

THE LEGAL PERSPECTIVES OF THE MAASAI CULTURE, CUSTOMS, AND TRADITIONS

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I. PREAMBLE

As you depart from the Kenya Airport for the outside world, you will notice the big billboards advertising mobile phones with a Maasai man balancing on one leg, and in full Moraan gear, looking greater than the greatest. As you flip through the Kenya Airways in-flight magazine, another advertisement attracts your attention with a Maasai Morran using the mobile phone and smiling from ear to ear. Various other advertisements depict the dancing warrior jumping high into the sky with masculine splendor.

There is little wonder then when Spear, in his book, *Becoming a Maasai*, writes “Everyone ‘knows’ the Maasai; men wearing red caps while balancing on one leg and a long spear, gazing out on the semi-arid savannah plains, stretching endlessly to the horizon; women heavily dressed in beads staring out from countless coffee table books and tourists snapshots.” Made known to the outside world by their neighbors’ colonial conquest, in modernization the Maasai stand in proud testimony to the vanishing African world. The *A-Z Kingfisher Encyclopedia* describes the African continent and its people; it highlights the fact that the Maasai women of east Africa wear bright cloth and beaded collars for special ceremonies.

II. INTRODUCTION

In order to understand the contemporary issues that my people – the Maasai – face, primarily evolving from the confiscation of our land, it is crucial to understand our culture, tradition, and lifestyle. As such, the following will provide accurate insight into the culture, traditions, and history of the Maasai. The understanding arising from this survey will allow the reader to better comprehend the social, political, economic, and legal issues later discussed in this Article.

The original home of the Maasai remains a subject of debate.¹ One

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I wish to point out that a number of people contributed ideas, in more ways than one, toward the development of this Article. Whereas I may not be able to mention each one of them by name, there are a few exceptions, like in every rule.

Chandra Roy was a pillar of strength throughout and a wonderful role model where patience and endurance was a prerequisite. Lucy Mullenkei of the Indigenous Information

school of thought maintains that they came from the Arabian peninsula, yet another insists that their origin is southern Sudan. Proponents of the theory that southern Sudan was the original home of the Maasai assert that they slowly moved down the Rift Valley that cuts through central Kenya and Tanzania and eventually supplanted or absorbed most previous inhabitants of this semi-arid savannah, bisecting the fertile highlands on either side.

It is difficult to be confident of Kenya's early development, especially when much information was only passed orally between generations (as happened in the less developed regions of inner Kenya) rather than by written records (as happened in the more "civilized" regions developing along the coast). It is thought that the Maasai left their home in the Nile Valley around the 15th or 16th century, reaching the Great Rift Valley and Tanzania between the 17th and late 18th centuries. This was approximately the time of great Portuguese influence on the coast, which was instigated by the explorer Vasco de Gama's arrival in 1498. The Portuguese were finally driven out of eastern Africa by the Arabs after the 1698 siege of Fort Jesus at Mombasa and after they failed in their renewed attack in 1728.

The Maasai and pastoralism have been closely linked in east African historical and ethnographic literature. Various people, claiming to be Maasai or deeply influenced by Maasai culture, occupy a variety of specialized economic niches in the Rift Valley and the highlands of central and southern Kenya and northern Tanzania. Each exhibits its own distinctive cultural ecology and ethnicity.

Periodic droughts, livestock and human diseases, movement of people, and invasions have constantly blocked ethnic boundaries in the northern parts of the Rift west of Lake Turkana. The *Turkana* drove Maasai speakers south and east of the Lake where they settled as *Samburu* cattle herders alongside unrelated *Rendile* camel herders. Their influence on the *Rendile* is still evident today.

Other Maasai settled in and around the swamps surrounding Lake

Network is a colleague in the area of community development and the struggle to have Indigenous rights recognized by various stakeholders. We have worked closely on a number of projects including the *Diversity in Culture* project. I owe her immense gratitude for encouraging me to believe in myself and her strong commitment to one day see the Maa community derive full benefit from the natural resources situated in their God-given land.

Elijah Marima Sempeta spent considerable time researching sources of historical data and gave valuable time to put it together. Ololtisatti Ole Kamuaro gave his insight from the perspective of a Maasai scholar and development practitioner. Thank you very much for the telephone contacts to discuss the subject.

The editor, Leslie Cole, made it easier and enjoyable to read. To everybody else, this is all our work, let us share in its success and work further to make a whole, collective product.

1. For detailed discussion on the migration and expansion of the Maasai, see works by John L. Berntsen and Richard D. Waller.

Baringo to become *Njamus* (pronounced *Ilchamus*), irrigation farmers and the only fishing Maasai. Further south, pastoral Maasai divided into a number of different sections. They came to dominate the Rift Valley as far south as central Tanzania. In central Kenya, pastoral Maasai fought, traded with, and married Kikuyu farmers. To the east, *Kalenjin* speaking agro-pastoralists to the west, and southern *Cushitic* mixed farmers and *Olkiek* hunter-gatherers were in their midst, while further south, they displaced *Maa*-speaking *Loogolala*, (people of the strong teeth – because they ate roots and grains), *Parakuyo* (*Iparakuo* – herders from southern Maasai land in Tanzania and the Pangani Valley), and interacted with Bantu-speakers in the surrounding highlands.

Today, the Maasai occupy distinct areas in both Kenya and Tanzania and number over one million.² In Kenya, they occupy Narok, Transmara, OlKejuado, Laikipia, Central Baringo, and parts of the Nakuru districts, as well as the Naivasha areas of their former traditional territories. In Tanzania, they settled the northern part of the country in the outskirts of Moshi and Arusha, areas surrounding Mt. Kilimanjaro.³

Alan Jacobs' 1920 pioneering ethnography regarding the pastoral Maasai encapsulated contemporary views by drawing a sharp cultural and economic boundary between pastoral, *Ilmaasai* and mixed economy *Iloikop*, and *Kwavi* (*ilkwapi*). Only the former, the *Kwavi*, contended Jacobs, were "real" Maasai – pure pastoralists who reflected the highest Maasai cultural ideals and practices. The others were mere pretenders of pastoral status, cultural scavengers who sought to copy the Maasai. Such copying or "aping" is considered "neo-ethnic plagiarism" or cultural piracy by modern historical observers and advocates of collective Maasai interests in that people who have no claim whatsoever to being Maasai adopt Maasai names and dress in Maasai attire and benefit from what rightfully belongs to the genuine Maasai. It is a growing cultural phenomenon in east Africa.

Cases of non-Maasai Africans posing with one leg resting on the other and dressed in colorful traditional Maasai attire are a common feature in tourist hotels throughout east Africa. One dance troupe in Kenya, calling themselves the Rare Watts,⁴ have become a household name and have remained popular for over ten years. Their services as rare entertainers (like the Maasai are perceived to be) are booked and paid for. Thousands of families in Kenya, keen to benefit from land deals and educational programs set aside for the Maasai, have adopted Maasai names.

This is common in the Ngong area, which is located just outside of

2. GOVERNMENT OF KENYA, 1999 CENSUS (Provisional Rep.).

3. Alan Jacobs, *The Traditional Political Organization of the Maasai* (1965) (unpublished Ph.D. dissertation, Oxford University) (on file with author).

4. Founded in 1992, Rare Watts is a fashionable group in the city donning Maasai attire and dancing more like Warriors do to regular music.

Nairobi and Nairragi-Enkare in the Narok district.⁵ Just like the technology wars of the information age, indigenous knowledge of the Maasai is on a threshold at the moment. Artifacts and traditional designs are being copied and developed without benefit to or acknowledgment of the source.

As early as 1918, A.C. Hollis stated in his book, *The Maasai, Their Language and Folklore*, that, "In east Africa, the Maasai are clearly distinguished by their language, customs and appearance from the Bantu races (although the latter often imitate them and have received a certain proportion of Maasai blood)."⁶

The "real" Maasai population, the pastoralists, can be divided into large sections that are internally structured into the following clans: *Iloodokilani*, *Ilkisonko*, *Ilkeekonyokie*, *Ilkankere*, *Ilmatapato*, *Ilkaputiei*, *Ilpurko*, *Iloitai*, *Ildamat*, *Isiria*, *Ihwuasin-kishu*, and *Ilmoitanik*. The *Ilkisonko* and *Ilpurko* are the largest sections, followed by the *Ilkaputiei* and *Ilkeekonyoike*, respectively. *Ilarusa*, *Iparakuo*, and a section of *Ilkisonko*, constitute the Tanzanian Maasai situated in the Mt. Kilimanjaro area of northern Tanzania. The demographic size and distribution here is larger than in Kenya. The contiguous geographical distribution of Maasai in Kenya, even on observation, is greater considering that the Serengeti, Kilimanjaro, Arusha, Moshi, and Ngorongoro (*koronkoro in maa*) areas constitute the Kenyan home of the Maasai.

III. LAND USE AMONG THE MAASAI

The Maasai people are tied to and are very much dependent on land and livestock for their upkeep and livelihood. The livestock depend on the land for sustenance. The people's movement is dictated by the livestock's needs (i.e., the pasture, water, and salt licks). The proximity of these requirements determines how long people remain settled in a given place. The Maasai people use their land principally for pasturing livestock. Natural resource management is a practice little recognized, but obviously employed throughout Maasai territories.

The principal land use activity of the Maasai is livestock production, appropriately described as pastoralism. Mobility is an essential management strategy to allow for maximized forage and ecosystem productivity. Periodic, controlled pasture burning ensures that diseases are kept under control and livestock have fresh, lush grass during different seasons. Wildlife grazing

5. Among the Maasai it is common to hear "my Kikuyu," or "my farmhand" as a form of assimilation, protection of the non-Maasai in exchange for errands and manual labor.

6. A.C. HOLLIS, *THE MAASAI - THEIR LANGUAGE AND FOLKLORE* (Oxford Clarendon Press 1905).

alongside livestock enriches pasture composition and variety. Nutrients are exchanged by the mixture of grazers and browsers, both domestic livestock and wildlife. Undoubtedly, this mode of land use is most sustainable and pastoralists are aware of this benefit.

There is also land set aside for use in cultural practices and ceremonial occasions. An example of the former is the *Enkutoto-E-Purko* in the Kinopop area of Kenya, which was used for the *Eunoto* ceremony to terminate warriorhood and free young adults for junior elder status. (Men may settle and marry after this rite is observed. They are also absorbed into the decision-making structures of the society, sitting in conflict resolution fora and articulating customary norms in marriage according to traditional legal mechanisms.) The *Endoinyo Oolmoruak* in Tanzania and the *Nainmina Enkiyio* area of *Loita* in Kenya are also reserved for religious and cultural rituals.

The land is further subdivided into grazing areas. One area is grazed during the rainy season and the other during the dry season. The forests and trees are used for a multitude of rituals, and importantly, as a pharmacy. Trees and certain plants are used to extract medicines that have assisted the community in healing a wide array of ailments since long before the arrival of Western medical science in the Maasai land. To this day, the community is proud of its (pharmaceutical) herbal medicinal knowledge. The Maasai have a wealth of experience in determining which plant is suitable for a certain ailment. Forests are the traditional pharmacy for the Maasai. Basic medical skills are shared by Maasai of all ages and both genders, and the majority can correctly prescribe treatments for simple ailments. Cultural wisdom requires men and women of all ages to possess these basic skills in case of unforeseen emergencies.

