIONS ENVIRONMENT PROGRAM, <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=52> (last visited Oct. 10, 2012).

⁶⁴ U.N. Framework Convention on Climate Change art. 6(a)(iii) (1992), available at <http://unfccc.int/resource/docs/convkp/conveng.pdf>.

⁶⁵ U.N. Convention to Combat Desertification, art. 3(a) (1996), available at <http://www.unccd.int/en/about-the-convention/Pages/Text-overview.aspx>.

⁶⁶ U.N. Framework Convention on Climate Change, art. 14(1) (1992), available at <http://www.cbd.int/doc/legal/cbd-en.pdf>.

⁶⁷ See Article 23, Secretariat of the Convention on Biological Diversity, Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Oct. 2000), available at <http://bch.cbd.int/protocol/text/>.

Aarhus Convention.⁶⁸ A committee comprising of both members of the Civil Society and the government, supervises compliance of the Aarhus convention. The African region, on its part, lacks a comprehensive legal instrument embodying environmental rights.⁶⁹

The origin and importance of the right to participation cannot be over emphasized. As an essential component to procedural fairness, the right is linked to the principle of *audi alteram partem* (which means hear both sides).⁷⁰ According to Kravchenko and Bonine, there are two reasons why public participation is particularly important in the African context: the first is the level of poverty and local reliance on the continent's natural resources; the second is that the laws and institutions in many African countries are a reflection of the colonial past, fifty years after independence.⁷¹

The Constitution of the United Republic of Tanzania contains provisions that can be construed as imposing a duty to members of the public to protect the countries natural resources.⁷² The Environmental Management Act⁷³ in addition, provides that citizens shall be availed of timely information prior to the making of an environmental related decision as well as the opportunity to participate. Accordingly, both the Constitution and the Environmental Management Act recognize the importance of public participation in the management of natural resource.

The experience in Ngorongoro however, attests to the opposite. The law technically excludes Maasai pastoralists from appointment to decision making organs. The main decision making organ of the Ngorongoro Conservation Area Authority is the Board of Directors. The President of Tanzania appoints the chairperson of the board to preside over board meetings⁷⁴ as well as the secretary to the board of directors⁷⁵ who is also the chief executive Officer or conservator of

⁶⁸ For a detailed discussion on this, see SVITLANA KRAVCHENKO & JOHN E. BONINE, HUMAN RIGHTS AND THE ENVIRONMENT 266–310 (2008).

⁶⁹ *Id.* at 297.

⁷⁰ Elifuraha Laltaika, *Public Participation and the Establishment of Protected Areas: The Tanzania Experience*, 1 IJTLS 62 (2009).

⁷¹ See KRAVCHENKO & BONINE, *supra* note 68.

⁷² See Articles 18(2); 20(1); and 27(2) of the Constitution of the United Republic of Tanzania, 1977 (as amended from time to time), available at <http://www.judiciary.go.tz/downloads/constitution.pdf>.

⁷³ See Section 178, THE ENVIRONMENTAL MANAGEMENT ACT, Parliament of the United Republic of Tanzania, (2004), available at <http://polis.parliament.go.tz/PAMS/docs/20-2004.pdf>.

⁷⁴ *Id.* at S.2(1)(a).

⁷⁵ *Id.* at S.2(1)(b) of the second schedule.

the Authority. The minister in charge of the management of natural resources appoints six to eleven other members.⁷⁶

The Act does not contain information regarding the procedures to be employed by the minister in making appointments nor does it outline the qualifications and experiences expected of appointees. It only stipulates that the minister must appoint persons who will, in his opinion “perform their functions under the ordinance having regard to the national interest.”⁷⁷

In practice, however, the minister appoints fellow serving members of parliaments in total disregard of the globally accepted constitutional principle of separation of powers and checks and balances. It is the same parliament that is charged with oversight functions on the management and performance of the NCAA. This legal position has seen persistent underrepresentation of Maasai pastoralists save for one or two politicians who are appointed not as a matter of right, but on the basis of the personal whims and discretion of the minister in charge of the management of natural resources.⁷⁸ The enormous powers bestowed the minister in appointing individuals to hold government positions is undoubtedly not an indication of participatory democracy or good governance, but rather a reflection of the partiality, potentials of corruption and exclusionary practices.

