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Maasai rights in Ngorongoro, Tanzania

Issa G Shivji
Wilbert B Kapinga

HAKIARDHI

LAND RIGHTS RESEARCH & RESOURCES INSTITUTE

Maasai rights in Ngorongoro, Tanzania

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- To organise and sponsor conferences, seminars, workshops, meetings
- To raise funds for the purposes of the Institute.

Maasai rights in Ngorongoro, Tanzania

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Abbreviations

| | |
|----------|--|
| BAKWATA | Supreme Muslim Council of Tanzania |
| BAWATA | Women's Council of Tanzania |
| BRALUP | Bureau of Resource Assessment and Land Use Planning |
| CCM | Chama cha Mapinduzi (political party) |
| DANIDA | Danish International Development Agency |
| DUSO | Dar es Salaam Students' Organisation |
| FAO | United Nations Food and Agriculture Organisation |
| FTP | Forests, Trees and People Programme |
| FZS | Frankfurt Zoological Society |
| GN | General Notice |
| GONGO | Government Organised NGO |
| GWFL | Gawal Wheat Farms Ltd |
| IIED | International Institute for Environment and Development |
| IUCN | World Conservation Union (International Union for Conservation and Nature) |
| LARRRI | Land Rights Research and Resources Institute |
| MLUC | Multiple land use concept |
| MNR | Management of Natural Resources |
| NAFCO | National Agricultural and Food Corporation |
| NCA | Ngorongoro Conservation Area |
| NCAA | Ngorongoro Conservation Area Authority |
| NGO | Non-Governmental Organisation |
| NGOEPO | Ngorongoro Environmental People's Organisation |
| NGOPADEV | Ngorongoro Pastoralist Development Organisation |
| NPA | Ngorongoro Pastoralists Association |
| NPW | Natural Peoples' World |
| NUTA | National Union of Tanganyika Workers |
| PC | Pastoral Council |
| PINGOS | Pastoralists Indigenous Non-Governmental Organisations |
| RDA | Ruvuma Development Association |
| TANAPA | Tanzania National Parks Authority |
| TANGO | Tanzania Association of Non-Governmental Organisations |
| TANU | Tanganyika African National Union |
| TFL | Tanganyika Federation of Labour |
| TLS | Tanganyika Law Society |

Table of legislation

I. Principal legislation

- 1923 Land Ordinance (No.3 of 1923), Cap.113
- 1932 Companies Ordinance, Cap.212
- 1940 Game Ordinance, Cap.159
- 1948 National Parks Ordinance (No.7 of 1948), Cap.253
- 1954 Societies Ordinance (No.11 of 1954), Cap.337
- 1956 Trustees Incorporation Ordinance (No.18 of 1956), Cap.375
- 1956 Town and Country Planning Ordinance (No.42 of 1956),
Cap.378
- 1959 National Parks Ordinance (No.12 of 1959), Cap.412
(Revised)
- 1959 Ngorongoro Conservation Area Ordinance (No.14 of 1959)
- 1963 Ngorongoro Conservation Area Ordinance (Amendment)
Act (No.43 of 1963)
- 1964 Range Development and Management Act, Cap.569 (No.9
of 1964)
- 1965 Interim Constitution of Tanzania (C.A. Act No.43 of 1965)
- 1967 Land Acquisition Act (No.47 of 1967)
- 1968 Ngorongoro Conservation Area Ordinance (Amendment)
Act (No.5 of 1968)
- 1969 Ngorongoro Conservation Area Ordinance, Cap.413
(Revised) Supp.65
- 1972 Decentralisation of Government Administration (Interim
Provisions) Act (No.27 of 1972)
- 1974 Wildlife Conservation Act (No.12 of 1974)
- 1975 Games Parks Laws (Miscellaneous Amendments) Act
(No.14 of 1975)
- 1975 Villages, Ujamaa Villages (Registration, Designation and
Administration) Act (No.21 of 1975)
- 1977 Constitution of the United Republic of Tanzania (C.A. Act
No.1 of 1977)
- 1978 Wildlife Conservation (Amendment) Act (No.21 of 1978)
- 1982 Local Government (District Authorities) Act (No.7 of 1982)
- 1984 5th Amendment to the Constitution of the United Republic
of Tanzania (Act No.15 of 1984)

II. Subsidiary legislation

- 1963 Ngorongoro Conservation Area (Control of Guides) Rules, 1963 (GN No.171 of 19/4/1963)
- 1964 Ngorongoro Conservation Area Rules, 1964 (GN No.247 of 8/5/1964)
- 1966 Ngorongoro Conservation Area (Amendment) Rules, 1966 (GN No.178 of 24/6/1966)
- 1968 Societies (Declaration of Unlawful Society) Order, 1968 (GN No.434 of 1968)
- 1968 Societies (Winding Up) Order, 1968 (GN No.435 of 1968)
- 1969 BAKWATA (Vesting) Order, 1969 (GN No.169 of 1969)
- 1972 Ngorongoro Conservation Area Rules (GN No.12 of 25/1/1972)

Table of cases

I. Tanzanian cases

- Anael s/o Kamunga v. Regina d/o Lazaro & Mary d/o Lazaro*, Criminal Case No.29 of 1996 (PC), Ngorongoro
- Attorney General v. Lohay Akonaay & Joseph Lohay*, Civil Appeal No.31 of 1994 (CA), Dar es Salaam
- Chapila, Abdallah v. Mvinyigoha & Others* (1965) LCCA D/30/6S
- Chanichua Marwa v. Officer ilc of Musoma Prison & Attorney General*, Misc. Criminal Case No.2 of 1988
- Director of Public Prosecutions v. Daudi Pete*, Court of Appeal, Criminal Appeal No.28 of 1990
- Kakubukubu, Suzana & Others v. Kasubi, Walwa Joseph & Director, Mwanza Municipal Council*, Civil Appeal No.14 of 1991, Court of Appeal, unpublished
- Marwa, Chanichua v. Officer ilc Musoma Prison & The Attorney General*, Criminal Cause No.2 of 1988 (HC), Mwanza
- Mtikila, Christopher v. The Attorney General*, Civil Case No.5 of 1993 (HC) Dodoma
- National Agricultural and Food Corporation (NAFCO) v. Mulbadaw Village Council & 66 Others*, Civil Appeal No.3 of 1986 (CA), Dar es Salaam
- Nyagaswa, Methuselah v. Nyirabu, Christopher*, Civil Appeal No.14 of 1985 (CA), Dar es Salaam
- N'gotyaki, Oloruja & Others v. Republic*, Criminal Appeal No.8 of 1991 (HC), Arusha
- Ruhondo, Hamisi Ally & 115 Others v. Tanzania-Zambia Railway Authority*, Civil Appeal No.1 of 1986 (CA), Dar es Salaam
- Yoke Cwaku & 5 Others v. The National Agricultural and Food Corporation (NAFCO) & Another*, Civil Case No.52 of 1988 (HC), Arusha

II. Cases of foreign jurisdictions

- Attorney General of Hong Kong v. Ng Yuen Shiu* (1982) 2 AC 629
- Kharak Singh v. State of Uttar Pradesh* (1964) 1 SCR 332
- Munn v. Illinois* 94 US 113 (1877)
- Ol Le Njogo v. Attorney General (The Maasai Case)* 5 EAPLR 70 (1913)
- Tellis v. Bombay Municipal* (1987) LRC (Const) 351

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|-------|--|
| AC | <i>Appeal Cases</i> [England] |
| CA | <i>Court of Appeal</i> [Tanzania] |
| EAPLR | <i>East African Protectorate Law Reports</i> |
| HC | <i>High Court</i> [Tanzania] |
| LRC | <i>Law Reports of the Commonwealth</i> |
| PC | <i>Primary Court</i> [Tanzania] |

Introduction

The origin

This book originated from an initiative of Charles Lane at the International Institute for Environment and Development, who approached the authors to conduct a legal study on the rights of Maasai residents of the Ngorongoro Conservation Area. The aim was to provide the Ngorongoro residents with a clear knowledge of their rights and to give practical advice on how the struggle for those rights can be facilitated. Among the terms of reference given to the authors were:

- i) to provide advice as to the potential value of the study of rights pertaining to land and in relation to freedom of association and expression in the NCA;
- ii) to undertake a study that would clarify the rights of residents to property, to freedom of movement, to the right to cultivate and to freedom of expression;
- iii) to look into the issues of freedom of association by residents in the NCA;
- iv) to evaluate the legal powers and administrative practices of the Ngorongoro Conservation Area Authority (NCAA) against the principles of rule of law and democratic governance; and
- v) to collate the relevant laws governing the operations of the NCAA.¹

In broad terms, the study focuses in the first instance on the legal issues and investigates possibilities of eventually providing practical advice to the target group (ie. the Maasai residents in the NCA) on how to make use of the material generated in the course of the study through, for example, test cases and legal education programmes. The second goal was in relation to the feasibility of presenting residents of the NCA and those working there with concrete, practical, finite advice about the legal context of the NCA administration with respect to the rights of Maasai residents as citizens.

Research methodology and sources

We identified and explored four main sources of primary materials. The first was legislation, both principal and subsidiary, conferring powers on the NCAA. This was collated and analysed. The second was primary documents copied from the originals in the possession of Maasai leaders and their representatives and at NCAA headquarters. The third was extensive open-ended interviews, conversations and informal meetings with groups of Maasai leaders at various levels, conducted by our researchers and the authors. This was the main

1 Appendix II is a consolidated version of the Ngorongoro Conservation Ordinance as amended and in force as at August 1997.

source for our understanding of the prevailing administrative practices of the Authority in relation to the rights of the residents as well as the perceptions of the community. Government publications and unpublished reports were also consulted. The fourth was judgements and records of proceedings in the courts. Our researchers investigated these at the High Court registry both in Arusha and in Dar es Salaam.

We also made use of secondary material. Some strategic critical pieces were closely studied and have been made use of in this study.

A further word on the method of our research is apposite. A background appraisal of the origins of the structures and evolution of the NCAA was carried out through library research and the use of existing empirical and other studies of the Conservation Area. Archival research was also undertaken on policy statements and legislative materials such as bills, records of the Legislative Council and parliamentary debates and legislation on the NCA. The library research and archival work were conducted in libraries of the University of Dar es Salaam (particularly the East African section and the Law Collection) which, among other things, has the custody of the Henry Fosbrooke papers and the evidence presented before the Presidential Commission of Inquiry into Land Matters, and the High Court in Dar es Salaam and Arusha. Library research work was also conducted in the Attorney General's Chambers and the Ministry of Tourism and Natural Resources in Dar es Salaam, and at documentation centres of the NCAA at its headquarters in Ngorongoro and its sub-office in Arusha.

The research for this work was completed in 140 person-days between May and July 1997, involving the two authors and two research assistants, one based in Dar es Salaam and the other resident in Ngorongoro/Arusha. The collection of data and information was carried out by using open-ended questions asked of target groups and individuals within the NCAA establishment and of certain local Maasai residents, including traditional leaders and village functionaries. A total of 25 residents, including two women and eight NCAA functionaries, were interviewed for the study.

Coverage

The fieldwork for the study was carried out at the Authority headquarters and in five villages within the NCA, namely, Endulen, Kimba, Ngoile, Olbalbal and Nainokanoka.

Approach

In the course of the study, there emerged, from the field, issues of the local community's right to self-determination, particularly in relation to the right to participate in the basic decision-making processes of the NCAA mandate on conservation and development in the NCA; in short, the right to determine the use and distribution of resources and

the right to benefit from the same. It is on the broad basis of the right to self-determination that we have organised our material and analysis around specific rights as stipulated in the Constitution of the United Republic of Tanzania, 1977.

The approach of the study has been to locate the source of various rights in domestic law generally and the Constitution in particular. We are aware that the various rights under discussion are also to be found in international and regional human rights instruments. We have not discussed these nor were they part of our mandate. Nevertheless, in our conclusion, we express an opinion on what we believe would be the best political approach to the international dimension of the rights struggles of the residents.

We have deliberately avoided using unnecessary legal jargon and citation of authorities which would have made the study inaccessible to non-legal readers. We have followed the main line of argument and cited a few leading cases to support our position. However, we have done sufficient research and are convinced that the legal positions we have taken are and can be supported credibly in courts of law, if need be.

Chapter 1 gives a broad overview of the genesis and history of the rights of residents. In Chapter 2 we discuss the legal powers of the NCAA in the context of the rule of law, rights and democratic governance. Chapters 3-6 discuss respectively the right to land; to life and livelihood (including movement); to association (including assembly and expression); and participation. Chapter 7 is devoted to our recommendations and broad directions along which future advocacy work could be strategised and organised.

Chapter 1

The history of human rights in Ngorongoro: a brief overview

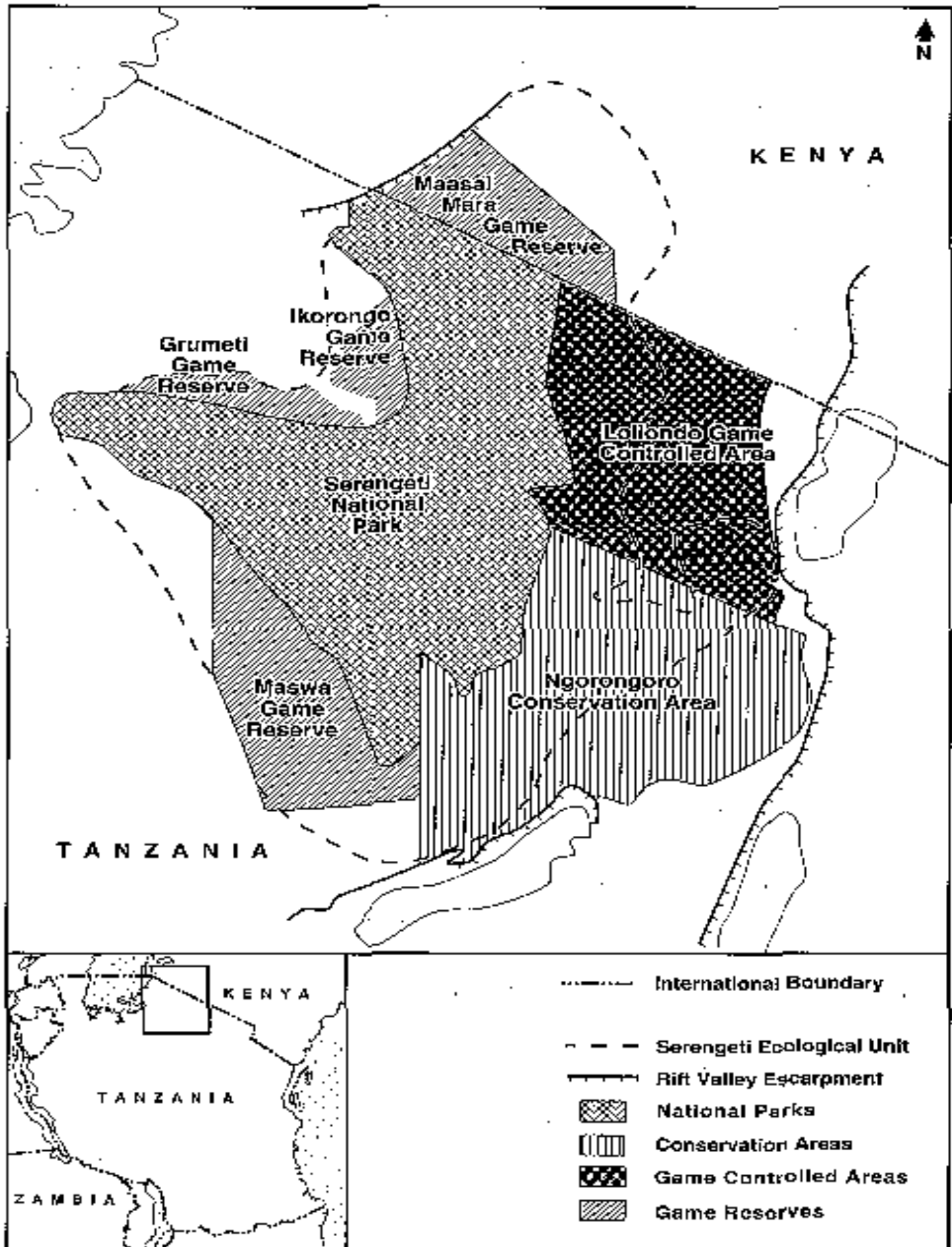
Introduction

The Ngorongoro Conservation Area (NCA or Area), which currently falls under the administration of a statutory body called the Ngorongoro Conservation Area Authority (NCAA), covers an area of 8,292 sq. km. in northern Tanzania (Tanzania 1990). Administratively it falls within Ngorongoro District, occupying some 59 per cent of the area of the whole district (*ibid.*). Besides its varied, and the world's most important, collection of wildlife, its beautiful landscape and its archaeological sites, the area is home to 42,000 Maasai pastoralists who constitute almost 60 per cent of the total population of the district. The Area constitutes the Ngorongoro division (*tarafa*) of the Ngorongoro district and has six wards (*kata*) and thirteen villages, some of which are registered under the Local Government (District Authorities) Act, 1982 (No.7 of 1982).

The Maasai pastoralists are said to have lived in the whole of the Serengeti plains and Ngorongoro highlands (including the Area, which they call *Koronkoro*) for some two centuries. One or other form of pastoralism is said to have been practised in the area for some two thousand years (Tanzania 1990:3; interview, Olbalbal). While the main activity of the residents of the Area was and continues to be pastoralism, informants told us that they have always practised small-scale subsistence agriculture in one form or another, particularly during periods of problems with their herds (*ibid.*).

The problems and predicament of the Maasai residents in the Area relate to the special, internationally significant conservation and tourist status accorded to their home. The Conservation Area is on UNESCO's World Heritage List and is a Biosphere Reserve (Tanzania 1990). It is probably the most important tourist attraction, yielding the highest foreign-exchange income, in the tourism sector. These virtues of their homeland have not necessarily been a boon to the human rights of the residents, as we shall see in this study. It is with this as a backdrop that the human rights of the Maasai residents, both as a community, as individuals and as citizens, have come under severe stress. To understand the problem of the human rights of the Maasai people in the Area, we need to consider the genesis and historical development of the Conservation Area as a whole, and its management and administration.

Map 1: Position of Ngorongoro Conservation Area and the Serengeti Ecological Unit, updated from Homewood and Rodgers 1991



An overview of the NCA's legislative history

1. 1940-59

The Serengeti National Park, which then included the Area, was created in 1940 under the Game Ordinance, 1940 (see Section 4, Schedule 1). The Ordinance was passed to make better provision for the protection and preservation of wildlife and in particular to give effect to the *"provisions of the International Convention signed in London on the eighth day of November, 1933 in so far as those provisions relate to the preservation of fauna in its natural state"*. The Ordinance covered both national parks and game reserves, neither of which were conceived as conservation areas exclusive of human habitation and all human activity. The pre-existing rights of native residents to use and occupy land in the Serengeti National Park were preserved, although regulated to a greater or lesser degree depending on the status of the reserved area.

Rights of entry, exit ('freedom of movement') and residence of residents were preserved in both national parks and game reserves in terms of Sections 6 and 15 of the Ordinance. The law prohibited anyone from entering or residing in a national park (Section 6) or a game reserve (Section 15) without a permit except, among others, b) a person whose place of birth or ordinary residence is within the park; and c) any person who has any rights over immovable property within the park.

In our view, these clearly covered the then Maasai residents of the whole of Serengeti, being persons who were born and bred in the park and also persons with rights over immovable (land) property under their customary laws, to be discussed in greater detail in Chapter 3.

Rights of hunting were totally prohibited in national parks (except where the Governor made exceptions), while in the case of game reserves they were regulated through a licensing system. Section 28, however, provided that it was not an offence for *"a native to hunt, without a licence, any animal protected under the provisions of Section 24, for the purpose of supplying himself and his dependants with food, or for any other purpose which may be prescribed, provided that he does not use arms of precision and provided that the animal is not one for the hunting of which a special licence or major game licence is required"*.

The residents' pre-existing rights of grazing and cultivation presumably continued to subsist since they were neither prohibited nor regulated explicitly. This becomes clearer when one reads the legislative debate on the Ordinance. A number of members raised the issue of the effect of the Ordinance on what were then termed 'native rights'. Major Grundy, referring to clause 15(c) in relation to *"rights over immovable property"*, wondered if that adequately safeguarded human inhabitants since it was difficult to establish 'native rights' because of

the absence of written records (Tanganyika 1940:218). A number of other members raised similar questions and doubts. In his answer the Administrative Secretary said:

"Reference has been made to the question of native rights, and the need for the insertion in the Bill of a definition of such rights has been suggested. It might be difficult to find a satisfactory definition to cover every possible question which might arise in connection with either individual or communal rights and the need for such is not apparent. Such rights as may exist are safeguarded, since the Bill provides for their preservation" [Emphasis added] (*ibid.*:222).