IV. CULTURES, CUSTOMS, AND TRADITIONS

Due to their unique and distinct culture, the Maasai people of east Africa are among the most well-known to outsiders of all of the ethnic groups in Kenya and Tanzania. Many travelers of the late 19th century, the so-called “explorers,” told tales of the courage and bravery of the Maasai people. Thomson describes how, in 1883, the Maasai entered through his camp and ordered about the whole caravan, including himself, as if they had been masters and the travelers were slaves!

The Maasai identify themselves as all those who speak the *maa* language and uphold the culture of pastoralism. However, a wide variety of dialects exist in the *maa* language. Different branches of Maasai peoples are known by different names, though they are basically, all one people.

The Maasai share their present expansive semi-arid lands with wild animals. Extensive and biologically diverse ecosystems form part and parcel of the pastoral lands of east Africa. A few of these areas have been classified as “Global Biosphere Reserves” by the U.N. Scientific Education and Cultural

Organization (UNESCO). They are protected by international conventions, such as the Convention on Biological Diversity (CBD). Some of these areas include Amboseli on the slopes of Mt. Kilimanjaro, and the Ngorongoro Crater in northern Tanzania. Maasai Mara is in line for the same status in due course. Pastoralism, the socio-economic lifestyle of the Maasai, promotes an integrated natural resource protection strategy, peacefully co-existing with the rich east African wild flora and fauna, thanks to the traditional, nature-friendly Maasai cultural practices.

V. THE CREATION OF NATIONAL PARKS AND GAME RESERVES

The policy of creating protected areas was a state reaction to the growth of commercial hunting that threatened wildlife species with extinction. Because professional hunters targeted the prime species of the wildlife herds, that is, the most productive, the gene pool was fast being threatened. Unlike the Maasai who hunted for socio-cultural or security reasons, commercial hunters were driven by aesthetics and pure prestige. The first park to be carved out of ancestral Maasai lands was the Nairobi National Park, in 1946.

Among the Maasai pastoralists, natural resources did not need official protection. Rather, wildlife, river systems, and forests, whether tropical or savannah, were taken care of through traditional checks and balances. Various taboos and beliefs were inculcated and entrenched in human behavior to enhance environmental and natural resource protection. Tales of trees that “bleed milk” or forests that would “eternally swallow adults” (the forest of the lost child), among others, are testimony of a conservation ethic in the Maasai culture.

In times of prolonged and severe drought, spiritual rituals were, and still are, organized by both men and women. Delegations (*ilamala*) of men and women of high moral standing, criss-crossed Maasai land to make known the intention to offer sacrifices to God (*Enkai* – “the One in the sky”). Families would contribute stock, labor, skills, venues, and guidance to facilitate this collective activity. Ritual experts would be identified and they would then fix events according to the traditional calendar and hold a ceremony to ask *Enkai* for peace and tranquility, rain and prosperity, and thus, social stability. This cooperative ritual illustrates Maasai understanding of the forces of nature and the limitations of human ability in controlling them. Divine interventions helped balance the needs provided through natural resources.

State protection of wild flora and fauna is subsidiary to the integral way that the Maasai people practice conservation and the morality that goes with it. However, game reserves and national parks are preservation centers that hasten the disappearance of the animals and habitats they are intended to protect. The national governments and international institutional strategies have also facilitated the rapid loss of Maasai land through alienation and gazettement of protected areas. Amboseli, parts of Tsavo East, Nairobi National Park, and Lake Nakuru National

Park are only a few of the defined protected areas in Kenya. Serengeti National Park and Ngorongoro Conservation Area in Tanzania are two examples of extensive losses of land and subsequent mismanagement of forest, water, and pasture resources. The alienation of the Maasai people from these lands can also be considered a violation of human rights.

The Kenyan state has also made and broken promises regarding compensation arising from the human-wildlife conflict. The level and processes of compensation are so cumbersome, without any legal foundation, it is a mockery of due process. This has led to a constant battle between the Maasai and the government authorities. The Maasai are inclined to graze their cattle in the game reserves, especially when there is scarcity of grass for their livestock. Grazing rights, salt licks, and watering points are all compromised in the rush for conservation of wild animals. Yet, wild game wander into communal territories and graze. They spread over a wide area without interference from the Maasai. The Maasai generally do not hunt wild animals or use them for food, as their cattle provide them with sufficient meat and meat products.

However, the Maasai are in constant war with the lion (king of the jungle) as each of the courageous warrior party tries to prove his prowess over the other. When the lions hunt for the Maasai cattle, the Maasai, especially the warrior group, hunt for the lions and make sure they find and kill the offending animal or animals. They also kill lions just to demonstrate their fierceness to their age mates and other members of the tribe. The killing of a lion is a source of prestige and the death of the 'king of the jungle' is not in vain. Even in death, the Maasai put its mane to use by wearing it on their heads during ceremonies and important occasions.

In recent years, across east Africa, the Maasai have taken bold steps toward setting aside land for the protection and management of wildlife natural resources. Communities have formed and registered wildlife conservation associations, wildlife sanctuaries, and ecosystem management groups in both Kenya and Tanzania with varying degrees of success. Olchorro Oirowua Wildlife Conservation and Management Association was the first such structure, under the leadership of the late Lerionka Ole Ntutu. Kimana Wildlife Sanctuary in Kajiado followed. These structures have since grown into multiple forums thereby increasing community interests in the management of their natural resources.

Under this system, Maasai landowners form cooperative organizational structures and apply for registration as wildlife management entities with authority to charge fees for tourist visits to their game ranches. This is different from national parks and reserves in two ways: (1) it is not government controlled; and (2) the revenues earned are shared by the community or individual landowners who have committed themselves to wildlife conservation as a form of land use rather than crop farming. On the other hand, national parks and reserves are created through official government notices, while the former are registered as companies limited by guarantee and no share capital.

The foregoing is relevant as a demonstration that there is the capacity

among indigenous Maasai to take responsibility for their short and long-term destiny. What is required is political goodwill from national governments and regional organizations such as the East African Community and for increased positive intervention from the relevant authorities.

Among the Maasai, land is a collective asset that defines identity by distinguishing the extent of ethnic territory from others and supports livelihood. It is not transferable nor is it for speculative investment.⁷ However, land rights and land use have evolved dramatically throughout Kenya and east Africa. Land use originally was universally for pastoralism, that is, the raising and keeping of livestock. This has also changed over the years.

VI. THE MAASAI COMMUNITY

When young, Maasai boys and girls live with their mothers in a house built of cow dung and wattle, in a large enclosure. Their father, his other wives, and young children live nearby in almost identical houses of their own. There is a small house called *orripie* where the father of the family lives. Around all these houses is a thorn fence for protection. This type of homestead is called an *enkang*, and may have twenty, or even thirty, houses within it, arranged in a circle. The livestock are usually penned-up in the middle of the enclosure at night.

To build a house, the women mark out an oblong space approximately two by three meters. They then scoop out small holes around this oblong and put cow-dung into them to soften the soil. These holes are made at about twelve centimeter intervals, leaving a space for a door, which will later be made of bamboo or other strong poles. They then collect a number of long stakes, which they drive into the holes. When the pole is deep enough, they pack it in with earth so that it stands firmly. These poles, which are about two meters high, are the beginning of the walls of the house. The women then collect whippy branches, peel the bark off, and tie them to the uprights near the top, at right angles, so that they are joined together all around. Saplings are pushed between the horizontal ties and the uprights and fastened together across the top of the hut, making a curved roof. This is the first stage in hut building.

Next, the women collect a quantity of twigs and small branches with which they fill in the spaces between the stakes. They then plaster cow-dung over the entire wooden structure, adding several layers of the mixture to make the wall and roof thick and smooth. This simple form of housing is demonstrative of the Maasai's conservative lifestyle. First, they conserve the environment by using renewable materials for, through the conservation, they are guaranteed their means of livelihood. Second, this form of housing contributes to the Maasai's lack of interest in money and its general societal value as most of their requirements, ranging from housing to clothing and food, are within arm's reach. When they

7. Land and a male child are two things a Maasai cannot compromise on.

need an item that requires the use of money, they always sell one or two of their livestock and have their needs fulfilled. It is this kind of self-contained ecosystem that has made the Maasai the proud, content, and most conservative (resistant to change) of the indigenous people of east Africa. Use of charcoal, gas, and electricity is unknown in the deep reserves and many Maasai have yet to comprehend what it means to “develop” in terms of new technology and keeping pace with national and international development.

For food, the Maasai live almost entirely off of their cattle, drinking their milk and blood, and eating meat occasionally. Frequent meat eating is taboo as it endangers stock levels and is considered unwise because it is seen as a form of poor spending. Livestock is the equivalent of a modern savings bank account. Emergencies might otherwise catch one without resources.

To ensure a balanced diet, meat is preserved by mixing it with a fat known as *olpurda*. This is then stored in tin containers and eaten when need arises or as a supplement to other foods. These foods are supplemented (except for the warriors) by cereals and grain obtained from the Bantu nearby. Milk is stored in calabashes cleaned with the stalk of *Oloirien herb*, a milk preservative that keeps it fresh for a period of three days.

A. Knowledge System

Knowledge comes in diverse forms; from the wisdom of an elder who understands the cycle of life and when rain will fall, to the logic of medicine men who have dispensed their herbal medicine from time immemorial. The almost mandatory use of herbs while consuming soup made of cow’s meat during recuperation or after childbirth is an example of the benefit to be derived from the use of certain medicine and herbs.

Knowledge also comes from the pastoral nomad who is capable of recovering his lost animals by reading subtle animal tracks brushed into the dust or from the traditional midwife who is able to remedy a traverse fetus without having seen the door of a classroom. The ability to fix broken bones of both humans and livestock is yet another remarkable form of rich traditional indigenous knowledge. With this outstanding common knowledge, it is perhaps surprising that Western knowledge has ascended to a global ideology at the expense of all other traditional expertise. Recently, however, it has been recognized that such valuable traditional knowledge tenders a monetary value in the market.

In the industrialized world where the process of production and consumption is a societal imperative, those with knowledge extract the resources, mobilize labor processes, and distribute the products. Knowledge then becomes synonymous with economic growth and progress. Knowledge of most indigenous people, the backbone of collective existence, remains caged in their owners’ minds and risks demise with the holder’s death. When a Maasai sage passes away, a library and a knowledge system goes with him or her. The Maasai, too,

have suffered from this fate typical of people belonging to an oral tradition. Even where attempts have been made to bring this knowledge to a minimal recognition level, it has been brushed aside as dangerous, crude, and unhygienic, and generally summarily dismissed. If taken seriously, it could be a valuable complement to modern medical scientific knowledge and pharmaceutical production.