In an unexpected turn of events, the ministry in charge of Natural resources and tourism appointed board membership to various institutions under its jurisdiction.⁷⁹ Outcomes of the envisaged processes are not expected to be positive or progressive, primarily because there is no legal basis for which citizens can demand accountability. In addition, no qualifications have been outlined and there is no independent search committee that has been formed to scrutinize applications. This means that the same ministerial preferences will prevail. The most likely interpretation of the call for application is that it is a deliberate move aimed at delaying the repeal the half a century old law, which inhibits public participation. We can look to South Africa's best practices in order obtain light on the level

⁷⁶ *Id.*, at S.2(1)(c).

⁷⁷ *Id.* at S.2(2).

⁷⁸ In the current board, there is only one Maasai pastoralists' representative Mr. Metui ole Shaudo, a politician representing Olbalbal Ward in the Ngorongoro District Council. The Member of Parliament for Ngorongoro was also appointed but his tenure came to a halt allegedly for differing with the minister in charge of Natural Resources.

⁷⁹ Tanzania Ministry for Tourism and Natural Resources, <http://www.tanzania.go.tz/natural.htm> (last visited Aug. 6, 2013).

of transparency and inclusion required in appointing decision makers in natural resources management in Africa.

The National Environmental Management: Protected Areas Act 57 of 2003⁸⁰ provides for both the qualifications as well as the procedure for the appointment of Board members to the Protected Areas.⁸¹ Unlike in Tanzania, members of parliament or provincial legislature are disqualified from appointment.⁸² In regards to the appointment procedure, the minister must release information to the national and provincial media to invite nominations from among members of the public.⁸³

Additionally, the minister must appoint members from the list submitted to him by the general public and only in the case of inadequate nominations can the minister individually appoint a suitable candidate out of a list submitted to him.⁸⁴ Furthermore, the law stresses that the minister's appointments must reflect a broad range of appropriate expertise, while simultaneously taking into account the need for appointing persons disadvantaged by unfair discrimination as a form of affirmative action.⁸⁵

For many years, the Maasai pastoralists in Ngorongoro have demanded legal backing for meaningful representation in the decision making body. The government of Tanzania responded by spearheading the establishment of the Pastoralist Council (PC).⁸⁶ This council is however merely advisory to the board of the Ngorongoro Conservation Area Authority and therefore cannot make any decision without the approval of the board of directors of the Ngorongoro Conservation Area Authority.⁸⁷ Membership to the NCA Board, a decision-making organ, remains to be based on the discretion of the minister in charge of tourism and natural resources.

⁸⁰ NATIONAL ENVIRONMENTAL MANAGEMENT: PROTECTED AREAS ACT, NO. 57 OF 2003, Republic of South Africa, (Feb. 18, 2004), available at <http://www.info.gov.za/view/DownloadFileAction?id=68034>.

⁸¹ *Id.* § 58(1)(a) and (b).

⁸² *Id.* § 58(2)(a) and (b).

⁸³ *Id.* § 59(1)(a).

⁸⁴ *Id.* § 59(3).

⁸⁵ *Id.* §§ 59(4) and (5).

⁸⁶ See NGORONGORO CONSERVATION AREA ORDINANCE (ESTABLISHMENT OF PASTORAL COUNCIL) RULES 2000, Government Notice No. 234 (June 23, 2000), available at <http://faolex.fao.org/docs/pdf/tan22673.pdf>.

⁸⁷ *Id.* at Rule 7.

B. The Wildlife Conservation Act

The Wildlife Conservation Act of 2009 was enacted in order to enable legal environment for conserving, managing, protecting and sustainably utilizing wildlife and wildlife products.⁸⁸ The objectives of this law include putting in place equipment, sufficient personnel and appropriate infrastructure for the protection and conservation of wildlife resources and its habitats in game reserves, wetland reserves, game controlled areas, wildlife management areas, dispersal areas, migratory route corridors, buffer zone and all animals found in areas adjacent to these areas.⁸⁹

Unlike the Ngorongoro Conservation Area Act discussed above, this law was enacted at the time when the need for human rights based approaches to environmental conservation had gained prominence in international discussions.⁹⁰ This fact notwithstanding, the law undermines pastoralists' right to land and natural resources when it comes to the management of Game Controlled Areas hence leading to the abridgement of a wide range of other rights as discussed below.

