

**Observations on the State of Indigenous Human Rights in Light of the
UN Declaration on the
Rights of Indigenous Peoples
Kenya
Prepared for
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CULTURAL SURVIVAL

Cultural Survival is an international Indigenous rights organization with a global Indigenous leadership and consultative status with ECOSOC. Cultural Survival is located in Cambridge, Massachusetts, and is registered as a 501(c)(3) non-profit organization in the United States. Cultural Survival monitors the protection of indigenous peoples' rights in countries throughout the world and publishes its findings in its magazine, the Cultural Survival Quarterly; and on its website: www.cs.org

In preparing this report, Cultural Survival collaborated with Maa Civil Society Forum, Indigenous Concerns Resource Center, and with a broad range of Indigenous and human rights organizations, advocates, and other sources of verifiable information on Kenya.

Executive Summary

The Maa Civil Society Forum, Indigenous Concerns Resource Centre, and Cultural Survival welcome the opportunity to contribute to the Human Rights Council's Universal Periodic Review (UPR) of Kenya. In the March 2013 Mid-term Implementation Assessment of Kenya, numerous States addressed the country's lack of recognition and protection of Indigenous peoples rights. Several recommendations raised by member States in the 2010 UPR to date have not been implemented. Physical security of Indigenous communities, the respect of Free, Prior and Informed Consent, and land rights issues remain a major source of conflict and concern.

Introduction and Background

"In Kenya, the peoples who identify with the indigenous movement are mainly pastoralists and hunter-gatherers, as well as some fisher peoples and small farming communities. Pastoralists are estimated to comprise 25% of the national population, while the largest individual community of hunter-gatherers numbers approximately 79,000...They all face land and resource tenure insecurity, poor service delivery, poor political representation, discrimination and exclusion. Their situation seems to get worse each year, with increasing competition for resources in their areas."¹

To date, Kenya has passed no specific legislation on Indigenous Peoples and has yet to endorse the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and ratify International Labour Organization (ILO) Convention 169. The principle of Free, Prior and Informed Consent (FPIC) remains one that Indigenous Peoples in Kenya are advocating for.

For the Maasai people of the Rift Valley in Kenya, being evicted from their homeland has become all too common. Over the years, the government of Kenya has dispossessed over 4,000 families in the Naivasha region². Without alternative land to settle on or compensation for the losses they incurred during forced evictions, these families' fates are uncertain. In the 1980s, the Maasai were evicted from their land to facilitate the creation of the Hells Gate National Park. Discoveries of massive potential for geothermal energy within the park made their land and homes an international point of interest for both local and international power-generating companies. Kenya Wildlife Services (KWS), which "owns" and manages Hell's Gate Park, leased part of the land to the state-owned Kenya Electricity Generating Company, KenGen, and an independent power producer by the name OrPower to undertake extractive processes for the generation of geothermal energy. Now the Maasai, who are sandwiched between Mt. Longonot, Hells Gate Park, and Lake Naivasha, are being forced

¹Jensen, Marianne W., and Geneviève Rose. "Kenya." *The Indigenous World 2013* (2013): 370.

² Koissaba, Ben Ole. "Forceful Evictions of Maasai a Recipe for Tribal Clashes in Kenya." IC Magazine, 29 July 2013. Web. 13 June 2014.

out again. The Olkaria geothermal plant, funded by the World Bank and its affiliate banking institutions³, and supported by the UN Environmental Program, is in its fourth phase of the development. With each new phase, the Maasai have been evicted from their homes—without their Free, Prior and Informed Consent. To date, the Maasai have received no compensation for the devastating loss of their land, livelihoods, and cultural heritage.

THREATS TO PHYSICAL SECURITY VIOLENCE

On July 26, 2013 hundreds of mercenaries hired by KenGen in collaboration with the provincial administration, accompanied by armed police officers, stormed a Maasai settlement in Narasha, Navaisha and burned over 61 homesteads. During the raids, 500 lambs, 200 calves and food storages were burnt. 2 men were shot and wounded and had to receive hospital treatment.⁴ Over 2000 people were left homeless. Narasha has been home for the Maasai but a land deal perpetrated by the former government regime has perpetually been bent on taking their land and evicting them. The land in question was sold to KenGen for the production of geothermal power with funding from the World Bank.

RIGHTS TO LAND AND RESOURCES

The Maasai seek compensation for past evictions, and assurance against potential future evictions, by provision of alternative land. Evictions for the next stage of geothermal development would displace over 3,500 families, removing them from the communities' two churches and Maasai cultural center, and would take over 1,000 children out of school in Narasha and Olomayiana.