B. Health Care

The Maasai have medicine in herbal form that is capable of curing nearly all of the diseases that affect them. For instance, they believe that a constant headache is brought about by two conditions: (1) an enlarged bile, which is cured by the administration of an herb known as *Esumeita* that has been proven to have unparalleled medicinal value; and (2) contaminated and unwanted food and impurities in the stomach. This is cured by the oral administration of *Iseketet*, small round seed-like berries. *Iseketet* are located and harvested hanging from trees in tropical forests in the mainly highland areas. They are then dried and pounded into a powder form that can be administered with boiled water or milk, depending on the age and severity of the patient's problem. This treatment has had effective positive results for all of its users.

Both drugs can be administered to a patient separately or concurrently and, to date, no side effects have been attributed to their use even though they have been in use for as long as the Maasai have been in existence. Various cures with proven results for venereal diseases also exist in the form of particular herbs.

The Maasai concept of medicine is not based on thousands of chemically analyzed herb samples, but rather has developed through generations of informal empirical learning and has been transmitted through a strong oral tradition. It is knowledge that is local and sensitive to the context of its application. This type of knowledge is powerful in that it allows indigenous people to instantly recognize what herbal medicine will cure a particular disease and good health has been preserved through such medication. Indigenous people have been conducting practical experiments for centuries with results that are invaluable to the modern world. Unfortunately, this knowledge is at the verge of being misappropriated and commercialized.

Further, the world is a complex ecosystem where the relationship between parts is as important as the parts themselves. The approach, therefore, that indigenous knowledge has to offer is not only useful, but also necessary. Indigenous knowledge does not hold a conventional market value, yet it does incorporate a whole system of ethical values and meaning that regulates its use. Attaching monetary or material value to a knowledge system inherently undermines the intrinsic value of that system. Furthermore, it is also a threat to the sustainability of natural resource products such as wildlife. Humans cannot reproduce game and keep it wild. The International Labor Organization (ILO) Convention No. 169 (articles 13-18) requires that indigenous knowledge be

recognized, protected, and duly compensated where necessary. The recognition and protection of Maasai traditional medical knowledge by both the national governments and international private interests working in Kenya and Tanzania falls under this international convention.

Scientific reductionism has sometimes had trouble dealing with complex systems and with the abuse of its own power. Thus, where Western knowledge has failed in that respect, indigenous knowledge may be an invaluable asset. However, one need not be a substitute for the other; they should and could complement one another. Serious research into traditional medical practices should be encouraged and is recommended, as the indigenous Maasai cannot afford the undertaking of such an expensive task.

C. The Maasai Girl-Child

- ENKAI Aomon Entomono (Lord, I pray for maternity).
 – feminine Maasai prayer.
- ENKAI Naai nchooki enkima (Lord, I pray for a fireplace).
 – masculine prayer, asking God to provide for a household.

The place of the Maasai girl-child is best represented by the two sagacious requests above. However, in essence, the two represent societal ties, which can only be guaranteed by the girl-child. She holds the key to the social fabric; she is the glue that holds Maasai society together, the source and the means for enhanced social ties. This synopsis cannot be exhaustive, but will attempt to highlight the central place of the Maasai girl-child in her nuclear family, extended relations, and the wider society.

The birth of a girl to a Maasai family is greeted with all the feminine fanfare that society can offer. Ululation is the initial signal, just like the boy. It is a form of social broadcast to celebrate and share in the family joy. Then, the gender of the newborn is indicated by the ritual slaughter of a heifer (literally a she) and the feeding of heifer blood to the new mother.⁸ A heifer represents the prime part of a herd. It is the store of fertility value and the hope of continuity. The girl-child is the fulcrum of stability and transition in Maasai society. She is also a guarantee of extending social ties through marriage and a repository of the accumulated experience of society, as passed on to her by the grandmother, mother, mother-in-law, neighbors, experts, and midwives.

Schooling begins with the naming ceremony. Her name will have a feminine connotation in most instances, although Maasai names are unisex from time to time. During the ceremony, she also learns how to respond when she is

8. As soon as a baby is born, the first thing that is done is to get blood from a live heifer or ox. The gender of the newborn determines the gender of the source of the blood. For a girl, it comes from a heifer; for a boy, it comes from an ox. The blood is the first food for the woman after childbirth to replace what she has lost in labor.

called out. Her response is different from that of the male child, the gender distinction. It is followed by the distinction in domestic tasks that each child performs as they grow up. At an early age young boys may herd calves, lambs, and kids close to home, while the girls help with the young children and keep the mother company doing household chores. Between the ages of eight and fourteen, or just before circumcision, the girls are allowed into the free company of the warriors (newly circumcised lads) and can engage in free sex as they wish and can accompany the warriors to the bush “holiday” where they spend “good” times and eat a restricted diet of meat and herbs.⁹

The social curriculum starts with communication – learning to speak effectively. The ability to reach out orally to different ages and genders in society is a highly valued accomplishment. This translates into skills for a good mother, a good wife, and perhaps even a social elite. A Maasai idiom states that “a good orator has an effective self defence,” “*emitu enkutuk olopeny*.”¹⁰ The next part of a girl’s education is the dress code. It is the role of the mother and older sisters to know and keep the dress code. At different stages of maturity the code and mode of dress change and the girls must adopt the style of dress appropriate for their maturity.

Food and music are standard measures of cultural practice and understanding. Choice, preparation, and the storage of food are considered vital skills in traditional settings at both the family and community levels. The skills of cookery and nutrition are taught by the mother and siblings and shaped by circumstances such as the availability of materials and type and sizes of accessories. The individual perfects how she wants her work done.

Custody of the girl-child is naturally in her nuclear family. Even in the case of an adoption, she is legally and socially a child of that family with all rights and privileges. Parents have the responsibility to provide for all necessities without exception. There are various social stages that are marked by ceremonial fanfare. However, the most important rite is that of transition, which happens at adolescence, and for girls is marked by circumcision, conventionally described as a clitoridectomy or Female Genital Mutilation (FGM). As a customary practice, it is as important to the initiates as it is to their families and the society at large. It marks a rite of maturity. The girl is promoted into the league of the honorables. Suitors may come, she may marry, and a social network is likely to be developed.

The seclusion period after circumcision is also characterized by teachings about the expectations of the larger society, their would-be spouses and children, and the chores that attend to womanhood. A good wife is not adulterous and is a hard worker. She wakes up early to milk her cows, prepare breakfast for her husband, and tend to the children before moving outside to replenish the stocks of firewood and water, and to repair the family hut.

The initiate is also made to overeat at every meal. She has to be healthy

9. The genesis of this Maasai norm is explained in the next section.

10. Good oratory is a sure defense.

or at least look healthy after seclusion. To the initiates, it is a time to be recognized as a grown woman who can marry and have a family of her own. It is a stage of personal achievement and social recognition among peers and parents, at least in the cultural context. It is a time of being responsible for one's own actions. The girl-child is not consulted when the time comes for her to be initiated. The parents of the initiation candidate determine the time and decide to carry on with it. It is simply practiced as a cultural norm.

1. The Custom of Circumcision or Female Genital Mutilation (FGM)

Perhaps the following true story firmly entrenched in the folklore of the Maasai and their language, and as authoritatively told by Hollis, on "How the Maasai girl-child met her fate" will help shed light on the issue.¹¹

There once lived an old man called Ole Kumpash who had two daughters and a son named Naipei, Nosim, and Saruni. In the course of time, the children grew up and the boy became a warrior. War then broke out between the old man's people and a neighboring tribe, with the result that the former feared to take their cattle to the salt lick, as they were accustomed to do once or twice a month. The cattle suffered in consequence and gave no milk.

When the old man's son saw that his cattle were diseased, he made up his mind to take them to the salt lick, and to die with them if necessary. His elder sister Naipei accompanied him, and as he was leaving the paternal roof, he told his younger sister Nosim, that if she saw smoke issuing from the salt-lick place, she would know that he was safe. The bravery, nobility, and faith of the warrior son are clearly seen here; that Saruni was determined to lose his life for a noble cause cannot be gainsaid.

The move to enemy land began in earnest and on his arrival at the salt lick, Saruni erected his kraal, and encircled it with a hedge of thorns. The next morning he took his cattle out to graze, leaving his sister behind to look after the kraal. For some days the enemy did not come near them, perhaps buying their time before attack. One morning however, the enemy suddenly appeared. The girl was alone at the time, and they made love to her after which they departed. Here, Naipei is seen striking a love relationship with an enemy or people with bad intentions.

11. HOLLIS, *supra* note 6.

Upon the warrior's return in the evening, he noticed the footmarks, but said nothing to his sister, obviously expecting her to narrate the story. But Naipei chose to stay mum. The next morning Saruni drove his cattle out to graze as usual, and when he had taken them to a safe distance, he returned and hid himself near the kraal. The enemy came again and made love to the sister. When they were about to leave, the warrior heard his sister say to them "If you come this evening, I will sing when my brother milks the big cow (olashe botor). You can then take the cattle and me away too." What great betrayal! This truly was a case deserving punishment and just as the punishment that was meted out to Eve after the fall, Naipei's act of betrayal would tremendously and directly negatively impact the generations of girls that followed.

The warrior went back to his cattle and in the evening, when he returned to the kraal, he placed his weapons in readiness and pretended to milk the big cow. His sister at once commenced to sing, so he left the cow, and seized his weapons. Almost at the same time one of the enemy warriors jumped over the thorn hedge only to be killed by the already informed and prepared warrior. Five others met with the same fate, and the remainder fled. The warrior then sailed forth and collected a lot of firewood with which he lit a fire and burned the bodies.

It had been raining and the women of the old man's kraal in the warrior's former territory were repairing the damage done to their huts by plastering them with a mixture of cow-dung and clay. The warrior's younger sister Nosim was on the roof of the hut, and when she saw the smoke issuing from the salt-lick she cried out, "My brother is safe." She was asked by the villagers how she knew and she told everybody what her brother had said to her when he left them.

The next morning all the people of the old man's kraal moved to the salt lick and their cattle speedily recovered. Saruni related to his father what the sister had done and the father was greatly dismayed that his own child could afford to indulge in such misadventures. His conscience implored him to act and to do so lovingly, decisively, and conclusively.

Since that time, female teenagers between the ages of twelve and fourteen have been circumcised as a social rite of passage. Teenagers are taught to refrain from improper sexual behavior, particularly to avoid having children out of wedlock. It is taboo for an uncircumcised female or male teenager to make

children. As a matter of fact, adult girls wear deterrent anklets symbolic of preventing unwanted pregnancy.

Prior to this event, it was not customary for the young girls to go to the warrior kraals and even follow them to the bush for “free love.” The girls always had remained at home tending domestic chores. However, after this treachery was exposed, it was considered safer to the community and for posterity to let the Maasai girl-child accompany the warriors to go sing, dance, and live with the warriors. This custom where young girls engage in free love with warriors has been observed ever since as a punishment and to curb lust in young, uncircumcised girls.

The sentence meted out to the young girl was, according to the *Maa* community, well thought-out and full of wisdom and nobility. They believe that it would have been unfair to the society not to act on traits that have the capacity of wiping out the race in the extreme or at least depriving them of their livelihoods. Security concerns were paramount in this incident, but on the other hand, there was blind and dangerous passion by a Maasai girl who was infatuated by what she thought was love. It was, therefore, necessary to remove the young, and mostly idle, girl from the possible reach and exploitation of the enemy and consequently, remove themselves out of real harm’s way. Yet, at the same time, it provided an outlet to the passion that formed the basis for treachery. The avenue for an enemy to attack through the girl-child was, therefore, permanently removed and a lasting precedent was stamped upon the whole race.

