



KENYA

Unrepresented Nations and Peoples Organization (UNPO)

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The Unrepresented Nations and Peoples Organization (UNPO) is an international, nonviolent, and democratic membership organisation. Its members are indigenous peoples, minorities, and unrecognised or occupied territories who aim to protect and promote their human and cultural rights and to find nonviolent solutions to conflicts which affect them.

Key Words: Maasai, Constitution of Kenya, minority rights, indigenous rights, political participation, land ownership, gender based discrimination, security, poverty, social services.

A. Introduction

The lack of an accurate census disaggregated by ethnicity makes it difficult to account for the number of Maasai, but estimates suggest they constitute about 1.2% of Kenya's population (total 36.9 million).¹ The Maasai located in Kenya are represented at the UNPO by three organisations: The **Maasai Women for Education and Economic Development (MAWEED)**, a community based organisation who campaign for the rights of Maasai women and the educational rights of youth. The **Mainyoito Pastoralist Integrated Development Organisation (MPIDO)**, is aimed at securing land rights, stimulating community development and responding to food insecurity in Kajiado District. The **Kitengela Iparakuo Land Owners Association (KILA)** acts as a focal point for stakeholders concerning wildlife lands in the region of Kitengela.

B. Kenya's Normative and Institutional Framework and International Obligations

The current Constitution of Kenya (1963) does not adequately represent the rights of minority populations. The emphasis on individual rights in the legal framework under Chapter V's 'Protection of Fundamental Rights and Freedoms of the *Individual*' neglects to acknowledge collective rights of a group. This is particularly important when considering that the Maasai identify themselves by community values and solidarity as well as the fact that claims of groups in reference to land and natural resources cannot be easily divided.

Kenya has undergone a process of addressing constitutional reform and in 2003, the Bomas draft offered a promising opportunity for marginalised communities.² However, revisions of the draft resulting in the current Constitution diluted the ability of the Maasai to claim their rights, operate control over their land and participate in public affairs. While 'marginalised group or community' was defined in Article 306 of the Bomas draft; the current constitution does not employ these specific terms. Although the Constitution prohibits discrimination against minorities,³ in contrast UNPO believes that the constitution is inherently discriminatory towards minority groups by failing to specify their unique needs.

UNPO is concerned by Kenya's non-ratification of ILO Convention 169 concerning Indigenous and Tribal Communities. Adoption of this convention would not necessarily direct the government's attention to any *special* or extraordinary treatment of the Maasai in virtue of their being indigenous, but would instead encourage the Kenyan government to take seriously the claims perceived as normal to non-indigenous citizens (Article 2.2a). The *UN Declaration on the Rights of Indigenous Peoples* which Kenya abstained from supporting stresses the collective right of groups to maintain their cultural characteristics and identity. Kenya would also benefit minority populations by seeking to support and adhere to this ideal.

¹ Minority Right Group and CEMIRIDE (2005) 'Kenya: Minorities, Indigenous Peoples and Ethnic Diversity' by Maurice Odhiambo Makoloo <http://www.minorityrights.org/download.php?id=147> (accessed 27 October 2009)

² The draft's dedicated section on minorities suggested equitable distribution of resources (distinct from 'even' distribution which would facilitate abuse) and decentralisation of power to include the recognition of group rights.

³ Particularly Chapter V Article 82 concerning protection from discrimination

C. Promotion and Protection of Minority Rights on the Ground

1. Political Participation - Concern about Maasai Representation

The Maasai have no legal recognition and, being numerically small, they are prevented from engaging in political activities at the national or provincial levels, exacerbated by lack of access to training in negotiation skills. Although the 2002 elections sparked hope for the realisation of civil liberties and the ability of minorities to participate in national debate, communities still complain about their ‘invisibility.’

The independence Constitution proposed that the government should be composed of several layers including the national government, eight semi-autonomous regions and representation of local governments, however a number of amendments have since eroded this structure and the resulting top heavy system of government marginalises communities such as the Maasai. Decentralisation of power should be encouraged to utilise local leaders’ knowledge and proximity to local needs to increase the level of collaboration and accountability. In Kenya there is a lack of transitional justice and redress and the only mechanism for enforcement is the Court which is not only arduous and expensive, but more importantly enforces technical criteria that group claims would fail to meet from the outset.