The World Bank reports that it has invested \$409 million in geothermal development since 2007; in 2013 it announced plans to raise another \$500 million for geothermal projects in the Rift Valley and other parts of the world.⁵ None of this budget has been allocated to fairly compensate the Maasai community, whose land has been usurped to make room for the projects. The evictions violate international human rights law, including the UN Declaration on the Rights of Indigenous Peoples, ILO Convention 169, and the African Charter on Human and Peoples' Rights.⁶ The Maasai have resorted to the courts to stop further evictions, arguing that

³ Mwangi, Martin N. "Environmental and Socio-Economic Issues of Geothermal Development in Kenya." *GRC Bulletin* (2010): 24-35. Geothermal Resources Council, Mar.-Apr. 2010.

⁴ Koissaba, Ben Ole. "President Uhuru and Vice-President Ruto Forestall Escalation of Maasai/Kikuyu Conflict in Kenya." *Cultural Survival*. Cultural Survival, 2 Aug. 2013. Web. 13 June 2014.

⁵ See World Bank response to community Maasai complaints dated 3/12/2009

⁶ Anaya, James. *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: Extractive Industries and Indigenous Peoples*. A/HRC/24/41. United Nations General Assembly, 1 July 2013.

the government of Kenya is in violation of international law by forcibly and continually removing them from their ancestral lands around Mt. Longonot in the Naivasha Administrative Districts and the Narok North Administrative Districts within the Rift Valley Province, without proper prior consultation or adequate compensation.

The area is important to the Maasai both for its history and their dependency on the land for their livelihoods and culture. Mt. Longonot is central to the Maasai religious and traditional practices, and further dispossession will separate the community from historical prayer sites, places of ritual, and other cultural ceremonies⁷s. These sites were used regularly for local ceremonies, and annually for cultural festivities involving Maasai from the whole region.

Furthermore, geothermal resources in Olkaria have been exploited with no regard for the health or environment of the local communities. Despite being touted as a green energy, KenGen's Environmental and Social Impact Assessment shows that geothermal power plants release certain pollutants into the environment including noise pollution, hydrogen sulphide gas, and trace metals like boron, arsenic, and mercury. Toxic wastes from the power station in Naivasha have been emitted into the air and disposed in local waterways in violation of applicable international environmental standards.

Despite these hazards, KenGen failed to conduct adequate consultation with the local community, which first expressed its dismay at the assessment in 2012.⁸ The Maasai have not been able to raise money to conduct an independent study on the harmful effects of the plant, but have noted increase of gastronomic and skin diseases, stillbirths in cattle, premature death of livestock, and increased rate of premature delivery in pregnant women. The company's environmental impact assessment notes potential health risks associated with the plant and recommends safe distances in the Narok district. However, since there was no effective consultation with community members, people were never informed of these health risks.

Outside of the Narasha area, Maasai pastoralists in Kedong, Akira and Suswa are glaring at massive evictions arising from a group of concessions awarded to several companies including Hyundai, Toshiba, Sinopec and African Geothermal International (AGIL) for the purposes of developing geothermal projects on the Maasai lands.

According to the local communities--who claim ancestry to the land and have filed cases in Kenyan courts-- African Geothermal International (AGIL) and Marine Power along with Akira I and Akira II have disregarded court injunctions instituted by the Maasai, proceeding to deploy their heavy machinery to their proposed project sites without due diligence or consultations

⁷ See World Bank response to complaints lodged by Olorkarian Maasai Cultural Center dated March 26th 2012

⁸ See Marine Power ESIA 2012

with the local communities. The concession areas, which cover hundreds of thousands of acres, are home to thousands of Maasai pastoralists.

The communities feel that their rights have been grossly violated because each of the companies have failed to adhere to the Maasai Bio-cultural Community Protocol, which was developed in line with the UNEP model and based on the Convention on Biological Diversity, that require all external actors to respect Indigenous Peoples' customary laws, values and decision making processes; particularly those concerning stewardship of their territories and lands⁹.

The companies have also disregarded a current dispute between Kedong Ranch Ltd and the Maasai community along with key provisions from the Constitution of Kenya (2010). Article 40 of the Constitution provides for the protection of the right to property (of any kind) without discrimination and just, prompt and full compensation where acquisition is of national interest. The right to a clean and healthy environment is equally guaranteed under Article 42 in addition to the right to a cultural heritage.