This was, however, a temporary measure and as *Isimi*, or the period of consorting with young warriors was, and still is, a short period of time ranging between six months to a year. Furthermore, this experience of “love” could and can only be shared between warriors and the young girls who have not necessarily reached puberty. It is the author’s belief that prior to Naipei’s betrayal any idea about female circumcision was not only unknown, but also unheard of. Naipei’s actions were dangerous and irresponsible. There was a need to act on this irresponsibility and to ensure that girls became mature and responsible members of the Maasai society that could not only be respected, but also trusted with families (i.e., children and spouses).

Circumcision has been entrenched in Maasai society as a rite of passage for so many years since Naipei’s action that the practice is worshipped with pride by Maasai girls and women, educated and uneducated alike. Early marriage was another drastic measure believed to remedy the treacherous and “promiscuous” mind of the girl-child.

The entrenchment of female circumcision as a rite of passage cannot be over emphasized. Case studies reveal an almost fanatical belief in it and many educated Maasai families still practice circumcision. To them, it is wrong not to circumcise their girls as ties to these traditions are very strong. They were brought up believing that an uncircumcised girl is incomplete. The issue is not that they do not understand the risks or negative effects, but they fear social isolation for their children. As far as the Maasai are concerned, no matter how

educated or wealthy one is, no matter who you are married to or how many children you have, as long as you are uncircumcised you still remain an “uncircumcised girl” (*entito neme murata*). Parents will not let their sons associate with uncircumcised girls, let alone marry them. The risk of isolation is much more tormenting than the age-old practice of circumcision.

Today, in the eyes of all and sundry, an educated Maasai girl is not only one of the most attractive of the women in Africa, but also the envy of many women for various reasons. The Maasai girl has proven qualities such as being a lasting marriage partner. It is indeed the desire and dream of many men in Kenya knowledgeable of Maasai culture and traditions, to have the hand of a Maasai girl in marriage. Their character is seen as consistent, responsible, loving, and firm, but humble.

Thomson in his book, *Journey Through Maasai Land* (1885), described the Maasai women as follows:

The women had all the style of men. With slender, well-shaped figures, they had brilliant dark eyes, Mongolian in type, narrow and with upward slant . . . obviously they felt they were a superior race, and that all others were but as slaves before them. Since then the Maasai had no formal schooling, one can only attribute these amazingly noble characteristics to their traditions, culture and value systems that have stood the test of time.

2. Toward Eradication of FGM

As seen above, the psycho-socio status of the girl is radically transformed after the initiation ritual. Her physical and psychological behavior must change and must be seen to have changed to reflect her new status. Her communication skills become those of a person with a wider view of life in the community and at home.

In a typical Maasai setting, formal schooling is less important than the new expectations of traditional life. Traditional dictates far outweigh academic responsibilities or demands; the Maasai girl easily opts for her cultural ways at the expense of educational opportunities. The practice of FGM exiles potential academics and trained manpower from the mainstream of things to the periphery of the poor and ignorant.

The girl-child develops an attitude that formal education through the school system belongs to the “little uncircumcised ones,” not her. Dropout rates multiply among the Maasai in general and the girl-child in particular. Dropout rates among male children of this age are lower, because there is a parental bias for the male-child to complete school rather than the girl-child contemporary.

Formal education has the effect of broadening one’s worldview. As such, fewer parents who have had formal education have their daughters

circumcised. The case is different among those who have not had formal education at all. Olkejuado district is a case in point.¹²

HIV/AIDS is a new phenomenon that should also discourage the practice of FGM. One of the means for transmission of HIV is through contaminated blood on broken skin or open wounds. More often than not, a circumcision surgeon operates on more than one client in a short sequence. Candidates are put at a very high risk, given that they are not generally examined before or even after the operation to determine their HIV status. Worse still, the operating tools are the same from one candidate to the other.

Other consequences, at times fatal, can result from circumcision. These include, but are not limited to, the rupturing of the birth canal, otherwise referred to as Recto Vaginal Fistula, and the Vesicle Vaginal Fistula, found in older women, where the uterus ruptures leading to excessive bleeding. It has also been scientifically proven that FGM does not alter the sexual urge of these girls. Thus, the intended effect, from a customary point of view, is not achieved after all.

Another point to note is that no government institution performs circumcision on girls in Kenya anymore. Cases of failed operations are reported to hospitals as illegal and unhealthy, therefore punishable by law under the Children's Act. There are tens of cases pending in courts throughout the country against families that have forced their daughters to undergo the practice.

3. A Case For Judicial Intervention

Africa has come of age in terms of judicial evolution. The east African region, particularly Kenya and Tanzania, has made great strides in this area of legal reform. For instance, Tanzania had a review of its constitution in 1997 and Kenya is in the process of conducting a constitutional review.

As these two countries are the primary abode of Maasai pastoralists, protection and advancement of the interests of the girl-child can be entrenched in the new judicial dispensation. Non-governmental organizations (NGOs) and community-based organizations (CBOs) have an opportunity to mobilize and sensitize the Maasai about the need to abandon unwanted customs. FGM has proven that it reverses the fortunes of the girl-child in the modern world.

The Children's Act (No. 8 2001, read with Cap. 141 Laws of Kenya), is another avenue that expedites judicial intervention on the matter. It explicitly protects the girl-child from early marriage or forced FGM. As recently as December 2002, some parents had to contend with the challenges that the Children's Act posed to them immediately after it received presidential assent and became law.

In order to give the proponents of FGM even less room to maneuver, the

12. Statistics to support this contention are not available, but will be availed at a later forum. The author is a native of Olkejuado and has personal experience on socio-economic life of the Maasai here.

East African Assembly should take up the matter as an agenda for its member states. An open day should be held at the Assembly's headquarters to lobby the members about the need to eradicate the practice through collective regional policies, if not legislation.

The cultural and intellectual property rights of the Maasai, as an outstanding national asset, should also be reviewed with a view of legislating against its abuse. Preoccupation with photography and unauthorized publication regarding the Maasai in east Africa is a full-time responsibility. It started with the explorers, then the missionaries, followed by scholars of all disciplines. The trend has never stopped. Some of the literature by these people is superfluous and does not accurately reflect Maasai culture or their history.

Misrepresenting traditional cultures should be considered a form of cultural pollution and be made a civil offence. This would go a long way toward providing indigenous people in east Africa the necessary leverage to benefit from the products of their traditional practices without prejudice. This, however, should not be used to denounce positive cultural norms. Involvement of traditionalists and conventional experts in formulating a national policy on cultural preservation would be advantageous.

D. Violence Against Women

Maasai women find it quite difficult to take their spouses to court as they believe society will condemn them. Is it only society or is it something in their blood that causes a woman to, at times, press charges and then drop them at the eleventh hour? Some women will say "because of the children." Others say, "I will become a vagabond as I have no job," and yet others state that, "It is in the man's blood just to be wild for the sake of it."

A story is told of a woman who was beaten severely for refusing to hand over the twenty-shilling coin she had earned from the sale of vegetables. The man had wanted to go and drink, but the woman would not budge as the money was needed to buy more vegetables for resale for the family's upkeep. The man went and got drunk on credit and came home in the wee hours of the night. He broke the fragile door and went straight to the bedroom and stepped on his children who were sleeping on the floor next to where their mother was asleep on a carton bed. He plucked her from the "Maskan" and threw her next to the fire and the "nyungu" that was on the fire spilt its contents on her. Then, in her effort to protect herself from the blows of her assailant, she actually fell into the fire and was seriously burnt by the log of wood that she had covered with ashes to ensure that the fire was preserved until morning.

The fifth blow from the cow dung that was being used on her by her husband fell on her shoulder and fractured her shoulder blade. She knew he was out to murder her as he kept shouting, "You think I can allow you to shame me in front of my friends who bought me beer tonight and I had to promise to pay the same in the morning. You dare refuse to part with the twenty shillings, which is

mine! Are you not mine? Are you not my property? Can't I beat you and kill you if I want, especially when you disobey me, yet you are my property?"

She shot out of the house like an arrow and as usual she took a familiar route to avoid pitfalls. There was only one big hole that was quite dangerous in this route and she almost fell into it when she tripped and came sprawling down like a heavy stone. She missed the deep hole by a whisker. She managed to come up to her feet just as the man's footsteps drew near. She nearly forgot her mission to save her life and remembered that her monster husband following her may be in danger of falling into the perilous hole, as he was really intoxicated that night. She stepped out of the path and screamed at the top of her voice "Baba Watoto! Look out! You are nearing the big dangerous hole and you might fall inside it." It was too late for her warning.

Needless to say, she looked for people to remove her husband from the hole first and went into debt ferrying him to a hospital before even thinking about her fractured shoulder blade. As if this was not bad enough, she gave an excuse for her broken shoulder blade and maintained that story to this very day. So what is it really? Society, women, or something in the blood? Work it out.

E. Marriage and Inheritance

Under the Judicature Act (Cap. 8 Section 3(c) Laws of Kenya), qualified cognizance is given to customary law as one of the legal and applicable statutes, as long as it is not repugnant to the Constitution or in conflict with other written laws. Other such "laws" include written law and English law.

In traditional marriage, it is considered a union between a man and woman or women. Marrying more than one wife, or polygamy, is a common practice among the Maasai. Legally, it is not an official practice; rather, the law does not recognize polygamy officially. However, neither does it forbid polygamy.

The father, as head of the family, has absolute authority to choose partners for his children. In some cases, the mother or the next of kin may also have a say, depending in the strength of relations between the family units. The girl-child has no say on the choice of a suitor or husband. In terms of property rights, the girl-child may have access to use the property, but not any hereditary right to property at her parents' home. This is considered a precaution because she will be married off as approved by the family and will move to the kraal of her husband. Wives will also be brought home by her male siblings. The same is true with the livestock; she may have access to the stock at her parents' home to maintain their livelihood, but not to own. Traditionally, land did not belong to any individual. All had access to it and it belonged to all.

Except for alienated user rights, such as special grazing areas, *ilookeri*, and strategic watering points that are fenced off using twigs and bushy leaves, traditionally, all of the land was for everyone to share. Settlement, more or less, meant ownership. A pattern of settlement is agreed on to avoid obstructing

grazing, watering, or salt lick points. These vital assets are also protected by using a round shape for settlement to limit the spread of houses into pasture areas. Security of the livestock is taken into consideration, as well as using easily renewable construction materials to ensure minimal damage to the ecology, particularly the trees. Large bushes and trees are reserved as sources of firewood, ceremonial hotspots, traditional pharmacies, and water catchment areas.

Any encroachment by another person must be by prior arrangement. Terms and conditions for sharing of settlement areas and pastures and other resources such as water and salt licks are agreed upon by the concerned families to avoid inconveniences. However, less is known of land tenure arrangements, a fact that shall be considered in details in a later section of this analysis.