Lack of data disaggregated by ethnicity keeps minority issues hidden and unaddressed. Minority groups are treated in the census as ‘others’ meaning that the government is not in a position to closely analyse the specific needs of crucial data with which to plan the country’s socio-cultural and economic development. There is serious concern that population numbers are miscounted, particularly those groups which are nomadic, which affects the justification of resource allocation.

2. Land Rights and Protection of Property

The most pressing issue facing the Maasai is land ownership, intrinsically linked to their right to movement, residence and protection of property. The semi-nomadic lifestyle of the Maasai is not conducive to the land regime in Kenya which does not recognise communal land tenure.

Ownership –It is estimated that during land allocations in the colonial period, the Maasai lost a third of their territory.⁴ Kenya’s first president, Jomo Kenyatta allocated more favourable shares of land to his own tribe – the Kikuyu. This discriminatory treatment represents a violation of Article 26 of the *International Covenant on Civil and Political Rights* and the *Convention on the Elimination of All Forms of Racial Discrimination* to which Kenya is a party. Since independence in the 1960s, vast areas of Maasailand have been expropriated for private farms, government projects and wildlife parks. The *Kitengela Ilparakuo Land Owners Association* has expressed concern about how new developments, particularly in the rapid growth of Nairobi and the progressive fencing of land has degraded ecosystems and the wildlife which can be supported. As their best grazing and water catchment areas are exploited for other uses, the Maasai are only able to farm on suboptimal sites which present threats to the survival of cattle and crop yields. This has a disproportionate effect on the Maasai as mobility is necessary for regeneration of environment for optimal management of herds. Individual farmers have been known to exploit herders in negotiations.

⁴ International Commission of Jurists, Kenya World Organisation Against Torture Centre for Minority Rights Development (2008) ‘THE LIE OF THE LAND: Addressing the Economic, Social and Cultural Root Causes of Torture and Other Forms of Violence in Kenya’
http://www.omct.org/pdf/ESCR/2008/CESCR_kenya_OMCT_alt_report.pdf?PHPSESSID=ca2bdac4033a408154b947fcd850ed6e (accessed 27/10/09)

The Parliament in Kenya has enormous autonomy to pass laws and convert land from private to public and create or abolish districts with little consultation. The Maasai face systemic marginalisation in national planning processes and are not consulted on major land use policy, such as the implications of the Mara National Reserve on their livelihoods and have weak powers to prevent degradation of their land, traditional forests and natural resources.

There is evidence that Kenya has breached Constitution Article 70 which promises ‘*protection from deprivation of property without compensation*’ and Kenya’s *Wildlife Conservation and Management Act* (1976 cap 376) pertaining to management of wildlife for the benefit of the inhabitants of Kenya. Article 75 of the Kenyan Constitution provides protective provisions against compulsory possession or acquisition of private property, but lists vague exceptions which could be employed to justify the expropriation of land for a variety of reasons not in keeping with international commitments which prohibit property from being ‘arbitrarily deprived.’ Maasai land in Narok, Transmara, Kajiado, Samburu and Baringo has been turned into conservation areas; however the Maasai do not benefit from an equitable return from the exploitation of their land. Similarly, the Maasai are not awarded any share in the revenue derived from resources, tourism and enterprise in the Maasai Mara. The Maasai deserve an equal share of the benefits from extracting of soda from the Magadi deposits exploitation of Gypsum in Kajiado and extractions of timber used for charcoal from the Mau forest. They demand compensation for the secondary effects of environmental degradation caused by the exploitation.

Forced Relocation and Violence- In 2004-6 there were a series of forceful evictions of Maasai from the Mau forest areas where houses schools and health centres were destroyed. Without due legal process or individual notification, title deeds in Mau were cancelled in 2005 and an estimated 10,000 households were evicted.⁵ Police threatened to burn houses down and no resettlement support or compensation was offered. These evictions are in violation of the right to adequate housing article 11(1) *International Covenant on Economic Social and Cultural Rights* and not in keeping with the Committee’s General Comment No. 7.⁶ The Maasai are treated by landowners as ‘trespassers’ or ‘poachers.’ Robert Njoya, a Maasai ranger was shot dead in 2006 while hunting on the Soysambu ranch.