1. The Right to Housing: Eviction

The Committee on Economic Social and Cultural Rights (CESCR) in its General Recommendation No. 4 (1991),⁹¹ made it clear that "the degree of security of tenure that guarantees legal protection against forced eviction,⁹² harassment, and other threats is necessary for all persons to possess."⁹³ However, the Wildlife Conservation Act,

⁸⁸ Wildlife Conservation Act (Act No. 5/2009) (Tanz.).

⁸⁹ *Id.* § 5.

⁹⁰ According to Kravchenko and Bonine, the turning point was the first earth day in April 1970, followed by the Stockholm Declaration. See KRAVCHENKO & BONINE, *supra* note 68, at 3.

⁹¹ U.N. Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, E/1992/23 (Dec. 13, 1991), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G99/420/12/PDF/G9942012.pdf>.

⁹² Forced Eviction is defined as "the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection." *Id.* ¶ 3.

⁹³ Report of the Committee on Economic Social and Cultural Rights on the Work of its Sixth Session, E/1992/23, *supra* note 91, ¶ 8(a).

referred to above, puts pastoralists below the threshold of the degree of security proposed by the CESC. ⁹⁴

The relevant provision provides that, “[a]ny person shall not, save with the written permission of the Director [of wildlife] previously sought and obtained, graze any livestock in any game controlled area.”⁹⁵ This provision disregards the fact that Game Controlled areas are homes to Maasai pastoralists who have freely grazed their livestock for centuries; so prohibiting livestock grazing effectively proscribes Maasai of their right to sustain themselves by means of a pastoral livelihood. Despite falling within the category of protected area, previous laws regarding these game controlled areas did not interfere with the pastoralists’ right to their ancestral land. Rather, they enabled pastoralists to remain in these areas in legally recognized village lands alongside wildlife. In response to the reality of such co-existence, the Division of Wildlife initiated a scheme called Wildlife Management Areas (WMA).⁹⁶ Although this program has since been marked by a lot of pitfalls since its initiation,⁹⁷ it began as a rhetorically important measure that entailed a land use plan aimed at involving the local community in the conservation of wildlife in their respective Village Lands.⁹⁸

Therefore, in order for this new law to be fully implemented the Maasai pastoralists must be evicted and barred from continued use and occupation of their ancestral land.⁹⁹ In the alternative, the government can deregister pastoralists’ lands from the list of Game Controlled Areas. Advocates for pastoralists’ land rights speculate that the government is more likely to implement the second alternative, of course after excising strategic areas that may contain important natural resources that support pastoralism such as seasonal pasturelands, salt lick, and water sources.¹⁰⁰ This speculation is based on the experience of the government’s decision in 2009 to forcefully

⁹⁴ *Supra* note 88.

⁹⁵ Wildlife Conservation Act, § 21(1) (2009), available at <http://polis.parliament.go.tz/PAMS/docs/5-2009.pdf>.

⁹⁶ See Francis Stolla, *Wildlife Management Areas: A legal Analysis*, TNRF OCCASIONAL PAPERS NO. 5, available at http://www.tnrf.org/files/E-TNRF_OCCASIONAL_PAPER_No_5_0.pdf.

⁹⁷ *Id.*

⁹⁸ The new law contains WMA provisions under §§ 31 to 33.

⁹⁹ See Elifuraha Laltaika, *Tanzania*, in IWGIA—THE INDIGENOUS WORLD 423 (2011), available at http://www.iwgia.org/images/stories/sections/regions/africa/documents/IW2011/tanzania_the_indigenous_world-2011.pdf.

¹⁰⁰ *Id.*

and unlawfully evicts pastoralists from parts of the Loliondo Game Controlled Area.¹⁰¹

It is therefore obvious that even prior to the implementation of any of the two alternatives above, the Maasai pastoralists are subjected to lack of security of land tenure and constant fear of eviction and as a result viability of their livelihood is threatened.¹⁰² This constant fear of a possible eviction has interventions by international actors.¹⁰³ By preventing pastoralists from grazing livestock, in their ancestral land, the provisions of the new law also stand contrary to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)¹⁰⁴ and the International Covenant on Civil and Political Rights (ICCPR), which provides in part that “by no means may a people be deprived of its own means of subsistence.”¹⁰⁵

2. *The Right to Participation*

In relation to the discussion above on Ngorongoro, it is clear that representation in government decision-making is key to any hope of meaningfully progress involving low-income communities.¹⁰⁶ In the case of the Wildlife Conservation Act, however, Maasai pastoralists have not realized their right to participate in the decision-making processes, despite the fact that this Act immediately and directly affects Maasai livelihoods. As reflected in the procedures for appointing members, this Wildlife Conservation Act limits the appointment of a representative from the pastoralists.

