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## Environment or (Collective) Human Rights: What Is More Important? A Critical Perspective on the Implementation of the Joint UNESCO/ICOMOS/IUCN Recommendation on the Voluntary Relocation of Maasai Residents from the Ngorongoro Conservation Area in Tanzania\*\*\*

- **SUMMARY:** *This article reflects on the ‘Yellowstone model’ of environmental conservation while considering the United Nations Educational, Scientific and Cultural Organization (UNESCO)/ International Council of Monuments and Sites /International Union for Conservation of Nature’s recommendation on the voluntary relocation of Maasai residents from the Ngorongoro Conservation Area (NCA) in Tanzania. While advocating for an inclusive conservation approach, it synthesizes the extent to which the relocation has affected the collective socio-economic and cultural rights of the Maasai in the property. It discusses the concept of Yellowstone conservation model, and subsequently traces the legal background to the existence of the Maasai in the NCA. The NCA’s statuses as a UNESCO heritage site of outstanding universal value, international biosphere reserve, and a global geo-park are also canvassed in the light of multiple-land use model. It further critically discusses the practical impacts of controlling the growing Maasai population at the site through induced voluntary relocation. The authors have drawn lessons from the Inter-American human rights system on the same area of conservation. Ultimately, the article concludes with practical recommendations and proposed issues for further research on this controversial topic.*

- **KEYWORDS:** Collective Human Rights, Environment, Maasai, Ngorongoro Conservation Area, Tanzania, UNESCO/ICOMOS/IUCN Recommendation

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## 1. Introduction

The article deals with a problem that typically arises where the traditional way of human life is closely linked to a particular natural landscape. Under these circumstances, legal positions that do not seem to be contradictory at first glance can indeed collide. On the one hand, there is public interest in the existence and preservation of an endangered ecosystem with its unique flora and fauna untouched by humankind. On the other hand, there is the legally protected interest of an indigenous population in preserving the traditional way of life as a collective. This phenomenon is alien from a European perspective. There is no such thing as collective human rights in the European Convention on Human Rights of 1950 and the European Court of Human Rights is reluctant to recognize such rights.<sup>1</sup> The situation is different in Africa. The African Charter on Human and Peoples' Rights of 1981 (Banjul Charter) explicitly grants such collective rights, which comprise the existence of a people and the right to a satisfactory environment for development. A conflict between these two legal positions can arise if such a group living in a nature reserve grows to such an extent that it jeopardizes the existence of the nature reserve, at least in the form prescribed by law. This is the reality in the Ngorongoro Conservation Area (herein referred to as 'the NCA', 'the site', 'the Area' or 'the property') wherein the Maasai people are faced with the pressure to abandon their ancestral lands for the sake of conserving the NCA, which is one of the mixed world heritage sites designated by the United Nations Educational, Scientific and Cultural Organization (UNESCO). The Maasai ethnicity, some of whom live in the NCA, identifies itself as an 'indigenous community' in the sense of associating itself with the global indigenous peoples' movement. The African Commission on Human and Peoples' Rights (ACHPR) has interpreted the concept 'peoples' under the Banjul Charter to include indigenous peoples<sup>2</sup> who

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1 Kriesel, 2020, pp. 113–184.

2 Application of the term 'indigenous peoples' in an African context attracts a great deal of debate as to whether there is an African who is not indigenous to the continent. However, the African Commission on Human and Peoples' Rights has come up with a more liberal way of approaching the term 'indigenous peoples' from an African perspective. It emphasizes that in defining the term 'indigenous peoples,' 'We should put much less emphasis on the early definitions focusing on aboriginality, as indeed it is difficult and not very constructive (except in certain very clear cut cases like the San of Southern Africa and the pygmies of Central Africa) to debate this in the African context. The focus should be on the more recent approaches focusing on self-definition as indigenous and distinctly different from other groups within a state; on a special attachment to and use of their traditional land whereby their ancestral land and territory has a fundamental importance for their collective physical and cultural survival as peoples; on an experience of subjugation, marginalization, dispossession, exclusion or discrimination because these peoples have different cultures, ways of life or modes of production than the national hegemonic and dominant model.' See African Commission on Human and Peoples' Right (ACHPR) and International Work Group on Indigenous Affairs (IWGIA), 2005, pp. 91–95, especially pp. 92–93.

have the potential to invoke particular rights in their collectivity.<sup>3</sup> The Maasai socio-cultural and economic collective interests in the NCA hang in balance with nature conservation in the property. The Tanzanian government's efforts to relocate them from the property have recently become more pronounced than ever. Many Maasai residents have been moved outside the property by July 2022. This model of nature conservation, which is considered redundant, is famously known as the 'Yellowstone model or syndrome'.<sup>4</sup> It is viewed as redundant for its unrealistic attempt to confine wildlife and humans within certain designated artificial boundaries in protected areas.<sup>5</sup> It is also said to distort the real concept of the world's heritage, as humans are part of nature too. It is alleged to have eroded indigenous peoples' cultural identity, development, and livelihoods by relocating them from their ancestral lands. These parameters are values that are respected under international law. At the same time, the Yellowstone model is defended by another school of thought, which propounds that, if nature conservation is not regulated and supervised, indigenous peoples have the potential to take advantage of natural resources at the expense of their sustainability.<sup>6</sup> Human beings are thus considered to hunt for prey just as it is the case with other terrestrial predators like lions, wolves, and jackals.<sup>7</sup> In addition, human activities, such as burning of natural forests or certain kinds of plants, are said to affect the natural occurrence and association of the flora kingdom.<sup>8</sup> Therefore, preservation, rather than exploitation, has always been the philosophy behind the Yellowstone model of nature conservation.<sup>9</sup>

It is definitely not advisable, presumably even impossible, to discuss the question of environmental conservation in isolation from human or (collective) peoples' rights, or assert that one of them is more important than the other. The two concepts are intertwined<sup>10</sup> without a simple solution being at hand. In this

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3 See the case before the African Commission on Human and Peoples' Rights: Center for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya, Communication No. 276/03, paras. 147–155. Also, see ACHPR and IWGIA, 2005, p. 13.

4 The name 'Yellowstone' comes from one of the world's oldest national parks, the first to be founded in the United States of America in 1872. The establishment and management of this national park became a model for many others that were subsequently inaugurated all over the world including the Serengeti National Park. One of its (famous) *modi operandi* was detaching indigenous peoples from particular 'strict areas of conservation' and confining them into designated areas within or outside the protected areas. This model is condemned for devaluing indigenous peoples' role in nature conservation, hence their marginalization. See Poirier and Ostergren, 2002, pp. 333–334.

5 Poirier and Ostergren, 2002, p. 351.

6 Ibid.

7 Wuerthner, 2015, p. 5.

8 Ibid, p. 4.

9 Ibid, p.2.

10 Mramba argues, 'The efforts to conserve the environment are an appreciation of the relationship between human and the natural system that supports life.' See Mramba, 2020, p. 5.

article, we describe the conflict situation about the presence of the Maasai within the NCA along with its historical and political background. We indicate possible solutions, for which we also take a comparative legal look at Latin America, where similar conflict situations have arisen.

## 2. Background

The Maasai form part of the 120 plus ethnicities in Tanzania.<sup>11</sup> Over the centuries, they have led a traditional life of pastoralism that solely depends on the natural environment for survival. Being a semi-nomadic (transhumance) pastoral community, they habitually shift their livestock in various parts of the country in pursuit of natural rangelands, water resources, and other mineral sources such as saltlicks, which are crucial for the survival of their livestock. Despite the fact that the Maasai are not one of the minority groups in the country,<sup>12</sup> they are one of the vulnerable categories of people in Tanzania due to the rapid increase of threats to the existence of their pastoral livelihood.<sup>13</sup> In some geographical locations, they have faced limitations to sustain their livelihood because of demarcation of their land for infrastructural development, mega-investment projects, large-scale crop cultivation, and establishment of protected areas such as national parks, game reserves and game controlled areas.<sup>14</sup> Given this background, the Maasai have been playing an active role in the ‘indigenous peoples’ movement’ in Africa from the very beginning of such initiative in the continent, including being at the forefront in self-identifying themselves as indigenous peoples.<sup>15</sup> They are one of the five ethnic communities in Tanzania who resonate with this cause, which is of global importance.<sup>16</sup> Despite the aforementioned reasons for dispossession of the Maasai’s rights, which are rather collective as they go down to the root of their collective existence, this article focuses on one specific question of environmental

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11 Maasai are not defined by a formal border between Kenya and Tanzania, but their shared origin, history, culture, traditions, beliefs, interests, and values. Nevertheless, this article refers to the Maasai within the geographical borders of Tanzania.

12 This can be explained by the fact that Maa, which is a language spoken by the Maasai, is one of the top 10 languages spoken in Tanzania. See Ministry of Information, Culture, Arts and Sports, 2015.

13 Dersso elaborates that, despite the fact that indigenous peoples can pursue peoples’ rights as a collective under the African regional human rights system, the ACHPR has not expressly pointed out that these peoples are necessarily the minorities in a particular country. See Dersso, 2006, p. 372.

14 Note that for many years, the Maasai community has lived in areas of abundant wildlife resources. Such locations are primary targets for tourist attractions as well as domestic and international environmental conservation efforts.

15 Ndahinda, 2011, p. 257.

16 Indigenous peoples’ movement seeks to advocate for, promote and protect the rights of indigenous peoples globally.

conservation as a basic ground for relocation of the Maasai from a specific area of conservation in Tanzania, i.e. the NCA.

### 3. Legal history of the existence of the Maasai in NCA

Some of the Maasai peoples were confined to the NCA following the legal establishment of the Serengeti National Park (SNP) as a standalone national park in 1959, upon enactment of the National Parks Ordinance, 1959, and the Ngorongoro Conservation Area Act, 1959. The SNP, which is now the oldest national park in Tanzania, was first established in 1940 to respond to the International Convention Relative to the Preservation of Fauna and Flora in their Natural State, 1933 (also known as the London Convention).<sup>17</sup> The London Convention was signed by colonial powers before the outbreak of WWII. This convention was one of the earliest international conservation agreements involving protection of flora and fauna in the African continent.<sup>18</sup> It introduced the notion of national parks and 'strict game reserve.'<sup>19</sup> Section 3(1) of the convention obliged all contracting colonial governments to immediately explore areas with the potential of being established as national parks and strict nature reserves. The convention played a role in the limitation of human residents and activities in 'protected areas' (specifically in 'strict game reserves') except with the written permission of competent authorities.<sup>20</sup>

Just like Article 6 of the League of Nations' Mandate Agreement of 1922, the British were obliged under Article 8 of the United Nations Trusteeship Agreement for the Territory of Tanganyika of 1946 to respect and safeguard the rights and interests of the present and future native populations, as well as to take into consideration their laws and customs while legislating laws affecting their land and

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17 Shivji and Kapinga, 1998, p. 7.