At the committee stage, the Solicitor General, referring to the phrase 'rights over immovable property' in clause 15, made it clear that the phrase was widely framed to cover all kinds of rights. Major Grundy asked: "Would grazing be regarded as immovable property?" The Solicitor General answered in the affirmative: "...I mean to say that it would be a right over immovable property" (*ibid.*:233). This exchange makes it clear that grazing rights were also preserved.

With the exception of the modification of hunting rights, it is clear therefore that the law at its inception saved all the pre-existing customary land rights of the Maasai residents in the Serengeti National Park including those of cultivation, grazing and residence. In short, the whole bundle of rights to do with using and occupying land were preserved. This is the bundle of rights to land under customary law which has come to be known under the Land Ordinance (No.3 of 1923) as deemed rights of occupancy.²

This position did not change with the enactment of the National Parks Ordinance, 1948 (No.7 of 1948), since the relevant sections discussed above were re-enacted in identical terms in Section 11 of the Ordinance. The 1948 Ordinance, however, presaged the separation between the administration of national parks and game reserves, while still maintaining the principle that indigenous people could continue to use and occupy their customary lands within the parks. Sessional Paper No.1 of 1956 affirmed this position in categorical terms as follows:

"The original creation of the Serengeti National Park under the Game Ordinance and its subsequent reconstitution under the National Parks Ordinance did nothing to affect the existing rights of any person in or over the land included in the Park. On the contrary, not only were these existing rights expressly preserved but the Masai already living within the area of the Park were given positive assurances by Government that their rights would not be disturbed without their agreement" (Tanganyika 1956b:1).

2 See the communication from the Governor to the Legislative Council on 17 November 1953 where, referring to the creation of the Serengeti National Park, he said:

"When this area was declared to be a national park it was recognised that there were people who had traditional grazing and water rights within its boundaries and that it would not be possible forcibly to evict these people" (Tanganyika 1954:13).

The colonial government had hoped that the Maasai would be lured out of the Park by provision of water supplied elsewhere. In the event, this did not happen, while at the same time the Trustees of the Serengeti National Park increasingly came to the conclusion that the Park must be protected from the Maasai. They put into effect more restrictive measures creating apprehensions among Maasai residents. The resultant tensions and antagonism led the colonial government to the position of excising the Park, while at the same time making it exclusive.

In consultation with the Maasai and the Trustees of the Park, the boundaries of the Serengeti National Park were redrawn leaving out of its purview the current Ngorongoro Conservation Area. The Maasai agreed to relinquish all their claims in the reconstituted Park³ in return for a solemn pledge by the government that they would be "permitted to continue to follow or modify their traditional way of life subject only to close control of hunting" in the Ngorongoro Area (Tanganyika 1958a:2). The Maasai community were also to be paid compensation in the form of provision of water supplies in the new Area (*ibid.*).⁴ It must also be noted that the government rejected the recommendation of the Nihill Committee of Enquiry⁵ implying exclusion of the Maasai from the two craters, that is, Ngorongoro and Empakai, within the Area. The Government Paper (No.5) was unambiguous in its language:

"...[T]he proposals for nature reserves in the two crater floors were not acceptable. They envisaged the eventual exclusion of the Masai from these two areas. It was not thought proper to seek Masai consent to a relinquishment of their rights in the two craters at the same time as they were giving up established rights within the Park itself; whilst to seek their removal gradually, as the Report recommended, was contrary to the need to find a clear-cut and final solution now" (*ibid.*:2).⁶

The pledge that pre-existing Maasai rights would continue to subsist in the Ngorongoro Area and that they were virtually underogatable was repeated in categorical terms at the highest level on different occasions. In his speech to the Legislative Council on 25 April 1956, the Governor reaffirmed the situation as follows:

"When the Serengeti National Park was proclaimed in 1940, solemn pledges were given by this Government to the Masai. This

3 See Agreement by the Maasai to vacate the Western Serengeti, 21 April 1958, reproduced here as Appendix J.

4 It is interesting to note that by this time, as the country drew closer to independence, the terminology in government papers changes from 'native rights' to 'human rights'.

5 The Committee was constituted to inquire into and recommend on the proposed boundaries of the Serengeti National Park and the whole question of Maasai rights.

6 As Loft has suggested, this compromise by the colonial government was probably pragmatic. The colonial state was not interested in taking on another rebellion after the experience of the Mau Mau uprising in neighbouring Kenya, which happened around the same time.

does not, of course, include the whole of Masai tribe, but those who had legal or customary rights in the area. I am quite sure that no one could expect this or any other British Government to break its solemn pledges. It has, therefore, been necessary to get the agreement of the Masai for the changes that are proposed" (Tanganyika 1956a:14).

Again in his address opening the 34th session of the Legislative Council on 14 October 1958, the Governor said:

"I feel I must take this opportunity of emphasizing that on all grounds of equity and good faith no government could contemplate excluding the Masai from the whole of the great game areas of the Serengeti and Crater Highlands. Lest some Honourable Members have not followed the inquiries and debates of the last three years, I would remind them that in 1956 the Government chose the Highlands as the focus of the new National Park. It was in response to public reaction, backed by scientific opinion, that the policy was altered to establishing the Park in the plains to the west, leaving the conservation of the Ngorongoro area to be built round the interests of its inhabitants. These interests include of course the preservation of all its amenities" [Emphasis added] (Tanganyika 1958b:9).

The idea that 'the conservation of the Ngorongoro area be built round the interests of its inhabitants' was made even clearer in a speech by the Governor to the Maasai Federal Council in August 1959:

"I should like to make it clear to you all that it is the intention of the Government to develop the Crater in the interests of the people who use it. At the same time, the Government intends to protect the game animals in the area, but should there be any conflict between the interests of the game and the human inhabitants, those of the latter must take precedence" (Tanzania 1990:5).⁷

The idea of the human being and his/her rights being both at the centre as well as compatible with conservation was gradually to develop into what is now referred to as the multiple land use concept (MLUC) in the conservation literature of which Ngorongoro is considered to be the pioneer (Tanganyika 1962:2).

On the legal front, while the pledge given by the colonial government was not directly translated into legislation (which was typical of the colonial state when it came to the land rights of 'natives'), there was nothing in the Ngorongoro Conservation Area Ordinance, 1959 (No.14 of 1959) even remotely to indicate that these rights were derogated from.⁸

7 This quote is taken from the Report of the Ad Hoc Ministerial Commission where no source is cited but there is no reason to believe that it is not authentic.

8 It is a moot point whether these pledges amounted to enforceable civil contracts for which the successor government could also be held liable. In earlier, similar types of agreements the colonial courts, including the Privy Council, tended to wriggle out of the situation by holding the native tribes to be sovereign and such agreements as treaties and therefore acts of state beyond the jurisdiction of the courts (see the famous case of *Ol Le*

The 1959 Ordinance created an Authority to oversee and manage the Area. It consisted of not less than five and not more than eleven persons appointed by the relevant Minister (second schedule). No criteria were provided as to the qualifications of potential members. In practice, as Fosbrooke reports, the first Authority consisted of local conservation officials (Forest, Game, Veterinary and Water Development) and five Maasai under the chairmanship of the District Officer, Ngorongoro (Tanganyika 1962). This body was to administer, manage and regulate, among other things, entry, residence and settlement in the Area. The typical formula used in the Game Ordinance, 1940 and later in the Fauna Ordinance, 1951, and the National Parks Ordinance, to exempt persons ordinarily resident in the Area from requiring a permit to enter or reside in the area was repeated with slight modification. Section 6 empowering the Minister to make rules prohibiting, restricting and controlling entry into and residence within the Conservation Area provided in Sub-section 2 that:

"Nothing in any rules made under this section shall operate so as to prohibit, restrict or control – (...)

(f) the entry into or residence within the Conservation Area of any members of the Masai tribe."

On the face of it, this is a wider formula than that restricted to people ordinarily resident in the Area. On the other hand, while it includes Maasai residents of the Area, it excludes those residents not from the Maasai tribe. At the same time, under Section 7, rules could be made requiring the Maasai residents to apply for certificates of residence. This power could undoubtedly be used to impose further restrictions on the rights of residents. Nonetheless, the power was not used to restrict the entry and residence of residents in the Rules made in 1964, which imposed the requirement of certificates of residence for some categories of residents (see the Ngorongoro Conservation Area Rules, 1964, GN 247 of 8 May 1964), thus remaining within the pledges made (but see the 1972 rules below).

Other enabling powers given to the Authority under the 1959 Ordinance with the potential of curtailing Maasai rights may be noted. The relevant Minister and the Authority (with the approval of the Provincial Commissioner) had wide powers to prohibit, restrict, control and generally manage cultivation, grazing, collection of forest products and residence and settlement generally in any part of the Conservation Area. Interestingly, the power of prohibiting, restricting and controlling residence and settlement did not apply to freehold land, leasehold land or land held under a granted right of occupancy

Njogu v. The Attorney General (The Masai Case) 5 E.A.P.L.R. 70 (1913). The least that could be said is that since the independent government has not repudiated the pledges made and as a matter of fact in public and semi-public pronouncements has implicitly upheld these rights, it has created a legitimate expectation which it cannot be heard to breach. (On the doctrine of legitimate expectation see the Privy Council case of *Attorney-General of Hong Kong v. Ng Yuen Shiu* [1982] 2 AC 629.)

(Section 8) or a mining lease granted under the mining laws. The power clearly applied to indigenous-held lands under the deemed rights of occupancy. This provision thus marks the beginning of discriminatory laws and practices in terms of the treatment of indigenous landholders and others, thus violating the mother of all rights, the right to equality.

II. 1961 to date

On the eve of independence, the Authority was reconstituted, with the newly appointed Conservator (Henry Fosbrooke) as the Chairman sitting with Regional Heads of Divisions instead of local Ngorongoro representatives, the District Commissioner and only one Maasai representative (Tanganyika 1962). This was perhaps the beginning of what was in store so far as resident representation and interests were concerned. Nonetheless, for the next couple of years under Conservator Henry Fosbrooke, the administration continued to be sensitive to residents' interests and in particular to the need for constant consultation with local people (see Chapter 6 below and Tanganyika 1962; Tanzania 1964).

Probably the most significant immediate post-independence amendment of the Ordinance came in 1963. The Ngorongoro Conservation Area Ordinance (Amendment) Act, 1963 (No.43 of 1963) replaced the 'Authority' by the 'Conservator' who, to all intents and purposes, was made directly accountable to the Minister. This apparent centralisation was considerably diluted, however, by an important principle (to be discussed in detail in Chapter 2) that rules and orders made by the Minister and/or the Conservator under various provisions of the Ordinance required prior consultation with the people through their representatives. Under the new Section 13 the Minister was required to send the draft of the proposed Rules to the local authority which would in turn submit its objections and recommendations. The Minister was obliged to consider the submissions of the local authority and either go ahead to make the Rules without modification or appoint a local enquiry to investigate and report the findings to him. The principle indirectly applied to general and special orders made by the Conservator as well. Section 13(4) stipulated that where general or special orders under the law required approval by the Minister, he had first to consult the local authority or satisfy himself that such consultation had taken place prior to the submission of the orders to him. This salutary principle of prior consultation, albeit truncated, came under severe strain as the trends towards modernisation, centralisation and concentration of power began to take their toll in the late 1960s and early 1970s in the country as a whole.⁹

A change in management style and greater encroachment on the rights of residents could be discerned with the appointment of Solo-

⁹ See generally 1978-81, *East African Law Review* and essays in Shivji (1986).

mon Ole Saibull as the Conservator in place of Henry Fosbrooke in 1965. This was the period of modernisation policy which the newly independent government pushed in a commandist fashion under the advice and tutelage of the World Bank, among others (see Coulson 1982). For the residents of the Area it took the form of greater restrictions on their rights of cultivation, grazing and movement. The so-called offenders against cultivation and grazing were strictly prosecuted and visited by criminal sanctions, including fines, imprisonment and confiscation of property (Tanzania 1966; Tanzania 1967). Conflicts inevitably ensued and even specialised Field Force Unit and Stock Theft Police Units were used (Tanzania 1966). The following quotation from the Annual Report typically represents the beginning of a new trend in the human rights situation of residents:

"We also had help this year from the Stock Theft Unit and the Police Field Force in attempting to control the illegal grazing that occurs annually in the Reserve. With their help 21 Maasai were caught and brought to trial. Of these, two Maasai were each sentenced to five months imprisonment, one to two months and the trial of seven others are still pending. The remainder were fined a total of 4,520/- including fines, expenses for our keeping their cattle until claimed and compensation for injuries received by conservation staff in scuffles with them in the forest" (Tanzania 1966:27).

Meanwhile, tensions between those in favour of exclusive conservation and supporters of human rights intensified. International conservationists were pressing for making the Area exclusive to wildlife (Tanzania 1990). The result was the wide-ranging amendments of the Ordinance by the Games Parks Laws (Miscellaneous Amendments) Act, 1975 (No.14 of 1975). At the same time, the Ngorongoro Conservation Area Rules, 1972 (GN 12 of 25 January 1972), which repealed and replaced the 1964 Rules, imposed for the first time in the conservation laws a requirement that indigenous residents also needed to apply for and obtain certificates of residence without which they would be committing an offence. The Conservator could revoke such permission from "any person who is convicted of any offence against these Rules" (Rule 8(1), (3) and (4)). To the extent that these Rules appear to place the right of the residents to enter and reside within the Area at the discretion of the Conservator, they were clearly in breach of the various pledges made by the state. Whether they could also be argued to be *ultra vires* of the principal Ordinance is more contentious. But with the amendment of the principal legislation in 1975, as we shall see, this point becomes moot. We now turn to these amendments.

The Games Parks Laws (Miscellaneous Amendments) Act, 1975 (No.14 of 1975) made far-reaching changes in the administration, management and control of the Area, with a direct impact on the lives and rights of the indigenous residents which is still operating. In line with the general trend of parastatals, the Authority was reconstituted

under a Board of Directors appointed by the Minister, with the chairman appointed by the President. The law does not provide for any representation of the local community on the Board. Under the Board is the Conservator who is the Chief Executive Officer. Powers of making rules and orders are now vested in the Authority with the consent of the Minister. Thus the provision regarding prior consultation with the local authority has been done away with. In any case, elected local authorities were dissolved and replaced by appointed government officials by the Decentralisation of Government Administration (Interim Provisions) Act, 1972 (No.27 of 1972). In sum, all semblance of democratic governance and rule of law was removed from the administration of the Area.

As for rights of residents, the biggest blow was that cultivation was statutorily banned under the new Section 9A, thus directly violating the basic human right of the residents, the right to life (see Chapter 4). The traditional formula placing limits on Maasai people's right of entry into and residence within the Area was also removed from the main legislation. Instead the Minister (presumably at his discretion) was given the power to specify a category of persons who would be exempted from the rules prohibiting, restricting or controlling entry into and residence within the Conservation Area (Section 10 of the Amending Act). So far as we know, the Minister has made no order under this provision. The powers to control the residence and settlement of deemed indigenous residents were re-enacted, while exempting holders of granted rights of occupancy, thus once again reinforcing statutory discrimination against residents. All other powers of control were kept intact or even formulated more sharply. These powers, as we shall argue in Chapter 2, could only be described as arbitrary in that no serious and effective machinery for appeals and judicial review was provided for. The question, therefore, which arises and which the Maasai residents of the Ngorongoro Conservation Area have been asking for the last two decades, is: What happened to the solemn pledges made by the colonial government in return for which the Maasai residents gave up their claims to the Serengeti National Park area?

It is true that even the 1975 amendments did not go so far as to extinguish all rights of the residents in the Area in the manner that has been common in the laws dealing with National Parks. It could therefore be argued, as we shall do in detail in Chapter 3, that the bundle of rights (discussed above) to use and occupy their lands (deemed right of occupancy under the Land Ordinance) survived the 1975 amendment. Nevertheless, the enjoyment of these rights was severely curtailed by blatant violations whether legal or illegal, but certainly not legitimate in the eyes of the people, as we shall show in the rest of this book.

It is also possible to argue (as we do in Chapter 3) that the promises of saving and preserving the rights of Maasai residents were translated

into the 1975 amendments in the form of explicitly adding a new function to the functions of the Authority. Among its four major functions (i.e. as well as conservation, promotion of tourism, and promotion of the development of forestry) is "to safeguard and promote the interests of the Maasai citizens of the United Republic engaged in cattle ranching and dairy industry within the Conservation Area" (Section 5A(c)). At the time it was made, the provision was probably not meant to be anything more than hortatory. Whatever the original intentions, the practices of the Authority over the last two decades at least, as many studies have shown (Lane 1997; Rugumayo 1994; Tanzania 1990), have clearly demonstrated that the provision is not worth the paper it is written on. Yet, at the least, even then it could be argued legally that the Authority has a statutory duty to 'safeguard the interests of Masai citizens of the United Republic ... within the Conservation Area'. This is what the social scientists have translated into the dual mandate, so to speak, of the Ngorongoro Conservation Authority – conservation and development (see Rugumayo 1994; Tanzania 1990). The same studies, with few exceptions,¹⁰ have shown that, even if the NCAA might be considered to have had moderate success in its task of conservation,¹¹ it has singularly failed on all counts in its mandate of development of the resident Maasai. Translated into the language of rights, this means violation of the human rights of the resident Maasai.

With the passage of the Constitutional Bill of Rights in 1984,¹² the provision under discussion (Section 5A(c) has to be read in a new light altogether. In law, it has to be read with 'modifications, adaptations, qualifications and exceptions as may be necessary to bring it in conformity with the Constitutional Bill of Rights (see Section 5(1) of the Constitution (Consequential, Transitional Temporary Provision) Act, 1984 (No.16 of 1984)'. This means that the statutory functions, powers and duties towards Maasai citizens imposed on the Authority face corresponding and enforceable rights vested in the Maasai community, first, as citizens and, second, as those having historical claims. What are these rights? Have they been upheld? If not, do the victims have legal redress? Against whom? Are the NCAA's powers consistent with the basic constitutional scheme providing for the rule of law and democratic governance? These are the questions we ask and try to answer in the next five chapters.

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- 10 Except probably those studies supported by the Frankfurt Zoological Society, which has been the main force pushing for conservation without regard to the rights and fate of the Maasai residents.
 - 11 Even this has been questioned by Rugumayo, not without reason and with cogent arguments supported, significantly, by the long-experienced Maasai elders. The latter have a simple but telling argument: it is their competent conservation which has enabled both the animals and themselves to survive.
 - 12 For the development of and debate on human rights jurisprudence surrounding the Tanzanian Bill of Rights, see Mwaikusa 1990; Peter 1992; Shivji 1990. For excellent bibliographies on the three East African countries dealing with the debate on rights and democracy, see Oloka-Onyango *et al.* (eds) 1996, and for a good collection of writings on these issues, see Kibwana *et al.* 1996.

Chapter 2

Legal structure, powers and jurisdiction of the NCAA

Introduction

In this chapter the legislative history of the Ngorongoro Conservation Area (NCA) is surveyed to illustrate how its structure has evolved to its current status. Given that the rights issues pertaining to the Maasai residents are the central focus of this study, the discussion on the powers of the Ngorongoro Conservation Area Authority will underline the Authority's administrative features which impinge directly or in practice on the lives and rights of the Maasai residents.

Since its establishment in 1959, the administration of the NCA has in various ways been subject to or affected by multiple jurisdictions, namely, the NCA Authority; the District Council; the village governments; the central government through the Ministry and President's office; and the presence of funding agencies, in particular the international conservation lobby. Consequently, we shall also outline in this chapter the multiple intersecting jurisdictions and the resulting conflict of interests (i.e. conservation, tourism and residents' interests), and the impact of such conflict, on the rule of law and the rights of the Maasai residents.

Legislative origins

The NCA was created on 1 July 1959 by the Ngorongoro Conservation Area Ordinance, 1959 (No.14 of 1959) (now Cap. 413 of the Revised Laws of Tanzania). Section 4(1) of the Ordinance established the Authority which was charged with the conservation and development of the natural resources of the NCA. During the early years the administrative set-up of the Authority was closely tied to the then-existing Provincial Administration (Tanganyika 1962), but beginning from 1962 a full-time Conservator was appointed in place of the previous Chairman of the Authority who also doubled as the District Officer in charge of the Ngorongoro Division. The Ngorongoro Conservation Unit under the charge of the Conservator was then set up as a new Division in the Ministry, responsible for the conservation and development of natural resources.

The Second Schedule (para 1) to the original NCA Ordinance provided for the Authority to be constituted by the Minister's appointees.

The first Authority was made up of the local conservation officials (Forest, Game, Veterinary and Water Development) and five Maasai representatives plus the District Officer, Ngorongoro as the Chairman. There was no legal provision requiring Maasai representation on the Authority and their substantial representation was probably due to the astute understanding of the local community of the then Conservator, Henry Fosbrooke. The significant Maasai representation on the Authority was, in our view, consistent with the colonial government's assurance that "*the conservation of the Ngorongoro area be built round the interests of its inhabitants*" (Tanganyika 1958b:9).