The decision-making body is called the Board of Trustees of the Wildlife Protection Fund (BTWPF), and it has the authority to

¹⁰¹ Laltaika, *supra* note 99.

¹⁰² A.Z. Mattee & M. Shem, *Ambivalence and Contradictions: A Review of the Policy Environment in Tanzania in Relation to Pastoralism*, in INTERNATIONAL INSTITUTE FOR ENVIRONMENT AND DEVELOPMENT, Issue Paper no. 140, (2006), available at <http://pubs.iied.org/pdfs/12527IIED.pdf>.

¹⁰³ This has led to an online campaign against any possible eviction with a petition addressed to the President of the United Republic of Tanzania. See http://avaaz.org/en/save_the_maasai/?slideshow.

¹⁰⁴ Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295, at 5 (Oct. 2, 2007). Tanzania Voted in favor of it when it was passed at the UN General Assembly. The relevant provision of the Wildlife Conservation Act provides that “Any person shall not, save with written permission of the director previously sought and obtained graze any livestock in any game Controlled Area, *supra* note 95.

¹⁰⁵ Article 1(3) of the ICCPR.

¹⁰⁶ LeRoy C. Paddock, *The Role of Public Engagement in Achieving Environmental Justice*, in POVERTY ALLEVIATION AND ENVIRONMENTAL LAW 131 (Yves Le Bouthillier et al. eds., 2012).

purchase or alienate movable and immovable property (i.e., land).¹⁰⁷ The BTWPF also manages the Wildlife Protection Fund, whose functions include “the development of communities living adjacent to the Wildlife Protected Areas.”¹⁰⁸

Eligibility for appointment to the BTWPF as provided by the law narrows the chances for both members of the Maasai pastoralists as well as Non-Governmental Organizations (NGOs), hence making it less inclusive contrary to the principles of governance and democracy. While the President appoints a person with proven experience in public service, the chairperson to the BTWPF,¹⁰⁹ six other members of the BTWPF are also appointees of the president (or their nominees) by virtue of their positions.¹¹⁰

The minister in charge of wildlife conservation appoints the remaining two members but experience has shown that the minister appoints fellow politicians, mostly members of parliament or retired army officers. In view of the above and given the enormous powers of both the minister¹¹¹ and the BTWPF, it is clear that pastoralists deserve more meaningful involvement.

CONCLUSION AND RECOMMENDATIONS

This article has shown that laws of Tanzania relating to wildlife conservation interfere with pastoralists’ right to land and natural resources. As a result, pastoralists find themselves at the receiving end of human right violations as demonstrated by both substantive as well as procedural rights discussed above. It is therefore recommended that Tanzania do away with all provisions that prohibit pastoralists’ continued access and use of their land. Instead, legislation should embrace co management of protected areas by empowering villagers and village authorities to sustainably manage wildlife in their respective village lands.

For Ngorongoro in particular, Tanzania can use international arguments on REDD+ (Reducing Emissions from Deforestation and Forest Degradation in Developing Countries) incentives to do the same locally. Conceptually, REDD+ is based on the need to order to

¹⁰⁷ Wildlife Conservation Act, 2009, *supra* note 95, § 92(2).

¹⁰⁸ Wildlife Conservation Act, 2009, *supra* note 95, § 91(2).

¹⁰⁹ Wildlife Conservation Act, 2009, *supra* note 95, § 92(3)(a).

¹¹⁰ Wildlife Conservation Act, 2009, *supra* note 95, § 92(3)(b)–(g).

¹¹¹ The new law retains the power of the minister in charge of Wildlife and Natural Resources Management to declare any part of Tanzania to be a Game Controlled Area. *See* Wildlife Conservation Act, 2009, *supra* note 95, § 16.

reduce the impacts of climate change by providing incentives to developing countries that opt to avoid destroying their forests by converting them into farmlands. In other words, REDD+ is based on financing “avoided development opportunities.” Similarly, pastoralists in Ngorongoro have “avoided” a lot of development opportunities that the ancestral land could provide and therefore do not deserve starvation. Instead, their right to land and natural resources should be realized and respected.