Suffice it to say that no one inherited land in traditional Maasai society, male or female. The basic items of inheritance in contemporary Maasai society, at the family level, are symbolic items, such as the father's traditional stool (*olorika loo nkejek*), the snuff and tobacco container (*olkidong*), the metal bracelets worn by all his sons (*ilkataarri*), the sword (*olalem*), ear ornaments (*isakankarri anaa muna*), the walking stick (*olartat*), and a prestigious cloth made from Columbus monkey or hyrax skin and worn only occasionally (*enkila*). There are those standard items, automatically inherited by the first-born son. There are also those that the father specifically allocates to particular sons. The girl-child is considered to have settled down with her own husband, children, and livestock and therefore, does not need her parents' property. However, the father has the authority and the right to apportion her anything in his estate. He is the final arbiter. One would live under an incurable curse to go against his death wish.

Livestock is the actual property to be inherited and shared in traditional society. However, with the changes in land tenure, land can now be inherited. With that has come the question of the place of the girl-child. She enjoys symbolic ownership of the stock identified with her at the family estate. As such, she loses claim to this as soon as she is married.

With the onset of land privatization, land laws did not conform to customary family practices that guaranteed egalitarian sharing of real estate as with the other properties in a family. Conventional law has conspired with cultural practices to further marginalize the girl-child at the family and community level. Sons can share in a piece of land inherited by the father, but a girl is easily ignored and she has had no legal recourse until the recent past when the law of inheritance was changed to consider all family members as equal in property rights.

ERA ntokitin are nemeishooroyu t'olosho aekata, olayioni,
 amu sinkanisho tenikirik olayioni lelikae osho t-enkop inyi.
 O'enkop, amu eukulupuoni eiputieki olosho

(There are two things that cannot be compromised ever, a son,
 who represents, leadership, continuity and genealogy, it is

slavery to be represented by a son from a different community, and secondly, the soil (land) because it upholds identity.)

It is hereby reiterated that the Maasai have long been the ideal western European mental conceptualization of the African noble savage. Tall, elegant, handsome, seemingly proud and indifferent to all but the most necessary external influences, that is the Maasai man. Less is, however, said and known of the young queens that support the societal and family structures of the Maasai man. The Maasai woman has been destined by fate to a hard life from childhood. What went wrong or right is an important question that one exploring the withdrawn and torturous life of a Maasai girl-child may wish to have answered.

To answer this question, one must dig into the history, culture, and folklore of the Maasai people. Without a proper understanding of a people's past, one is left at the mercy of impulse and prejudice, lacking in balance, objectivity, and continuity. In the work described as of the highest scientific value and great colonial interest, *Die Masai*, M. Merker Berlin (1904) described the Maasai as follows:

The remarkable agreement between the primitive traditions of the Maasai, and those of the Hebrews, is still such as should arouse the widest interest today. The question has not yet been settled as to whether the traditions concerned were really those of the original Arabian home of the Maasai tribe, which have been preserved through thousands of years, or whether a Christian or Jewish influence can be admitted.

F. Maasai Customary Law?

All of customary law lacks a codified system of records. It is about what can be remembered as a practice, as well as occasionally some academic evidence of what the practices were and still are. The secular nature of our countries almost entirely outlaws customary practices, albeit against written laws.

Judicial matters in the traditional sense are the preserve of elders, both male and female. Carefully selected representatives of each spouse, husband and wife, meet to deliberate on all matters of social welfare, dispute, abuse, separation, and divorce. Representation is based on the family tree and loyalty, clan, fairness, and justice. Any perception of misnomer on the part of either representative disqualifies a candidate. It may be matters of personal conduct in previous cases, integrity, poor communication, inability to articulate traditional norms as a reflection of fairness, or otherwise. Case studies are a strong basis for Maasai judicial experiences.

Culture and customary practices cannot be wished away like a bad omen. As a social norm, it should be dynamic, as opposed to static, and unresponsive to the changing times. Culture must and should be dynamic. Maasai cultural

practices are no exception to this principle.

The benefits of education, intense lobbying for sensitization, and renewal of the minds are the three avenues that the Maasai community may wish to pursue in dealing with their problems, especially with respect to the treatment of their teenage girls. Despite the traditional endorsement of their nobility, the physical demeanors and traumas of self-mutilation for ostensibly regulating character and instilling discipline and identity are clearly wanting.

This dull marriage and/or sexual life of the Maasai tradition is alleged to account for the polygamous marriages and, at times, marrying off very young girls (circumcised early) to older men. The concept of love in this part of the world is very physical, and indeed it is seen only as a way for making children and families. It is devoid of any other meaning, fanfare, or enjoyment. The brunt of this denial is born solely by the womenfolk.

G. Land Tenure Systems: The Untold Story

Nothing meaningful can be said about the land tenure arrangements of the Maasai people in the present age without a concise articulation of their history. The land question for the Maasai manifests perhaps one of the greatest injustices of African history, second only to South African apartheid. A chronology of events from the onset of colonialism to this day will fortify this assertion and attract the conscience of the world to a cry for help from the Maasai people. The colonial masters dispossessed the Maasai of their vast parcels of land and natural resources, thus disenfranchising them and leaving them preoccupied with the resultant problems.

In 1895, the Royal Ordinance was enacted establishing the British Protectorate in Kenya. This formally set the quasi-legal process for the colonial authorities to apply extra legal measures of expropriating large tracts of Maasai land to settle what became known as the white settlers in Kenya. "All that land, west of the railway line from where the railway borders the maasai, shall form the natural boundary between Crown land and the natives."

As a consequence, they hindered the Maasai from appreciating, enhancing, or developing and enjoying the good attributes of their culture. Life among the Maasai has been one of struggle and depreciation ever since. First, the British structures and laws deliberately maintain illegal occupation of Maasai land. Second, there exist great challenges to acquire the basic necessities, such as food and clothing, since the pastoral practices and resources were severely diminished by the dispossession. This dispossession and exploitation rendered a once proud, rich, and independent people to near destitution and despondency.

The U.N. Conference on Trade and Development (UNCTAD) attempted to address this problem of dispossession and exploitation within the colonial context, albeit unsuccessfully. It is not surprising to learn that the former colonial masters of Kenya refused, through the United Nations, to apologize for their criminality and pave the way for reparation. Why? Because the very same

people, or at least some nations, who perpetrated this act against humanity are on the U.N. Security Council. Hope, however, abounds with the recognition of indigenous land title, although through a long, tedious, and expensive process via structures and systems of law governed by uncertain jurisprudence. In fact, if the *Mabo* case of Australia (where the Aboriginal people sued the government for recognition of the wrongful dispossession of their land and for compensation of the same) is anything to go by, then the process through which these rights are enforced are slow, dangerous, expensive, and uncertain. The injustice was committed over two hundred years ago and the case took a decade to hear, but in 1994 the verdict was decided in favor of the Aborigines and it was recognized that they indeed were the indigenous and rightful occupants of their land who had been forcibly removed, like the Maasai, in order to settle British citizens. There are intricacies and difficulties lying ahead of us, but it is worth making the legal effort.

It is a fact that the indigenous people of the world, mainly in developing countries, are among the poorest and most disadvantaged, living as they often do in remote and isolated areas. New developments challenging the pattern of abuse, marginalization, and isolation are welcomed. The new approach to national and international development envisaged in the *Mabo* case is not only worthy of increased attention, but is highly commendable for a number of reasons: (1) the dispossession, deprivation, marginalization, and isolation of any group of mankind can be a potential recipe for international and/or national chaos and therefore a threat to world peace; (2) deprivation, dispossession, and marginalization have been the most powerful causes of poverty in the developing world; (3) the realization, appreciation, and *redress* for wrongs committed against disadvantaged people of the world would transform their lives, bring a practical and lasting solution to the problems of poverty, and make an immense contribution to world peace; and (4) redress could form the basis upon which harmonious and peaceful inter-ethnic co-existence can be realized in a meaningful manner.

It must be observed that the introduction of the European (British) element deprived the Maasai of their one pursuit, and had the inevitable results of reducing them from the first rank to among the lowest rank in economic status among the East African people.

For generations, the Maasai had customs regulating the occupation of land. Such natural laws recognized the rights of the descendants to control and use the land and water resources in accordance with the agreed norms. The people are normally responsible for nature and the environment, which are usually held as communal property or for the common good of all. Is it proper to state that land does not belong to one person? Traditional land rights reflect the social constraints, and hence such land rights deliberately forge effective solidarity among occupiers and users to practice sustainable management and conservation. There are mechanisms of access, use, and management of natural resources that are implemented by clan elders, including access to water, salt licks, wood fuel, herbal medicine, grazing, and ceremonial sites.

The rules governing the right of tenure are sacred, crucial to the community's survival, and eliminate possible alienation of individuals. The landholder, according to Maasai custom, is the community itself. The individual member has the limited right to use community land along with other members. However, a member has no right to sell, lease, or charge money for use of any portion of the community's land. The community itself has no such right either. It cannot alienate, lease, or charge for use of its land, because under customary law, land has no monetary value. The land is held in trust by the community for its members, both present and prospective. Such members collectively have a duty to defend communal land against external aggression and encroachment. The community cannot transfer any portion of its land to any of its members or to any outsider. It is the ruthless attack on these structures by the British that rendered the Maasai extremely poor and disadvantaged. This situation can be remedied by specific performance and payment of damages for acts of omission and commission. Biosphere areas and other reserves must remain accessible to and useful to the Maasai. In any case, they were declared as such because of the stewardship of the indigenous community that utilized and retained their pristine state of biodiversity.

Added value may be provided in the form of training opportunities for local people to manage the exclusive biosphere areas, while increasing their understanding of the ecological complexities. Investment and employment opportunities, as a matter of priority, should go to indigenous local people not only as incentive, but also as recognition of their special protection of the natural flora and fauna. Indigenous ecological knowledge can be harnessed and recorded to expand the spectrum of scientific understanding of natural systems.

Hilkka Pietila of Finland's Focal Point for the U.N. Institute for Training and Research on Women (INSTRAW),¹³ has said that "most Western countries extracted their wealth for centuries from their colonies." All of our people agree that this repatriation of wealth strangled the indigenous peoples' economy and enabled the British to develop. This extortion continues to this very hour. The British still occupy the finest of grazing land and "own" one of the Maasai peoples' greatest natural resources – the *Magadi soda*. This extensive natural formation of soda ash, found at the heart of Kenya's Great Rift Valley in the middle of Maasai territory, was annexed by British Colonial authorities in 1901. This area, approximately 222,788 acres of Maasai land, is far away from the divide of the railway line quoted elsewhere in this Article as the official border between the British and the Maasai. To date, this area ostensibly "belongs" to private British interests under a ninety-nine-year lease with the government of Kenya. This latter piece of information has never been divulged to the local

13. Hilkka Pietila was Honorary President of the World Federation of U.N. Associations (WFUNA) and was Secretary General of the Finnish U.N. Association for 17 years.

people or to the general Kenyan public.