18 The London Convention of 1933 was however preceded by the Convention for the Preservation of Wild Animals, Birds and Fish in Africa (the London Convention of 1900). Despite the fact that, the convention never entered into force, it was a pioneering agreement ever signed by the colonial powers with intentions of conserving nature in Africa.

19 Nevertheless, the Germans had remotely begun the practice of Game administration in Tanzania as far back as 1908 through the German Game Ordinance of 1908. Specific to NCA, in 1914 the current northern highland forest reserve of the NCA was accorded a conservation status to protect the watershed. The British colonial government, which took over this German colony as a mandate territory, continued the conservation practice through the Game Preservation Proclamation No. 4 of 1920. For instance, the Ngorongoro Crater which is within the current NCA was gazetted by the British colonial administration as a closed game reserve in 1928 whereby, unlicensed hunting and crop cultivation was prohibited therein, but human settlement according to customary law was allowed. However, these conservation schemes had no connection with international commitment to wildlife conservation. See Mchome, 2001, p. 120. Also, see Ministry of Natural Resources and Tourism, 2019, p. 1.

20 S. 2(1) and (2) of the London Convention, 1933.

other natural resources. Hence, it was not by accident that the relocation of the Maasai from SNP to the NCA was legally formalized. This was done after a series of consultations with the Maasai residents in the then SNP through a designated committee of inquiry known as the Nihill Committee to decide the demarcation of SNP and fate of the Maasai residents. When the proposed artificial boundaries of the SNP contained in British Government Seasonal Paper No. 1 of 1956 were initially communicated to the Maasai, the possibility of a revolt became obvious.<sup>21</sup> Generally, the Maasai did not heed the new conservation regime that had been imposed on their homeland, as they considered their interests disregarded. Their resistance involved various disruptions such as vandalism and setting some areas of SNP on fire.<sup>22</sup>

In order to come up with a long-term solution to this, the Nihill Committee Report proposed the division of the park into two; that is, the SNP and NCA, whereby the rights of the Maasai would be reconciled through the scheme of multiple land uses,<sup>23</sup> in compensation for the provision of social services like water for them and their livestock. Additionally, it was recommended that the traditional lifestyle of the Maasai in the NCA should be maintained. This recommendation was implemented in terms of the ‘solemn pledge’<sup>24</sup> by the then-British government in exchange of the Maasai’s voluntary relinquishment of all of their rights in the now SNP<sup>25</sup> and relocation to the NCA.<sup>26</sup> Thus, it can be argued that, the question of negotiating with native communities before acquiring their customary land rights in lieu of the creation of these protected areas was not completely omitted in this case.<sup>27</sup> However, Lissu argues that the British colonial administration presented

21 The Maasai had already been relocated from their ‘ancestral’ lands in Kenya by the British colonial government through the ‘tacit’ agreements of the year 1904 and 1911 (famously known as the Maasai Accords) which had tragic consequences. Hence, it was already in their consciousness to approach such identical case with great caution and self-defense. For an extensive discussion of the 1904 and 1911 Maasai Accords, and their aftermath in courts of justice see Kabourou, 1998, pp. 1–20.

22 Ministry of Natural Resources and Tourism, 2019, p. 1.

23 The Eastern part of the SNP was demarcated as NCA. This area became the earliest protected area in the country and beyond to ever practice multiple land use in terms of mixed wild and human life governed by the rules of conservation.

24 The solemn pledge to specifically preserve and protect the rights of indigenous Maasai inhabitants in the SNP as it was about to face re-definition of boundaries was made by the British government through the governor as he did the opening of the 34th Session of the colonial Legislative Council in 14 October 1958. The governor reiterated this pledge in his speech to the Maasai Federal Council in August 1959, which was the year when the NCA was legally established. See Shivji and Kapinga, 1998, pp. 9–10.

25 National Parks Ordinance, 1959 that re-established the SNP came in with strict restrictions on human activities in national parks. This left no room for the Maasai residence and activities therein anymore.

26 Shivji and Kapinga, *ibid.* It is never the less argued by Lissu that, Nihill’s Committee was subject to and influenced by the international standards of wildlife conservation, not the pre-existing indigenous knowledge that had subsisted in the area for centuries.

27 S. 5 of the Game Ordinance, 1940. See Mchome, 2001, p. 123.

the agreement it had with the Maasai in Serengeti as a ‘compromise,’ while in reality the same was a compulsion on the Maasai, and the residents who inhabited the western part of Serengeti. He argues that such compulsion was done for the interests of the international conservational image and those of the colonial administration. He presents his empirical findings that the Maasai in Serengeti were faced with only two options in the said ‘comprise,’ that is, to either sign the agreement to surrender their customary land rights or be forcefully evicted.<sup>28</sup>

#### 4. Ngorongoro Conservation Area Act and Authority

Post-independence, the 1959 NCA Ordinance was revised in 1975 through the Game Parks Laws (Miscellaneous Amendments) Act, Act No. 14 of 1975, and the Ngorongoro Conservation Area Authority (NCAA) was established as an autonomous organization whose management and functions were vested in the Board of Directors.<sup>29</sup> The established authority was bestowed with the responsibilities of conserving and developing natural resources, promoting and providing tourism facilities and protecting the interests of the Maasai community within the NCA.<sup>30</sup> The NCA Act also permitted entry and residence within the NCA to people who owned property or legal land rights in the area. This permit extended to their dependents and family members.<sup>31</sup> However, the NCAA was conferred with powers to limit and control residence in any part of the NCA to any category of residents, while respecting their legal rights.<sup>32</sup> The mandate is still carried out on behalf of the NCAA by the park rangers who conduct periodic patrols in the property. This method of control is associated with the aforementioned Yellowstone model that introduced the ‘militarization style of conservation’ in the country.<sup>33</sup> Despite this condemnation, the NCA Act is in operation in present times.

Since its establishment, the NCAA has made efforts to live up to its obligation to safeguard the interests of the Maasai of Tanzania living within the NCA as charged by the NCA Act. The Authority has a specific community development department that works hand in hand with the established Ngorongoro Pastoral Council (NPC). The NPC is composed of both the local government and Maasai community leaders (Ilaigwanak). This council protects the interests of the Maasai

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28 See Lissu, 2000.

29 S. 4 of the Ngorongoro Conservation Area Act, 1959 read together with s.9 of the Game Parks Laws (Miscellaneous Amendments) Act, Act No. 14 of 1975.

30 S. 6 of the Ngorongoro Conservation Area Act, 1959.

31 S. 21(1), (2) (b) and (d) of the NCA Act.

32 S. 23 of the NCA Act.

33 The Yellowstone Park was run by the United States Army since 1886. In 1918, the park was handed over to the National Park Services, which had been created in the same year. See Oldest Org., ‘10 Oldest National Parks in the World.’ [Online]. Available at: <https://www.oldest.org/geography/national-parks/> (Accessed: 16 December 2022).

community in the property and offers them an inclusive platform in matters related to conservation and development. Through this collaboration, the NCAA has been offering veterinary services to Maasai livestock and has provided them with food supply at affordable prices to supplement their traditional food as cultivation is prohibited within the NCA. The NCAA has also offered education services (from primary to university level) amongst Maasai children living in the NCA, including vocational training programs such as carpentry, tailoring, and tour guiding. In addition, the NCAA offers free health services in the NCA and supports the Maasai community to participate in ecotourism projects, for example, operation of campsites within the Area and display of their culture and daily routines in the designated *bomas*.<sup>34</sup> Finally, the NCAA facilitates income-generation programs such as poultry and beekeeping as well as handicraft training for the Maasai residing in the NCA.<sup>35</sup> Nonetheless, some of these activities that have introduced the Maasai of the NCA to the money economy are not typically in line with their ‘traditional’ life, which ought to be strictly maintained in the property. In order to buy and sell the proceeds of their economic activities, they need markets in and outside the conservation area, hence introduction to and interaction with the mainstream society. The NCAA’s initiatives to support formal education and introduce economic activities to the Maasai have been one of the *bona fide* strategies to convince them to voluntarily relocate from the NCA. Through educational and economic activities, a number of the Maasai have moved out of the conservation area, yet some have maintained their residences therein. The authors observe that this strategy has a possible resultant effect of attracting new residents to the site in the form of dependents and family members acquired outside the site through intermingling.<sup>36</sup>

## 5. NCA: Mixed world heritage of outstanding universal value

The NCA is located in the northern part of Tanzania, in the Ngorongoro division, Ngorongoro district, and Arusha region. It stands in the eastern part of SNP.<sup>37</sup> The site is essentially part of the mega Serengeti-Mara Ecosystem whereby it covers a total of 8,292 km<sup>2</sup> out of the 25,000 km<sup>2</sup> of the said ecosystem.<sup>38</sup> It is a protected

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34 NCAA, ‘Community Services.’[Online]. Available at: <https://www.ncaa.go.tz/pages/community-service> (Accessed: 17 July 2022).

35 NCAA, ‘Economic Empowerment.’ [Online]. Available at: <https://www.ncaa.go.tz/pages/economic-empowerment> (Accessed: 19 July 2022).

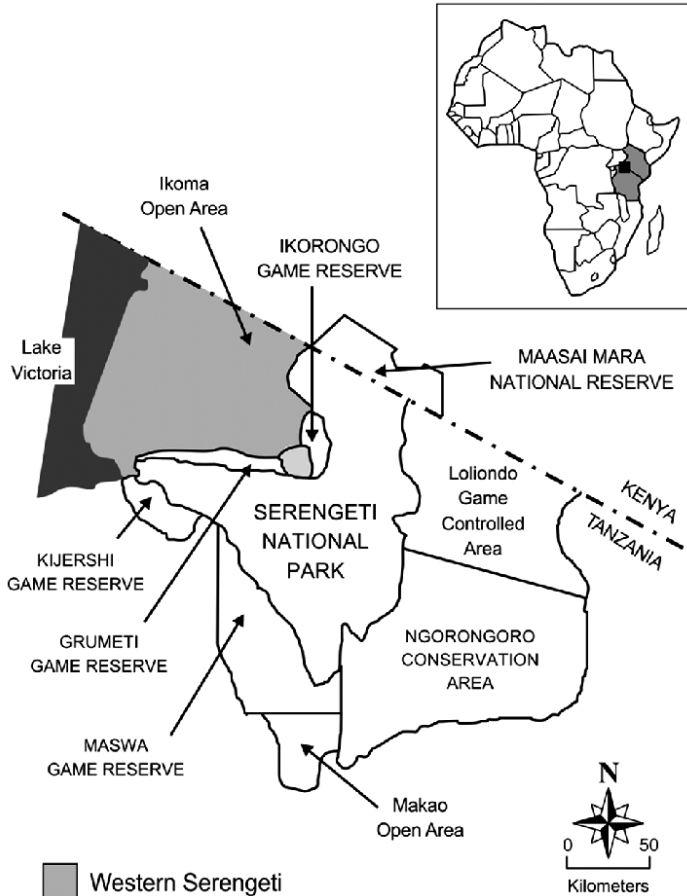
36 For more discussion on in how Maasai intermingle though marriages see Coast, 2006, pp. 1–34.