It is said that the original set-up of the Authority quickly ran into difficulties and fell into abeyance. In consequence, the Minister reconstituted the Authority in September 1961, with the newly appointed Conservator as its Chairman and the Regional Heads of Divisions in place of the local Ngorongoro representatives. The restructured Authority also included the District Commissioner as a member and retained only one Maasai representative (Tanganyika 1962). It seems to us that this was the starting point in the process of the erosion, and what would eventually emerge as the practical denial, of the interests and rights of the Maasai in the NCA. Significantly it was not long before the Ngorongoro Conservation Ordinance (Amendment) Act, 1963 (No.43 of 1963) was enacted to provide for the centralisation of power in public officers. The Amendment Act deleted the definition of the Authority (Section 2) and the provisions of Section 4 which established it (Section 3). A new Section 4 was enacted and provided for the appointment of the Conservator and for Assistant Conservators, who would be acting under the directions of the Conservator who in turn was directly accountable to the Minister. The powers previously vested in the Authority were to all intents and purposes transferred to the Conservator; thence reference to the 'Authority' was throughout the Ordinance replaced by the word 'Conservator'.

However, as was pointed out in Chapter 1, this latent centralisation of power was to some extent diluted by the statutory requirements placed upon the Minister and the Conservator to consult the people through their representatives before making any orders or regulations under the Ordinance. The new Section 13 of the Ordinance (as amended by Act No.43 of 1963) required the Minister to submit drafts of proposed regulations to the local authority (i.e. the District Council having jurisdiction over the NCA) to enable it to raise any objections or make recommendations. It was a mandatory requirement for the Minister first to consider the submissions of the local authority before either proceeding with making and publishing the rules with or without changes, or directing the holding of a local enquiry into the matter (at a place or places within the Maasai District) and receiving the findings.

It is clear from the provisions of Section 13(4) of the Ordinance that

the powers of the Conservator to make orders which were subject to the approval of the Minister also had to comply with the consultation requirement. Under Section 13A(3) the Minister was obliged to consider the report of the investigation conducted by his appointee and decide whether to make the rules which were the subject of the enquiry. In the event that he decided to make the rules, and whether modifications were to be effected on account of the enquiry, the Minister was mandatorily required to communicate his decision to the local authority.

The 1975 amendments

The Games Parks Laws (Miscellaneous Amendments) Act, 1975 (No.14 of 1975) virtually overhauled the Ngorongoro Conservation Area Ordinance and made substantial changes in the administration, management and control of the NCA. The Authority was reconstituted under a Board of Directors whose Chairman was appointed by the President of the United Republic of Tanzania and the members by the Minister responsible for the conservation of natural resources. Under the Board was the Conservator who was the Chief Executive Officer of the Authority, also appointed by the President.

A new Section 6 vests in the Authority the power of making rules and orders subject to the consent of the Minister. The provisions of Sections 13 and 13A, relating to prior consultation with the local authority, have now been done away with. In any event, the elected local authorities were dissolved and replaced by appointed government officials by the Decentralisation of Government Administration (Interim Provisions) Act, 1972 (No.27 of 1972).

In relation to cultivation in the NCA, the powers of the Authority under the original Ordinance largely envisaged restriction or control of the use of land for agricultural purposes and depasturing of stock in order to ensure conservation of the soil or prevent adverse effects of soil erosion, and for the protection of natural resources (Section 9). In 1975 a new Section 9A was added prohibiting the use of any parcel of land in the Conservation Area for cultivation.

At the time of its establishment in 1959, the Authority was charged with the duty of conserving and developing the natural resources of the NCA. These same functions were transferred to the Conservator in 1963 when the Authority was disestablished by Sections 2 and 3 of the Ngorongoro Conservation Area Ordinance (Amendment) Act, 1963 (No.43 of 1963). Apart from elaborating the duty of the Conservator of conserving and developing the natural resources of the NCA in accordance with the provisions of the 1959 Ordinance, the Ngorongoro Conservation Area Ordinance (Amendment) Act, 1968 (No.5 of 1968) introduced no substantial changes in the functions of the Authority (Section 4).

The Games Parks Laws (Miscellaneous Amendments) Act, 1975 (No.14 of 1975) effectively re-established the NCAA. Instead of being a division of a government ministry, it now became a body corporate with perpetual succession and capable in law of suing and being sued in its corporate name (Section 4). The management and functions of the Authority were vested in a Board of Directors (Section 5) and a new Fourth Schedule to the Ordinance was enacted to provide for the composition of the Board, the appointment and termination of service of its members, and the direction of its proceedings (Sections 5 and 27). Unlike the rather skeletal provisions of the original 1959 Ordinance and the amendments of 1963 and 1968, the new Section 5A of the Ordinance introduced in 1975 made comprehensive provisions concerning the functions of the Authority. These functions include:

- a) conserving and developing the natural resources of the Conservation Area;
- b) promoting tourism within the Conservation Area and providing and encouraging the provision of facilities necessary or expedient for the promotion of tourism;
- c) safeguarding and promoting the interests of the Maasai citizens of the United Republic engaged in cattle ranching and dairy industry within the Conservation Area;
- d) promoting and regulating the development of forestry within the Conservation Area;
- e) promoting, regulating and facilitating transport to, from and within the Conservation Area;
- f) constructing such roads, bridges, aerodromes, buildings and fences, providing such water supplies and carrying out such other works and activities as the Board may consider necessary for the purposes of development or protection of the Conservation Area;
- g) doing all such acts and things as, in the opinion of the Board, may be necessary to uphold and support the credit of the Authority and to obtain and justify public confidence, and averting and minimising any loss to the Authority;
- h) doing anything and entering into any transaction which, in the opinion of the Board, is calculated to facilitate the proper and efficient exercise by the Authority of its functions under this Act, including: (i) the carrying on of any of the activities of the Authority in participation with any other person; (ii) the acquisition, by agreement, of interests in companies and firms engaged in activities in which the Authority may lawfully be engaged under this Act, and the management of the affairs or the continuance of the business of such companies and firms; (iii) the establishment of branches within the United Republic or elsewhere.

The Authority's functions (a) to (d) outlined in the new Section 5A of the Ordinance focus on human interests or rights as well as conservation interests, and are at the heart of the concept of multiple land usage of which the Ngorongoro Conservation Area was considered to

be a pioneer venture (Tanganyika 1962). Functions (c) to (g) of the said Section are merely supplemental to the main objective of multiple land usage in the NCA.

Powers of the Authority

An examination of the powers of the Authority under the 1959 Ordinance reveals typical powers of a governmental authority, namely, executive powers including enforcement and police powers and legislative powers, under which the Authority may make rules and orders of a general and special nature in relation to the management and affairs of the Area, as well as over the conduct of the residents within the NCA. The Authority also has quasi-judicial powers in respect of grievances against the exercise of power by the Conservator (or his nominees) or against orders made under the Ordinance.

Legislative powers

The Authority has vast powers to make subsidiary legislation in relation to the control of, or entry into, residence and settlement within the Conservation Area, control of cultivation and grazing, and protection of natural resources. Under Section 6(1) of the Ordinance as amended by the Games Parks Laws (Miscellaneous Amendments) Act (No.14 of 1975), the Authority may, with the consent of the Minister, make rules prohibiting, restricting and controlling entry into and residence within the Conservation Area. The provisions of Section 7(1) of the Ordinance as amended empower the Authority, with the consent of the Minister, to make regulations requiring certain categories of persons who reside in or seek to enter the Conservation Area, to apply for a certificate of residence.¹³ The current rules made under Sections 6 and 7 of the Ordinance are the Ngorongoro Conservation Area Rules, 1972 (GN No.12 of 25 January 1972).

Section 8 of the Ordinance empowers the Authority to make orders to prohibit, restrict or control residence or settlement in any part of the Conservation Area other than land held under a right of occupancy granted under the Land Ordinance (No.3 of 1923), or land which is subject to a claim or mining lease made or granted under the mining laws. In relation to land use by the local community in the NCA, the Authority has wide powers under the provisions of Section 9(1) to

13 The categories of persons who are required to apply for certificates of residence are described under paragraphs (b), (c), (d) and (f) of Section 6(2) of the Ordinance and include:

- (i) persons holding in the NCA any estate or interest in any land under a right of occupancy granted under the Land Ordinance, Cap 113;
- (ii) persons holding, over lands in the NCA, a prospecting right or licence or exploration licence, or a mining lease granted or claimed under the mining laws;
- (iii) persons who are wives, children, dependants and servants of public officers on duty in the NCA or persons specified in (1) and (2) above;
- (iv) any person or category of persons specified by the Minister by an order published in the *Gazette*.

make orders, in respect of any particular piece of land or over the Conservation Area generally, to prohibit, restrict or control the use of any land whatsoever. More particularly, the Authority has power to impose restrictions or control over grazing, watering, movement or removal of stock, use of wells, boreholes, waterholes, watercourses, streams, rivers or lakes, clearing of vegetation, gathering of honey or forest produce, use of agricultural implements or machinery, and carrying or use of weapons, snares, traps, nets or poison.

Executive and police powers

The Authority is empowered to enforce and impose penalties for breach of orders made under the Ordinance. In particular Part VI of the Ordinance as amended by the Ngorongoro Conservation Area (Amendment) Act, 1963 (No.43 of 1963) and the Games Parks Laws (Miscellaneous Amendments) Act, 1975 (No.14 of 1975) gives the Authority police powers to:

- i) authorise seizure of stock, implements, machinery, weapons, snares, traps, etc. the depasturing, use or carrying of which is believed to be in contravention of any order made under the Ordinance (Section 16);
- ii) authorise arrest without warrant of any person who is reasonably suspected of having committed an offence against the Ordinance or against rules made under it (Section 17); and
- iii) authorise entry upon any land, other than land occupied by a dwelling house, for the purposes of ascertaining whether the land is being used in accordance with any orders made under the Ordinance or for the purpose of communicating such orders (Section 12).

In addition, the Authority is empowered to demolish works constructed in contravention of any order made under the Ordinance (Section 15); to conduct prosecutions for offences against the Ordinance or rules made under it (Section 20); and to compound offences committed against the Ordinance or the rules upon admission of guilt by the offender (Section 20A).

Quasi-judicial powers

Sections 14 and 14A to 14D of Part V of the Ordinance, as amended by Act No.14 of 1975, provide for an appellate machinery for persons aggrieved by the exercise of power by the Conservator (or any other person authorised on his behalf) or against orders made under the Ordinance. The first category of appeals to go to the Authority are against refusal by the Conservator or his nominee to grant permits, certificates or other authority granted under the Ordinance or subsidiary legislation made under it (Section 14(1)(a), or against any condition or term annexed to any such permit, certificate, or other authority granted to him (Section 14(1)(b)). The appeal to the Authority has to be heard and determined by an Appellate Committee consisting of three members of the Board nominated by the Minister (Section

14C(1). The law deems the decision of the Committee to be the decision of the Authority (Section 14C(3)). A further appeal to the Minister is available to a person dissatisfied by the decision of the Appellate Committee (Section 14(2)).

Appeals in the second category may be sent to the Minister against orders made under the Ordinance which have adversely affected the aggrieved person (Section 14A). Appeals under this category are permissible if they relate to special orders made in relation to the aggrieved person or a member of his household or in respect of land in or over which such person has an interest under a right of occupancy, lease, tenancy or mortgage. No appeal is available against any order made under Section 10 of the Ordinance relating to closed areas.¹⁴

The appeals authority (the Appellate Committee or the Minister, as the case may be) has power to affirm, vary or set aside the decision or order appealed against. Where any decision or order is varied, modified or set aside, the appeals authority has discretion to give directions in respect of any matter or thing previously done or suffered under the decision or order appealed against (Section 14B(1)). The decision of the appeals authority and any direction given by it is final and binding upon the parties and not subject to judicial review (Section 14B(2)). Until very recently the High Court construed the finality clauses strictly in favour of excluding the jurisdiction of the courts to review such decisions. And indeed, Article 13(6) of the Constitution provides for appeals as a matter of right. Even so, while the scheme of the NCA Ordinance does not envisage appeals by persons aggrieved by orders made by the Minister, the residual powers of the High Court may be invoked for Judicial Review or invalidity proceedings in cases of breach of rules of natural justice or infringement of the enabling legislation.

Although the Conservator is not eligible to be nominated as a member of the Appellate Committee, it would seem apparent that the regulators of the NCA (i.e. Board members responsible for the management and functioning of the Authority) also sit on appeal in respect of grievances against the Authority! There is thus a strong tendency towards fusion rather than separation of powers in the Authority. Such an arrangement is in clear violation of the rule of law, one of whose indices is the separation of executive, legislative and judicial powers.

In conclusion, it should be obvious from the perusal of the powers of the Authority that they are akin to those of a government authority.

¹⁴ Section 10 provides as follows: (a) The Authority may, if it is of the opinion that any land within the Conservation Area, other than land occupied by a dwelling house, shop or premises used for the accommodation of travellers and visitors, or under a mining claim made, or a mining lease granted, under the mining laws, is being or may become despoiled, by order direct that such land shall be a closed area and (b) any order made under this section shall specify the area to which it applies and shall state that the occupation and cultivation of land within such area, the depasturing of cattle, the cutting down of trees or destruction of vegetation and the taking of forest therein are prohibited.

What is more, within the Ordinance there are no checks and balances on power. As we illustrate in Chapter 4, the exercise of the governmental and/or police powers by agents/employees of the Authority has often been in flagrant violation of the rule of law and the human rights of the Maasai in the NCA. Under the guise of law enforcement by the Authority's dreaded Management of Natural Resources (MNR) wardens, allegedly to curb illegal cultivation and grazing in forest reserves of the NCA, the local community in the NCA have been subjected to punitive treatment at the hands of the MNR, resulting in loss of human life and property and violation of the right to livelihood (through denial of grazing and access to water sources and salt licks for cattle) and liberty (through illegal incarceration and restriction of movement of the pastoralists by agents of the Authority).¹⁵

Multiple jurisdictions

From its inception in 1959 the administration of the NCA has in various ways been subject to multiple intersecting jurisdictions, resulting in the conflicts of interests to which we alluded in Chapter 1. And as we shall demonstrate in Chapters 3, 4 and 5 this conflict of interests has had far-reaching consequences for the rule of law and the rights of residents in the NCA.

Control by governmental authorities, and particularly central government control at Presidential and Ministerial levels, is overwhelming (Fimbo 1992). The powers of the President in relation to the administration of the NCA include:

- i) the appointment of the Chairman of the Board of Directors of the Authority (para 2(1)(a) of Fourth Schedule);
- ii) the appointment of the Conservator of the NCA (Section 5B(1));
- iii) the amending, varying or replacing of all or any of the provisions of the Fourth Schedule to the Ordinance which provides for the appointment and termination of service of members of, and proceedings of, the Board of Directors of the Authority (Section 5(3)); and
- iv) giving directions of a general or specific character as to the exercise by the Authority of any of its functions (Section 5N).

The Authority is subject to the extensive powers of the Minister responsible for the conservation of natural resources. These include legislative power to approve rules made by the Authority prior to their being put into operation (Sections 6(1), 7(1)) and to regulate appeals under the Ordinance (Section 14D). He also has quasi-judicial powers

15 The Law Enforcement Department of the Authority is heavily financed by the Frankfurt Zoological Society (FZS) in terms of provision of vehicles, uniforms and communications equipment (eg. walkie-talkie radio transmitters, etc.). It is said the FZS financed the anti-cultivation operation of 1987/8 during which pastoralist settlements were raided and their crops burnt and slashed, and nearly 25 per cent of all pastoralists leaders were arrested and fined and others incarcerated at the behest of the MNR officials (interviews with residents, 2-5 July 1997; E.oft 1996; Makacha and Sayale 1987).

to hear and determine appeals against decisions or orders of the Authority (Sections 14(2), 14A) and to nominate all members of the Appellate Committee of the Authority (Section 14C(1)). He also has the power to appoint any number of Assistant Conservators (Section 5B(3)) and the majority of the members of the Board of the Authority (para 2(1)(c) of the Fourth Schedule). Another significant power of the Minister relates to parliamentary appropriations of funds for the Authority (Section 5G), and control over the maintenance of reserve and special funds, investment and borrowing by the Authority (Sections 5I, 5J, and 5K).

Under Section 6(2)(f) of the Ordinance, as amended by Act No.14 of 1975, the Minister has power to specify by order published in the Gazette any person or category of persons whose entry into or residence within the Conservation Area should not be prohibited or restricted. Although the Minister has to date not exercised his powers under this section, they could undoubtedly be used to impose restrictions on the rights of the residents. The effect of this legislative scheme is to require even the Maasai residents in the NCA to apply for and obtain certificates of residence under Rule 8(1) of the Ngorongoro Conservation Area Rules, 1972 (GN No.12 of 25 January 1972), without which they would be committing an offence under Rule 8(3) of the GN.

In addition to the regulatory powers of the Authority over the NCA, the District Development Councils during the era of decentralisation of government (1972-82) and the current local government administration have jurisdiction over the Area in matters of planning and implementation of programmes affecting agriculture, public health, education, natural resources, water supplies and land development. The District Councils are authorised to make by-laws applicable to their area of jurisdiction. Indeed, the Ngorongoro District Council has continually enacted by-laws to provide for a development levy; cropping and capturing of game; tourist hotels' bedding fees (largely in relation to hotels within the NCA) and many other by-laws in connection with livestock markets, animal dipping fees, and agricultural and forest produce taxes.

Conflicts arising from multiple jurisdictions

The residents in the NCA are subject to the administration of the Authority as well as the District Council and village governments. It has been observed that this state of affairs has caused confusion in the decision-making processes in the administration of the NCA. The lines of responsibilities of the different authorities appear to be unclear (Rugumayo 1994). The situation has been aptly summed up in the following terms:

"There is little or no interaction as regards decision making particu-

larly between the latter level [i.e. the Maasai traditional decision-making system] and those of government and the parastatal NCAA... there is, for instance, no clear cut policy as to the participation and involvement of local authorities such as that of the Village Executive Officer and the Ward Executive Officer, or that of the Ward Development Executive Officer or Village Council. Leaders at these levels therefore feel they have no authority as to the decisions made by the NCAA" (ibid.:10).

It is pertinent to note that both the Local Government (District Authorities) Act, 1982 (No.7 of 1982) and the NCA Ordinance provide that, before approving any by-law or any amendment to any by-law which affects the natural resources of the NCA, the Minister responsible for local government shall first consult the Minister responsible for the conservation of natural resources. And in the event of any conflict between any such by-law and any rule made under the Ngorongoro Conservation Area Ordinance, the provisions of the latter rule shall prevail over the local government by-law.¹⁶ It should be obvious from this legislative scheme that the Authority is more powerful than the District Council.

Another significant factor in conflicts arising from the multiple jurisdictions over the NCA is the weighty presence of donors and in particular the international environmental lobby (the Frankfurt Zoological Society (FZS) and the International Union for Conservation and Nature (IUCN)). The FZS is said to have considerable influence over conservation policy at the national level and consequently over the management and functioning of the NCA. Loft (1996) speaks of more recent FZS initiatives in creating a ministerial committee for the amalgamation of all protected areas in the country (now covering 25 per cent of Tanzanian territory). The influence of donors and the environmental lobby is undoubtedly likely to aggravate further the conflictual situation in the administration of the NCA, to the detriment of the Maasai residents in relation to their participation in decision-making processes within the Area.

These multiple jurisdictions and their resulting conflict have tended to create extreme uncertainty on the part of the Maasai residents in the NCA. The issue of cultivation in the NCA illustrates this point. While the provisions of Section 9A of the NCA Ordinance as amended by Section 14 of Act No.14 of 1975 prohibit cultivation in the NCA, in 1992 the central government (through a pronouncement of the Prime Minister), without changing the law, permitted cultivation in the NCA, apparently against the wishes of the NCA Authority.

A criminal case which arose in the Ngorongoro Primary Court

¹⁶ See Section 150(5) of the Local Government (District Authorities) Act, 1982 and 3rd Schedule to the Ngorongoro Conservation Area Ordinance, Cap 413 as amended by Section 24 of Act No.43 of 1963 and Sections 5, 51 and 3rd Schedule to Range Development and Management Act, 1964 (No.9).

(*Anael s/o Kamunga v. Regina d/o Lazaro & Mary d/o Lazaro* (1996)) may serve as a short case study to illustrate the confusion which has arisen from the multiple authorities over the NCA residents. In this case the accused were charged with the offence of entering the Ngorongoro Conservation Area without a permit, contrary to Section 7(1) and (2) of the Wildlife Conservation Act, 1974 (No.12 of 1974). The prosecution's case was that since 1973 the accused had been ordered to move from the NCA because they were illegal immigrants allegedly engaging in unauthorised cultivation. A letter of the District Commissioner dated 30 November 1993 was tendered in support of the prosecution's case. It was addressed to the Conservator and directed the removal of the accused persons. It further directed that only persons who were ordinarily resident in the NCA had the right to cultivate in the Area. In defence the accused stated that they were born at Olopiro Endulen within the NCA and that they had lived as a married couple outside their village until they were divorced, whereupon they returned to Endulen where they had since lived for more than 35 years.