The concept of law in Kenya is vague and oppressive. It is incumbent upon law practitioners, who know what law should be, to agree on what law is and should be regarding indigenous peoples. We need to identify and adopt a working jurisprudence. Indigenous Maasai people have not understood the imposition of rules and regulations other than their own, yet these laws create obligations that they must observe and obey. The enactment of laws is not a consultative process. As an advocate and practitioner of laws, the author believes in owning the governance process. Thus, empowerment of indigenous people must be entrenched in the evolution of national laws and legislation.

1. Colonial Systems

Kaja-Rhem in the article, *The Maasai and the State*, wrote:

In pre-colonial times, the Maasai controlled a vast area of land in Kenya and Tanzania, at the height of their power in the mid 19th century, Maasai land extended from central Kenya down to Ugogo and Uhehe in central Tanzania. Today, they occupy less than two-thirds of their former territory. The great rinderpest, which hit east Africa in the 1890s, all but obliterated their herds. Weakened by disease and the famine, which followed in its wake, the Maasai saw their best grazing land being taken over by white settlers and encroaching cultivators. The colonial land policies in Kenya and Tanzania at the time favored settler agriculture and indigenous smallholder farming. In Kenya the Maasai moves were not legislated. They were *forced* as part of the purported of 1904 and 1911 agreements in which the Maasai “gave” up their dry season pastures and drought reserves in the highlands, which became known as the “White Highlands.” They were reserved for white settlement while the Maasai were confined in government controlled “Southern Reserves.”

Merker described the Maasai Country in the following words:

In both German and British East Africa, between the 34th and 38th degrees of longitude and between 3 degrees North and 7 degrees South of the equator, we find wide plains which are often called the Maasai steppes after their inhabitants. The wide area of the plain, with their ample rainfall and their innumerable watering places, make them more than sufficient grazing grounds for a pastoral nomadic tribe. The earth contains so much salt that it produces excellent fodder grasses

and supplies countless salt licks. According to the legend, as far as the memories and indeed many, many centuries earlier, these plains were and always have been, the arena of the Maasai tribe.

Kenya officially became a British colony (a British Protectorate) in 1905, and all land was declared Crown land.

In 1890, the Foreign Jurisdiction Act was passed in England (and subsequently amended in 1913), which stipulated how the power of the crown was to be exercised in a protectorate. Such power was to be exercised through orders of council. Under British constitutional theory, a protectorate is a sovereign state and the power of the Crown is merely equal to that provided under the articles of agreement. The only agreement that existed at this time was the one negotiated under the Berlin Conference of 1884-5,¹⁴ where the imperialists agreed to consciously divide Africa between themselves. On the other hand, in a colony, the colony is part of the dominions of the Crown. Thus, the Crown's power in a colony is limited and the land belongs to the Crown. The British declaration of Protectorate did not confer power to acquire land for British settlers.

The constitutional position, as stated in the 1883 *Ionian Islands* case, was the exercise of protection over a state and power was not conferred to alienate land unless the agreement or treaty of protection specifically reserved the right to deal with wasted and unoccupied land, or such rights were vested in the protecting authority. The concept of waste and occupied land was a conscious British invention that was meant to provide a "legal" basis for robbing the Africans of the lands vested upon them naturally through customs and traditions that were not comprehended by the foreigners. It is submitted that, particularly for the pastoral practice of the Maasai people, it was necessary to leave land after exhausting its pasture for some time until the rain came and the grass grew again and thus became suitable for grazing. In other words, this was a rudimentary version of the modern agricultural system of subdividing into fenced plots (paddocking).

But even in cases of reservation by the agreements, it was not clear whether "waste and unoccupied land" could be alienated. The colonial office was asked for an opinion on Crown rights to land in 1913. The advice given was as follows:

As regards land regulations, the Secretary of State's view is that the acquisition of partial sovereignty in a protectorate does not carry with it any title to the soil. The land is foreign soil, and does not become vested in Her Majesty, as is the case in a territory, which is actually annexed to the British dominions. It is therefore advisable to avoid making grants or leases or other

14. The conference was a blueprint and the threshold for the scramble and partitioning of Africa by Europeans.

dispositions purporting to be an alienation of land by the British Authorities, to whom it does not in fact belong. Where native owners exist, it is not, of course, desired to interfere with them, but where there are no such owners and the land can be regarded as vacant, the object desired may be obtained by other methods.

In such cases the British authorities may permit a person to take possession of land, and may undertake to secure for him in that possession, subject to such conditions as the protecting power may think fit to impose. The granting of such permission is an Administrative Act, *not a transfer of title*: for practical purposes it will give to the occupier all that he requires; and a land certificate authorising him to occupy the land will be a sufficient document of title and one which the courts would enforce.¹⁵

It is the author's submission that the property rights, an interest otherwise embodied in a certificate of title currently being held by occupiers of the present white highlands in Kenya, which in essence were former Maasai territories, are illegal and therefore void for several reasons which include, but are not limited to, the following: (1) they offend the international legal position; (2) they were never unoccupied lands and indeed native occupants existed and still do to date; (3) occupation was brought about by extreme use of force, otherwise known as "punitive expeditions," and the execution of illegal, illegitimate, null and void treaties, such as the notorious ones of 1904 and 1911; and (4) such treaties were an exercise of an administrative action to lend credence to an otherwise illegitimate action.

The Ionian Islands constitutional position, which does not confer power to alienate, placed a major constraint on the implementation of imperial objectives. The protectorate authorities resolved these legal constraints as herein summarized.

In 1887, through the East African Order in Council, the colonial government extended to the Protectorate the 1884 Indian Land Acquisition Act (Indian Act), which was used to expropriate land for the railway and a ten-mile-zone on each side of the railway line for government buildings and other public purposes. However, the Indian Act did not provide for the resale of land so acquired, although it was necessary to make these provisions for this right by the East African (Acquisition of Lands) Order in Council of 1898. This provided that the land acquired under the Indian Land Acquisitions Act should rest with the Commissioner in trust for the Crown, and further permitted the Commissioner to sell or lease it.

So far, these two ordinances capture the *malafide* of the colonial masters to dispossess the Maasai of their land, the harsh aftermath of which is appreciated by a majority of the present generation. The elitist African class, holders of political

15. Emphasis added.

and economic power and influence, blindly benefited from the status quo. Most of the benefactors were not indigenous peoples and, therefore, betrayed the indigenous peoples' cause without an iota of guilt.

Circa 1897, the protectorate authorities promulgated the East African Land Regulations in order to provide land for settlers. These regulations distinguished between land in the Sultan's dominions and land in the rest of the Protectorate. In the Sultan's dominions, the Commissioner was empowered to sell freehold Crown land that was not the private property of the Sultan. In the remainder of the Protectorate, he could only offer certificates of occupancy valid initially for twenty-one years, but that were renewable for an additional twenty-one years. A year later, the term of certificate was extended to ninety-nine years. It should be emphasized that the rights thereby conferred were no more than licenses to use land. Few settlers were interested in such rights. There was still the unresolved problem of the Crown's right to the land outside of the Railway Zone.

In 1899, the foreign office asked the law officers of the Crown for an opinion on the Crown's right to land in the Protectorate, and particularly to "waste land" in their interior of the East African Protectorate. Their reply was as follows:

Sovereignty, if it can be said to exist at all in regard to territory, is held by small chiefs, or elders, who are practically savages, and who exercise a precarious rule over tribes which have not as yet developed either an administrative or a legislative system, even the idea of tribal ownership in land is unknown. The occupation of ground in which a season's crops have been sown, or where cattle are for the moment grazing, furnishes the nearest approach to private ownership in land; but in this case, the idea of ownership is probably connected rather with the crops and the cattle, than with the land temporarily occupied by them.

To separate crops and cattle from the lands for which they are either grown or reared is yet another conscious, deliberate, and fraudulent move to manipulate the legal standards for selfish reasons. Indeed, the opinion went on to assert that, in some jurisdictions, "protection" gives title to land to the crown. The law officer affirmatively stated as follows: "We are of the opinion that in such regions the right of dealing with waste and unoccupied land accrues to Her Majesty by virtue of Her right to the Protectorate." (The Right referenced here is that one conferred upon Her Majesty by the Berlin Conference.) These protectorates over territories occupied by savage tribes have little in common with protectorates over such states such as Zanzibar, which enjoy some form of settled government, and in which the land has been appropriated either to the sovereign or to individuals. Protectorates such as those now under consideration really involve the assumption of control over all lands unappropriated. Her Majesty might, if she pleased, declare them to be crown lands or make grants of them to individuals in fee simple or for any term. The question of the system to be pursued was really one

of policy.

This opinion thus formed the legal basis for deprivation and dispossession based only on the reasoning that Maasai were “savage” and had no “settled government.” The law officer’s illegal opinion was then legalized by the East Africa (Lands) Order in Council in 1901. This defined Crown lands as:

All public lands within the east Africa protectorate which for the time being are subject to control of His Majesty by virtue of any Treaty, Convention or Agreement, or of His Majesty protectorate, and all lands which have been or may hereafter be acquired by his Majesty under the Lands Acquisition Act, 1894, or otherwise howsoever.

This statement did not define “public lands,” but the assumption was that “public lands” applied to all “waste land.” Administrators then made decisions as to what constituted Crown land. The issue of European settlement was considered important, and this, as the law officer had suggested, was mainly a matter of policy. However, as agreed by Sorrenson, the foreign office had no clearly defined policy for future settlement, largely because it lacked information on the Protectorate’s potential.

The 1901 order in council permitted the commissioner to make grants or leases of any crown lands on such terms and conditions as he may think fit, subject to any directions of the secretary of state. In April 1902 Commissioner Eliot, undirected, issued a notice permitting the sale of land at 2 rupees per 100 acres. The notice was approved by the foreign office on the condition that no more than 1,000 acres were to be sold in one lot.

In 1902, the commissioners promulgated the Crown Lands Ordinance to effectuate the 1901 order in council. It provided, *inter alia*, that: (1) the commissioners could sell freehold estates in land; (2) regard had to be taken for the rights and requirements of the African population in dealing with Crown land but these rights were seen in terms of actual occupancy only; and (3) when land was no longer occupied by Africans, it could be sold or leased as if it were “waste and unoccupied land” and there was no requirement of seeking the consent of any tribal chief before disposition.

This remained the land policy and legislation until 1915. The Crown lands ordinance of 1915 repealed the 1902 ordinance and redefined Crown lands to include land in actual occupation of native tribes and land reserved by the governor for the use and support of members of native tribes. The reservation of land for native tribes was provided for specifically in the ordinance which, however, further stipulated that “such reservation shall not confer on any native

tribe or members of any tribe any right to alienate the land so reserved or any part thereof." Furthermore, land reserved for the use of the indigenous population could at any time be appropriated.

According to Barth Chief Justice in *Isaka Wainaina v. Murito*, a 1923 case, the effect of the Crown lands ordinance of 1915, the Kenya Annexation order in-council of 1921, and the Kenya colony order in council of 1921, was to take all native rights in land, vest all land in the Crown, and leave natives as tenants at the will of the Crown. At independence, in 1963, the Crown was replaced by the state of Kenya. Thus, the state born in 1963 was an instrument to preserve the colonial interest and did indeed retain the basic principles and administrative structures of the colonial regime. To perpetuate colonial legacies, a mechanism had to be devised. The dominant colonial policy response to the problems of African agriculture was to try and integrate peasant agricultural production with tenure reform and cash crop production. The central objectives of these measures were the incorporation of the peasantry into colonial production processes and the creation of a politically conservative landed middle class that would resist changes in property relations. It has also been noted that this policy orientation paid dividends and survived the colonial state. This is the primary reason that the Maasai and most other indigenous African tribes are still removed from their native land, despite having attained independence from colonization.