37 It lays 180 kms from the Arusha City.

38 Ministry of Natural Resources and Tourism, 2019, p. 7.



area and a mixed heritage site bearing both natural and cultural resources of outstanding universal value.<sup>39</sup>



Source: Emerton and Mfunda 1999

Map: Serengeti-Mara Ecosystem indicating the exact location of NCA.

The NCA was accorded the status of the world’s natural heritage site by the World Heritage Committee in its Third Ordinary Session held in Cairo and Luxor in 1979. It later gained its status as an International Biosphere Reserve in 1981.<sup>40</sup> In 2010,

39 See NCAA, ‘NCA History.’[Online]. Available at: <https://www.ncaa.go.tz/pages/ncaa-history> (Accessed: 29 August 2022).

40 According to UNESCO, biosphere reserves are ‘...learning places for sustainable development. They are sites for testing interdisciplinary approaches to understanding and managing changes and interactions between social and ecological systems, including conflict prevention and management of biodiversity. They are places that provide local solutions to global challenges.’ See UNESCO, ‘Biosphere Reserves.’ [Online]. Available at: <https://en.unesco.org/biosphere> (Accessed: 7 August 2022).

the World Heritage Committee in its 34th Session in Brasilia made a decision and inscribed the site as one of the world's cultural heritage sites, making it a mixed world heritage site.<sup>41</sup> The property received another UNESCO recognition on April 17, 2018, as a Global Geopark.<sup>42</sup>

## 6. UNESCO World Heritage Centre's missions and impacts on the management of the NCA

UNESCO strives to maintain peace through international cooperation in education, sciences, and culture.<sup>43</sup> One of its overall missions regarding world heritage is to encourage the identification, preservation, and protection of the cultural and natural heritage of outstanding universal value, given the fact that heritage sites are considered of relevance to the entire humanity irrespective of their geographical location.<sup>44</sup> Within the UNESCO auspices, the World Heritage Centre (WHC) plays the role of the Secretariat to the World Heritage Committee tasked with the implementation of the World Heritage Convention.<sup>45</sup> It has the function of assisting state parties to the convention to apply for international assistance in matters related to conservation of natural or cultural heritage as well as coordinating the reporting processes.<sup>46</sup> The aforementioned committee is sanctioned by the convention to cooperate with other international and national governmental and non-governmental organizations and individuals that have objectives like those of the convention in the execution of its programs.

Since its establishment, the NCA has experienced a growing human population, part of which is summarized in the graph below.

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41 UNESCO WHC, 2019, p. 12.

42 According to UNESCO, global geoparks are '...single, unified geographical areas where sites and landscapes of international geological significance are managed with a holistic concept of protection, education and sustainable development.' For more information about the Ngorongoro-Lengai UNESCO Global Geopark, see NCAA. 'The Ngorongoro-Lengai UNESCO Global Geopark.' [Online]. Available at: <https://www.ncaa.go.tz/pages/geopark> (Accessed: 7 August 2022).

43 UNESCO, 'UNESCO in Brief.' [Online]. Available at: <https://www.unesco.org/en/brief> (Accessed: 2 August 2022).

44 UNESCO, WHC. 'World Heritage.' [Online]. Available at: <https://whc.unesco.org/en/about> (Accessed: 1 August 2022).

45 See Art. 14 of the World Heritage Convention, 1972 read together with Rule 43 of Rules of Procedure of the World Heritage Committee, 2015, para. 27 of the Operational Guidelines for the Implementation of the World Heritage Convention, 2021 and Circular Letter No. 16 of 21 October 2003. [Online]. Available at: [https://whc.unesco.org/circs/circ\\_03-16e.pdf](https://whc.unesco.org/circs/circ_03-16e.pdf) (Accessed: 2 August 2022).

46 UNESCO WHC. 'The Center.' [Online]. Available at <https://whc.unesco.org/en/world-heritage-center> (Accessed: 1 August 2022).

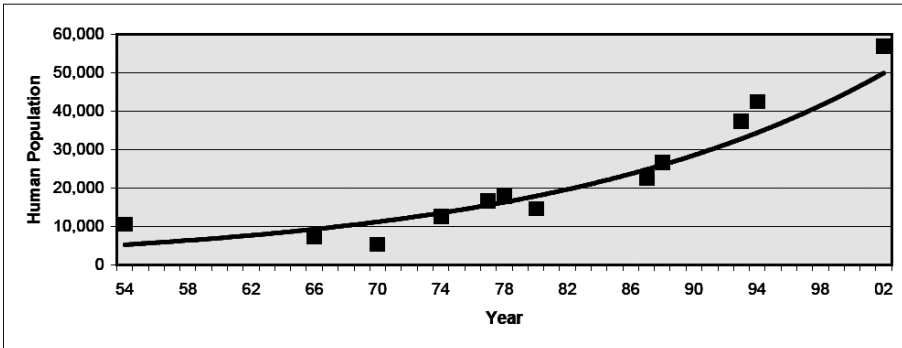
**Human population growth trend in the NCA between 1954 and 2002 (2006 General Management Plan)**

Chart: An extract from the Report of the WHC/IUCN Reactive Monitoring Mission to NCA (United Republic of Tanzania), 1–6 December 2008, p.10.

Therefore, for the last 15 years, several measures have been taken by the Tanzanian national government in collaboration with international organizations, specifically the UNESCO World Heritage Centre (WHC), the International Council of Monuments and Sites (ICOMOS), and the International Union for Conservation of Nature (IUCN), with the aim of assessing the rapid increase in human population and activities in the NCA and offering technical advice on how to contain the situation. Examples of the measures undertaken by the aforementioned international organizations are reactive monitoring missions to the property carried out in the years 2007, 2008, 2011, 2012, 2017 and 2019. One of the repeated recommendations in the reports of these missions has been to depopulate the property by offering attractive incentives outside the NCA to the indigenous Maasai who live therein to encourage their relocation. This strategy has not been successful in halting the drastic increase in the number of people living on the property. There are no exact figures, but estimates put the number of the Maasai living in the NCA at around 100,000 today. If the population continues to grow, it will double to 200,000 by the year 2038.<sup>47</sup>

## **7. Human/collective rights' perspectives on the selected circumstances of the indigenous Maasai in the NCA**

The atmosphere surrounding relocation of the Maasai from the NCA may be analyzed from different points of view. We have selected the following relevant aspects for a focused discussion on the selected theme of this article.

<sup>47</sup> Ministry of Natural Resources and Tourism, 2019, p. 93.

### ■ 7.1. *The question of Maasai ancestral lands and cultural rights in the NCA*

As in the case for Lake Bogoria Game Reserve in Kenya (the lake and the surrounding areas) which is considered an ‘ancestral land’ with rich natural resources for the livestock and historic, religious and cultural value to the Endorois peoples,<sup>48</sup> the Maasai also have areas in Tanzania of the same nature and status. One of them is the Oldoinyo Lengai Mountain.<sup>49</sup> In the language of the Maasai, it means ‘The Mountain of God.’<sup>50</sup> It is the youngest active volcanic mountain with a unique global feature of producing carbonatite, silicon-free lava.<sup>51</sup> It is located adjacent to the NCA and has religious and spiritual importance to the Maasai community. They believe that whenever the mountain erupts, their gods are upset. The mountain has been significant as a medium of prayer and a source of fertility, especially among women and healing among the Maasai people. Hence, Maasai women, even those from Kenya, travel long distances to undergo cleansing in the mountain vicinity and pray for fertility. The same is considered a source of guidance for Maasai leaders.<sup>52</sup> Therefore, relocating the Maasai from this spiritual-strategic-geographical location in the name of nature conservation to Msomera village in the Tanga region, which is more than 600 kilometers away from the NCA, contributes to detaching them from their cultural site as a people. Article 22 of the Banjul Charter provides for peoples’ rights to cultural development as per their freedom and identity. The same charter provides for an individual’s right to participate in his or her own community’s culture.<sup>53</sup> The ACHPR in the Endorois case had this to say regarding a particular state’s obligation to peoples’ right to their own culture:

... protecting human rights goes beyond the duty not to destroy or deliberately weaken minority groups, but requires respect for, and

48 Para. 6 of the Endorois case. In this case, it was revealed that, the Endorois believe whenever an Endorois is buried, his or her spirit lives in Lake Bogoria.

49 The mountain is the highest point of the Ngorongoro-Lengai UNESCO Global Geopark.

50 Naming of the protected areas using the Maa language by itself speaks volumes of the cultural and historical connection the Maasai have with such areas. It suggests the life lived in particular geographical locations for a reasonably long period. For instance, Serengeti National Park; the name Serengeti is originally from the Maa language ‘Siringit,’ which describes the vastness of endless savannah plains of such locality. See TANAPA. ‘Serengeti National Park.’ [Online]. Available at: <https://storymaps.arcgis.com/stories/da3c674bdcc44265af0d5e85d8403583> (Accessed: 9 July 2022).

51 See UNESCO, ‘UNESCO Geoparks: Ngorongoro-Lengai UNESCO Global Geopark (Tanzania).’ [Online] Available at: <https://en.unesco.org/global-geoparks/ngorongoro-lengai> (Accessed: 9 July 2022).

52 Haulle and Njewe, 2016, p. 26.

53 This right is provided for under Art. 15 (1) (a) of the International Covenant of Economic, Social and Cultural Rights, 1966, acceded by Tanzania in 11 June 1976. The same is also reflected throughout the United Nations Declaration of the Rights of Indigenous Peoples, 2007, particularly Arts. 8(1) (a), 11, 12 and 31. Tanzania was among the 144 countries, which voted in favor of this Declaration on 13 September 2007.

protection of, their religious and cultural heritage essential to their group identity, including...sites....Article 17 of the Charter is of a dual dimension in both its individual and collective nature, protecting, on the one hand, individuals' participation in the cultural life of their community and, on the other hand, obliging the state to promote and protect traditional values recognized by a community....thus culture...includes a spiritual and physical association with one's ancestral land, knowledge, belief, art, law, morals, customs, and any other capabilities and habits acquired by humankind as a member of society – the sum total of the material and spiritual activities and products of a given social group that distinguish it from other similar groups....cultural identity...encompass a group's religion...and other defining characteristics.<sup>54</sup>

This quote presupposes that culture is an important tool to protect indigenous peoples' interests in their own ancestral lands.<sup>55</sup> Raisz also argues that land is an important factor in preserving the cultural identity of indigenous peoples.<sup>56</sup>

Articles 3 and 4 of the Cultural Charter for Africa (1976) emphasize respect for cultural diversity of each African country. Further, Section 5 of the same charter is not in favor of asserting national identity at the cost of varying communities' cultural orientations.<sup>57</sup> The right to take part in one's cultural life is also provided under Article 15(1) (a) of the International Covenant of Economic, Social and Cultural Rights (ICESCR), 1966 to which Tanzania is a party.<sup>58</sup> It goes hand-in-hand with protecting peoples' collective rights to land.