Environmental Degradation- Erosion, soil degradation and access to safe drinking water leave the Maasai with very few alternatives to survive on the land that they have been allotted. Land sales means fences are erected, posing serious challenges to the movement of livestock and wildlife which threatens the survival of the Maasai. For example, an area traditionally belonging to the Sekenani village in the Maasai Mara was apportioned for the construction of a private tourist resort and communities lost access to two major water sources.

Pollution from spraying wheat at large scale farms in Narok threatens grazing lands and water sources with concern about respiratory impact on the community. The Kenya Electricity Generating Company, Olkaria, emits acidic sulphur dioxide also causing air and water pollution. These poisonous fumes are known to kill the *prosopsis plant* which the Maasai use to medicate gastro-intestinal problems. More studies need to be conducted to evaluate the lasting impact of this pollution on the Maasai.

⁵ ‘No where to go-forced evictions in Mau forest Kenya’ May 2007
www.cohre.org/store/attachments/Mau%20Forest%20Evictions%20Report.pdf

⁶ UN Committee on Economic Social and Cultural Rights General Comment 17: evictions can only proceed when fully “justified”, “carried out in strict compliance with the relevant provisions of international human rights law and in accordance with general principles of reasonableness and proportionality” with “appropriate procedural protection and due process.”

Nomadic Practices and Identity –The way in which the Maasai have been forced to change their traditional ways of life is a violation of ICCPR article 27. Governmental land policies disregard cultural mapping and ignore claims to designated sites. The Maasai are trying to gain legal control of the sacred sites⁷ to protect them from commercial exploitation. As representative of *Mainyoito Pastoralist Integrated Development Organisation*, J. Ole Simel explains, ‘it is only ownership of land however tiny that gives a sense of security and independence to indigenous peoples.’⁸

Gender Based Discrimination Regarding Land Inheritance - Despite the fact that article 82 of the Constitution prohibits discrimination; subsection 4 allows exceptions with respect to marriage, divorce and devolution of property on death. Patrilineal systems of land inheritance inhibit a Kenyan woman’s ability to own land and in the case of widowhood or divorce their claims to land or property are futile. Maasai women experience increased risk of poverty and homelessness as a result of this discrimination and today ‘less than 5%’ of property in Kenya is owned by women.⁹ These patriarchal laws are in contradiction to the *Convention on the Elimination of All Forms of Discrimination against Women*, particularly article 15 concerning equality before the law and article 16 pertaining to marriage.

3. Civil and Political Rights – Violence and Lack of Security

The police violently broke up a peaceful demonstration in 2004 where Maasai representatives intended to submit a memorandum seeking compensation for historical injustices to the British High Commission in Nairobi. Demonstrators were severely repressed by police, resulting in the killing of an elder Ntinai Ole Moiyare and seriously injuring four people.¹⁰ Some of the demonstrators have been charged in court accused of participating in an unlawful assembly. A ‘campaign of intimidation’ ensued during 2004-5 and Maasai report of human rights abuses committed by the security forces seeking to stop them from enforcing their demands, for instance there were reports of rape of women and looting in local villages as a result of the security operation.

4. Economic Social and Cultural Rights– Poverty, Employment and Social Services

The Rift Valley Province has one of the highest incidences of poverty and lowest access to social services out of Kenya’s districts-over 60% of the people living in the arid and semi-arid land areas are below the poverty line.¹¹ Not only does the Constitution fail to recognise any economic, social and cultural rights, but the government refuses to recognise traditional indigenous activities such as pastoralism and hunter gatherer systems as a viable livelihood. Poverty forces some Maasai to sell land and enter modern job markets however there is a marked lack of the employment of local people in Maasai areas, particularly in transit facilities and tourist industries where employment is skewed in favour of people from abroad.