The second mechanism used by the colonial authorities to preserve colonial property relations consisted of a program for limited re-Africanization of the White Highlands, former Maasai territories, through land settlement and redistribution schemes. The redistribution benefited the Africans who mattered in terms of colonial interests and these were mostly the Mau-Mau fighters and the so-called Nationalists (mostly Kikuyu). In this category of Africans, not a single one was a Maasai and therefore the Maasai lands were taken over by non-Maasai people through a British policy in a newly "independent" African state.

Indeed, the removal of racial discrimination and segregation was the key point in the 1953-55 East African Royal Commission's recommendations. Its basic thesis was that European interests could only be preserved if access to land production resources was not based on racial criteria. The Commission therefore suggested progressive integration of Africans into the Highlands economy. This policy was subsequently adopted by the colonial government through government blueprints known as Sessional Papers. These recommended, *inter alia*: (1) the removal of the boundaries created through the reserve policy; (2) the creation of a uniform land tenure system and the progressive replacement of customary land law; and (3) the conversion of ninety-nine year leases held by Europeans into freeholds. This was to prevent future nationalization without compensation. Leases were government property.

The Sessional Papers were approved by the legislative council in 1960. Their implementation was effected through the 1960 Kenya Land Order in Council, which made provision for: (1) the conversion of leaseholds into freeholds; and (2) the acquisition of land located in the Highlands by Africans

through purchase on a willing buyer-willing seller basis. Attention must be drawn to the magnitude of this deception; a person agreeing to buy what already belongs to him is indeed ridiculous.

In December of 1962, at the first Lancaster House Conference, the position of the Nationalists was that claims of land ownership and property rights in the White Highlands were in dispute and had been in dispute since the establishment of the White Highlands in Kenya. It must be remembered here that the so-called White Highlands were Maasai lands secured by the British under the infamous 1901 and 1911 agreements. The highlands now attracted the interest of other African tribes. Recall that by this time the Maasai had already been rendered helpless and powerless in terms of economic interests.

Thus, the position of the Nationalists (Kenya political party representatives) at the conference of Lancaster was progressively undermined and the nationalist leaders were steam-rolled into granting enormous constitutional and economic concessions to European settlers in exchange for a speedy transfer of political power – to the disappointment of the African masses and, more particularly, the Maasai. Recognition of colonial land titles became the bedrock of the transfer of political power. As demonstrated, the poor natives had to buy back their country from the rich colonial landowners.

The Nationalists accepted not only the sanctity of private property, but also the validity of colonial expropriations. The independence constitution immortalized this negotiated position by declaring that there would be no state expropriation without due process. It seems amazing that it was now appropriate to accord due process to Europeans with regard to their ill-gotten land title and yet it was never necessary to accord the same due process to the legitimate owners of the land (i.e., the indigenous people).

It was also decided at the Lancaster Conference that African accession to the White Highlands would be through the purchase of land either under willing buyer-willing seller schemes or through purchase by the post-colonial state for resettlement and redistribution. This latter program would occur through a loan granted to the state by the United Kingdom, the colonial Development Corporation, West Germany, and the World Bank. Note that the World Bank was thereby oiling the paths of deprivation, dispossession, and deception. It is here that our people, the Maasai, unknowingly committed economic suicide by taking loans that had to be paid by taxpayers to buy back our own natural and customary lands.

Kenya today ranks as one the most indebted nations in the world and, of course, is extremely poor. This indebtedness means that the people of Kenya have been and continue to be forced to utilize their meager resources to repay loans that were taken out to buy their country back. Was this a market economy?

This scheme also provided the emergent petty bourgeois elements with the opportunity to accede to and entrench themselves in large-scale capitalist agricultural production. In any case, since land had to be purchased, the majority of the people who were actually settled upon the land were not the dispossessed

people who had provided the political impetus for land redistribution. It is clear from the historical processes that by the end of the 1960s, a distinct social category with vested interests in the continuity of colonial property and political processes had emerged. This accounts for the remarkable lack of transformation in the colonial land policies and property law regime after independence.

Strife is still common in property rights, as is demonstrated in a number of very recent events and case law. There is the *Ogiek* case (HCCC No. 1996), *Ogiek v. The Republic*, in which an indigenous hunter-gatherer community was forcefully evicted from their ancestral forest lands for not possessing a title deed. They filed a suit in the High Court of Kenya. Their proprietary rights were upheld by the High Court, but government authorities with an interest in the contested forest area ignored the decision. There are also the cases of the Maasai "squatters" and the Karen Langata lands issue, the Kitengela Sheep and Goat Ranch dispute, and the Samburu grazing facilities dispute.

The Kitengela Sheep and Goat scheme is a 150 square kilometer strip of land, about twenty kilometers outside Nairobi city, bordering the Nairobi National Park, adjacent to traditional Maasai territories. The park itself and the location of Kenya's capital, historically, are part of the ancestral Maasai property. The strip of land was set apart in the late 1960s as a breeding and livestock research area for the benefit of the local Maasai and other Kenyans interested in improved breeds of sheep and goats. Olkejuado County Council, a Maasai local authority, offered this portion of land, on behalf of the Maasai people, to the then Ministry of Livestock Development, formerly a department of the Ministry of Agriculture.

After twenty-seven years of operation, the Structural Adjustment Programs (SAPS) withdrew government subsidies from public projects. The Sheep and Goats scheme was no exception. Throughout the 1990s, the program became ineffective. Government functionaries schemed to have the land allocated to private non-Maasai individuals within and outside of the government without consulting the inherent owners or even their trustee, the Olkejuado County Council. Local activists learned about the taking and moved to mobilize the residents of Olkejuado to condemn and resist the plan.

There is overwhelming evidence of other similar confiscations in areas located just outside of Nairobi city and within the jurisdiction of the same County Council. One example is the Ngong Veterinary Farm, belonging to the Maasai, set aside originally for livestock (cattle) breeding and improvement. Ironically, the players in dispossession at the top are the same! Proximity to the city makes land speculation a lucrative business. Imposed political leadership also puts Maasai interests in permanent threat.

Improper land dealings in Kenya are a historical phenomenon initiated and integrated in the legal system by the British colonial masters and inherited by the African ruling elites who took full advantage of it. It is costing the country dearly.

There is also immense weakness in the existing legal system's ability to solve land problems, as is demonstrated by the government's appointment of

endless land commissions to look into the system of land laws. The weakness of the law can be explained by its orientation (i.e., it was invented to secure the interest of the British and the nationalists through the state and exclude other interested parties).

The foregoing provided an overview of the grounds upon which the poverty of indigenous people is rooted. Our lands were the best and were endowed with diverse natural resources. The so-called “sole proprietors” of lands alienated from the indigenous people are among the richest in the country. What can we do to offer the deprived people a remedy and claim back what rightfully belongs to them for posterity and for peace in the world?

The British imposed rules and technical devices – called laws by the colonial government – and enforced so-called “native protection” in their newly acquired habitat. British colonials believed they were imposing law and order in a lawless, no-man’s land. Dispossession of land is contrary to natural justice of the Maasai people. Centralized control (i.e., military police and the state machinery) were contrary to the freedom of movement and association that the Maasai exercised in their territory prior to this occupation.

The Maasai are crying out for due process with regard to British atrocities manifested *inter alia* in the concept of land tenure. The British parliament in the statute of Edward III stated that “[n]o man of what estate or condition that he be, shall be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in answer by Due Process of the Law.” It is a judicially noted fact that the Maasai were disinherited and therefore technically rendered helpless by the British through colonialism.

To this end, I firmly believe in a jurisprudence that integrates the three traditional schools (natural, positive, and social) and goes beyond them. Such an integrative jurisprudence would emphasize that law has to be believed in or it will not work. It involves not only reason and will, but also emotion, intuition, and faith. It entails a total social commitment. It therefore necessarily follows that this concept of law cannot be used as a technical device for having things done, for it will not work. There will be disorder and chaos, especially if things are done to try and satisfy the greed of a few.

Using law as a technical device for accomplishing acts explains the predicament that we find ourselves in as a people. Jeremy Bentham, the English architect of the present political dispensation, said this about the right to property:

Man, that is every man, has a right to property, to proprietary right which cannot be taken away from him by laws. To proprietary rights. Good: but in relation to what subject? For as to proprietary rights, without a subject, in relation to which they can be exercised, they will hardly be of much value, they will hardly be worth taking care of with so much solemnity, as there is not such subject specified with relation to each man.

According to Bentham's logic, the fact that the Maasai did not have a state during the advent of colonialism meant that their land resources were ownerless and therefore, open to appropriation. It is through Bentham's notion of a "subject" that the Maasai and occupants of other former British colonies, like Zimbabwe, were dispossessed of their fundamental, inalienable, customary, sacred rights and entitlements to their lands. According to this positivist school of thought, for property rights to have effect, the Maasai had to be subjects of the Crown, in fact, be tenants at the Crown's will. Even after Kenya was converted into a colony and its people made subjects of the Crown, property rights were only conferred to British citizens. The masses to whom the land belonged were left either with inferior lands infested with mosquitoes and unfit for human habitation, or were left landless (as squatters).

Pursuant to the objects of the Berlin Conference (1884-85), Kenya was created by the appropriation of territory and resources by settlers from Europe. The dominant group was a minority. The main function of the imposed and impractical imported law was to protect this numerically inferior group. Equality under British law was a marginal note, and administration of justice was, of necessity, integrated into the apparatus of the state. The imported law thus developed a pervasive contradiction, as it was not meant to be fair and objective. The aim was to oppress ("legally") through a legal framework that could be enforced in a court of law which was alien to the uneducated native Maasai who had never seen the inside of a classroom let alone the intricacies of a foreign legal system.

The Nuremberg Charter 172 (1947) states that general persecution on political or racial grounds is a crime against humanity for which individuals should be punished. To this extent, we maintain the guilt of the white settlers, thereby providing a basis for their indictment on charges of crimes against humanity. It is a fact that crimes against humanity are committed by men, not by abstract entities and it is submitted that only by punishing individuals who commit such crimes can the provisions of international law be enforced. The provisions of the Nuremberg charter and the judgment of the tribunal are now regarded as part of international law because the U.N. General Assembly, in 1946, by resolution 95(1), affirmed the principles of the charter and the decision of the tribunal. It is incumbent upon us, as indigenous people, to push for the adoption of a General Assembly resolution denoting that colonialism was a crime under international law bearing state, as well as individual, responsibility.

The colonialists deliberately inflicted on the Maasai conditions of life calculated to bring about modification or total physical and economic destruction of their culture, tradition, and customary rights. The 1904 and 1911 agreements between the Maasai and the British Crown, where the former would agree to migrate from their ancestral land east of the railway line, were invalid. Despite international consensus that any agreement between two entities where one lacks international legal capacity is not binding under international laws, as espoused by the decision in the *Island of Palmas* case, the said agreements nevertheless are

purported to bind the Maasai to the last of their race on earth.