Despite the existence of the aforementioned legal guarantees to peoples' right to culture and cultural practices, and the reality that the land in Ngorongoro is of cultural importance to the Maasai as one of their ancestral lands,<sup>59</sup> the legal history of the country in Tanzania provides a narrow possibility to enforce the right to ancestral land. Most peoples who have asserted recognition of ancestral land as a collective right *vis-à-vis* the public interest have not been successful. The reason behind this is that Tanzania opted to maintain a substantial part of the colonial legal regime on land administration. The colonial administration declared all land in Tanganyika (now Mainland Tanzania) whether occupied or not as 'public land.' Currently, the Land Act maintains this position and vests all land under the custody of the President to hold it as a trustee for and on behalf

54 Endorois case, para. 241.

55 For an extensive discussion on this topic see Marinkás, 2016, pp. 15–38.

56 See Raisz, 2008, p. 43.

57 Tanzania ratified the Cultural Charter for Africa on 5 May 1978.

58 Tanzania ratified the Covenant in 11 June 1976.

59 In this article, ancestral land connotes the land which generations of a particular community have lived on for a considerable long period of time without interference and has been central to the survival of such community' socio-economic and cultural ways of life.

of all Tanzanians.<sup>60</sup> Tracing the roots of this notion, the concept ‘public land’ surfaced in the German and subsequently British colonial land administration regimes in Tanzania, that is, through the Imperial Decree of 1895 (Imperial Decree Regarding Creation, Acquisition and Conveyance of Lands, 1895) and the British Tanganyika Order in Council, 1920<sup>61</sup> and later the Land Ordinance of 1923, respectively. Another sustained colonial legacy with respect to land administration in Tanzania is reserved land. Section 6 of the Land Act provides for reserved land as one of the categories of land in Tanzania and lists the land designated under the NCA to be amongst the categories of reserved land. This colonial legacy has played a significant role in dismissing claims of ancestral lands in Tanzania and other African countries. Before the post-colonial societies in Tanzania<sup>62</sup> could comprehend and re-adjust to what had happened to their identities and heritage, they found themselves under a different legal regime that did not revert their right to ancestral lands that had been alienated through colonial legal instruments. Wanitzek and Sippel argue, ‘The identities of people are strongly affected by the laws which govern their daily activities.’<sup>63</sup> It is a reality for the Maasai of the NCA that the Land Act that does not recognize the question of ancestral lands countrywide automatically affects subsistence of their cultural identity and practices in relation to their traditional land.

### ■ 7.2. *Right to a general satisfactory environment favorable for development vs. environmental conservation*

The African Commission in the SERAC case<sup>64</sup> stated:

The right to a general satisfactory environment, as guaranteed under Article 24 of the African Charter, or the right to a healthy environment, as it is widely known,...imposes clear obligations upon a government. It requires the state to take reasonable and other measures to prevent... ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.<sup>65</sup>

For the case of Ngorongoro, this obligation backfires to the government of Tanzania as a party to the Banjul Charter as it finds itself positioned in the violation of human rights of the Maasai peoples in the NCA as it strives to maintain the ecology,

60 See s. 4(1) of the Land Act, Cap.113 Revised Edition, 2019.

61 S. 2 and 8 of the Tanganyika Order in Council, 1920.

62 The pre-colonial societies lived in a different setting compared to that of the post-colonial era, for instance, they were in the position of owning their community lands. See, Gastorn, 2008, p. 22.

63 Wanitzek and Sippel, 1998, p. 113.

64 The Social and Economic Rights Action Centre (SERAC) and the Center for Economic and Social Rights v. Nigeria, Communication No.155/96, Judgment of October 2001.

65 SERAC case, para. 2.

promote conservation, and ensure the sustainable use of natural resources.<sup>66</sup> The implementation of peoples' rights to satisfactory environment depends on against whom such right is being enforced for a state to be regarded as fulfilling or not fulfilling this right, that is, the states are tested against omission or commission of such obligation. In the SERAC case, the government was found to have violated the Ogoni peoples' right to a generally satisfactory environment, having omitted to take reasonable steps to ensure that the concession on oil extraction in the Ogoni land considered sustainable ecological preservation and utilization of natural resources. Conversely, Tanzania is doing what the Nigerian government did not do and finds itself on the wrong side of human rights implementation. Although these two cases have different backgrounds, they provide suitable scenarios of how the right to a satisfactory environment for development can be fulfilled.

### ■ 7.3. *Other aspects of the Maasais' socioeconomic and cultural rights in the NCA*

The Maasai peoples' predicaments in the NCA became aggravated when the area gained international recognition as one of the world's natural and cultural heritage of outstanding universal value and as an important biosphere reserve.<sup>67</sup> The predicaments related to their population increase and human activities in the property. The legal incentives under the Ngorongoro Conservation Area Act in terms of sanctioned resident Maasai's right of entry, property ownership and use of land in the site as well as social services provision such as veterinary and hospital services are some of the causes of population increase in the NCA apart from the primary factor of the relocation of Maasai from the SNP.<sup>68</sup> The aforementioned factors have for many years now granted the Maasai's assurance of their establishment in the site. Another factor is immigration of people to the property. The government aims to prevent immigration by encouraging the relocation of Maasai outside the property as much as possible. A reason that the government gives for this is to prevent fatal accidents caused by wild animals as the rapid growth of population in the NCA aggravates the human-wildlife encounters in the property. It has been recorded that there have been 49 deaths of people caused by human-wildlife encounters between 2015 and 2021, which is an equivalent of seven deaths per year.<sup>69</sup>

66 This duty also falls on the shoulders of the Government under Arts. 7 and 8 of the International Convention on Biological Diversity, 1992. Tanzania signed this Convention on June 12, 1992, ratified it on March 8, 1993 and became a party thereto on 6 June 1996; having deposited the instruments of ratification with the Convention's Depository.

67 Shivji and Kapinga, 1998, p. 5.

68 Following the establishment of the NCA, about 4,000 people from SNP were relocated to the NCA. This population joined another population of approximately 4,000 Maasai who inhabited the Ngorongoro Highlands since 17<sup>th</sup> Century. The two groups were guaranteed protection of their interests and livelihood development. See, Bellini, 2008, p. 5.

69 The statistics were shared by the Director of Wildlife whose presentation is available in Swahili language at Mwananchi Digital. 'Serikali Haihamishi Mtu Loliondo' (Unofficial translation: 'The Government is Not Evicting Anyone from Loliondo'). [Online]. Available at: <https://www.youtube.com/watch?v=DeXi7H4PBnc> (Accessed: 9 August 2022).

The government considers the ban of crop cultivation in the NCA and facilitating it elsewhere outside the property where food and cash crops may be grown as part of fulfilling the Maasais' right to food and economic development. Even before the property was renowned with international conservation status, a legal restriction to cultivate in the property was already in place through section 16 of the Game Parks Laws Act, 1975. Nevertheless, the rise of food insecurity due to climate change grossly affected the Maasai livestock. Consequently, the ban on cultivation in the Area was lifted in 1992 though the ban was reinforced in 2009. The NCAA took actions to ensure that such a ban was heeded to by wiping out whatever farms were standing past the period when the ban was restored.<sup>70</sup> With the ban on cultivation in the Area, food insecurity and malnutrition in children has been on the rise, as the NCAA is allegedly not substituting enough food for the resident Maasai families. It is argued that the authority has been deliberately providing minimum food supplies as a strategy to force them out of the property.<sup>71</sup> This line of argument does not find any other explanation for this shortcoming, taking into account the amount of profit the Area generates out of tourism, that is, USD 100 million or more per annum.<sup>72</sup> The right to food is not directly addressed under the Banjul Charter. Nevertheless, the ACHPR in the SERAC case implied such rights in articles 4, 16, and 22 of the charter, which provide for the right to life, health, economic, social, and cultural development. The same commission asserted that a minimum requirement for state parties to the Banjul Charter is to refrain from hampering peoples' efforts to feed themselves.<sup>73</sup> The scenario of banning cultivation in the NCA speaks volumes on the relationship between the environment and human rights. It implies violation of the right to food and utilization of natural resources. However, the government considers relocation of the Maasai from the NCA to areas where land for crop production is offered to every family without any conditions, as a fulfillment of the human right to food, and an economic right to cultivate cash crops for economic gains.

Article 1(2) of the ICESCR guarantees the right to free disposal of wealth and natural resources and that no person should be deprived of means of subsistence.<sup>74</sup> The same right is provided for under article 24 of the Banjul Charter whereby unlike the ICESCR, the African philosophy is embedded in this right through the wording; '...This right shall be exercised in the exclusive interest of the people.' The charter also provides that if people are disposed of this right, they

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70 IWGIA, 2013, p. 76.

71 Laltaika argues: 'For reasons unclear, the government gives the Maasai only nine (9) kgs of maize per family for six months, which is hardly a week's worth of food for an inherently large Maasai family. As a result, many families consume far below the recommended daily caloric intake, and thus are exposed to deaths caused by hunger and malnutrition.' See, Laltaika, 2015, p. 51.

72 Laltaika, 2015, p. 77.

73 SERAC case, para. 65.

74 Art. 1(2) of the International Convention on Economic, Social and Cultural Rights, 1966.



should be awarded adequate compensation. Nonetheless, this right has several limitations.

First, the exercise of this right should have due regard for the principles of international law. Tanzania is a party to the World Heritage Convention and the Rio Convention on Biological Diversity, 1992, thus it is bound to implement international commitments. For instance, under Article 4 of the World Heritage Convention, Tanzania is obliged to do everything necessary to conserve the natural and cultural heritage of outstanding universal value within its jurisdiction.