The primary court magistrate acquitted the accused on being satisfied that, since Olopiro was within the NCA, the accused who were ordinarily resident in the NCA could not have committed the offence of entering the Conservation Area without a permit. The magistrate also observed that to the extent that it upheld the right of residents to cultivate in the NCA, the directive of 30 November 1993 by the District Commissioner was *ultra vires* of Section 9A of the NCA Ordinance¹⁷ which clearly prohibits cultivation in the Conservation Area.

Conclusion

An examination of the regulatory scheme of the NCA reveals that there is a stronger tendency of fusion than of separation of powers in the Authority and that there is virtually no system of checks and balances in the enabling Ordinance. Such a set-up clearly violates the rule of law, one of whose tenets is the separation of executive, legislative and judicial powers.

Notwithstanding the parastatal structure of the Authority, its functions and regulatory powers are akin to those of a local government with territorial and personal jurisdiction over its residents. We would argue that, like local governments elsewhere in the country, the local community in the NCA, whose area constitutes 59 per cent of Ngorongoro District (see Tanzania 1990), should be represented and participate in the decision-making processes of the Authority. We need

17 The magistrate cited a wrong Section 9(1) and (2) of the Wildlife Conservation Act, 1974 (No.2 of 1974) which incidentally creates an offence for destroying vegetation in game reserves.

only echo previous observations that involvement of people at policy-making levels and in implementation is a prerequisite for the success of environmental programmes. The challenge indeed is how to involve people in order to ensure effective participation (Kijazi 1994:35).

To the extent that Rule 8 of the Ngorongoro Conservation Area Rules, 1972 (GN 12 of 25 January 1972) appears to place the right of residents to enter and reside within the Conservation Area at the discretion of the Conservator, it is undoubtedly in breach of the various pledges undertaken by the state. On the face of it the restriction on the local resident citizens' right of movement violates the Constitution.

Chapter 3

Land tenure in the Ngorongoro Conservation Area

The legal tenure regime

The issue of land rights of the Maasai residents is complicated by the historical factors reviewed in Chapter 1 and the current state of confusion in the whole land tenure regime in the country (see Tanzania 1994a). The principal legislation governing land tenure is the Land Ordinance, 1923 (No.3 of 1923). Under this law, there are two major forms of holding land: granted rights of occupancy and deemed rights of occupancy. 'Right of occupancy' is defined in Section 2 as "*a title to the use and occupation of land and includes the title of a native or a native community lawfully using or occupying land in accordance with native law and custom*". Granted rights of occupancy are those granted by the President over public land under Section 6, while the rights of a native or native community are termed deemed rights of occupancy.

In relation to the area falling under the jurisdiction of the NCAA, the following questions need to be answered so as to understand the nature of land rights of the resident Maasai a) Did the creation of the Authority by statute give the Authority any title to land? b) What are the land rights, if any, of the Maasai residents? And how, if at all, are they protected by law including the Constitution of the United Republic? c) What is the effect of the extensive powers of regulation and control of the NCAA on the land rights of the residents?

The Authority's land rights

Certain things are clear in law and will be disposed of at the outset. The Ngorongoro Conservation Area Ordinance, as enacted in 1959 and through its various amendments, did not, either explicitly or implicitly, extinguish any pre-existing titles or rights to land, nor did it vest land in any form in the Authority. This is unlike the National Parks Ordinance, 1959 (No.12 of 1959) which, in terms of Section 6(1) extinguishes "*all rights, titles, interests, franchises, claims, privileges, exemptions or immunities of any person other than the President in, over, under or in respect of any land within*" national parks. Furthermore, this Ordinance makes provision for payment of compensation to anyone whose rights are extinguished (Section 7). The result is that

all lands within national parks revert to the President whose powers to grant rights of occupancy under the Land Ordinance are explicitly saved (Section 6(2)(b)). However, even under the National Parks Ordinance land is not granted or vested in the Trustees of the Parks.

Thus the conclusion is, first, that whereas land rights in the National Parks are extinguished, those of indigenous residents in the NCAA are preserved. Second, that both in the parks and in the NCAA the Trustees and the Authority respectively do not have any title to land as such.¹⁸

Maasai land rights

As for the rights of resident Maasai, studies have shown the Maasai community in the NCA to have a concept of communal ownership in which land tenure is governed by 'native law and custom' (see, for instance, Potkanski 1994). It is also established that some of the existing population of Maasai have all along lived in what is now Ngorongoro Conservation Area, and that others were moved there from Serengeti (interviews) when the Area was excised from the then Serengeti National Park (see Chapter 1). It can therefore be argued that the Maasai, at least as a community, had deemed rights of occupancy over the Area before the creation of the Conservation Area. The rights of those who were moved there merged into this community both by virtue of the government undertaking to preserve their rights in the Conservation Area (Chapter 1) and the long passage of time (almost four decades) during which they have exercised such rights.

As we have seen, there is nothing in the law to indicate, even remotely, that these rights were or have been extinguished. The problem arises in terms of the extensive statutory powers of regulation that the Authority has over the lands in the Area. Can it be said that these powers can coexist and/or are compatible with the deemed rights¹⁹ of occupancy? What about the statutory powers of the Authority to construct roads, buildings, etc. and to prohibit, control and restrict residence and settlement in the Area, and even restrict and prohibit access

18 In the course of our research, we came across agreements between the trustees of Tanzania National Parks (TANAPA) and the NCAA and hoteliers granting leases. Sometimes the recitals seem to assume that the trustees or the Authority hold rights of occupancy. As far as our research is concerned, neither the Trustees nor the Authority hold any right of occupancy nor any other type of land allocation which would entitle them to grant land on (long-term) leases.

19 The proviso to Section 6 (2) of the Ordinance which states certain categories of people whose entry or residence in the Area may not be prohibited, restricted or controlled under the rules, stipulates:

Provided that nothing contained in this Sub-section shall be construed as granting or recognising any right or title to land or any interest in, over or under land within the Conservation area ...

In our view, this provision in itself cannot be used to argue that pre-existing rights have been extinguished or recognised or new rights established. It is strictly not applicable to the argument in the text where the source of deemed rights being discussed is the Land Ordinance.

to specified areas within the Conservation Area which directly impinge on the deemed rights? Would this amount to expropriation of deemed rights, and if so, is it valid if the procedure under the Land Acquisition Act, 1967 (No.47 of 1967) is not followed and no compensation is provided for in terms of Article 24 of the Constitution? We consider these questions next.

There used to be the view that customary rules of tenure cease to apply on reserved land (see the case of *Chapila v. Mwinzigoha* and the discussion in James and Finbo 1973), just as customary rights are extinguished once an area is declared to be a planning area under the Town and Country Planning Ordinance (No.42 of 1956). The latter position has been challenged following the case of *NAFCO v. Mulbadaw Village Council* (1986) which established that deemed rights have to be acquired under the Land Acquisition Act (No.47 of 1967) and cannot be assumed to be extinguished by operation of law simply by the grant of a right of occupancy over the same area. At least in the case of planning areas, it seems to be now well-established that customary rights are not extinguished on declaration of the area as a planned area. This was observed by the Court of Appeal, albeit in passing (obiter), in the case of *Nyagaswa v. Nyirabu* (1985), and it has been affirmed positively in the later decision of the highest court in the case of *Kakubukubu v. Kasubi* (1991). As for reserved lands, we agree with the position advanced by Professor R. W. James that no general statement can be made on the existence or otherwise of customary tenure without examining separately the relevant piece of legislation establishing the reserved area under consideration (James 1971). This position would also be in line with the decisions of the Court of Appeal just cited. We would go further and argue that in examining the relevant piece of legislation today one would have to bear in mind the constitutional Bill of Rights which did not exist at the time James was writing, nor was the Constitution argued in the cases cited.

The Ngorongoro Conservation Area Ordinance itself has not come under the scrutiny of the courts. Bearing in mind the history, it certainly cannot be read as having extinguished customary rights, turning the Maasai residents into either 'licensees' or 'squatters'. At the same time, it has to be recognised that the statutory powers of the Authority considerably reduce and restrict the enjoyment of the residents' land rights. Nonetheless, as was suggested by the Ministerial Ad Hoc Commission, such regulatory powers are quite compatible with the existence of the customary tenure, just as the planning powers of various local and other authorities are compatible with the existence of granted rights of occupancy in urban planned areas. The question is: at what point does regulation cease and expropriation begin?²⁰

20 In planning areas, as was pointed out by the Court of Appeal in *Kakubukubu*, no expropriation can take place without invoking the provisions of the Land Acquisition Act, 1967 (No.47 of 1967) and following the procedure provided in that law.

Expropriation would clearly be in breach of several rights stipulated in the Bill of Rights, including the right to own and enjoy property.

Constitutional protection

This brings us to the vexed issue of whether customary right of occupancy is a property for the purposes of Article 24 of the Constitution. If the term 'property' is defined narrowly to imply right of ownership (including use and disposal) in bare land (soil), then, clearly, rights of occupancy cannot be considered property, as the whole scheme of the Land Ordinance reveals.²¹ On the other hand, it is now well established that human rights provisions in the Constitution must be given generous and purposive construction (see *Mtikila v. Attorney General*, (1993)). Giving the term 'property' in Article 24 a broad meaning, it could be argued that any bundle of rights or interest in land, like the right to use and occupy land, in itself amounts to property.²² This seemed to be the position of the Court of Appeal in the leading case of the *Attorney General v. Akonay* (1994), although the reasoning there is somewhat *a priori*. In that case, the Court firmly arrived at the conclusion that 'customary or deemed rights in land, though by their nature are nothing but rights to occupy and use the land, are nevertheless real property protected by the provisions of Article 24 of the Constitution' (p.14 of cyclostyled report). This means that the Maasai residents of the NCA, as lawful 'occupiers', have a right to 'own' their 'property' and receive protection for it under Article 24.²³ Furthermore, Article 29 stipulates that:

"...every person in the United Republic has the right to enjoy and benefit from (kufaidi) basic human rights and the performance of duties stipulated in Articles 12 to 28 of this part of this chapter of the Constitution."

This is an important provision in that a person is entitled not only to own and receive protection for his/her property but also to be able to enjoy and benefit from it and to benefit from the performance of duties by others. Under Article 7,²⁴ read together with Article 27(1) (duty to respect other people's property, discussed below), the Authority as a governmental department and its Board members and staff as individual public officers have a constitutional duty to observe,

21 For discussion, see Shivji (1994).

22 This position is different from that taken by one of us on this issue (Shivji 1994).

23 Section 2 of the Land Ordinance defines 'occupier' to mean 'the holder of a right of occupancy and includes a native or native community lawfully using or occupying land in accordance with native law and custom'.

24 This article appears in the Directive Principles which in terms of article 7(2) are not enforceable in a court of law. In our view, this only means that an aggrieved party cannot found a cause of action exclusively on the provisions of Directive Principles, but it does not mean that they do not have the force of law and that they cannot be used in conjunction with other enforceable provisions of the Constitution to understand and interpret these other provisions.

respect and protect basic human rights stipulated in the Constitution. This would, of course include the rights of the Maasai community under Articles 24 and 29.

To the extent that the various powers of restriction and control exercised by the Authority impinge on the rights of the Maasai to enjoy their property fully and benefit from it, they can be considered unconstitutional and to that extent the relevant provisions of the Ordinance are invalid (see Article 64(5)). Some of the powers of the Authority can be argued to amount to expropriation without compensation, in breach of Article 24 and therefore invalid. However, that is not the end of the story.

Limitation clauses

We have to consider other competing rights and duties and specific derogation clauses which limit the exercise and enjoyment of basic rights and which are stipulated in the Constitution. These have to be considered in the special context of the specified objectives and statutory duties of the NCA to "*conserve and develop the natural resources of the Conservation Area*" (Section 5A).

The right to property under article 24, for the purposes of our discussion, is limited in three ways. First, the provision itself is clear that the right is not absolute. It does not make expropriation of property by the state illegal *per se*, except that it has to be carried out (a) under the authority of law; and (b) compensation is provided for. So far as the impact of regulatory powers is concerned, we would suggest that deemed land rights are of two types. There are those which can be specifically identified as belonging to a particular individual, family or a much smaller group than the whole community. Such rights may be in practice identifiable and identified with particular parcels of land. In this case, any form of regulation which amounts to expropriation (for example, building a road through or closing off an area of land belonging to a family) could be argued to be invalid unless the provisions of the Land Acquisition Act are followed and compensation provided for. The Ngorongoro Conservation Area Ordinance, unlike the Town and Country Planning Ordinance, does not make provision for the applicability of the Land Acquisition Act and to that extent it could be held to be invalid or the Court might read the latter Act into it to make it consistent with Articles 24 and 13 (right to be heard) of the Constitution. In practice, though, if litigation were to be mounted on these particular issues, it would have to be done in relation to very specific holders of land relating to a very specific incidence of what is alleged to be expropriation.

The second set of deemed rights are of a more historical and general nature, relating to the Area as a whole belonging to the Maasai community as a whole. In this case, we submit, the enabling regulatory

powers amounting to expropriation are also of a general nature and exercisable on a continuous basis. But these too need to be subjected to the test of constitutionality. We consider this together with the other limitations on rights stipulated in the Constitution.

The second and third types of limitations relate to certain specific provisions in the Constitution and the general derogation clause in Article 30. Article 27(1) provides:

"Every person has a duty to protect the natural resources of the United Republic Government and public property which is collectively owned by all citizens, and to respect other person's property."

Here every person would include the NCAA which is, moreover, specifically charged under the Ordinance to conserve the resources of the Area. Since the performance of this duty impinges on the rights of the residents, as we have seen, it should be construed in this context as a limitation on their basic rights.

Similarly, Article 30 in Sub-article 2 stipulates that basic rights and duties do not invalidate any existing law or prevent any legislation from being passed or anything from being done under it if the purpose of such law is to:

b) ensure ... preservation and development of wealth or any other interests to enhance public benefit; ...

f) enable anything else to be done in national interest.

On first reading, these are very wide limitations. But the courts have developed certain, now generally accepted, principles of construction to limit the effect of such clauses on basic rights. Increasingly the Tanzanian courts have begun to take notice of these developments elsewhere. Broadly speaking, the principles and criteria used (and we would say the list is still open) in the interpretation of such limitation clauses are:

1. That the limitations should be strictly and narrowly construed (*Chamchua v. The Attorney General* (1988); *Mtikila v. The Attorney General* (1993), etc.).
2. That the onus of showing that the limitation is applicable to limiting certain basic rights is on the state.
3. That the limitation in question should be proportionate to the mischief it is supposed to correct (*The Director of Public Prosecutions v. Daudi Pete* (1990)).
4. That it should be justifiable in a democratic society (this formulation itself comes from other jurisdictions and has not yet been judicially adopted in Tanzania, but the High Court, particularly through Judge Mwalinsanya, has come very close to it, see *Chamchua v. The Attorney General* (1988)).
5. That the limitation should not be such that it undermines the core or essential content of the right (also from other jurisdictions).²⁵

25 On limitation generally, see Mbonda 1988.

Right to be consulted

It is in the light of these principles on rights and limitations that the twin objectives of the NCA to conserve the natural resources, on the one hand, and promote the interests of Maasai citizens, on the other, should be read. This also means that the limitations discussed above can only be upheld if they do not undermine the essential content of the rights of property (and other rights) of the Maasai as a community. What is the essential content of the right to property? The principles and the rationale behind the Land Acquisition Act and the provision for compensation in Article 24 of the Constitution supply the essential content, and should be adapted to apply to the circumstances of the NCA and the rights of the resident Maasai community. The rationale behind the Land Acquisition Act is to put into operation the right of the individual to be heard before his/her property rights are affected in any way. This is also stipulated as a part of basic rights in Article 13(6) of the Constitution which provides, among other things, for the right to be heard.

In the case of the community as a whole, we would argue that the right to be heard translates into the right to be consulted before decisions regarding their property are made. In support of this proposition, there are highly persuasive cases from India, a jurisdiction which has many similarities to Tanzania and whose court decisions are well respected throughout the Commonwealth. In the famous case of *Tellis v. Bombay Municipal* (1987), where pavement dwellers were evicted by the Bombay municipal authorities and their properties demolished, the Supreme Court of India, holding that the pavement dwellers had a right to be heard, which in this case meant the right to be consulted, put it thus:

"The right to be heard has two facets, intrinsic and instrumental. The intrinsic value of that right consists in the opportunity which it gives to individuals or groups, against whom decisions taken by public authorities operate, to participate in the proceedings by which those decisions are made, an opportunity that expresses their dignity as persons ... (right of the poor to participate in public processes)" (Tellis v. Bombay Municipal (1987:376); for further discussion see Shivji (1996)).

Thus the very processes of the NCA and the exercise of powers affecting the property rights of the Maasai on a continuous basis entail statutory provisions to enable a continuous process of consultation prior to decision-making. For the consultation to be effective and not simply cosmetic, it has to take place prior to the making of decisions (see *Ruhondo etc v. Tanzania-Zambia Railway Authority* (1986)). In practice, in the case of the NCA, putting this proposition into operation can only mean the statutory law providing for 'participation in public' [in this case the management and administrative processes of

the NCAA] processes'. To the extent that the Ordinance does not stipulate organs and/or mechanisms for such participation and consultation, it is deficient and therefore inconsistent with the basic rights provided in the Constitution. As we have argued, this deficiency cannot be cured by the limitation clauses in the Constitution.

We now turn to the issue of compensation. Again, the principle of compensation has to be adapted to the context of conservation and the collective property rights of the residents. We can take our cue from the way the issue of compensation was addressed by the colonial government when the Serengeti Maasai were moved to Ngorongoro. For some groups (those moved from the village of Handajega), monetary compensation was awarded. For the Maasai who were moved to Ngorongoro, the pledge included the provision of water (and presumably other facilities) in the new area as compensation (Tanganyika 1958a).²⁶ That pledge has never been fully carried out (Lane 1997; Tanzania 1990; Rugumayo 1994). We would argue that the continuous effect of the regulatory powers of the NCAA on the property rights of the Maasai entails a continuous obligation on the part of the Authority to compensate them in terms of providing collective facilities such as water, health, schooling etc.. In other words, this is not a welfare measure or at the discretion of the Authority. Rather, it is a constitutional obligation on the NCAA, the breach of which results in the violation of the Maasai right to property stipulated in Article 24.

Village-based tenure?

Before we conclude this chapter, we should draw attention to the recommendations of the Ad Hoc Ministerial Commission on land tenure, the only study we know which specifically addresses the issue of land tenure in the NCA. The recommendations may be summarised as follows:

1. That the Authority as such does not have tenurial rights *per se* over the Conservation Area.
2. That the Authority's planning, regulatory, conservation and management functions are not incompatible with the land tenure rights belonging to the indigenous community.
3. That the Villages, Ujamaa Villages (Registration Designation and Administration) Act, 1975 (No.21 of 1975), now absorbed within the Local Government (District Authorities) Act, 1982 (No.7 of 1982), should be fully applied to the villages of the NCA.

26 Even the formulation of the pledge to compensate fits in and supports the argument in the text:

"It will be readily appreciated that full compensation must be paid to all who are to be disturbed by the exclusion of human rights from the new Park. In the case of the Masai such compensation will take the form of new water supplies in areas outside the Park, while compensation in cash will be paid to individuals evacuated from the Lake Province village of Handajega" (ibid.:2).

4. That the villages should be given tenurial rights by surveying, demarcating and titling village lands.
5. That the ultimate control of land-use planning should continue to be vested in the Authority.
6. That the Authority should be fully involved in drawing up village boundaries, thus ensuring that critical conservation areas remain outside the villages and that tenure in them should be vested in the Authority (Tanzania 1990).

We fully agree with the proposition in 1, as we have demonstrated in this Chapter. We partially agree with 2 but, as argued above, the conception and statutory operation of the conservation, etc. functions of the Authority have to be considerably modified to make them compatible with the constitutionally entrenched tenurial rights of the Maasai. In our view, to the extent that 3 implies that the Villages Registration Act deals with issues of land tenure, it is misconceived. The Villages Registration Act (as was observed in the *Mulbadaw* case) has nothing to do with questions of land tenure. Whether or not the NCA villages are registered will not in itself resolve the tenurial problem of the NCA. It is in this respect that the position taken by the Commission in 4, 5 and 6 becomes critical.

The subtle but significant implication of the recommendation that the villages be demarcated with the full involvement of the NCAA, such that sensitive conservation areas are vested in and left under the exclusive jurisdiction of the Authority, has the potential, indeed the real danger, of a second Serengeti-like displacement of the Maasai. As with the Ministry of Lands at the national level (see Tanzania 1994a), the Authority would use all its power to limit lands within village boundaries. In short, it would 'ghettoise' the Maasai within their village boundaries where it would continue to have a say on land-use planning, while at the same time the Maasai community would have no say, let alone rights, over the rest of the so-called sensitive conservation areas. Besides being totally inconsistent with the constitutional and historical rights of the Maasai, this move would compartmentalise conservation and development functions over geographical and social space, thus disembodimenting the Maasai not only as a cultural but also as an economically sustainable community. This kind of recommendation assumes that the local community has no role in participating in conservation and benefiting from it. We would recommend that any move in this direction should be strongly resisted.