While the Maasai are not against infrastructure development for the country, they are equally distressed over the companies' similar dismissal of the principle of Free, Prior and Informed Consent (FPIC) as enshrined in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). By forcefully evicting the Maasai from their land while denying them the opportunity to participate in and benefit from the development projects, the companies are also in contravention of the Nagoya Protocol on Access and Benefit Sharing.

On top of these concerns, the Maasai decry the use of armed police to enforce the evictions, the destruction of their property, and the outright dispossession of their grazing land which is the only source of their livelihoods.

Follow up to 2010 UPR Recommendations

Recommendation n°35: Ensure that public policies for combating poverty are in accordance with the rights recognized in the International Covenant on Economic, Social and Cultural Rights and that they are not negatively affected by commitments that might be undertaken in the context of trade and investment agreements (Recommended by Bolivia).

Kenya has ratified the ICESCR and is therefore bound to its articles. In this regard, Kenya should recognize the indigenous pastoralist tribes' right to free, prior and informed consent regarding any infrastructure or development project that would affect their lands, natural resources, property, cultural expression, and sacred sites; as well as require all development projects,

⁹ See letter from Nature Kenya on the violation of social and nature safeguards

including the road construction, oil and geothermal exploration and exploitation, and tourism development projects underway or planned meet the highest international standards and best practices in regard to their environmental and social impacts.

Recommendation n°64: Better educate security and law enforcement authorities at all levels about the basic rights of the citizens, take each reported case seriously and impartially investigate and punish those found guilty of such actions (Recommended by Finland).

Recommendation n°24: Take effective measures against police violence, in particular by ensuring comprehensive investigations and the prosecution of alleged offenders within the police and security forces (Recommended by Austria)

The National Police Service is established by the National Police Service Act of 2011. The Service holds a constitutional duty to train its staff to respect human rights, fundamental freedoms and dignity of the human person. The Police must comply with constitutional standards of human rights and fundamental freedoms. National trainings should take place for all police officers, judges, prison guards and other enforcement officers, especially those working in districts populated by indigenous and other marginalized minorities. Investigations need to take place into the police violence against the Samburu and Maasai people, and those responsible for the extrajudicial killings need to be punished.

Recommendation n°100: Follow up on the recommendations made by the Representative of the Secretary-General on the human rights of internally displaced persons, particularly those relating to the need to adopt measures for reconciliation and to implement a comprehensive strategy for the internally displaced (Recommended by Mexico).

Recommendation n°128: Continue to devote great attention to the situation of the most vulnerable groups (Recommended by Senegal)

Recommendation n°33: Continue to take all efforts necessary to implement the recommendations of United Nations special procedures who have visited the country, and request international assistance to that end, if deemed necessary (Recommended by Bolivia)

Many important recommendations from the Special Rapporteur have not been implemented, such as; constitutionally recognizing indigenous peoples, the creation of effective mechanisms to address historical injustices and settle current land and natural resource disputes resulting from dispossession of lands traditionally owned by pastoralists and hunter-gatherers, the Government should adopt the current draft ASAL policy and fully implement it with the participation of pastoralist communities.

Recommendations

We respectfully request that the UPR Working Group and the Human Rights Council pressure the Government of Kenya to comply with the following actions:

- That the government of Kenya endorse the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and ratify International Labour Organization (ILO) Convention 169.
- That the government of Kenya recognize Indigenous Peoples in the national constitution.
- That the government should stop operating with impunity and in disregard of the law and contrary to the provisions of the Kenyan constitution and other International human and people's rights instruments
- That the current deployment of armed police to enforce the evictions of Maasai communities be stopped immediately.
- That the companies mentioned be held in contempt for disregarding court orders.
- That plans for compensation be put in place, including a clear and documented plan on access to benefit sharing be put in place to ensure the affected families' livelihoods are sustained.
- That the following international donors and companies be held accountable for losses suffered by the Maasai and demand that they put in place safeguards and develop consultative and inclusive forum with the Indigenous inhabitants of the land:

Sinopec-China
KEC-India
Hyundai-South Korea
Toshiba, Toyota, Tsusho, and JICA-Japan
AGIL
Marine Power

- That other bilateral donors that support the projects being undertaken hold consultative meetings with the Maasai community before any further investments are made.
- That the current ESIA reports which excluded livestock, homes and cultural rights should not be used and instead a team that includes Indigenous People be reconstituted to undertake another Environmental and Social Impact Assessment.

- That the selective and non-consultative process of compensation process that is currently being used by KenGen should be transparent and that all deserving community members be treated equally and in consultation on the Identification of suitability of alternative resettlements to their pastoralist life