Second, Tanzania is a dualist state. Therefore, provisions of international agreements cannot be directly enforced as they are at the domestic level unless and until enabling domestic legislation is enacted. A good example is the Law of the Child Act, 2009, which was enacted to give force to the Convention on Rights of the Child and the African Charter on the Rights and Welfare of the Child, 1990, to which Tanzania is a party. Therefore, if Tanzania was a party to the ILO C 169- Indigenous and Tribal Peoples Convention of 1989, the same would still require another level of domestic legislation. A noteworthy aspect about dualist states is that their enabling legislation may have room for deviation from international obligations through modifications or omissions in relation to the rights sought to be enforced, or they may face undue delays when it comes to enactment. However, although Tanzania has been condemned for lagging behind in domesticating international treaties and conventions,<sup>75</sup> its parliament has enacted legislation reflecting on the right to free disposal of wealth and natural resources, that is, the Natural Wealth and Resources Act, 2017.<sup>76</sup> The law imposes the responsibility to ensure protection of peoples' interests in any agreement entered by the government with respect to the utilization of natural resources.<sup>77</sup> Nevertheless, it is tedious for the Maasai as an indigenous group to enforce the right to free disposal of wealth and natural resources. As is the case with land under the Land Act, per this law all the wealth and natural resources in the country are owned and controlled by the government on behalf of all Tanzanians which is held in trust by the President.<sup>78</sup>

Third, the Tanzanian Constitution only makes it a duty to every person to safeguard natural resources (Article 27). There is no provision on the right to use natural resources. Thus, the Maasai may only invoke Article 24, which grants

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75 For a deeper analysis of undue delays in domestication of international legal obligations in Tanzania, see Kamanga K.C. 'Treaty Constipation As a Key Factor in Implementation of Human Rights Treaties in Kenya, Tanzania and Uganda,' pp.1-22. [Online] Available at: [https://www.academia.edu/13587731/Treaty\\_Constipation\\_As\\_a\\_Key\\_Factor\\_in\\_Implementation\\_of\\_Human\\_Rights\\_Treaties\\_in\\_Kenya\\_Tanzania\\_and\\_Uganda](https://www.academia.edu/13587731/Treaty_Constipation_As_a_Key_Factor_in_Implementation_of_Human_Rights_Treaties_in_Kenya_Tanzania_and_Uganda). (Accessed: 22 July 2022).

76 Act No. 5 of 2017.

77 Preamble to the Natural Wealth and Resources (Permanent Sovereignty) Act, 2017.

78 Art. 4(2) and 5(2) of the Natural Wealth and Resources (Permanent Sovereignty) Act, 2017.

the general right to own property to every individual citizen when it comes to claiming their right to ancestral lands within the NCA. However, the legal situation regarding this matter remains unclear. When the Maasai were moved there in 1959, the NCA Act did not imply or expressly grant them the right to occupy or use the land under their customary law, as was the case in the previous laws governing the Area as part of SNP, which expressly provided for such right.<sup>79</sup> Thus, the only option left is to assume that the customary law of the Maasai still applies. Consequently, the land belongs to those who were already there before the NCA was established, together with those who were relocated there afterwards. Since the combined resident and ‘immigrant’ Maasai of the NCA share a similar history, beliefs, language, values, and most importantly livelihood, they can principally assert the collective right to land, a claim that goes into the core of their existence as a people.

If viewed from an African philosophical perspective of human rights, the Maasai right to land as a property and a natural resource can be explained in the form of a pre-colonial sense of communal ownership whose utilization went in line with protecting and ensuring the existence of a particular community as a whole.<sup>80</sup> The post-colonial sense of property ownership in Tanzania has mainly embraced individualism, as reflected in the country’s constitution. Nonetheless, a little room for communal land is provided under section 13 of the Village Land Act.<sup>81</sup> The Maasai living in the NCA live in registered villages whose land is not under the category of village land under the Land Act, but under reserved land.<sup>82</sup> This means that their village councils have no power over the land they occupy, as it is the case with other villages outside the property. They only have usufruct rights to land within the NCA. This explains the NCA restrictions on Maasai pastoralists to access some of the crucial grazing lands within the property on the grounds of environmental conservation. For this reason, the Maasai in the area have lost more than 8,292km<sup>2</sup> of grazing land.<sup>83</sup> Shrinking grazing land affects their way of relating, sense of prestige, identity, beliefs, and most importantly, survival. Madsen argues that ‘once people lose their land, it is not long before they lose everything else; their language, their heritage, identity, children, culture and all too frequently their lives.’<sup>84</sup>

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79 See S. 6 of the Land Ordinance, 1923. The Game Ordinance of 1940, which was succeeded by the National Parks Ordinance, 1948 and later the Fauna Conservation Ordinance, 1951 also provided for this right.

80 Amin, 2021, p. 38.

81 Chapter 114 of the Laws of Mainland Tanzania. Communal lands in the villages are governed by the village councils on behalf of all villagers and in pastoral communities like the Maasai, this portion of village land can be demarcated for purposes of communal livestock grazing.

82 S. 6 of the Land Act, Chapter 113 of the Laws of Mainland Tanzania.

83 Lissu, 2000.

84 Madsen, 2000, p. 8.

Fourth and to a much smaller extent, litigation of any dispute related to the country's sovereignty over natural resources is limited to domestic courts.<sup>85</sup>

Fifth, and to add weight to the aforementioned limitation, individuals and NGOs' right to access the regional human rights court that is the African Court on Human and Peoples' Rights (herein referred to as the 'African Court') has been inhibited following Tanzania's withdrawal of the declaration under Article 34(6) of the African Court Protocol which accepted the jurisdiction of the Court.<sup>86</sup> Therefore, under the Banjul Charter the ACHPR remains the only forum within the African human rights system at the disposal of the Maasai of NCA through which they can access the African Court to initiate human rights litigation. The aforementioned withdrawal of the declaration is quite a setback toward securing their legal rights because the NGOs that have been at the forefront in advocating and supporting indigenous peoples' rights movement (due to their expertise and financial capabilities compared to the peoples they represent) have fallen victims to such withdrawal.

## **8. The relocation: the government policy and status quo**

Attempts to relocate the Maasai from the NCA are not new. They began in the 2000s whose results manifested in a 30 days' notice to vacate the property dated April 12, 2021. The notice targeted residents who had previously voluntarily vacated and returned to the Area. The eviction notice raised various national and international concerns, which led to the withdrawal of the notice a few days later, with a promise to find a much more suitable solution. On February 17, 2022, a meeting was held at the NCA, attended by the Tanzanian Prime Minister and prominent members of the government as well as Maasai leaders. The Maasai communicated their willingness to cooperate with the government, and the prime minister offered all residents an option for voluntary relocation from the property to an area of their choice. Shortly after the meeting, the government announced that a suitable location for the resettlement of NCA residents had been identified in Msomera village, Sindeni division, Handeni district, Tanga region. The registration and relocation processes for those willing to leave the NCA are ongoing. The fate of the Maasai who are not willing to relocate from the property is yet to be determined. The NCA believes that the more voluntary the relocation of residents from the Area, the better it is for conservation purposes. The Authority has shared statistical information regarding the level of poverty and illiteracy amongst the NCA Maasai residents from the National Bureau of Statistics (NBS). According to

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<sup>85</sup> S. 11(1), (2) Natural Wealth and Resources Act.

<sup>86</sup> Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, 1998.

these statistics, the percentage of illiteracy in the Area was 64% by the beginning of the relocation process. One reason for this is that children walk to schools that are situated long distances away from their homes, through threatening wildlife environment.<sup>87</sup> Therefore, voluntary relocation from the property has been highly encouraged by the NCAA.

The government of Tanzania has received both criticism and calls from different stakeholders domestically and internationally to contain the situation in the NCA. Internationally, the reactions were openly made by, among others, the United Nations Permanent Forum on Indigenous Issues,<sup>88</sup> the International Work Group on Indigenous Affairs (IWGIA),<sup>89</sup> the ACHPR,<sup>90</sup> and the UNESCO. Specifically, the UNESCO made it clear that the organization ‘...has never at any time asked for the displacement of the Maasai people.’ It acknowledged the hurdles faced by the Maasai in the NCA and vowed to continue supporting the government of Tanzania to find suitable solutions.<sup>91</sup> Domestically, the Pastoralists Indigenous Non-governmental Organizations Forum issued a statement warning the government about the imposter Maasai leaders who attended the prime minister’s meeting, which sowed the seed for acceptance of the government’s offer to voluntarily relocate from the Area. The forum stated that such imposters could be compromising the long-term solution to the subsisting problem between the indigenous Maasai and the NCAA. It also advised the government not to conduct the relocation process in haste, but to give enough room for dialogue and grassroots consultations.<sup>92</sup>

87 Okuly Digital (2022). ‘Kwa Sababu Hizi ni Muhimu kwa Wakazi wa Ngorongoro Kuhamia Msomera.’ (Unofficial translation: ‘Reasons for Ngorongoro Residents to Relocate to Msomera’). [Online]. Available at <https://www.youtube.com/watch?v=k4UnXIXHAIe> (Accessed: 8 August 2022).

88 United Nations Permanent Forum on Indigenous Issues. ‘Statement by the Chairperson of the Permanent Forum on the Eviction of Maasai people from the Ngorongoro Conservation Area in Tanzania,’ dated June 14, 2022. [Online]. Available at: <https://www.un.org/development/desa/indigenouspeoples/news/2022/06/statement-by-the-chairperson-of-the-un-permanent-forum-on-indigenous-issues-with-reference-on-the-eviction-of-maasai-people-from-the-ngorongoro-conservation-area-in-tanzania/> (Accessed: 9 August 2022).

89 IWGIA. ‘Urgent Alert: Threats of forced eviction of the Maasai indigenous pastoralists of the Ngorongoro Conservation Area (NCA) and Ngorongoro District in Tanzania,’ dated February 23, 2022. [Online]. Available at: <https://www.iwgia.org/en/resources/publications/4606-urgent-alert-maasai-ngorongoro-tanzania-forced-eviction.html> (Accessed: 9 August 2022).

90 ACHPR. ‘Urgent Call for Cessation of the Eviction of the Maasai Community in the Ngorongoro District in the United Republic of Tanzania,’ dated 13 June 2022. [Online]. Available at: <https://www.achpr.org/pressrelease/detail?id=639> (Accessed: 9 August 2022).

91 UNESCO WHC. ‘News, Ngorongoro: UNESCO has Never at Any Time Asked for the Displacement of the Maasai People,’ dated 21 March 2022. [Online]. Available at: <https://whc.unesco.org/en/news/2419>. (Accessed: 10 August 2022).

92 PINGOS Forum, ‘Tamko toka Mashirika Yasiyoya Kiserikali Kuhusu Mgogorowa Ardhi Wilayaya Ngorongoro’ (Unofficial translation: ‘Joint Statement of the Non-governmental Organisations regarding land conflict in Ngorongoro District’) dated 26 February 2022. [Online]. Available at: <https://pingosforum.or.tz/tamko-toka-mashirika-yasiyo-ya-kiserikali-kuhusu-mgogoro-wa-ardhi-wilaya-ya-ngorongoro/> (Accessed: 10 August 2022).