Maasai communal rights of occupancy relate to the whole of the Conservation Area, and to the extent that certain so-called sensitive areas are closed to human use and activity this should be with the full consultation and participation of the community which continues to have participatory jurisdiction over the same. In terms of land tenure, the land continues to be vested in the community under their deemed right of occupancy, albeit modified.

In conclusion, the property rights argument developed in this Chapter does a number of things. First, it reconciles the dual mandate, ie. conservation and development, of the Authority, and gives the statutory objective of safeguarding and promoting the interests of Maasai citizens a tangible content. The objective therefore ceases to be hortatory at the absolute discretion of the Authority. Second, the position taken in this chapter allows restriction of the property rights of the Maasai without destroying the essential content of those rights. Third, it brings into focus the centrality of the consultation/participation of the local community (the Maasai) in the management of the natural resources concerned in the interests of the nation as a whole without compromising the basic and fundamental rights of the Maasai. Finally, our argument demonstrates the deficiencies of the existing Ngorongoro Conservation Ordinance, while at the same time giving pointers as to the direction of amendments. These are the arguments which are carried further in the following Chapters of this study.

Chapter 4

Right to life and livelihood

The law

In the Bill of Rights right to life and its protection is one of the most important basic rights (Article 14). Various jurisdictions have construed life to mean more than simply biological existence. It includes life in the sense of being able to live as a wholesome human being with all the basic necessities for living in human dignity. The Indian case of *Tellis*, cited in Chapter 3, held that the right to life includes the right to livelihood "because no person can live without the means of living, that is, the means of livelihood" (1987:368). The Indian Supreme Court continued:

"Life, as observed Field, J. in Munn v Illinois 94 US 113 (1877), means more than mere animal existence and the inhibition against the deprivation of life extends to all those limits and faculties by which life is enjoyed. This observation was quoted with approval by this court in Kharak Singh v State of UP (1964) 1 SCR 332" (ibid.).

None other than the first President and the respected leader of Tanzania, Julius Nyerere, clearly summed it up thus:

"Life is the most basic human right. If justice means anything at all, it must protect life. That should be a constant underlying purpose of all social, economic, and political activities of government at all levels. ...

"To have food, clothing, shelter, and other basic necessities of life; to live without fear; to have an opportunity to work for one's living; freedom of association, of speech, and of worship. All these things together are among the basic principles of living as a whole person in 'Freedom and Justice'. In other words, all are almost universally accepted as basic 'Human Rights'".²⁷

The Tanzanian courts have not had the opportunity to consider Article 14 on the right to life. But there is no reason why they should not find persuasive the Indian authorities and the pronouncement of Nyerere, who has been previously quoted by the Courts in their judicial pronouncements (see for example *Attorney General v. Akonway* (1994)).

The Maasai 'means of livelihood'

What, then, are the traditional and 'modern' means of livelihood of the Maasai residents in the Conservation Area? The main activity is

²⁷ Quoted in the *Daily News* (Dar es Salaam) 27 September 1993.

livestock keeping which is done in what has now been recognised as a rational manner through the pastoral mode of production. One of the important aspects of this mode of production is the seasonal movement of people and cattle called 'transhumance' which assumes freedom of movement, a right protected in Article 17(1) of the Constitution. In the case of the Maasai such freedom of movement within the Area assumes even more significance as an essential means of their livelihood. The other components of this means of livelihood are: access to pasture, grazing, water points, and salt in the crater. One must also include in this the traditional practice of burning unpalatable grasses as part of sound range management (NCAA 1995).

As a secondary means of livelihood, the Maasai practise bee-keeping and honey gathering. Probably the most important activity on which the Maasai fall back, particularly in times of crisis, is subsistence cultivation of food crops. This has been the subject of great contention since the inception of the Ngorongoro Conservation Area, and will be considered in some detail in the next section. Suffice it to conclude here that the rights of grazing, access to pasture, water, salt, and the right to cultivation are part of the right to life and livelihood of Maasai as individuals and as a community. We now turn to the thorny problem of cultivation to illustrate in practice how the exercise and enjoyment of the right to life are prohibited and restricted.

The problem of cultivation

There are a number of misconceptions and prejudices surrounding this problem, which result in misleading and highly inappropriate (and possibly even dangerous to the Maasai) solutions being suggested. These need to be cleared at the outset.

First, there is the view that the nomadic practices of the Maasai result in lack of care for land, resulting in soil erosion and other abuses. It is now recognised that the pastoral mode of production is not necessarily nomadic but is what is called transhumance, namely a rational system adapted to the ecology and the delicate environment in which the Maasai operate. More often than not overgrazing resulting in soil erosion, for example, is the result of other factors, such as shortage of land available for pasture arising from massive 'land grabbing' in Maasai areas (for example, see case studies in Tanzania 1994b) rather than of the pastoral practices of the Maasai themselves.

Second, there is the view that if cultivation were permitted, it would result in extensive cultivation, and that there would be an influx of immigrants, which it would not be possible to control. The solution therefore is to prohibit cultivation for everyone, including the resident Maasai (Tanzania 1990:67-8). The answer to this is that all studies have shown that the Maasai residents themselves are not, and never have been, interested in extensive cultivation. Their interest and

demand throughout have been for small plots (*mabustani*) for growing food (Tanzania 1994b:40).

The NCAA's General Management Plan itself cites a study showing that Maasai residents cultivate small plots for food near their *homas* or at some distance in places suitable to grow maize, beans or potatoes (NCAA 1995). In the study the average size of such plots varied from 1.5 acres per head of household in Endulen to 2.3 acres near Nainokanoka. More extensive cultivation was found to be practised by "government and NCA employees, school teachers, hospital workers, shop keepers, and other non-indigenous residents who have a job or business within the NCA" (*ibid.*:17). In this case, the size of plots was found to be twice that of Maasai plots; in many cases they were worked by hired labour and usually they were used to grow crops for profit rather than subsistence.

The other group which also cultivated extensively was the WaArusha and WaMeru who have been resident in the NCA for generations (NCAA 1995). Thus, visiting the sins of others by a complete ban on cultivation, violating the Maasai's right to life, is unfair, unreasonable and disproportionate, to say the least. Rather, one would have thought, it would be more rational and reasonable for the NCAA to control cultivation by its own employees and other non-indigenous people. The argument that permitting cultivation would attract a flood of immigrants only points to the NCAA's inability – for whatever reason – to control immigration, for which the Maasai, who in any case do not participate in the management, cannot be held responsible.

Third, there is the stereotype that cultivation by the Maasai is of recent origin and that traditionally the Maasai were pure pastoralists. It is held that the cultivation is necessitated by the fact that the Maasai can no longer rely exclusively on their livestock for food, and that the multiple land use concept includes only dual use, ie, wildlife conservation and pastoralism, not cultivation. As the Ad Hoc Ministerial Commission put it, "cultivation and conservation are, to a large extent, mutually exclusive" (Tanzania 1990:67).²⁸

There is evidence that small-scale subsistence cultivation by Maasai has been practised since, at least, 1890 (Tanzania Wildlife Conservation Monitoring 1993). Therefore it could be considered part of traditional Maasai practices. In which case, the right to cultivate was within the contemplation of the colonial authorities when they assured the Maasai that their rights would be preserved in the new Area. Admittedly though, even the colonial authorities were hoping that the Maasai would eventually be persuaded to give up cultivation altogether.

28 To be fair, the Ad Hoc Planning Team of the General Management Plan (GMP) had suggested that limited, managed cultivation by the indigenous people should be permitted and that cultivation in this respect be integrated as a legitimate component of the multiple land use concept. But this was rejected by the Board of Directors (NCAA 1995).

In the early 1960s, under Fosbrooke as Conservator, the problem of cultivation existed but he sought to regulate it by a system of permits rather than banning it altogether.²⁹ His successor Saibull was more aggressive in enforcing the regulations and bringing to book the so-called illicit cultivators, which cost him dearly in terms of amiable relations with the indigenous people. In 1975, the conservationist lobby (both the scientific and the political!) won the day and cultivation was banned totally by amending the Ordinance (Section 9A). After an outcry from the Maasai (Tanzania 1994b), the then Prime Minister in 1992 lifted the ban temporarily for three years.³⁰ But without amendment of the law, the situation is precarious. In our interviews, the Maasai people could not hide their anxiety as to what would happen now that the three years had expired.

Fourth, the solutions offered are that the Maasai should choose either to be pure pastoralists and stay in the NCA, in which case their food needs would be taken care of by relief supplied by the NCAA, or to become pure cultivators and quit. This is what goes under the rubric of 'food security' in the literature. Under the second option, those who want to cultivate should be given lands and equipment, etc. in other areas, Loliondo for example. In other words, the Maasai should abandon their homes a second time round (NCAA 1995). All along, however, the government and the NCAA position has been, and is, to phase out cultivation in the NCA.

None of these solutions addresses the real issue and the demand of the Maasai based on their fundamental rights. The Maasai have made it very clear (a) that they are not pure pastoralists; they have always cultivated as a fall-back position; (b) that they do not want to be predominantly cultivators; and (c) that they are not asking for, nor interested in, 'food security' in the sense of food relief. Their demand is for food self-reliance. They are only asserting their right to livelihood (food) with dignity and not begging for a favour in the form of relief. In any case, relief becomes relevant only when there is a natural disaster. They are suffering from a man-made disaster because of the stubborn attitude of the NCAA and the government.

All in all, the cultivation problem has persisted and no solution has been found. In our opinion, Section 9A of the Ordinance, banning all cultivation, breaches the Maasai's fundamental right to life and livelihood. The food problems of the Maasai have been well documented (Tanzania 1990) and studies have shown that when cultivation was permitted in 1992 it dramatically changed the nutrition standards of

29 See Ngorongoro Conservation Area (Control of Use of Land for Agricultural Purposes) Order of 30 October 1961.

30 But see the case of *Anael s/o Kamungu v. Regina s/o Luzaro & Mary s/o Luzaro*, Criminal Case No. 29/96 in which the primary court magistrate, albeit gratuitously, observed that no one was allowed to cultivate and therefore the District Commissioner's order that only indigenous people be allowed to cultivate in the Conservation Area was wrong.

the Maasai. The enforcement of the blanket ban on agriculture under Section 9A has led to great suffering for the Maasai and further violation of their other human rights as the following case studies show.

Case 1:

In November 1986 the NCAA Board passed a resolution recommending continued legal action against illegal cultivators (Fosbrooke 1988). Between December 1986 and April 1987 five villages of the highland area (Empakaai, Navobi, Nainokanoka, Esirwa and Ngorongoro) and three villages of the lowland area (Endulen, Esere and Kakesio) were surveyed to determine the extent of cultivation. Subsequently an anti-cultivation operation involving 26 rangers was launched at the behest of the Board. At any one time during the operation there were 20 rangers in the field. It is reported that some 1,305 acres of land had been cultivated within the NCA (Makacha and Sayalal 1987).

In August 1987 the Conservator reported that the Authority had carried out a special 'anti-cultivation' campaign. The operation involved the slashing of the offenders' maize in the 1,305 acres of cultivated land. A total of 666 people were arrested, of whom nine were jailed for three months and 649 fined a total of 515,600.00 Tanzania Shillings. The offences with which they were charged included illegal cutting of trees within the Conservation Area contrary to Section 9(i) and (ii) of the Wildlife Conservation Act, 1974, and illegal cultivation in the NCA contrary to Section 9(1)(vii) of the Ordinance as amended by Act No.14 of 1975 (Makacha and Sayalal 1987; Fosbrooke 1988).

Of those convicted as a result of this operation, five appealed to the High Court of Tanzania against the decision of the Monduli District Court. The decision of the lower court was quashed and the convictions set aside on the grounds that: (a) the accused were charged under a repealed provision of the NCA Ordinance, and (b) that Section 9A of the Ordinance which the accused were alleged to have violated contained no provision for punishment (*Olorija N'gotyaki & Others v. Republic* (1991)).

It is reported that after noting the severity and illegality of the anti-cultivation operation, including allegations of bribery and corruption stating that villagers paid large sums to Authority staff to avoid being prosecuted and having their maize slashed, Henry Fosbrooke, who was then a member of the Board, took steps leading to an enquiry by a committee appointed by the Board. The committee is said to have reported back to the Board, fully substantiating the allegations of gross violations of the law and of bribes taken by Authority staff. The committee recommended that the services of junior staff involved should be terminated and that the senior staff should be dealt with by the Minister. As Fosbrooke's appeals to the Minister and the President of the United Republic to take action against the culprits went unattended, he resigned from the Board in protest (Fosbrooke 1988; Loft 1996).

Case 2:

William ole Seki, a Maasai resident of Endulen village and secretary of NGOPADEF, a local NGO in the NCA, recounts an incident in 1994 when the Authority's game wardens found herds of cattle grazing in village forest, whereupon the wardens impounded the herds and detained them in the Authority's yards for several days without feed or water. The pastoralists who owned the cattle were also beaten and their *bonnas* burnt down. This inhumane high-handedness on the part of the wardens was condemned even by the Pastoral Council (interview at Endulen, 2 June 1997).

Case 3:

On 21 March 1997 an armed squad of the Authority's game wardens under the supervision of Mathew Maige, the head of the Management of Natural Resources law enforcement unit, raided the pastoralists of Nainokanoka village who were grazing their herds of cattle in the part of Irkeepusi village forest which is outside the boundaries of Northern Highlands Forest Reserve. The herdsmen (Ringoine Septu, Parkepu Kasale and Singore Lemailoya) were severely assaulted and their spears and *sines* were seized by the wardens who in turn used them to slash the herds of cattle. Three head of cattle had their legs, backs or stomachs slashed and five were lost in the ensuing stampede. Seven head of cattle subsequently died (Letter to the Ngorongoro District Commissioner by Village Executive Officer, dated 8 April 1997). The Maasai reaction was immediate. About 500 Maasai warriors are said to have mobilised and prepared for war with the Authority. A potentially violent confrontation was averted only by the intervention of the *Ngorongoro District Commissioner, the local Member of Parliament, the Maasai traditional leaders (the Laigwenak)* and the Conservator of the NCA.

At the reconciliation meeting held at Irkeepusi village on 23 March 1997 between the Maasai community and the District and local government leaders and the Authority's representatives, it was decided that the dispute should not be pursued to the higher levels of the government or the courts of law, but should be settled through the traditional customs of the Maasai. The terms of the settlement were that Mathew Maige, the head of the Authority's MNR, should be forthwith relieved of his duties, and that the Authority should pay compensation to villagers who lost their cattle and to the three persons who were assaulted by the game wardens. To the knowledge of William ole Seki (interviewee) the NCA paid compensation for the heads of cattle killed or lost in the incident at 70,000.00 Tanzania Shillings per head, and the two herdsmen who were injured by the MNR wardens were reportedly paid 75,000.00 Tanzania Shillings each. It is not known whether Mathew Maige was indeed relieved of his duties (interviews with William ole Seki and Francis ole Syapa on 2 June 1997).

These case studies demonstrate the extent and intensity of the breaches of human rights in the course of the exercise of the Authority's powers of enforcement. The next question is whether the breach of the right to livelihood is covered by any of the limitation clauses, thus perhaps validating the provisions of the Ordinance banning cultivation? That is the next question to which we turn.

Constitutional validity

The NCAA, as we showed in Chapter 2, has extensive statutory powers of prohibiting, restricting, controlling and regulating the very means of livelihood of the residents. Section 9(1) empowers the Authority in its discretion to make general or particular orders for the purposes of conservation, protection and preservation of natural resources:

- i) prohibiting, restricting or controlling the use of land for any purpose whatsoever;
- ii) prohibiting, restricting, limiting or controlling;
 - a) the introduction, grazing, watering or movement of stock;
 - b) the firing, clearing or destruction of vegetation including stubbles;
 - c) the use of wells, borcholes, waterholes, water-courses, streams, rivers or lakes;
 - d) the gathering of honey or forest produce;
 - e) the exercise of any rights in relation to forest produce determined under the provisions of the Forests Ordinance;
 - f) the introduction or removal of flora or fauna;
 - g) the use of agricultural implements or machinery;
 - h) the carrying or use of weapons, snares, traps, nets or poison.

Disobeying orders so made is punishable by fines and/or long prison sentences. The powers are not only wide-ranging but virtually made at the discretion of the Authority. The right of appeal is to the Minister whose decision is final and not subject to review by any court (Section 14B(2)). What is more, appeals are limited to specific orders 'made in relation to the person aggrieved thereby or any member of his household or in relation to any parcel of land in or over which such person has an interest under a right of occupancy, lease, tenancy or mortgage'. In practice, such a right of appeal, limited as it is to the Minister, can hardly be of much use to the community whose grievance is general and against whom the general orders of the Authority function as essentially oppressive (and unconstitutional) legislation.

In our view, the powers enumerated above (and other similar powers in the Ordinance) are in breach of the constitutional right of the Maasai to life. To that extent the relevant provisions are invalid unless they can be rescued under the general derogation (limitation) clause. The arguments made in Chapter 3 in relation to the strict construction of limitation clauses apply with even greater force when considering

the fundamental right to life and livelihood. We very much doubt if any respectable court would uphold violation of the right to life of a whole community simply on an argument that it was done in the public or the national interest (Article 30 of the Constitution). Such overriding public or national interest (probably war or a national disaster but certainly not conservation) would have to be strictly established but, even more important, it would have to be established that public interest demands deprivation of the livelihood of the Maasai. Giving the limitation clause a narrow reading, and accepting conservation as in the public interest (including of course the interest of the local community itself), we would argue that the wide-ranging powers of the Authority can only pass the constitutional test if;

- i) the law (ie. the Ordinance itself) makes it mandatory on the Authority to provide the affected individual, group or community with alternative means of equivalent livelihood, meaning, in this case, grazing, cultivation, gathering honey, access to water sources, etc. within the Area as compensation; and
- ii) this is done in consultation (right to be heard) with the community on a continuous basis.

If these two requirements were embodied in the law, then one could also argue that the limitation on the rights of the residents was truly in the public interest since the immediately affected members of the public (the local community) were involved in the making of decisions involving the exercise of power. The argument is not that, by being consulted and giving their agreement, the community concerned has waived its rights. Human rights cannot be waived. But the argument would be that the limitations would be 'justifiable in a democratic society', since democratic governance by the NCAA would be legally in place, and that the limitations did not destroy the essential content of the right to life.

In other words, the conclusion we arrived at in Chapter 3 regarding land rights is equally applicable in the case of right to life and livelihood. This means that the law governing the NCA has to be fundamentally restructured if it is to be consistent with the constitutional (human) rights of the residents in the Area.

Chapter 5

Right of freedom of association, assembly and expression

Introduction

The formation of associations is one way whereby people sharing common interests may organise, communicate, manage social, economic and political activities or work together to advance special or general interests. The right of association is therefore central to the realisation of other rights such as freedom of assembly, expression or worship. The discussion of these rights in the context of Maasai residents in the NCA has to proceed from the premise of long-standing and continued state-imposed and institutionalised legal restraints upon the rights of Tanzanian citizens to associate. It is therefore important to understand the problem of the right of the Maasai to associate as typical of the problems encountered by other citizens in their attempts to organise in civil society.

As a backdrop to the appreciation of the difficulties facing the people in their attempt to organise in civil society, in this Chapter we shall first survey the legal regime on the right of association and, second, briefly trace the law and practice for the registration of societies. We shall also provide an overview of the NGO scene and focus on specific problems related to the right of association within the Ngorongoro Conservation Area. We conclude by arguing that the right of association of Maasai residents in the NCA should be treated at the same level as that of other Tanzanian citizens.

Overview of the legal regime on the right of association

Associations or societies in Tanzania may be organised and registered or incorporated under three different statutes. There is, first, the Societies Ordinance, 1954 (No.11 of 1954); secondly, the Trustees' Incorporation Ordinance, 1956 (No.18 of 1956); and lastly the provisions of the Companies Ordinance, Cap. 212 of 1932 relating to incorporation of companies limited by guarantee and not having share capital. As the majority of societies are registered under the Societies Ordinance, our main focus here will be on the operation of this Ordinance. In relation to organisations registered under the Trustees Incorporation Ordinance, trustees appointed by a body or association

established in pursuit of, for example, religious, educational, scientific, social or charitable purposes, may apply to the Administrator General in the Ministry of Justice for incorporation (Section 2). Companies limited by guarantee and not having share capital are in effect non-profit-earning associations organised in company form. Often, these are charitable organisations established to advance social, cultural, educational, research and scientific objectives. There are very few NGOs in Tanzania which have been registered under the Companies Ordinance.

Registration of an association under the Societies Ordinance is sought by application to the registrar of societies who is the Principal Secretary in the Ministry of Home Affairs. Section 2 defines a society registrable under the Ordinance as including any club, company, partnership or association of ten or more persons, whose objectives are not similar to companies set up for business under the Companies Ordinance. Trade unions, political parties, co-operative societies and statutory agencies or associations are not societies within the meaning of the Ordinance.