The pertinent facts of the *Palmas* case are as follows. At the conclusion of the Spanish-American war in 1898, the Spanish Government ceded the Philippines Island to the United States (U.S.) under the Treaty of Paris of the same year. In January 1906, U.S. General Leonard Wood, who was the governor of the province of Moro, visited the Island of Palmas, which the United States believed to be a territory ceded to it by Spain, and found, to his surprise, the Dutch flag flying there. The United States protested to the Dutch government upon finding the Dutch flag and subsequently engaged in a diplomatic controversy lasting from 1906 until it was concluded by an agreement during an arbitration in 1925. Max Huber, the arbitrator, noted that “[a]s regards contracts between states or a company such as Dutch East India Company and Native Princes or Chiefs of peoples not recognized by members of the international community capable of creating rights and obligations such as may in international law arise out of treaties.”

Ole Njogo (correct spelling Ole Nchoko) v. the Attorney General of the East African colony (1913), a decision by the High Court and East African Court of Appeal, involved a Maasai petition challenging the legal sanctity of the agreements and treaties. This case epitomized the callous, deceptive, and outright theft of Maasai natural resources through force and blackmail by the colonial authorities. It was a fundamental breach of the human and legal rights of the Maasai using three elements of British strategy to acquire Maasai territories: trickery, legalism, and force. Consequently, the Maasai filed an appeal and the appellant was Ole Nchoko. The case has never been solved, unlike the *Mabo* case of Australia.

Further, the *Mabo* case (1993) highlights some of the fundamental truths pertaining to native lands. In this case, it was held that native title “has its origin in and is given its context by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory.” Those rights, although ascertained by reference to traditional laws and customs, are enforceable as common law rights. When “native title is recognized by common law” it is in reference to the forgoing explanation. Torres Straits Islander Eddie Mabo led the action in the High Court of Australia that paved way for the recognition and protection of native title across Australia under the Native Title Act of 1993.

It is nearly impossible for the Maasai to follow suit due to the post-colonial Government’s lack of political will. Restitution to the former position would mean “deprivation” for some “important” people who matter to the powers that be, specifically, the then British colony and the white settlers. Subsequently, they became the ruling class of the new republic. The concept of willing buyer-willing seller would also mitigate against the native claim. Nevertheless, strategies must be sought and laid down and a way forward must be forged.

2. Suggested Solutions

a. Awareness-raising

The Maasai are concerned about various uses of their heritage, including the appropriation of indigenous art and cultural expressions, unauthorized use of their beadwork, talent and the appropriation of their indigenous bio-diversity knowledge, often without their informed consent and knowledge. The first remedial step would be to raise awareness among the Maasai about what they have, what is lost, how it was lost, and to whom.

Participation in political institutions and decision-making processes, particularly by marginalized and disadvantaged groups, should be encouraged. Training programs and mechanisms to enhance participation in consultation processes should be developed. The Maasai have an elite sect, albeit a minority in number, but nevertheless they need to be represented by their own leaders, people who understand their peculiar problems. Participation in district, national, and international levels should be encouraged by enhancement of opportunities for the Maasai particularly in regard to participation in public life through civil society organizations.

The second step would be for the Maasai to organize themselves into structures and/or forums. These forums and organizational structures would form fundamental networks that generate and share information on different issues at distinct levels. They could encourage sharing of experiences and ideas for the benefit of all interest groups.

b. Capacity-building

The Maasai lag behind in education. The few who have made it through secondary education had to acquire bursaries through the government and other organizations that at times are not able to continue sponsoring the students as they reach university or college level. This results in dropouts and equips traditionalists with reasons not to allow the girl-child to go on with her education programs. Financial support for education for the Maasai community should be given priority and the quarter system should be strengthened to enable them access provincial and national schools.

c. Recording Traditional Knowledge

It would then be possible to collect and collate all information on Maasai indigenous knowledge systems. This information could be reviewed and stored in Resource Centers to be developed at various community locations or schools. This information could be published and distributed throughout the community as a means of information sharing and empowerment. Information is power. An informed population is a powerful people.

d. Advocacy

Government should invest in empowering and organizing its people. An empowered and organized population makes the institutional and official operations of not just its government, but its local, as well as, international partners easier and better.

Organizational structures will help bring together different shades of opinion and points of view to strengthen advocacy of the issues affecting the Maasai. This creates an informal training sector that will push for the formal recognition and protection of indigenous cultural and intellectual property rights and rights of heritage at different fora. It starts with community level awareness. At this level, local people identify their felt and strategic needs. They also prioritize the order for implementing needs according to importance.

Government and non-governmental organizations should encourage and support policies that enhance the viability of pastoralist, as it is a major factor in the economy of the Maasai community. Development policies and laws and regulations relating to land tenure and access to salt licks, water, and other common rights should be reviewed to be in tandem with the Maasai Customary Law. Programs should be introduced to reduce the economic vulnerability and risk during droughts and other adverse vagaries of the weather and to restock their herds after the drought has passed.

The strengthening of traditional governance is necessary. The Maasai community has been traditionally dominated by elders who were responsible for the governance of the community. Structures for self-regulation through a council of elders, traditional courts, and fees or age group supervision where each individual or group had to meet certain social norms was automatic. Elders made decisions that were absolutely binding. However, customary traditional governance has been eroded due to failure to recognize the important role played by these traditional institutions. Changing property rights regimes is partly to blame in this instance. Traditional structures are vital among the Maasai. Indigenous knowledge and cultural practices should be recognized and respected by national and district administration, so as to strengthen the Maasai culture and way of life for the community.

c. Governmental Intervention

The Maasai community is not adequately represented in political life (i.e., in parliament or in high level civil service posts), nor do they have educational rates in line with the majority of the population. A mechanism to ensure adequate representation is necessary.

The Maasai people contribute immensely to the Kenyan economy in a range of industries including arts and crafts, tourism, advertising, and film. They should therefore receive compensation or royalties for use of their indigenous cultural resources where appropriate and where prior informed consent has been

granted by an indigenous group. To this extent, we appeal for support to develop systems and standards that would allow indigenous people to fully negotiate terms for the commercial use of their cultural heritage. Heritage, in this sense, should consist of the intangible and tangible aspects of the whole body of cultural practices, resources, and knowledge systems developed, nurtured by indigenous peoples, and passed on by indigenous peoples as part of expressing their cultural identity.

At the same time, as a signatory to the U.N. Charter and a member of most of U.N. agencies, Kenya should develop a policy on marginalized populations. It is an open secret that successive government authorities have systematically ignored the plight of pastoralist communities, although they are fully aware of the challenges facing these peoples. Kenya should ratify the 1989 ILO Convention No. 169 on Indigenous and Tribal Peoples. This Convention demands special attention be given to groups that need focused intervention by U.N. member-states due to historical and other disadvantages they may have been faced with during the creation of the modern nation states.

There is need for the international community to intervene in the dispossession claims of the Maasai. The 1904-1911 Maasai agreement should be reviewed to enable the Maasai to access their original land. The suffering occasioned due to the dispossession is unimaginable.

3. The United Nations System

Today, indigenous people worldwide have a forum for interacting every year – the U.N. Permanent Forum on Indigenous Issues – thanks to the U.N. system, and especially the Working Group on Indigenous Populations. Further, the development of education and awareness strategies that reinforce the cultural value of heritage should be supported. The strengthening of intellectual property rights of indigenous peoples is further strongly recommended under International Law and the World Intellectual Property Organization (WIPO). The U.N. Special Rapporteur on the Human Rights and Fundamental Freedoms of Indigenous Peoples should visit all U.N. member-states to evaluate the status of indigenous peoples with a view toward demanding action from those governments reluctant to implement Indigenous Peoples programs.

The reality of history cannot be covered or denied forever, for inevitably it will become visible to everyone. The Maasai were at the mercy of people and regimes whose dictionary lacks words such as peace, brotherhood, and respect. Like so many people who struggle with their ancestral and modern identities, the Maasai grapple with theirs. A *consensus adidem* (meeting of the minds) to facilitate a better future for a people at a crossroads cannot therefore be postponed.

APPENDIX A

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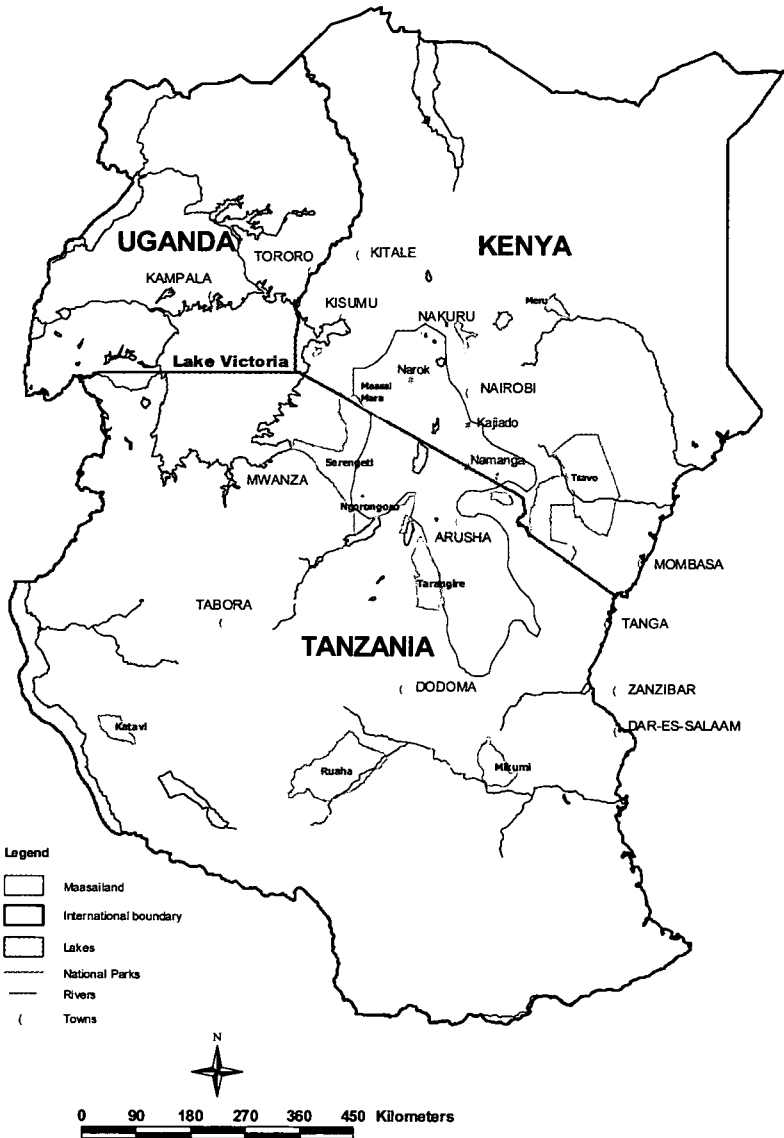
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APPENDIX B



Source: Peoples Ethnicity in Africa. Murdock (1957).