Moreover, the Legal and Human Rights Center published a press release on June 30, 2022, touching on both the Loliondo and Ngorongoro cases involving Maasai land rights in conservation areas. The center advised the government to halt the promulgation of reviewing the NCA Act with the view of legally formalizing the relocation of the Maasai from the NCA.<sup>93</sup>

On March 25, 2022, the government convened a meeting with the ambassadors and consular officers present in Tanzania to brief them of the Tanzanian government's plans and strategies to maintain the sustainable use of its natural resources, particularly, the conservation of the NCA. The meeting was an opportunity for the government of Tanzania to inform the world of what was happening on the ground with respect to the implementation of the voluntary relocation of NCA residents. The Tanzanian Minister of Constitutional and Legal Affairs (who previously held the position of the Minister of Natural Resources and Tourism) addressed the issue of Ngorongoro from a human rights perspective. He admitted that the protection of natural resources for sustainability is not an easy task for any country, but Tanzania will not do so at the cost of human rights of its citizens. He reiterated Tanzania's human rights obligation to the international community with regard to preservation of natural resources<sup>94</sup> and insisted that Tanzania has taken into account all human rights and constitutional safeguards in relation to the people who have decided to voluntarily relocate from NCA to Msomera village.

He further stated the position of the government in relation to the recognition and implementation of indigenous peoples and minority rights in Tanzania. He specifically declared the government's position in relation to the notion of ancestral lands. He uttered (as quoted), '...we do not have anyone within Tanzania who has indigenous rights...we do not have any minority groups in Tanzania.' With this position, credits were accorded to the late Julius Nyerere (1922–1999), the first President of Mainland Tanzania who abolished the question of tribalism in the country as well as established '(one of) the most equitable land ownership systems in the world.' In this line of argument, the minister stated that nobody owns land privately in Tanzania. All land is publicly entrusted to the President and leased to the citizens in the form of a right of occupancy that can be issued in a span of 33, 66, or 99 years. Hence, 'there is no Maasai (ancestral) land in Tanzania.' The ancestral land notion was elaborated to be non-existent within the legal framework of

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93 LHRC. 'Tamko Kuhusu Hali ya Loliondo na Ngorongoro' (Unofficial translation: 'Press Statement on the Situation of Loliondo and Ngorongoro') dated 30 June 2022, p.9. [Online]. Available at: <https://humanrights.or.tz/en/news-events/ngorongoro> (Accessed: 10 August 2022).

94 This includes the African Convention on the Conservation of Nature and Natural Resources, 2003. Tanzania signed this Convention on September 15, 1968 and ratified the same on September 7, 1974. This is when the Convention was still known as the (Algiers Convention) before its revision in Maputo in 2003. Some scholarship indicates that, lack of functional human rights safeguards positions local communities at a risk of losing their land and other rights associated with it. See Laltaika, 2020, p. 21.

the country, and non-existent in the constitution. Hence, he iterated that human rights implemented in the country were equal for all citizens.<sup>95</sup>

As of 22 July 2022, 757 households (4,344 individuals) had registered to be relocated from NCA to Msomera village.<sup>96</sup> So far, the government has devised all means to provide adequate, equitable, fair, and proportional compensation to people who have volunteered to join the exercise. This includes a minimum of three hectares, a modern house with electricity, and running water per household. In addition to all the incentives, they also receive monetary compensation as startup capital.<sup>97</sup>

## 9. Why are the Maasai reluctant to leave the NCA?

The traditional way of life the Maasai have led over the centuries has enabled them to persistently survive with wildlife. This life solely depends on the natural environment for subsistence. Many of their generations have lived there before. The British colonial government had hoped that the Maasai who were granted the right of residence in SNP would voluntarily evacuate if provided water services elsewhere outside the park;<sup>98</sup> a relative supposition was possibly made while relocating them to the NCA. It might have been expected that the Maasai would abandon the NCA overtime in search for social services outside the property given the limitations in their supply therein.<sup>99</sup> All of these assumptions were rendered futile for both cases in the SNP and the NCA due to the long established historical peaceful existence of the Maasai in the wild.

The proposition that Maasai co-existence with wildlife is a distortion to nature conservation attracts scrutiny, except for their (including livestock's) overpopulation and practice of non-traditional ways of life in conservation areas. Generally, and specifically the Maasai residing in Ngorongoro do not prey on wild animals. Their main source of food is meat, blood, and milk from the cattle, goats, and sheep that they keep.<sup>100</sup> Exceptions can be made in extreme cases of food shortage for example during long periods of drought as a result of climate change when they would hunt specific types of animals or substitute their meals with grains such as maize.

95 Maelezo Tv. 'The Truth about Loliondo Game Controlled Area and Ngorongoro Conservation Area' date 21 June 2022. Available at: <https://www.youtube.com/watch?v=GMGMoQXW16w&t=12s> (Accessed: 11 August 2022).

96 Okuly Digital (2022).

97 Maelezo Tv, 2022.

98 Shivji and Kapinga, 1998, p. 9.

99 Notably, the supply of social services like water and electricity and modern day infrastructure is limited in the NCA due to the requirement of nature conservation. Modern markets, hospitals, and schools are available but kept at minimal levels to reduce human activities within the Area, and there is little importation of any building materials therein.

100 Information from the Maasai during field visit to NCA on 24 March 2022.

Additionally, given the pre-existing knowledge on the use of medicinal plants for themselves and their livestock, they neither invade and clear forests' vegetation, nor do they cut down trees to make their houses.<sup>101</sup> Their houses are made by women using mud, cow dung, tough sticks picked from fallen tree branches, and savannah grass for roofing. All the aforementioned building materials are environmentally friendly and can decompose and return to soil naturally in the event that they vacate the place.<sup>102</sup> Moreover, the Maasai do possess traditional knowledge on managing grazing lands, for example, demarcation of pasture reserves for drought seasons (*alalili*) as well as reserves for calves and sick livestock. Notably, the elders hold more knowledge and experience of traditional pastoralism and they are the ones who manage the communal grazing lands. Furthermore, the question of preserving water sources is of utmost importance to the Maasai, as it is crucial for their and livestock's survival. Traditionally, any member of the Maasai community who violates rules on the preservation of water sources or grazing land is liable for punishment.<sup>103</sup>

The Maasai in the NCA have further argued that their presence has been beneficial to wildlife in terms of containing animal poaching. They claim to have been the guardians of nature for centuries. The Maasai associate the relationship between their removal from the NCA with the rise in numbers of poached animals, specifically rhinos, who have now been reduced to endangered species.

## 10. Comparative aspects with other jurisdictions

The question of interests of nature conservation clashing with indigenous peoples' rights is not a novel phenomenon beyond Tanzania. Thus, this segment provides a 'bird's eye view' on the same matter in other jurisdictions with an objective of drawing viable lessons which have the potential to be applied in the NCA's situation to balance the interests at stake. Impliedly, the discussion will tackle a sub-objective of painting a picture of the situation of indigenous peoples elsewhere and their justification for carrying on with the 'global indigenous peoples' movement' to-date.

### ■ 10.1 A glimpse from African jurisdictions

Indigenous peoples' rights in Africa remain a delicate matter despite the fact that all African countries except Morocco have ratified the Banjul Charter and

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101 During our field visit to Ngorongoro we learnt that when it becomes unavoidable for a Maasai to cut down a tree he or she prays and offers nature an explanation in Maa language about the intention to cut down a tree before he or she does so.

102 Information obtained through observation and authors' interaction with Maasai residents in the NCA, Ngorongoro District and the late Maasai Olaiboni's residence in Monduli District during a field visit to Tanzania in March 2022.

103 Goldman, 2011, p. 73.

they neither acknowledge the concept of indigenous peoples nor recognize their rights.<sup>104</sup> Only the Central African Republic has ratified ILO C 169, which is the basic international legal instrument providing for the rights of indigenous and tribal peoples in post-colonial countries. This is, however, not to degrade the domestic milestones that have been made in some African countries in recognizing indigenous peoples' rights through their country's constitutions and judicial activism by domestic courts. A good example can be drawn from Uganda, whose Constitution categorically recognizes the rights of minorities and right to culture and other similar rights.<sup>105</sup> A similar provision was included in the 2010 Kenyan Constitution under Article 56. Regarding the work of the judiciary, a decision passed by the Constitutional Court of Uganda in 2021 is a recent revolutionary move. The Court upheld the rights of the Batwa indigenous peoples in relation to their ancestral lands situated in the present-day Echuya Central Forest Reserve, Bwindi Impenetrable National Park, and Magahinga Gorilla National Park. These parks were designated by the British colonial government as protected areas since the early 1930s and are still recognized as such by the independent Ugandan government.<sup>106</sup> Another decision of this kind surfaced in 2006 when the High Court of Botswana delivered a judgment in favor of the Bushmen (the San), whose eviction from the Central Kalahari Game Reserve to settlement camps was found to have been illegally carried out, hence, their entitlement to return to their traditional land.<sup>107</sup>

### ■ 10.2 Lessons and experiences from the Inter-American human rights region

Human rights have formed part of transcontinental adjudication practice. The African regional human rights implementation bodies, that is, the African Commission and Court on Human and Peoples' Rights, have borrowed jurisprudence from the Inter-American Court of Human Rights while developing their own human rights jurisprudence.<sup>108</sup> This was the case when the African Commission and Court on Human and Peoples' Rights specifically cited cases from the Inter-American Court of Human Rights while adjudicating cases touching on indigenous peoples' rights. A clear example can be drawn from the SERAC and Ogieks<sup>109</sup> cases, whereby the cases of *Velásquez Rodríguez v. Honduras*<sup>110</sup> and *Yakye Axa Indigenous*

104 ACHPR & IWGIA, 2005, p. 112.

105 Arts. 36 and 37 of the Constitution of the Republic of Uganda, 1995.

106 See the case of *United Organisation for Batwa Development in Uganda (UOBDU) & 11 Others v. Attorney General & 2 Others*, before the Constitutional Court of Uganda at Kampala, Musoke JCC, Constitutional Petition No.003 of 2013, judgment delivered on 19 August 2021.

107 Survival. 'Bushman win landmark legal case.' [Online] Available at: <https://www.survivalinternational.org/news/2128> (Accessed: 29 August 2022).

108 Kannoński and Steiner (eds.), 2021, p. 11.

109 *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Application No. 006/12.

110 *Merits, Reparations and Costs*, Judgment of 19 July 1988.