Under Section 7(1) of the Ordinance every local society is required to apply to the registrar for registration. The registrar has powers to refuse registration if he is satisfied that such local society is a branch of, or is connected with, a foreign political organisation. The registrar is empowered under Section 9 to refuse the registration of a local society under the following circumstances:

- i) that such local society is being or is likely to be used for purposes prejudicial to, or incompatible with, the maintenance of peace, order and good government; or
- ii) that the application does not comply with provisions of the Ordinance or any rules made under it; or
- iii) that such society does not exist; or
- iv) that the name under which the local society is to be registered is: (a) identical to that of any other existing local society; or (b) almost resembles the name of another local society, as in his opinion, to be likely to deceive the public; or (c) the society is, in the registrar's opinion, undesirable.

While (ii), (iii) and partly (iv) could be categorised as purely regulatory, (i) and (iv) (c) are restrictive, giving the registrar very wide discretionary and almost arbitrary powers. This places the right to association under the powers of the Executive branch of the government.

Under Section 12 of the Ordinance the registrar has absolute discretion to cancel the registration of any local society if the society concerned is:

- i) a branch of or is connected with any foreign organisation of a political nature; or
- ii) being used for unlawful purposes or for any purpose prejudicial to or incompatible with the maintenance of peace, order or good government; or

- iii) has altered its objects or pursues objects other than its declared objects; or
- iv) has failed to comply with an order to furnish the Registrar with audited accounts.

Although it is not a requirement under the law, in practice the registrar seeks the opinion of government departments and institutions considered relevant by him before registering a society. For example, when a national chapter of Amnesty International, the world-wide human rights organisation which works for the release of prisoners of conscience, sought registration in 1983, the registrar sought the opinion of several ministries including those of Justice and Foreign Affairs and the Prime Minister's office. It took nearly 16 months for the organisation to be registered.

Often, the registrar seeks the views of other established organisations before deciding on the application. This is one way by which the state exercises control over civil organisations – by using existing organisations or their leaderships, by patronising them or offering them favours, and then using them to exert control or exercise influence over potential civil activism (Mwaikusa 1993).

Restriction on the right of association

Control of every aspect of civil life and activity has been the pre-eminent occupation of the Tanzanian state. It has been aptly asserted that during the three decades of the one-party state control was facilitated by providing the appropriate structure and framework (Mwaikusa 1993). In single-party states, the government or ruling political party assumes a vanguard role and tends to see no need for autonomous, independent structures such as NGOs (Clark 1991). The political, legal and constitutional development of Tanzania from the early 1960s reveals a perverse process of monopolisation and incorporation of power in the state and party structures. Virtually from its inception, the independent state embarked upon the systematic legal control of the labour movement, co-operatives and other civil associations (Shivji 1986).

The tendency towards state monopoly of control over political and civil society first manifested itself in 1962, when the independent government plunged into a serious rift with the trade union movement, the Tanganyika Federation of Labour (TFL), culminating in the banning of the TFL and its replacement in 1964 by the National Union of Tanganyika Workers (NUTA), an organisation affiliated to the then ruling party, the Tanganyika African National Union (TANU). The 1965 constitutional proclamation of the one-party state system in Tanzania (Article 3 of the Interim Constitution of Tanzania, 1965 (No.43)) and the subsequent consolidation of one-party rule led to the further erosion of the conditions for the growth of a sustainable civil

society. The statutory decentralisation of government in 1972 abolished the local government system and four years later the state banned the co-operative movement. Before the end of the 1970s popular movements such as the Dar es Salaam Students' Organisation (DUSO), the women's movement, the national youth organisation and the national workers union had been firmly placed under the hegemony of the ruling and sole political party, *Chama cha Mapinduzi* (CCM).

It should be noted that the Societies Ordinance, which is still in force today, was in the list of repressive laws recommended for repeal or amendment by the Nyalali Commission (Tanzania 1991) for being violative of Article 20 of the Constitution. The article provides:

"20-(1) Subject to the laws of the land, every person is entitled to freedom of peaceful assembly, association and public expression, that is to say, the right to assemble freely and peaceably, to associate with other persons and, in particular, to form or belong to organisations or associations formed for the purposes of protecting or furthering his or any other interests.

(2) Subject to the relevant laws of the land, a person shall not be compelled to belong to any association."

It is apparent that the Societies Ordinance makes it extremely difficult for citizens to create civil organisations. The wide and virtually uncontrolled discretion given to the registrar of societies to allow or refuse registration or to cancel a registered society may be politically manipulated to stifle the organisation of civil society. Under Section 6(1) of the Ordinance the President has the power to declare any society unlawful and he is not required to give any reasons for the decision. The Minister of Home Affairs is also empowered to order any organisation to register as a society under the Ordinance if he forms the opinion that such an organisation is carrying on activities other than lawful trade or business (Section 6A(1)). Once registered under the Ordinance, the organisation henceforth falls under its purview (Section 6A(3)).

The provisions of the Societies Ordinance were used to liquidate the Ruvuma Development Association.³¹ A number of other associations have been deregistered under the Ordinance, including the Jehovah's Witnesses and the East African Muslim Welfare Society in the 1960s. During the same period certain Muslim congregations which refused to reconstitute themselves into regional or district organs of the Supreme Muslim Council of Tanzania (BAKWATA)³² were declared unlawful under the Societies Ordinance and their assets were vested in

31 Ironically the Ruvuma Development Association (RDA), an association of villages founded in 1963, was engaged in self-reliance and communal production activities which were actually in line with official policies and the ideological inclinations of the state. RDA's only folly was to organise outside state-sponsored structures where the government had no say or control.

32 BAKWATA was formed in 1968 with the active encouragement of the government, with the aim of creating a single organisation for Muslims.

BAKWATA by government fiat (GNs 434 and 435 of 1968; GN 169 of 1969). In 1990 the registration of the Tanzania Junior Doctors Association was delayed for a long time on the ground that there was already in existence the Tanzania Medical Association, which the junior doctors were free to join instead of creating their own organisation. Around the same time, two lawyers' associations, the Tanzania Women Lawyers Association and the Kilimanjaro Lawyers Association, met with the same fate when members of the Tanganyika Law Society argued in remarkably similar tones to those of the single political party in defence of its own monopoly position (Mwaikusa 1993).

More recently, in his 1997/8 budget speech to the National Assembly, Ali Ameir Mohamed, the Minister of Home Affairs, reportedly stated that thirty NGOs, including the Women's Council of Tanzania (BAWATA)³³, had been struck off the register by the end of June 1997, while 206 others had received notification from the Ministry that they were slated for deregistration. The Minister cited inappropriate conduct under the conditions of their registration as the grounds for being struck off. He warned that NGOs using their registration as a platform to engage in hostile exchanges of words with the government would be struck off. According to the Minister, the aim of the deregistration exercise was to reduce the presence of NGOs whose activities amounted to confronting the government by use of fora likely to create confusion and insecurity in the country (sic!). NGOs proving to be stubborn and working against their own constitution, the Minister added, would be struck off the register in accordance with the law. Mr Ali Mohamed further informed the National Assembly that the Ministry's department for legal affairs and registration of NGOs had been directed to look into the activities of every NGO in the country to determine which ones should continue to operate. Responding to the speech, a member of the opposition (Civic United Front) expressed concern that the Minister was declaring war on freely organised groups in society and the opposition as a whole.³⁴ These threats and intimidation are a fair representation of the intolerant attitude of the government so far as the freedom of association is concerned.

The NGO scene

Since the mid-1980s there has been a proliferation of civil associations commonly known as non-governmental organisations (NGOs). The growth of NGOs in Tanzania is said to be one of the results of the economic crisis which hit the country from the late 1970s. The crisis had the effect of eroding the already doubtful capacity of the state to provide social services for the majority of Tanzanians. The ensuing struc-

33 BAWATA has challenged its deregistration by filing a constitutional petition in the High Court. Among other things, it has applied for several provisions of the Societies Ordinance to be cancelled.

34 *The Guardian* (Dar es Salaam) Thursday, 31 July 1997, p.1, col. 5.

tural adjustment programmes shrank state frontiers socially and economically, thereby creating space for private and autonomous initiatives which, *inter alia*, were manifested in the creation of non-governmental organisations (Kiondo 1993). The unprecedented upsurge in NGOs appears to have been in consequence of the encouragement by donors and European NGOs which had decided to by-pass the government and give direct financial support to local NGOs.

The government has characteristically responded to the recent proliferation of NGOs by initiating the formation of non-state umbrella organisations supposedly for the purpose of monitoring and co-ordinating NGO activities. Thus, the Tanzania Association of Non-Governmental Organisations (TANGO) was set up for this purpose. TANGO deliberately encouraged associations seeking registration as NGOs to affiliate with it. The registrar of societies often asks for TANGO's opinion before registering a new organisation and takes its opinion quite seriously. It is said that TANGO has taken upon itself the role of a legitimate authority providing advice to anybody wishing to have dealings with any NGO in Tanzania. The government as a general rule of practice consults it regularly on NGO-related matters (Mwaikusa 1993). A draft proposal for an NGO law is also apparently under consideration in government circles.

Notwithstanding the legal and policy restrictions on the right of association and the threats of deregistration or manipulation of civil society by the state, there have been forces resisting these restrictions. For example, BAWATA has instituted proceedings in the High Court to challenge the validity of the association's recent deregistration on constitutional grounds. The Tanganyika Law Society (TLS) convened a seminar in June 1997 at which they urged that:

- i) any proposed umbrella organisation should only have broad regulatory powers which should not undermine the right to free association;
- ii) the office of the Registrar of Societies should be based in the Ministry of Justice instead of the Ministry of Home Affairs;³⁵
- iii) the Registrar should have no power to deregister a society without a court order; and
- iv) instead of criminalising them, breaches or abuses of a civil nature in societies should be taken care of by members of the society themselves.

NGOs in the Conservation Area

Not unlike the situation elsewhere in Tanzania, NGOs in the NCA are largely a phenomenon of the 1990s and, like all other local NGOs which have emerged in recent years, they are still incipient and have limited organisational skills and capacities (Haagsma and Hardeman

35 Historically, the office of the Registrar of Societies was placed by the colonial state in the Ministry of Home Affairs for control purposes through the Ministry's intelligence and police departments. Probably for the same reasons, it continues to be there.

1997). As elsewhere, they are largely donor-driven. The interest of donors in the so-called indigenous peoples, which marked 1993 as the International Year of Indigenous People, is principally responsible for the growth of NGOs in pastoral areas. While the formation of NGOs manifests an expression of the right of association, when they are mainly motivated by funding agencies they lack clear focus and drive and may even stifle local initiatives (*ibid.*).

Writing on the issue of local participation in the management and conservation of resources in the NCA, Rugumayo makes an assessment of the informal role played by NGOs and residents in the Conservation Area and argues that the role of NGOs is unclear to the NGOs themselves, as well as to the authorities (Rugumayo 1994). Attempts to create NCA-based NGOs have encountered obstruction including opposition from the NCAA and the district authorities in Ngorongoro. Often the authorities have refused to support NGOs initiated outside the establishment.

The case of the Ngorongoro Pastoralist Development Organisation (NGOPADEO) illustrates this point. The organisation has 24 founder members and more than 100 spread over the NCA, although much of its concentration is believed to be in the Endulen and Kakesio wards of the NCA (Loft 1995; interviews with villagers in Olbalbal and Nainokanoka, 4 July 1997). NGOPADEO's main area of concern is its total lack of meaningful co-operation with the main actors in the Conservation Area, namely the NCAA, the Pastoral Council and the District Council. The concerns of the Maasai residents are for sheer survival in the light of the FSZ lobby, which has virtually assumed state powers to the point that it dictates conservation policy in Tanzania, the central feature being conservation of nature to the absolute exclusion of human life and activity in the NCA (Loft 1996).

It is said that NGOPADEO took a very long time to be registered. Much of the delay was supposedly on the ground, which in any event is not a requirement under the Societies Ordinance, that the registrar of societies had first to receive a positive recommendation from the District Council. During the period of waiting, founder members of NGOPADEO were continually harassed by the NCAA and were forbidden to hold meetings under threat of arrest. The formal application to the Ministry of Home Affairs was finally submitted in November 1993 and the District Council was 'requested' to approve the association's constitution in April 1994. Further delay was caused by bureaucratic procedures and NGOPADEO was eventually registered on 22 July 1994. Even after registering the organisation, it is reported that, until the Pastoral Council meeting of 31 May 1995, the NCAA maintained an illegal procedure demanding the endorsement of NGO constitutions by the management before they were allowed to operate (NGOPADEO 1995). NGOPADEO is one of two legal NGOs in existence in the NCA while many others operate outside the Area. The

other is the Ngorongoro Crater Pastoralist Survival Trust which is incorporated as a trust.

There is also an unregistered NGO in the NCA, the Ngorongoro Environmental People's Organisation (NGOEPO), the main membership of which is reported to derive from the staff and governmental officials working in the NCA (Rugumayo 1994). Presumably because of its establishment composition, despite being unregistered it has not encountered the kind of problems the NGOPADEC faced. The move to organise establishment-oriented NGOs to counter the effects of independent ones and also to partake of some of the donor funds is not unknown in Tanzania. In the NGO community these are called GONGOs (government-organised NGOs).

Efforts to set up a single NCA-wide Ngorongoro Pastoralists Association (NPA), through which donors would have liked to channel much of their support, seem to have fallen through. Despite early assurances of support at Ministerial level, this has subsequently been withdrawn. It is known that the Authority opposes the formation of an independent NCA-wide pastoralist organisation, and has insisted that Maasai residents should play only an advisory role through the Pastoral Council proposed by the General Management Plan (NCAA 1996; for further discussion on the NPA see Chapter 6). In retrospect, the Ministry's withdrawal of support for the proposed NPA is consistent with the long-standing policy and practice of registering only those organisations which established agencies, in this case the Authority, are willing to endorse.

Conclusion

It has been demonstrated that the whole legal regime on association in Tanzania is under stress. The government has continually sought to control the formation and development of NGOs through restrictions on registration. As we have shown, this is carried out through selective registration regulations to eliminate NGOs suspected of deviating from government policies and state interests in general. Those which are registered are constantly monitored, and organisations which directly question state authority have often found themselves in difficulty.

This discussion has underlined the point that the right to association and its related components of freedom of assembly and expression,³⁶ in the context of Maasai residents in the NCA, must be situated in the state-institutionalised legal restraints upon the rights of the larger society in general. Consequently, any struggle of the Maasai to liberate themselves from those constraints must be linked to the rest of the

36 In law, at least, Maasai have as much right of expression as others except that the NCAA's overall authority to control entry and exit into the Area could be used to limit this right substantially, for example, by denying an entry permit to video film-makers like those who made "Enkigwana-ee-Kamat". Such decisions could probably be challenged in court.

population in their struggle for more fulfilling rights under the law and the Constitution. It is true that the extensive powers of the NCAA to prohibit, restrict and regulate entry, residence and exit under the Ordinance can be used to infringe considerably the Maasai rights of assembly and association with non-residents and their right of receiving and disseminating information (right of expression). For example, the present authors have seen a circular from the Tanzania National Parks Authority (TANAPA) virtually banning social science research in conservation areas. However, as we argue in this study, the Authority's powers under the Ordinance, the exercise of which is carried out without consultation and participation of the residents, have to be challenged at the larger level of the structure of the management authority, which would include the issue of freedom of association. We do this comprehensively in the next chapter.

Chapter 6

Right to participation, consultation and representation

Introduction

In this chapter we consider the basic problem which goes to the root of democratic governance, the rule of law and the rights of Maasai residents in relation to the NCAA. First, we shall deal with how the problem is formulated and addressed by policy-makers as well as some researchers. Second, we shall look at the current structures of participation and the different perceptions in which these are embedded. Finally, we shall consider whether the right to participation is a fundamental human right entrenched in the Constitution of the United Republic and, if so, what kind of amendments to the law are required to make the Ngorongoro Conservation Ordinance consistent with the Constitution.

The issue

'Participation' or involvement of the Maasai in the management and decision-making structures of the NCA is seen by the policy-makers of the government and the Authority as, at best, an exercise in sound management, a good human relationship, a necessary public relations stunt or a response to international/donor pressure. At any one time, any one or more of these perceptions may predominate. What is common to all of these perceptions is that none of them sees the issue of participation as an entitlement of the Maasai like other citizens of the country and equal human beings. Different perceptions are important not so much for the way the issue is formulated but for the kind of structural and legal solutions recommended to effect participation. A brief review of the history of the problem will illustrate this point.

When the Ngorongoro Conservation Ordinance was first passed, it provided for an Authority to be constituted by the relevant Minister's appointees. As noted earlier, there was no mandatory provision requiring Maasai representation except that (probably because of Conservator Henry Fosbrooke's more sympathetic attitude to the local community) there were five Maasai representatives on the first Authority (Tanganyika 1962). This number was in no time reduced to one and later disappeared altogether (*ibid.*).

Drawing from extant reports, there was also a non-statutory body called the advisory board whose members were appointed by the par-

ent Ministry. Maasai interests were represented on this board by an executive officer of the Maasai district and the Member of Parliament (see Tanganyika 1962; Tanzania 1964-7). Consultation with the local community was seen as a public relations exercise by means of what was called 'liaison'; this had its ups and downs depending on the administration's attitude towards the issues affecting the Maasai most (for example, the right to cultivate). The 1967 *Annual Report* under the signature of the then Conservator Mr Saibull reported that liaison had been difficult that year because of some tension in the relationship. This was only a year after the recommendations of Mr Dirschl (author of a management plan for the area), to institute a permanent forum for liaison with local residents, had been adopted (Tanzania 1966; Rugumayo 1994). The perception, the motive and the goal of such liaison were clearly formulated by Dirschl himself (Rugumayo 1994) and summed up accurately as follows:

"To avoid mistrust of government policy in the Area, and in order to further understanding of the (Conservation) Unit's intentions and its field projects, it has been decided to institute a permanent forum. Chosen spokesmen of all residents will meet the conservator and senior officers of the Unit four times a year to exchange information regarding policy and the wishes and problems of the people" (Tanzania 1966:16).

The intention was to create a channel for one-way, top-down communication from the administration to the people. For its time, even this was a step forward. Yet it lay in abeyance for many years as the more obviously authoritarian management style took over with the creation of a parastatal-based public sector in the country. This was neatly reflected in the 1975 amendments to the Conservation Ordinance creating a Board of Directors made up of Ministerial appointees and with a chairman appointed by the President of the Republic. Typically the Board would be accountable vertically to the parent ministry and would receive general or specific directions from the President to which it was required to give effect. Neither the law nor the practice then dominant was sensitive to local Maasai representation or consultation.

The typical forms of what went under the guise of representation and consultation of local communities during the single-party era of the 1970s and the '80s were characterised by two main features: (a) top-down approach and (b) representation by *ex officio* members. By the latter we mean persons occupying their positions by virtue of their other offices, and thus concentrating power in the small coterie of members of the Executive which overlapped with the political structure.³⁷ To some extent, this is reflected in the 1982 BRALUP (Bureau

37 Thus the same person, for example, a principal secretary, would be a member of several boards of directors of parastatals and other government bodies (see generally Eastern Africa Law Review 1982; Shivji 1986).

of Resource Assessment and Land Use Planning) Management Plan (Rugumayo 1994:14) which suggested greater involvement and consultation with village governments and others (presumably government officers) at district and regional levels. The issue of participation does not seem to have surfaced again until it was taken up in the report of the Ad Hoc Ministerial Commission in 1990 which eventually led to the establishment of the current Pastoral Council.

The Pastoral Council

The 1966 management plan on proposals for local participation was resurrected by the Ad Hoc Commission: *"It is the Commission's view that the long-term success of the Conservation Area will rely upon the active involvement and participation of local communities in all aspects of the NCA's management"* (Tanzania 1990:55). The Commission went on to assert that it was important that residents be given *"a much greater voice in the affairs of the Conservation Area"* and that they should have a role in the *"decision-making process"* (*ibid.*). One would have thought that this way of formulating the issue would have constituted a fundamental conceptual break with the past on the question of participation. But, as Rugumayo points out correctly, the means proposed to achieve these ends hardly follow from the normative assertions and in no small measure reflect the continuity with previous perceptions and practices.

The Pastoral Council, the Commission recommended, should consist of ward councillors (then 4), village chairmen (then 9), senior management staff (then 6) and six directly elected representatives of the permanent pastoral residents. The principle of directly elected representatives was undoubtedly a significant step forward although they were outnumbered by *ex officio* members in the ratio of 1:4. The Commission also recommended that the NCAA Board of Directors should include two local residents elected by the permanent pastoral residents of the Area.

The Council, according to the Commission, would serve as both a forum for discussion between the NCAA and residents, and as a channel through which residents' concerns could be brought to the attention of the Board. Thus, the Council was to be advisory; it would help to communicate the decisions of the top to the bottom and let the top know the concerns of the bottom. Clearly, this cannot be described as effective participation in the management processes of the Authority when statutory powers of decision-making and exercising policy and other discretion continue to be vested in the top management and ultimately the Board of Directors.