Understaffed social and health services are distributed unevenly, leaving groups such as the Maasai particularly inhibited from their access to in virtue of their nomadic live styles. For the Maasai in Laikipia, for instance, the closest hospital is 25km away in Nanyuki. Lack of services disproportionately affects women and children; maternal health care is lacking and

⁷ At *Endoinyo Ormoruwak and Entim e Naimina Enkiyio*

⁸Ole Simel, J. Executive Director Mainyoito Pastoralist Integrated Development Organization ‘The Reality Behind Kenya’s Political Stalemate.’ (2008) <http://mpido.org/reality.html> (accessed 27/10/09)

⁹ The Commonwealth ‘Kenyan judges tackle gender discrimination in land disputes’ 10 June 2009 <http://www.thecommonwealth.org/news/190714/163087/206668/100609judges.htm> (accessed 27 October 2009)

¹⁰Time “The Land Is Ours” 19 September 2004 <http://www.time.com/time/magazine/article/0,9171,699336,00.html>

¹¹ Report of the Special Rapporteur – ‘Situation of human rights and fundamental freedoms of indigenous people’ UN Doc A/HRC/4/32/Add.3 26/02/07

infant mortality is high. Of particular concern is access to HIV services given the estimates that 30% of Maasai are now living with HIV, about four times the rate for the general population¹² although this figure should be consulted with caution. Being Nilotic-speaking peoples, the Maasai's Maa language carries minority status in Kenya. Primary education is taught in Kiswahili and there is a marked lack of Maa teachers. Community members from Laikipia estimate that the teacher-pupil ratio is currently 1:90. The literacy levels for Maasai in Kajiado is 3% compared with a national average of 79.3%.¹³

It is difficult for small communities who are not represented by an MP to have equal access to development resources, such as the Constituency Development Funds (CDF) and the Local Authority Transfer Fund (LATF). In the 2007 budget, Nyeri District, the home town of the President, was allocated Ksh. 780 million against a meagre allocation of 3 million for Kajiado District (Nyeri 3,356 km² and Kajiado: 21,903 km²) The government does not publish full budget breakdowns, meaning minorities are prevented from contributing their perspective and the allocation of funds is not transparent.

D Recommendations

On Constitutional and Legal Reform

- Constitutional reform to promote group rights and adopt policy which furthers the political recognition and participation of unrepresented groups such as the Maasai. Reviving sections from the Bomas draft on the land rights of pastoralists retaining important provisions to recognise and support minorities and indigenous peoples.
- Developing the legislative framework to secure the rights of minorities: to recognise pastoralism as a legitimate land use production system, to support traditional socio-economic activities and to promote stronger guarantees against land dispossession.
- The signing of ILO Convention 169 and measures taken to promote its efficacy in supporting indigenous rights, and be trickled into domestic law.
- An inquiry into episodes of grievances over land and seeking redress and compensation for victims of historical injustices. The follow up on 2008 commitments to the establishment of a Truth and Reconciliation Body.

On Political Participation and Consultation

- The monitoring of minority groups' activities to ensure collaboration with the government. Ensuring the next census is disaggregated by ethnicity to build a better picture of the composition of the Kenyan population and tailor policy according to specific groups' needs. Adopting an inclusive national strategy for the treatment of minorities including a consultative process on major decisions affecting the Maasai, particularly in land use policy and management. Initiation of projects to protect traditional languages and celebrate identity.

On Land and Environmental Rights and Poverty Alleviation

- The employment of measures to restore the environment. Monitor activities such as tourism to mitigate their environmental impact and ensure their sustainability. Working more closely with local NGOs to ensure development projects are both equitable and effective. The introduction of punishment for significant polluters.
- Publication of data on budget allocation to promote transparency and combat accusations of discriminatory fund allocations. Taking affirmative action to develop policies to initiate a poverty reduction strategy. Offering of incentives to employ local people.

¹² Minority Right Group and CEMIRIDE (2005) 'Kenya: Minorities, Indigenous Peoples and Ethnic Diversity' by Maurice Odhiambo Makoloo <http://www.minorityrights.org/download.php?id=147> (accessed 27 October 2009)

¹³ Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people UN Doc 26 February 2007 A/HRC/4/32/Add.3