Community v. Paraguay<sup>111</sup> adjudicated before the Inter-American Court of Human Rights contributed to the decisions of these cases. Despite developments in the field of indigenous peoples' rights in Africa, the situation in the Inter-American human rights region provides more active engagements in relation to the aspect of collective rights of indigenous peoples due to the magnitude of human rights violations in such regions and the zeal of the victims and their supporters to turn to the Inter-American human rights system for recourse.<sup>112</sup> This section therefore analyzes the situation of the indigenous Maasai in the NCA in relation to cases of approximate nature decided by the Inter-American Court of Human Rights, while drawing lessons where applicable. Such cases are *Xákmok Kásek Indigenous Community v. Paraguay*,<sup>113</sup> (*Xákmok case*), *Mayagna (Sumo) Awastingni Community v. Nicaragua*<sup>114</sup> (*Mayagna case*), *Garífuna Triunfo de la Cruz Community and its Members v. Honduras*<sup>115</sup> (*Garífuna case*) and *Kaliña and Lokono Peoples v. Suriname (Kaliña and Lokono case)*.<sup>116</sup>

*Xákmok's* case involved the *Xákmok Kásek* indigenous community's claim of their ancestral land, measuring 10,700 hectares in the Chaco region of Paraguay. Between 1885 and 1887, the independent state of Paraguay sold two-thirds of the land in Chaco belonging to this indigenous community at the London Stock Exchange to clear the debt that the state had incurred in the 'War of the Triple Alliance.'<sup>117</sup> This land disposition, carried out between Paraguay and private settlers who established a ranch (Salazar Ranch) on the sold property was done without any consultation with the indigenous community. As the strife continued between the Paraguayan government and the *Xákmok Kásek*, the property was divided and sold to another private individual. Immediately after this, a part of the claimed territory (4,175 hectares out of 10,700 hectares) was declared a private nature reserve land for a period of five years by presidential decree.<sup>118</sup> This rendered futile the administrative route for claiming collective rights by the *Xákmok Kásek* indigenous community. Therefore, the matter landed before the Inter-American human rights bodies, starting with the Inter-American Commission on Human Rights and later the Inter-American Court of Human Rights. This regional court eventually found a violation of several articles of the American Convention on Human Rights, 1969, by the government of Paraguay.

The *Xákmok* case has the following significance in addressing the case in the NCA. First, it addresses the question of 'dispossession by formalization.' Just as the Maasai in the NCA found themselves automatically losing their customary land

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111 Merits, Reparations and Costs Judgment of 17 June 2005.

112 Raisz, 2008, at pp. 41 and 45.

113 Merits, Reparations and Costs, Judgment of 24 August 2010.

114 Merits, Reparations, and Costs, Judgment of 31 August 2001.

115 Merits, Reparations and Costs, Judgment of 8 October 2015.

116 Merits, Reparations, and Costs, Judgment of 25 November 2015.

117 *Xákmok Kásek Indigenous Community v. Paraguay*, para. 58.

118 *Ibid.*, para. 80.

rights due to domestic legislation in 1959, the Xákmok Kásek suffered the same fate when part of their ancestral land was declared a private nature reserve by a presidential decree in 2008. According to the law establishing protected wildlife areas in Paraguay,<sup>119</sup> private nature reserves could not be annexed as long as the declaration that gave them such status was valid. The same law put restrictions on human activities and control mechanisms, including the arrest of peoples who trespass and perform any activity thereto, just like the restrictions that came in with the National Parks Ordinance, 1959, and necessitated the relocation of Maasai from SNP to NCA.

Second, the question of poor or lack of indigenous peoples' prior consultation and free consent to disposition of their ancestral land was a fact in this case. At the very beginning, the Xákmok Kásek peoples were not consulted when their land was sold to pay debt that the state had incurred in war. In negotiating back this land, the same peoples were presented with a probable substitute land that did not support their livelihood; this was also done without prior consultation. Further, before part of their ancestral land was declared a private nature reserve, no consultation was made despite the fact that their claim towards such land was still pending. The same shortcoming can be observed in Mayagna's case in which the state of Nicaragua granted a concession to SOLCARSA Corporation for logging and road construction on the ancestral lands of about 62,000 hectares without the Mayagna peoples' prior consent.<sup>120</sup> Similarly, there are suppositions that the Maasai who were moved from the SNP to NCA had not willingly consented to such relocation as it was presented to have been by the British colonial government.<sup>121</sup> Fimbo argues that:

The predicament of non or poor consultation of villagers in decisions affecting their customary rights of occupancy in land has been long observed in Tanzania. This was also reported to be one of the manifested and persisting problems by the Presidential Commission of Enquiry into Land Matters (Shivji Commission) in the year 1994.<sup>122</sup>

The aforementioned discussion provides a bird's eye view of the exclusion of indigenous peoples in decisions that affect the ownership of ancestral lands, one of which is formalizing such lands as protected areas with insufficient or non-consultation at all.

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119 Law No. 352/94 of Paraguay.

120 *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, para. 83 (b). [Online]. Available at [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_79\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf) (Accessed: 27 January 2023). Also, for a detailed analysis of this aspect in this case see Marinkás, 2013, pp. 922-929.

121 Lissu, 2000.

122 Fimbo, 2004, p. 36.

Third, the Xákmok case is a good example to explain that the presence of national laws recognizing indigenous peoples' rights as well as institutions designed for protecting such rights are not the panacea for the challenges they encounter. It has been indicated earlier that Tanzania lags behind in terms of specific legal and institutional frameworks that accommodate and promote indigenous peoples' rights. However, in the Xákmok case, even with the existence of presidential decrees which granted legal standing to the Zglamo Kacet community recognizing it as part of the Maskoy ethnic group (which is another name for the Xákmok Kásek community),<sup>123</sup> coupled with the presence of state institutions like the Institute of Indigenous Affairs (INDI) and the Rural Welfare Institute in the country, they could not succeed in the claim to their ancestral land before landing into the Inter-American Court of Human Rights.

Fourth, this case sheds light on the debate on indigenous peoples' identity formation and relationship with their ancestral lands. In the case of Ngorongoro the question has always been on the legitimacy to claim the right to ancestral land between the Maasai who were moved from SNP to NCA and those who were already settled there. In the Xákmok case, the Xákmok Kásek community was presented to be multiethnic, comprising 73.7% Sanapanás, 18.0% South Enxet, 5.5% North Enlhet, 2.4% Angaité, and 0.4% Toba-Qom.<sup>124</sup> The Inter-American Court of Human Rights reasoned that neither the court nor the state should decide for a community how they choose to identify themselves. It added that the identity of a community is based on historical and social factors that determine its autonomy and ought to be respected.<sup>125</sup> This explains why it does not matter whether the Maasai were moved from SNP to join other Maasai who were settled at the NCA. As long as they identified themselves as part of the Maasai community within the property, according to their history and other social factors, their identity cannot be denied. This raises the next question as to whether the Maasai outside the NCA may also claim the land in the property to be their ancestral land. The answer to this question can be obtained by drawing inspiration from the Xákmok case through relating the situation of the Xákmok Kásek community vis-à-vis the Paraguay government to that of the Maasai community vis-à-vis the Tanzanian government. In the Xákmok case, the court noted that the state was not denying its duty to reinstate the rights of Xákmok Kásek community that were lost when their land was sold in the stock market. However, it had an issue with the 'ancestral notion' of the specific land that was claimed. It stated that the ancestors of the Xákmok Kásek community inhabited a larger territory than what was being apparently claimed by the victims. According to this, the land covered by the Salazar Ranch was just one of many places in the area that was wandered about by Xákmok

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123 Xákmok Kásek Indigenous Community v. Paraguay, para. 44.

124 Ibid., para. 41.

125 Ibid., para. 37.

Kásek ancestors as part of internal migration and that, part of such the community settled there when the sale was executed. Hence, it was proper for the state to allocate them land elsewhere within such vast ‘ancestral territory.’<sup>126</sup> The same line of argument has been used by the government of Tanzania in the NCA case. The government has maintained its position that every citizen can live in any part of the country as long as he or she is not breaking the law. This means that the Maasai can live in the NCA, or in Msomera village, just as other ethnic groups that are scattered throughout the country. Some of the Maasai and other pastoralist families belonging to the Ilparakuyo, Datoga, and Sukuma ethnic groups have been living in the Tanga region for a long period. Therefore, the government believes that relocating the Maasai to Msomera village will not affect their semi-nomadic and traditional pastoral livelihood. Contrarily, as in the Xákmok case, where the claimant stated ‘... the lands being claimed have been identified through the collective memory which is still alive in the community and its members who clearly and systematically link and associate events, places, memories and practices of traditional economy to the geographic spaces referenced’, the Maasai in Ngorongoro have the same reasoning. They assert that as far as their collective memory takes them back the land in the NCA has always been their home just as other Maasai in other localities like Simanjiro, Loliondo, or Monduli. It is our view that the Tanzanian government’s argument that every citizen can live anywhere in the country is an assertion that will encroach the cultural survival of the Maasai who have led a traditional life in the NCA for centuries. Maasai’s traditional livelihood does not thrive in any other geographical location, but only in particular supporting natural environment.

The fifth is the question of detachment from ancestral land and its effects on a community’s cultural identity. The Xákmok case exemplifies how relocating indigenous communities from their traditional land may affect their livelihood. For communities that hunt, farm, and fish like the Xákmok Kásek, the proceeds of these activities are part of their cultural activities like weddings, payment of bride price, reconciliation, and sacrificial offerings. The same applies to the Maasai community. Apart from pastoralism being the backbone of their survival as a community, livestock is used in initiation processes, offering sacrifices for rain or casting away diseases and payment of bride price. It is also a source of prestige and security for Maasai men. Furthermore, a cow or goat’s skin is used for making beds, and cow dung is crucial for building traditional Maasai houses. Hence, relocating the Maasai from NCA to Masomera village, where ready-made modern houses and alternative lands for food production and economic activities are offered as incentives, exposes them to a different kind of environment that threatens their cultural survival as a community. In the Xákmok case, it was noted by the court that the connection which indigenous peoples have with their

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126 Ibid., paras. 90-91.

traditional lands, natural resources and other intangible elements form part and parcel of their culture hence, deserves to be safeguarded by article 21 of the American Convention.<sup>127</sup>

In addition, the court elaborated that unlike the classical sense of property ownership of property among indigenous communities is based on their collectivity. Thus, it deserves equal protection like private property under law. It added that the failure to recognize this dichotomy would imply that there is only one way of owning properties which will in turn make the legal guarantees of the right to property meaningless for millions of people across the world.<sup>128</sup>

While making this remark, the court revisited one of its landmark judgments in the *Mayagna* case where it asserted:

There exists a communitarian tradition of a communal manner regarding collective property of land, in the sense that ownership does not pertain to an individual, but rather to the group and the community. Indigenous peoples, as a matter of survival, have the right to live freely on their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, [their relationship with] the land is not merely a matter of possession and production but a material and spiritual element, which they must fully enjoy to preserve their cultural legacy and transmit it to future generations.<sup>129</sup>

The question of collective ownership of land under the umbrella of ‘ancestral lands’ has nevertheless remained a subject of controversy. For instance, in the *Garífuna* case, the *Garífuna Triunfo de la Cruz* Community of indigenous peoples made of mixed races of descendants from Central Africa, West Africa, the Caribbean, Europe, and the Arawak who were living on the Caribbean coast of Honduras, claimed title to the land they had occupied historically. This raised the question as to whether history should be the factor for determining the ancestral nature of the land, and, if so, whether this community would hold the right to claim title to the lands where their ancestors originated from, i.e. from West and Central Africa, South America as well as Europe. The same debate has arisen around the question of Maasai claiming ancestral land in the NCA. If history is to be traced, the Hadzabe occupied the land earlier than the rest of the communities living within the NCA territory. Nevertheless, priority in time with respect to the occupation

127 *Xákmok Kásek Indigenous Community v. Paraguay*, para. 85.