The recommendation was implemented by the management four years later. The Council was instituted on 15 January 1994. Meanwhile, however, a number of other developments had taken place in which the issue of participation became entangled. We discuss this next.

Debate and conflict

With the relative liberalisation of the political atmosphere nationally in the 1990s, there was an upsurge in the formation of NGOs on the one hand, and a more explicit attachment of political conditionalities by donor agencies on the other, as was hinted at in the previous chapter. Two Maasai NGOs with their activities predominantly in the Area were formed. Both of these were supported by donor organisations, in particular DANIDA.

Meanwhile, DANIDA was supporting the economic recovery programme for the NCA Maasai through the Natural Peoples World (NPW). The NPW was suspicious of the Pastoral Council as essentially an instrument of the management, non-representative and without serious executive powers. It therefore supported the formation of an Area-wide, single, representative NGO, the so-called Ngorongoro Pastoralists Association, through which donor organisations could channel their funding. The management, as was to be expected, did not take kindly to this idea. The NPW programme was eventually terminated. The issue of the role of the Pastoral Council became entangled in the different positions adopted by the various actors and may be summarised as follows.

First, the NCAA continued to support the idea of a Pastoral Council as an advisory body to the Board of Directors, with its membership coming predominantly from ward councillors and village chairmen, while its deliberations were restricted to issues of 'community development'.³⁸ In this it faced pressure from two sources, from donors and from members of the Council.

Second, DANIDA supported the formation of a single NGO, the NPA. It is not clear as to whether this support was in exclusion of or parallel to the Pastoral Council. Either way, the proposed programme on formation and procedure was:

- i) a 'general assembly' of all pastoralists to elect a drafting committee;
- ii) the committee to work with the help of a lawyer to draft a constitution, etc;
- iii) a second general assembly to endorse the draft and elect officers; and
- iv) a lawyer to help with the registration of the association under the Societies Ordinance.

The idea of a representative, non-statutory and non-governmental, Area-wide single organisation is self-contradictory, both in terms of law and of policy. It certainly cannot be subsumed within the means to effective participation as such. Societies under the Societies Ordinance are voluntary civil society membership organisations and usually act as

³⁸ The Authority's General Management Plan proposed the following membership for the Pastoral Council: 6 from the management, 1 District Council Chairman, 6 Ward Councillors, 13 village chairmen, 2 non-Maasai indigenous representatives, 2 women representatives and 3 traditional leaders, a total of 33 (NCAA 1995). (In practice 7 from the management sat on the Council).

pressure groups. By definition a society cannot act as a representative body because its membership cannot be imposed and therefore cannot be made universal, contrary to the proposed plan (see Article 20(4) of the Constitution). First, the number of NGOs in the NCA cannot be limited, for that would be breaching the constitutional right of the people to associate. Secondly, the participation of an NGO in a statutory body like the NCAA can only be by the latter's goodwill and, therefore, at its discretion. And, thirdly, an NGO cannot therefore be a suitable vehicle or mechanism to effect the right of participation. It can certainly help to mobilise and bring pressure to bear for representative and effective participation of the community as a whole but it cannot itself substitute for it.

In any event, since DANIDA seemed subtly to be making acceptance of the NPA a condition for its assistance, the members of the Pastoral Council, other NGOs and the Maasai leaders (and curiously, after initial resistance, even the NCA management) accepted it. The Ministry (of Natural Resources and Tourism), however, insisted that the Council, whose composition was widened to include women and traditional leaders, was a representative body and that the NCAA and the Council should be the appropriate bodies to administer the DANIDA-supported programme.

Third, the membership of the Pastoral Council, and the community as a whole, seemed to accept the Council in principle. However, as could be gathered from the minutes of their meetings and our interviews, they were not satisfied with the composition, powers and jurisdiction of the Council. They wanted it to be more representative and dominated by the representatives of the community rather than the management. Thus the membership of the management in the council was eventually reduced from seven to one.

The community spokespersons wanted the Council to be able to participate effectively in making and implementing decisions and also to be able to hold the officers involved accountable to the Council. In short, the local community was asking for more executive (as opposed to simply advisory) powers. In our interviews, we also gathered that the feeling was that the participation of the local community should not simply be restricted to community matters but should also extend to conservation. In other words, the community wanted to participate in the whole administration of the NCA.³⁹ There was also some mild grievance (although we could not establish how widespread this was) about the tendency for the same people to hold multiple positions and a feeling that this should be avoided.⁴⁰

39 For example, in our interviews, we were informed that the members of the Council were not at all happy that they were asked to discuss only the community welfare budget and not the whole of the NCAA budget.

40 One example was cited. The chairman of the Pastoral Council is also a village chairman, the chairman of NGOPADEO and the chairman of the proposed NPA.

Meanwhile, at the time of our visit the issue had reached an impasse since the lawyers asked to draft the guidelines/constitution of the Pastoral Council had reacted by saying that there was no provision in the Ordinance enabling the formation of such an organ. Some of our interviewees indicated that they would have liked independent legal advice on the matter. The basic objection of the lawyers was that the Pastoral Council was not provided for in the Ordinance and that therefore there would be a need eventually to amend the Ordinance. In the meantime, the Council would have to function under some 'by-law' passed by the Conservator. (We doubt if such a by-law would be valid within the terms of the Ordinance.)

It is our view that the issue of participation has been squarely raised by the community itself and ought to be addressed in a principled manner from the standpoint of the demands, interests and rights of the resident community. Otherwise there is the danger that it can be derailed in confusion by the expediency preferred by the management, or will have to give in to immediate donor pressures which may be based on their own short-term convenience and credibility. In the following section, we discuss the question within the larger context of rights.

The constitutional right to participation

Article 21 of the Constitution provides for the right to elect and be elected and to participate either directly or through representatives in the affairs of the country. Article 145 provides for local government and 146(1) states:

"The aim of local government is to enable citizens to exercise power. Local governmental organs have a right and authority to participate and let the citizens participate in the planning and other developmental activities in their local areas and in the country as a whole."

Reading these provisions together with the whole scheme of the Constitution based on principles of democracy, the rule of law and human rights, it can be argued that the Constitution has entrenched the right of every citizen to participate in the exercise of governmental powers, either directly or through elected representatives. It is the fundamental principle of democratic governments that the legislative, executive, judicial and coercive powers of the government are not legitimate unless the people have participated in their formulation and exercise.

We argued in Chapters 3 and 5 that, given the restrictions over the right to property and life which follow from the special conditions of the Conservation Area, the residents have a continuous right to be consulted if such restrictions are to be seen as reasonable and justified. In Chapter 2 we showed that the Authority exercises powers which are in effect, or in the nature of, governmental powers with territorial and

personal jurisdiction over the residents. In substance, therefore, the Ngorongoro Conservation Area Authority is a body similar to a local government. By virtue of the provisions of the Constitution just discussed, the residents have a right to participate in the administration of the exercise of what might be described as semi-governmental powers. This is then the constitutional source of the right of the local community to participate and be consulted.

In our view, the Authority as currently constituted follows the structure of an economic or service parastatal rather than that of a local governmental authority. It is not surprising that the Ad Hoc Commission used the analogy of non-statutory and advisory workers' councils in such parastatals to justify the establishment of a Pastoral Council. But the analogy is misconceived. There is a fundamental difference in the quality of the power exercised by economic organisations (*inter alia*, over employees through voluntary contracts) and the governmental powers exercisable by the NCAA. The so-called parastatals, even statutory ones, do not have mandatory territorial and personal jurisdiction (legislative, executive and coercive) over their employees or consumers. This is unlike local authorities, which are an emanation of the government. For these reasons, the structure of the NCAA has to be such that it constitutes a kind of 'legislative/policy' representative body which has the ultimate authority to pass or approve all major policies and subordinate legislation of the NCA with direct or indirect impact on the rights of the residents. That is how, at least at its inception, the Authority was conceptualised, as may be seen in the provisions for the consultation of local authorities before any general orders, rules and regulations made by the Authority could take effect (see Sections 13 and 13A of the 1959 Ordinance as amended in 1963).

It is true that Maasai residents, like other citizens, have a right to participate in the Ngorongoro District Council through their elected representatives. The jurisdiction that the District Council exercises over them can therefore be justified and is legitimate. But that is not sufficient so far as the exercise of NCAA jurisdiction is concerned. The NCAA exercises separate jurisdiction over the residents and in fact where the two jurisdictions conflict over the same subject, that exercisable by the Authority prevails (see Section 150(5) of the Local Government (District Authorities) Act, 1982 (No.7 of 1982)). Nor can it be argued that the representation of the residents on a purely advisory Pastoral Council through ward councillors and village chairmen (all of whom are otherwise elected) is sufficient participation. First, the Council is not statutory; second, it is not an executive body whose decisions are binding; third, it has very limited powers and no say over the Authority's legislative activity. What is more, its composition is dominated by ward councillors and village chairmen who, although elected, were elected with an altogether different mandate.

To sum up, then, in our view, if the Ngorongoro Conservation Ordinance is to be made consistent with the Constitution of the United Republic, it should, at the minimum, provide for a Council as its top decision-making body which:

1. is dominated by directly elected representatives,
2. has powers to deliberate and make general policy decisions on all matters, ie. both conservation and developmental matters;
3. has substantial authority to approve rules, regulations and orders made by the Authority which impinge on the rights of residents; and
4. has effective provisions for appeal and judicial review for those aggrieved by the decisions made by the Authority.

In the next chapter we recommend one possible structure of a Council which would satisfy the minimum constitutional requirements stipulated here (and in Chapters 2, 3 and 5).

Chapter 7

Recommendations to advance knowledge of and struggle for rights

Introduction

This chapter attempts to present recommendations intended to advance knowledge of and struggle for rights in the context of the predicament of the Maasai residents in the NCA. Having regard to the constraints that the existing legal and structural framework has imposed on the fundamental rights of the Maasai, including the right to livelihood, association and democratic participation in the management and administration of the Conservation Area, our objective is to identify alternative and feasible ways that could legitimise and promote the rights of the Maasai community in the NCA.

In addition to considering the advantages and drawbacks of possible intervention by judicial means (through test cases) and by way of legislative reform, we also suggest how the local residents in the NCA might utilise the findings of this study through legal awareness programmes. Indeed, our proposal in this regard aims at building grass-roots-based awareness programmes around a campaign for legislative reform towards democratic governance in the NCA.

Judicial intervention: test cases

While it is theoretically possible to institute a test case, for example, by judicial review or petitioning the court to seek a declaration on the rights of the local community as a whole, say in relation to the land rights of the Maasai citizens in the NCA, in practical terms there are legal and political problems that have to be reckoned with. The risk of pursuing the rights of a community as a whole is that the courts often tend not to see the general picture and may decide a case on a technical point which in the ultimate analysis would not assert or advance the community right. This point is succinctly illustrated by the decision of the Court of Appeal in the case of *NAFCO v. Mulbadaw Village Council & 66 Others* (1986) and the High Court judgment in the case of *Yoke Gwaku & 5 Others v. NAFCO & Another* (1988). We turn to a brief discussion of these cases.

In *NAFCO v. Mulbadaw Village Council*, the respondent village council and the 66 villagers had sued the appellant corporation in the High Court of Tanzania at Arusha for general and special damages in

respect of, among other things, alleged trespass over land which the respondents claimed they owned. In allowing their claim, the High Court stated:

"They had customary tenancies or what are called deemed rights of occupancy... This court finds that the rights of the peasants and this village council could not be extinguished except by operation of law..." (ibid.).

The point which was taken on appeal was that the respondents had not established their title over the lands they claimed under customary law. The Court of Appeal of Tanzania proceeded on an extremely technical line and found, first, that of the 66 peasants only five had testified before the High Court and, second, they failed to establish that they held customary tenancies over the lands for which they claimed ownership because they did not prove they were 'native' within the meaning of that term in the Land Ordinance (No.3 of 1923).⁴¹ In allowing NAFCO's appeal against the village council and the 66 villagers the Court of Appeal said:

"If the villagers who testified could have established that as natives they had rights of occupancy by virtue of customary tenancies then the view of the Judge that such villagers in this case could only be evicted or dispossessed under the provisions of the Land Acquisition Act No.47 of 1967 is sound" (ibid.).

In *Yoke Gwaku & 5 Others v. NAFCO & Another* (1988), the plaintiffs, who were members of the Barabaig tribe in Hanang District, claimed that the land which was occupied and used by the second defendant – Gawal Wheat Farms Limited (GWFL) – was lawfully owned by the plaintiffs and other members of their tribe. They further claimed that both NAFCO and GWFL had forcefully and unlawfully evicted them from their land. Yoke Gwaku and others wanted the High Court to do three things:

1. Declare NAFCO and GWFL's acquisition of that land null and void.
2. Order that NAFCO and GWFL be evicted from the land and be permanently barred from re-entering it.
3. Order NAFCO and GWFL to pay damages and solatium to all persons who were affected by the evictions and destruction caused by NAFCO and GWFL.

The form of the suit in *Yoke Gwaku and 5 Others* (1988), who had been allowed to file a representative suit on behalf of other members of the tribe with an interest in the suit, was hotly contested in the proceedings of this case. As a matter of procedure a public notice of the institution of the representative suit was issued by the court in terms of Order 1 Rule 8 of the Civil Procedure Code, 1996 and published in the *Daily News* of 17 October 1989. There was concern that the public notice did not list the names of the alleged interested persons, and at

41 Section 2 of the Land Ordinance defines a native to mean any person who is a citizen of the United Republic of Tanzania and who is not of European or Asiatic origin or descent.

the insistence of the defendants a document with a list of 788 names was supplied in the course of the hearing. But as the document did not indicate the farms which were affected by the suit, a point was raised as to whether the suit was a representative suit within the meaning of the law.

The High Court Judge took the view that the public notice should have been directed to identifiable interested persons and that it was not enough merely to refer in the notice to 'all interested persons' and assume that those with the same interest in the suit as the plaintiffs would know this themselves. The list which was supplied was also faulted because it included names of persons who had never been residents of Gawal; some names had been repeated several times; and one witness who came to give evidence for the defence admitted that he had not been aware that a suit had been filed on his behalf! In addition, the pleadings in court had not been amended to include the claims of the other 788 persons. The Judge therefore found that the suit could not be said to have been filed for and on behalf of 788 persons and proceeded to make judgement on the basis that there were only six plaintiffs (ie. *Yoke Gwaku and 5 Others* (1988)). In the final result three of the six plaintiffs were unable to prove that they possessed land in the area which was the subject of the suit and over which they could assert a customary title. The other three plaintiffs had a partial success in that they were awarded some damages and solatium. But the plaintiffs were unable to obtain the declaratory orders and injunction against NAFCO and GWFL. Desisting from ordering restitution of the claimants' expropriated lands, the Judge said:

"The more difficult question appears to me whether I should order the defendants to restore to the plaintiffs their expropriated pieces of land. Considering that only less than 300 acres of Gawal farm area has been proved to belong to all the plaintiffs together out of 10,000 acres of land, restoring the lands to the respective plaintiffs would mean that there would be small patches of private lands inside the farm and if each of the plaintiffs brought back their livestock a very inconvenient situation would be created for both sides in the case" (p. 25 of cyclostyled report).

In our view these two cases illustrate a serious disadvantage of taking a general struggle to court. In particular, a community-based test case to establish the deemed right of occupancy of the Maasai community over the Conservation Area should be undertaken, if at all, only after very careful consideration. Losing such a case, even if on technical grounds, or scoring a partial success (for some members of the community as in the NAFCO cases) can disproportionately strengthen the hand of the Authority, while adversely affecting the political clout and solidarity of the community. Unlike India, where the Supreme Court, for example, has shown positive attitudes towards public interest liti-

gation establishing collective rights for disadvantaged groups and communities, the Tanzanian courts and judges have still to emerge from the conservative, private-law orientation of their British judicial traditions. The court is a technical forum where professionals rather than members of the community as a whole (the real protagonists in the general struggle) are the main, and virtually the sole, actors. In a situation where a community right cannot be asserted, the legal arena is singularly frustrating and tends to have a demoralising and divisive effect on the general struggle of the community.

This is not to say that test cases to establish collective rights should never be undertaken. In this particular situation, though, our advice would be against filing, for example, a constitutional petition for a declaration that the Maasai community as a community has a deemed right of occupancy over the Area. We would rather suggest a piecemeal approach, if litigation is to be undertaken at all. A better approach would be to institute cases for specific instances of breaches of human rights (including property rights), say the wanton acts on the part of MNR wardens in relation to destruction of property – the slashing and killing of the cattle of Maasai pastoralists in the Conservation Area; or unjustified assault, harassment and maiming of herdsmen or some specific pieces of oppressive subsidiary legislation, administrative orders and decisions. The chances of success in such specific cases are greater and would be important in boosting the morale of the community. Individual NCAA managers or MNR wardens would be sued along with the Authority (in its corporate name) for specific and exemplary damages, for example. This would send the message that the NCAA cannot get away with the violation of Maasai rights and at the same time publicise the problems of the community. In practical terms, favourable judgements in this respect would also act as a restraint on the Authority and its managers from continuing to act with callousness and insensitivity, while, it is hoped, bringing the reckless and inhumane behaviour of MNR wardens under some control.

Legal awareness through legislative reform

We have shown in the previous chapters that Maasai residents as citizens have some basic rights – to the protection of property, to life and livelihood, to participation and democratic governance – under the Constitution. We also recognise that these rights have limitations. In the specific context of the Conservation Area, we have argued that the limitations can be justified only if there is prior consultation and participation of the Maasai residents in the decision-making processes of the Authority. The existing structure of the NCAA under the Ordinance does not provide for the rights mentioned, nor is it participatory enough to justify limitations.

Other studies from social and conservation standpoints have estab-

lished the need for participatory approaches both to the conservation and development functions of the Authority. We have established consultation, participation and democratic governance as a legal/constitutional requirement. All this points towards the need for an overhaul of the legal and managerial structure of the Authority. The powers-that-be themselves have taken initial, albeit hesitant, steps towards enabling participation by establishing the Pastoral Council, although this seems to have reached a legal impasse. There are indications that amendment of the NCA Ordinance might be in the offing. At the same time, the community and its spokespersons have already joined issue with the limited, even tokenist, powers of the Pastoral Council. The new campaign should therefore take off from this stage.

We are of the view that the programme of rights awareness should be located concretely in a sustained campaign for legislative reform of the structure of the NCAA so as to make it consistent with the human rights of the residents as stipulated in the Constitution of the United Republic. In short, the campaign should be for an alternative structure to govern and administer the Conservation Area.

As a broad programme, we would suggest the following steps:

1. In consultation with the community, through their NGOs and traditional forum, activists (including professionals), facilitators and others should crystallise the main outline of the new structure.
2. The outline should be a 'brief' for the community's own lawyers to draft a new law.
3. The draft law should be discussed with community representatives, Pastoral Council members, management, etc. through seminars, workshops, etc. and be the focus for legal awareness and training.
4. Eventually they should work towards having the draft law presented to the Parliament through a private member's bill.

We are aware that passing a piece of legislation through a private member's motion has never been attempted before in Tanzania. But there is nothing in the Constitution or laws to prevent this. An attempt in this direction by a compact community like the Maasai in the special circumstances of the Conservation Area would be an appropriate form and platform through which to bring the struggle for the rights of a historically disadvantaged community on to the stage of mainstream politics.

We outline below some of the main features of the alternative law and structure which would be compatible with the constitutional rights of the residents.

1. (a) There should be explicit provisions in the law that whenever the exercise of the powers of the Authority affects the livelihood of an individual, group or community alternative means of equivalent livelihood i.e. grazing, access to water sources, cultivation, gathering honey, etc. should be offered in the Area. (b) To ensure that the alternative means of livelihood really recompense the affected person or commu-

- nity this should be done in consultation with the community on a continuous basis.
2. There should be provision for appeals and eventual judicial review by the courts against decisions, orders etc. affecting the rights of the residents.
 3. There should be provision for a structure that would be akin in principle to that of local government as opposed to the existing one based on the structure of a (commercial or service) parastatal. This is because, as we have shown and argued, the NCAA is in the nature of a governmental body with legislative, executive and (quasi)-judicial power over the residents and the territory of the Area.

One possible structure would be as follows:

1. A representative policy-making body, say the Pastoral Council, to be the final decision-making body under which a small management team under a Conservator carries out day-to-day functions.
2. The Pastoral Council to be composed as follows: a) directly elected members from all the thirteen villages (13); b) two traditional leaders elected by all the recognised traditional leaders (2); c) Conservator (1); d) two from the management/staff of the Authority elected by that staff (2); e) two women elected by women (2); and f) two from the non-Maasai indigenous population (2); with the following (additional) full members, but without voting rights: a) a representative of the Ministry of Natural Resources and Tourism; b) a representative from the District Council; and c) a representative elected by NGOs active in the Area.

The PC would be concerned with general policy on all matters of conservation and development, and would have power to approve rules, regulations and orders affecting the rights of residents after consultation with the District Council. The Minister responsible for natural resources would have power to disallow by-laws and refer them to the NCAA for reconsideration. In short, there would not be a Board of Directors composed of persons from outside the Area and appointed at the discretion of the Minister.