128 *Ibid.*, para. 87.

129 *Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations, and Costs. Judgment of August 31, 2001. Series C No. 79*, para. 149.

and use of a particular territory has been paramount in determining the right to ancestral lands by indigenous peoples, as indicated in paragraph 107 of the Ogieks case. This has also been reflected in the Garífuna case since the Agrarian Reform Law allowed indigenous communities to make applications for full ownership of land that they have used and occupied for not less than three years.<sup>130</sup>

In the Kaliña and Lokono case, which involved alienation of land of two indigenous communities, that is, the Kaliña and Lokono of Lower Marowijne River in East Suriname for purposes of nature conservation, the question of lack of consent and non-recognition of indigenous peoples' collective right to ancestral land was one of the central issues. Nevertheless, two other issues worthy of noting and relevant to the Ngorongoro case have been extensively covered by the Inter-American Court of Human Rights. One addresses indigenous peoples' right to participate in government, and the other addresses balancing the state and indigenous peoples' interests in a multiple land-use setting.

Starting with the issue of participation in the governance of natural resources, the court noted that the state made no efforts to consult the Kaliña and Lokono peoples prior to establishing 45% of their claimed ancestral land as nature reserves. This formed 59,800 hectares of the 133,945 hectares claimed by indigenous peoples. The rest of the 55% of the land claimed included the area where private persons had been granted titles and leases to conduct activities like building a hotel, vacation homes, shopping malls, gas stations, mining, and logging businesses.<sup>131</sup> Consent was not sought in granting titles and leases to non-indigenous persons in the ancestral lands. In addition, inclusion of indigenous peoples in the governance of their ancestral land like preparation of the Draft Bill on Traditional Authorities whose tasks would include administration of traditional land did not take the indigenous peoples on board.<sup>132</sup> In this situation, the court held that despite the fact that parties did not refer to the right to participate in the government under article 23 of the American Convention on Human Rights, such right had to be applied nonetheless under the *iuranovit curia* principle as long as the parties presented the facts that point to such violation.<sup>133</sup> In the end, the state of Suriname was found to have violated the Kaliña and Lokono peoples' right to participate in government, specifically the governance of their own traditional land, by excluding them from decisions that affected their interests in land. Viewing the case of Ngorongoro, there have been allegations that the Maasai peoples have not been granted sufficient opportunity to participate in the governance of the NCA. It is claimed that most decisions concerning the management of the property have been unilaterally carried out by the Board of Directors of the NCAA. This has led to the suggestion that the NCAA needs to be disbanded or reconfigured to

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130 Garífuna Triunfo de la Cruz Community and its Members v. Honduras, para. 108.

131 Kaliña and Lokono case, paras.137–140.

132 Ibid., paras. 55–56.

133 Kaliña and Lokono case, para. 126.

accommodate equal representation of the government and local communities in the Board.<sup>134</sup> On this aspect, Goldman offers his views as follows:

I am suggesting that a participation gap is bad for conservation and for local communities; it represents human rights abuses and poses ecological threats to conservation. Participation by local people in conservation may provide new insights and strategies for conservation, which do not separate people from nature in the strict dichotomous way...The exclusion of local people, on the other hand, can result in deliberate (if illegal) misuse of resources or passive neglect of an area, once it is no longer seen as belonging to the community.<sup>135</sup>

Another important feature in this case is the balancing of interests when it comes to the question of public interest vis-à-vis indigenous peoples' rights. It has been highlighted earlier that in the Kaliña and Lokono case, multiple activities had taken place on indigenous peoples' ancestral lands, some of these being building of a hotel and formation of nature reserves therein. The NCA presents the same circumstances, that is, apart from nature conservation in the Area, there are luxury hotels for tourists within the property.<sup>136</sup> The Maasai are of the view that if the aim of relocating them from the NCA is to reduce the impacts of human activities on the property for nature conservation, the hotels constructed in the property should also be relocated outside the Area.<sup>137</sup> Notably, the NCA was established as a multiple land use property whereby the interests of tourism, wildlife conservation, and human activities were meant to be balanced. In the Kaliña and Lokono case, the court elaborated that, in a situation where the interests of indigenous peoples are against the interests of nature reserve, the state should balance the collective rights of the indigenous peoples vis-à-vis environmental conservation, which is also part of the state's responsibility to defend the public interest.<sup>138</sup> In this case, the state had granted mining concessions on indigenous peoples' ancestral lands while denying hunting and fishing rights to the indigenous peoples. Fimbo argues '...land has always been an arena of struggles between contending forces.'<sup>139</sup> With this in mind, a way forward of taking on board both sides' interests has been provided by the Inter-American Court of Human Rights in case of conflict of interests between indigenous peoples and other forces, being the state or non-state actors, while implementing any 'public interest activity' at the indigenous

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134 Lissu, 2000.

135 Goldman, 2011, p.68.

136 The Maasai opinion obtained from a field visit to NCA, Tanzania, on 24 March 2022.

137 Ibid.

138 Kaliña and Lokono case, para. 168.

139 Fimbo, 2004, p. 2.

peoples' vicinities. Also, the court insisted that such situations should be treated on a case-by-case basis to bring about relevancy in handling indigenous peoples' interests in varying contexts.<sup>140</sup>

By summing up this section, it is worth noting that the experiences of indigenous peoples in Latin America with regard to struggles to defend their rights in areas of nature conservation and other economic activities sanctioned by the state, such as tourism, are similar to issues faced by the Maasai in Tanzania. This explains why the Maasai in Tanzania self-identify with the global indigenous peoples' movement. The positive aspect of this discussion is that the Inter-American Court of Human Rights has been revolutionary in terms of safeguarding indigenous peoples' rights, mostly ancestral lands, something that also implies protecting the survival of their culture and livelihood. The bar has been set high for the African Court on Human and Peoples' Rights that operates under the realm of the Banjul Charter, which protects the (collective) rights of the indigenous peoples in Africa.

## 11. Conclusion

This article addresses the question of human and collective rights of the Maasai of the NCA *vis-à-vis* natural and cultural heritage conservation in the NCA. It has been revealed that the Maasai's traditional and cultural way of life is threatened by environmental conservation. This situation is typical for the Yellowstone model of nature conservation. The article has attempted to balance the two notions of peoples' rights and nature conservation while explaining the role played by the colonial administration, post-colonial legal regime, international law and practice in detaching the indigenous Maasai from the NCA. The role played by UNESCO's technical assistance in facilitating voluntary relocation of the Maasai from the NCA to maintain the property's status as a world heritage site has also been highlighted. It has been discovered that the presence of legal guarantees by itself does not suffice to protect peoples' rights in protected areas. Problems such as impeded enjoyment of the collective right to culture, threatened livelihood in terms of food insecurity and restrained economic subsistence; inadequate consultation and inclusion of the Maasai in natural resources governance of the NCA have been uncovered despite guarantees of these rights in several international instruments to which Tanzania is a party. The fact that the Tanzanian government considers the NCA's Multiple Land Use Model<sup>141</sup> a failure and uses such allegation as a justification for relocation of

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<sup>140</sup> Kaliña and Lokono case, para. 155.

<sup>141</sup> The NCA Multiple Land Use Model was established as a very first trial model of mixed wild and human life in Tanzania.



the Maasai from the NCA continues to play a role as the root cause to unending conflict between the Maasai residents in the property and the government. The Maasai maintain that their coexistence with wildlife has been their way of life ever since before multiple land use model was established in such geographical area, i.e. before when the NCA and SNP were demarcated as two protected areas of different statuses.

## 12. Recommendations

Given the fact that Tanzania as an internationally recognized state may not function in isolation from the international community with regard to abiding by the body of laws on environmental conservation it has committed to, a balance between modern and traditional nature conservation techniques may be an option in containing the situation in the NCA. This will contribute to reconfiguring conservation approaches to bring about sustainable preservation and utilization of natural resources that do not offend the human rights principles or collective interests of the Maasai peoples. Nevertheless, the biggest question here is, are the Maasai, the government of the United Republic of Tanzania, and the international community willing to take this route?

Another suggestion is increased transparency, unfailing grassroots consultations, the practice of prior and informed consent, and inclusive feedback sessions. This may gradually improve the participatory governance of the property. Moreover, periodic community awareness programs on the national and global initiatives on environmental conservation and its accepted standards as well as its importance ought to be keenly implemented to avoid misinformation, confusion and chaos in controlling the growing number of population and livestock in the NCA. Collective rights to information and participation in form of a group are of crucial importance in such cases.

As for the residents who opt to remain in the property, voluntary relocation from the area should remain open at their disposal. Sufficient time, resources, and close monitoring of this process should be dedicated to the program to determine its challenges and possible solutions. This will ensure the perpetual fulfillment of human rights to both the relocated and residents of the property.

Most importantly, the human rights approach should be at the heart of identifying, proposing, vetting, approval and management of all UNESCO world heritage sites. It will be illogical to preserve these sites for the benefit of all humanity at the expense of humanity itself.

### **13. Opportunity for future research**

Since the process of relocating Maasai people from the NCA to Msomera village is ongoing and such an experiment costs this community to abandon the only place they have ever known to be home, there might be a window for future assessment of the socio-cultural and economic impacts of this exercise on the relocated Maasai. Another research route might be taken by looking into what lies ahead of the resident Maasai, who have resolved to remain in the NCA. This assessment might be made in relation to the future conservation of the property.

Moreover, thorough research may be conducted on the effect of the Yellowstone model of nature conservation on the collective interests of indigenous peoples in Tanzania. Contemporary data will provide timely and effective solutions to this persistent problem. The Maasai have suffered repercussions from actions taken to conserve natural environment in the NCA and other protected areas in Tanzania such as Loliondo Game Controlled Area, Mkomazi Game Reserve, Mkungunero Game Reserve, and Tarangire National Park, to mention but a few. Establishment, redefinition, and management of these protected areas have remained a threat to the Maasai and other indigenous peoples' livelihoods. Finally, lessons from other jurisdictions may shed light on how to move forward from the current situation. Comprehensive research is needed to come up with suitable lessons for each case. Research on the jurisprudence of other jurisdictions like the Inter-American Court of Human Rights on the protection of indigenous peoples' livelihoods may also play a great role in influencing judicial attitude towards protecting indigenous peoples' rights in Tanzania and Africa in general, hence a potential area for legal research.

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