These proposals can be fleshed out in discussions with the community. The principle, though, is to ensure that the structure complies with democratic governance, human rights and the rule of law as stipulated in the Constitution so that the Ngorongoro Maasai, like their compatriots in the rest of the country, enjoy full citizenship rights, which at present they do not. As we showed in Chapter 2, this is not a novel proposal. The 1963 amendment actually conceived the NCAA as a governmental body, and this was the reason it provided for consultation with the local government before the passing of any subsidiary legislation.

Finally, it is probably necessary to emphasise that our approach to human rights awareness takes off from the existing struggles of the community rather than from some pedagogical premises of human

rights education. The practice of many existing human rights NGOs is to organise seminars, etc. so as to 'educate' people in human rights. We find this not only abstract and patronising but of little effect and certainly unsuitable for addressing the kind of human rights issues discussed in this study.

Conclusion

This study of the rights of the Maasai residents of the Ngorongoro Conservation Area has been approached from the standpoint of domestic or municipal law and, in particular, in the context of human rights as formulated and provided for in the Constitution of the United Republic of Tanzania, 1977. We are very much aware that the rights discussed here are all stipulated in international and regional human rights instruments to which Tanzania is a party. The International Covenant on Civil and Political Rights, 1966 and the International Covenant on Social, Economic and Cultural Rights, as well as the African Charter on Human and People's Rights, are all relevant. Following the common law system, these treaties are not directly applicable to Tanzania. But they can be, and have been, used by way of interpreting the provisions of the Constitution. This indirect way of bringing in international human rights may be somewhat tortuous. But in practice we do not find it that limiting, as our own discussion in this study has shown. Some of the formulations that we have used in limiting the effect of the derogation clause, for example, come from international human rights jurisprudence.

The other aspect of the international dimension is, however, a little more contentious. It concerns the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, 1992 (GA Res. 47/135) and the UN Draft Declaration on the Rights of Indigenous Peoples (UN Doc. E/CN.4/Sub.2/1994/2/Add.1, 20 April 1994). The latter is very much in the drafting stage and therefore does not raise immediate legal problems as such. The point about both these Declarations is the political implication of relating and treating Maasai rights as 'minority' or 'indigenous people's' rights.

A number of international advocacy groups, albeit with good intentions, are attracted to using the concepts and terminology of these Declarations in relation to the Maasai. It probably helps them to be more effective in dramatising the case of the Maasai (and pastoralists generally) in Tanzania. This may be effective internationally, in particular with donor agencies in raising funds and putting pressure on the national government. We are not sure, however, of the civil and political impact of this type of advocacy on the rest of the civil society internally. Using terms like 'minority' or 'indigenous' for the Maasai sets them apart from the social and political mainstream in the country. The powers-that-be can use this effectively to divide the Maasai from the rest of civil society. Yet, while it is true that for historical reasons the Maasai have suffered from prejudice and lack of development, their human rights situation is not fundamentally different from that of the rest of Tanzanian non-elite society. In our view, the Maasai need

to build bridges and alliances with the rest of the Tanzanian society in their human rights struggle while still highlighting and drawing attention to their own particular plight.⁴² As this study has shown, this is not impossible. In fact, it may be even more productive and effective. The struggle of the Ngorongoro Maasai for their land rights or right to participation, for example, fits in neatly with the current struggle of the rural communities in the country against the new Land Act (see *Change* 1997; National Land Forum 1997).

The recommendations of the Presidential Commission of Inquiry into Land Matters (1994a) were clearly based on the premise of the participation of local communities in owning and controlling their lands. These recommendations have been endorsed by pastoral communities (Pastoral Caucus 1995) but rejected by the government. The Pastoralists Indigenous Non-Governmental Organisations (PINGOS) are among the members of the National Land Forum which adopted the Declaration of NGOs on the New Land Act. We would therefore argue, and this study has clearly shown, that the rights struggle of the Maasai is, first, that of the rights of equal citizens and, second, part of the general struggle for human rights and democratic governance of the rest of Tanzanian society. Approached in this way, the struggle is likely to be linked to, rather than isolated from, the rest of civil society. Nationally, this is an important dimension of the struggle which should not be undermined or dismissed out of hand. In short, our plea would be that the choice of forms of struggle and instruments should be such that the international and national dimensions of the rights struggle are complementary and reinforcing rather than contradictory and mutually undermining.

Finally, we would also like to draw attention to the other dimension of this study which is likely to contribute further to the African debate on human rights. This is the contest between 'individual' and 'collective' rights. All the important rights discussed here in relation to the Ngorongoro Maasai – the right to land, right to life, right to participation and democratic governance – partake strongly of collective rights by the very nature of the structures and organisation of Maasai society. This study illustrates, albeit in a tentative fashion, the potency of the concept of 'collective' rights to restructure the institutions of local governance. This is a point which we hope will be explored further by researchers and advocacy groups as the struggle unfolds.

42 This is different from the struggle in developed societies like the US and Canada where the indigenous people have to reassert their claims to separateness and territorial rights. It would be simplistic to transfer this to an African situation.

Epilogue

Since completing this study we have been informed of a development which could have serious implications for the land rights of residents in the NCA. At the presentation of this study at a workshop in London on 27-9 August 1997, the member of parliament for Ngorongoro district, who is also a member of the Board of the NCAA, informed the meeting that the Board had authorised the Authority to obtain a title to land of the Conservation Area in its name.

The immediate motivation for obtaining a title may be related to the problem that the NCAA faces when granting land interests to so-called 'investors'. As shown in Chapter 3, the NCAA, at least in some agreements, has granted leases to investors on the assumption that it has a right of occupancy. This, we argue, is not the correct position in law. The NCAA has no recognisable land interest from which to create leases. Whatever the intentions, a right of occupancy granted to the NCAA would have a very serious legal and political impact on the land rights of the Maasai community and other non-Maasai communities at Lake Eyasi, including other long-term residents of the NCA.

Under the Land Ordinance (No.3 of 1923), the only title that the NCAA could apply for and obtain would be a right of occupancy which, when registered, would result in the issue of a certificate of occupancy. It is possible that the conditions attached to this certificate would be modified to accord with the special status of the NCA as a conservation area. The NCAA is a body corporate with the capacity to hold property and therefore in law it can hold a title to land as a legal entity in its own name. But what would this mean in relation to the land rights of the residents?

First, as argued in Chapter 3, the Maasai community as a native community holds a deemed right of occupancy to the Area. Notwithstanding some problems of evidence as to the exact boundaries and the amount of land so held which might crop up if the matter went to court, in principle we believe the legal position to be as argued in that chapter.

Secondly, since the case of *Mulbadaw* and *Akonay*, it is now well-established that (a) a deemed right of occupancy is protected by the property clause (Article 24) of the Constitution, and (b) that a granted right cannot be given over the same land held under a deemed right unless the existing deemed right is lawfully acquired under the Land Acquisition Act (No.47 of 1967). This means that, should the NCAA be granted a right of occupancy without first following the procedures of the Land Acquisition Act, it would amount to a double allocation and the certificate of occupancy granted to the NCAA would be invalid and without effect in law, as was held by the High Court in the *Mulbadaw* case – a point on which the Court of Appeal did not disagree.

Thirdly, if indeed it is true that the Authority has decided to obtain a title, then the cautious approach that we urged in Chapter 7 on resolving the question of land rights through courts of law would no longer apply. In fact, an early court action might be the most appropriate intervention on the part of the resident Maasai community at this stage, at least to stop the process of obtaining title going further, while other avenues are explored simultaneously to address the problem in a more comprehensive manner. To be sure, a number of legal hurdles (choice of parties, forum, remedies, etc.) would have to be carefully considered, but this is not the occasion or place to discuss these matters. Suffice it to say that technically these problems are surmountable with a considerable possibility of success.

Finally, we must reiterate that nowhere in the various reports and documents examined by us has it been explicitly suggested to the Authority that they should apply for a title. The Ad Hoc Commission certainly did not and, in our view correctly, recognised that the Maasai had land rights which are compatible with the imperatives of conservation. Politically, it would probably be very imprudent for the Authority to proceed with this, and in legal terms it is certainly risky. We would be very surprised if the NCAA were to proceed with this decision without seriously and soberly considering legal advice.

Appendix I

Agreement by the Maasai to vacate the Western Serengeti

We, the Laigwanak (elders) of the Ngorongoro and Loliondo division of the Maasai district, agree on behalf of all the Maasai living in these areas to renounce our claim to all those parts of the Serengeti plains lying within the Northern and Lake provinces which lie to the west of the line* shown to us by the District Commissioner, Maasai on the 13th and 14th March and the 20th April, 1958.

We understand that as a result of this renunciation we shall not be entitled henceforth in the years to come to cross this line which will become the boundary of the new Serengeti National Park and which will be demarcated. We also understand that we shall not be entitled to reside in or use in future the land lying to the west of this line, which we have habitually used in the past.

We agree to move ourselves, our possessions, our cattle and all our other animals out of this land by the advent of the next short rains, that is before the 31st December, 1958.

Laigwanak: Sgd.

- | | |
|---------------------------|-------------|
| 1. Seketa ole Pose | Ngorongoro |
| 2. Tendemo ole Kisaka | Endulen |
| 3. Ngoitien ole Munga | Moru |
| 4. Olongoyu ole Goek | Ngorongoro |
| 5. Pokidale ole Mansusu | Moru |
| 6. Loldunyai ole Murunga | Moru |
| 7. Olmatapatoi ole Kekuka | Moru |
| 8. Kissale ole Serupe | Makessio |
| 9. Ndengoya ole Parmat | Loliondo |
| 10. Keriko ole Lohumo | Loliondo |
| 11. Olakeru ole Malera | Loliondo |
| 12. Munge ole Keyamba | Nainokanoka |

The above agreement was interpreted by me from English into Kimasai to the above-named Laigwanak today and I am satisfied that they have understood it and have signed it voluntarily.

Sgd. T. S. Colley
Executive Officer
Maasai Federal Council

Witnessed by us at Ngorongoro this
21st day of April, 1958.

Sgd. M. J. B. Molohan
Principal Commissioner,
Northern Province
Sgd. E. B. Townsend
District Commissioner,
Masai District

* Explanatory Note: The line mentioned above is that marked in brown pencil on the plan attached to P. C.'s Minute no. CCU/9/135 of 21.3.1958. The above boundary retains for the use of the Maasai the wells in the lower Olduvai and Korongos to the north thereof; the Hdashu wells; the Meiran'gwai wells; and the grazing adjacent thereof; Lake Igarja in its entirety will remain within the new Serengeti National Park.

Appendix II

Tanzania

Ngorongoro Conservation Area Ordinance

(Unofficial version prepared by
authors)

Cap. 413 (Revised)

(Incorporating amendments by Act No. 43 of
1963; No. 5 of 1968 and No.14 of 1975)

August, 1997

Note – Revised

Supersedes Cap. 413 in R. L. Supplements

Chapter 413

Ngorongoro Conservation Area

An Ordinance to control Entry into and Residence within the Ngorongoro Crater Highlands Area, to make provision for the Conservation and Development of Natural Resources therein and for purposes connected therewith, and to amend the Mining, Fauna Conservation, Forests and Mining (Mineral Oil) Ordinances

Ord. 1959
No.14 Acts
1963
No.43,
1964 Nos9
and 51

[1st July, 1959]

Part I

Preliminary

- | | | |
|-----------------------|---|------------------------------|
| | 1. This Ordinance may be cited as the Ngorongoro Conservation Area Ordinance and shall come into operation on the first day of July, 1959. | Short title and commencement |
| | 2. (1) In this Ordinance unless the context otherwise requires: | |
| Act 1975 No.14 s.7 | “the Authority” means the Ngorongoro Conservation Area Authority established by section 4; | Act 1963 No.43 s.2 |
| Act 1975 No.14 s.7 | “the Board” means the Board of Directors of the Authority; | |
| | “closed area” means an area with respect to which a closing order has been made under Section 10; | |
| | “Conservation Area” means the area to which this Ordinance applies; | |
| Act 1975 No.14 s.7 | “Conservator” means the Conservator of the Conservation Area appointed in accordance with the provisions of section 5B; | |
| | “forest produce” has the meaning ascribed to it in the Forests Ordinance; | Cap.389 |
| | “mining laws” means the Mining Ordinance and the Mining (Mineral Oil) Ordinance, and any ordinance or ordinances amending or replacing either of them; | Cap.123 Cap.399 |
| | “Minister” means the Minister for the time being responsible for the conservation of natural resources; | |
| | “Regional Commissioner” means the Regional Commissioner for the Arusha Region; | |
| | “stock” means cattle, donkeys, sheep and goats. | |
| | (2) General orders made under this Ordinance shall apply to persons generally or to such classes of persons as may be specified therein. | |
| | (3) Special orders made under this Ordinance shall apply to the persons to whom they are addressed. | |
| | 3. (1) This Ordinance shall apply to the area described in the First Schedule hereto: | Application of Ordinance |
| | (2) The President may, with the consent of the National Assembly, by proclamation in the Gazette, alter the boundaries of the area to which this Ordinance applies. | |

4. [Repealed: Act 1975 No.14 s.8]
5. [Repealed: Act 1963 No. 43 s. 4]

Part IA

Ngorongoro Conservation Area Authority

Act 1975
No.14 s.9

Establishment of
Authority

4. (1) There is hereby established an authority which shall be known as the Ngorongoro Authority Conservation Area Authority.
- (2) The Authority shall be a body corporate with perpetual succession and a common seal and shall be capable in law of suing and being sued in its corporate name, of purchasing, holding, alienating, managing and disposing of any property whatsoever, whether movable or immovable, and whether by way of investment or otherwise, and of entering into any such contract and other transactions as may be necessary or expedient for the performance of its functions under this Act or any other written law.

Board of
Directors

5. (1) The management and functions of the Authority shall vest in a Board of Directors.
- (2) The provisions of the Schedule to this Act shall have effect as to the composition of the Board, the appointment and termination of the appointment of its members, the proceedings of the Board and such other matters in relation to the Board and its members as are provided for therein.
- (3) The President may, by order in the Gazette, amend, vary or replace all or any of the provisions of the Schedule to this Act.

Functions of the
Authority

- 5A. The functions of the Authority shall be
- (a) to conserve and develop the natural resources of the Conservation Area;
 - (b) to promote tourism within the Conservation Area and to provide and encourage the provision of facilities necessary or expedient for the promotion of tourism;
 - (c) to safeguard and promote the interests of Masai citizens of the United Republic engaged in cattle

- ranching and dairy industry within the Conservation Area;
- (d) to promote and regulate the development of forestry within the Conservation Area;
- (e) to promote, regulate and facilitate transport to, from and within the Conservation Area;
- (f) to construct such roads, bridges, aerodromes, buildings and fences, to provide such water supplies and to carry out such other works and activities as the Board may consider necessary for the purposes of the development or protection of the Conservation Area;
- (g) to do all such acts and things, as in the opinion of the Board, may be necessary to uphold and support the credit of the Authority and to obtain and justify public confidence, and to avert and minimize any loss to the Authority;
- (h) to do anything, and enter into any transaction which, in the opinion of the Board, is calculated to facilitate the proper and efficient exercise by the Authority of its functions under this Act, including
 - (i) the carrying on of any of the activities of the Authority in participation with any other person;
 - (ii) the acquisition, by agreement, of interests in companies and firms engaged in activities in which the Authority may lawfully be engaged under this Act, and the management of the affairs or the continuance of the business of such companies and firms;
 - (iii) the establishment of branches within the United Republic or elsewhere.

Conservation

- 5B. (1) The President shall appoint a Conservator of the Conservation Area.
- (2) The Conservator shall be the principal executive officer of the Authority and shall be responsible to the Board.
- (3) The Minister may appoint as many Assistant Conservators of the Conservation Area as he may consider necessary.
- (4) The Assistant Conservators, if any, shall be subject to the directions of the Conservator.

- Appoint-
ment of
other
officers
and
employees
- 5C. The Board may from time to time appoint at such salaries and upon such terms and conditions as it may think fit, such other officers and employees of the Authority as it may deem necessary for the proper and efficient conduct of the business and activities of the Authority.
- Super-
annuation
benefits
- 5D. The Board may
- (a) grant gratuities or other retirement allowances or benefits to the officers and employees of the Authority;
 - (b) establish and contribute to a superannuation fund and a medical benefits fund for the officers and employees of the Authority;
 - (c) require any officer or employee of the Authority to contribute to any such superannuation fund or medical benefits fund and fix the amounts and method of payment of such contribution.
- Agents and
contractors
- 5E. The Board may, from time to time, appoint and employ upon such terms and conditions as it thinks fit such agents and contractors of the Authority as the Board may deem necessary.
- Power of
the Board
to delegate
- 5F. (1) Subject to subsection (6), the Board may from time to time, by writing under the seal of the Authority delegate, subject to such terms, conditions and restrictions as it may specify, to any committee of the Board or to any officer or servant of the Authority, all or any of the functions, powers, authorities or duties conferred by or under this Act upon the Authority or the Board, and where any delegation is so made the delegated function, power, authority or duty may be performed or, as the case may be, exercised by the delegate subject to the terms, conditions and restrictions specified in the writing.
- (2) Any delegation under subsection (1) may be made to the holder of an office under the Authority specifying the office but without naming the holder, and in every such case each successive holder of the office in question and each person who occupies or performs the duties of that office may, without any further authority, perform or, as the case may be, exercise the delegated function, power, authority or duty in accordance with the delegation made.
 - (3) The Board may revoke a delegation made by it under this section.

- (4) No delegation made under this section shall prevent the Authority or the Board from itself performing or exercising the function, power, authority or duty delegated.
- (5) Any delegation made under this section may be published in the Gazette, and upon such publication shall be judicially noticed and shall be presumed to be in force unless the contrary is proved.
- (6) The Board shall not have power under this section to delegate:
 - (a) its power of delegation; or
 - (b) the power to approve the annual budget or any supplementary budget of receipts and expenditure, the annual balance sheet or any statement of account.

Funds and resources of the Authority

- 5G. The funds and resources of the Authority shall consist of
- (a) such sums as may be provided for the purpose of Authority by Parliament, either by way of grant or loan;
 - (b) any loan or subsidy granted to the Authority by the Government or any other person;
 - (c) any sum or property which may in any manner become vested in the Authority as a result of the performance by the Authority of any of its functions;
 - (d) any voluntary subscription, donation or bequest received by the Board from any member of the public for the purposes of the Conservation Area;
 - (e) any fee or other monies received or raised by the Board pursuant to any provision of Ordinance or any subsidiary legislation made hereunder.

Annual and supplementary

- 5H. (1) In this Ordinance "financial year" means any period not exceeding twelve budget consecutive months designated in that behalf by the Board:
- Provided that the first financial year after the commencement of the Game Parks (Miscellaneous Amendments) Act, 1975 shall commence on the date of the commencement of that Act and may be of a period longer or shorter than twelve months.
- (2) Not less than two months before the beginning of any financial year (other than the first financial year) the

Board shall, at its meeting, especially convened for that purpose, pass a detailed budget (in this Act called the annual budget) of the amounts respectively:

(a) expected to be received; and

(b) expected to be disbursed;

by the Authority during that financial year.

- (3) If in any financial year the Authority requires to make any disbursement not provided for or of an amount in excess of the amount provided for, in the annual budget for the year, the Board shall, at a meeting, pass a supplementary budget detailing such disbursement.
- (4) The annual budget and every supplementary budget shall be in such form and include such details as the Minister may direct.
- (5) Forthwith upon the passing of any annual budget or any supplementary budget, the Board shall submit the same to the Minister for his approval.
- (6) The Minister shall, upon receipt of the annual budget or any supplementary budget, approve or disapprove the same or may approve subject to such amendment as he may deem fit.
- (7) Where the Minister has approved any annual budget, the budget, as amended by him, shall be binding on the Authority which, subject to the provisions of subsection (8), shall confine its disbursements within the items and the amounts contained in the budget as approved by the Minister.
- (8) The Board may:
 - (a) with the sanction in writing of the Minister, make disbursement notwithstanding that such disbursement is not provided for in any budget;
 - (b) from the amount of expenditure provided for in any budget in respect of any item, transfer a sum not exceeding twenty thousand shillings to any other item contained such budget;
 - (c) adjust expenditure limits to take account of circumstances not reasonably foreseeable at the time the budget was prepared, subject to submitting a supplementary budget to the Minister within two months of such alteration of expenditure limits becoming necessary.

- Reserve and special funds
- 5I. The Board may, and shall if so directed by the Minister, establish and maintain such reserve or special funds of the Authority as the Board or the Minister may consider necessary or expedient, and shall make into or from any such funds such payments as the Board may deem fit or, in the case of a fund established pursuant to a direction by the Minister, as the Minister may direct.
- Investment
- 5J. With the prior approval of the Minister, the Board may, from time to time, invest any part of the moneys available in any fund of the Authority maintained by it in such manner as the Board may deem fit.
- Power to borrow
- 5K. (1) With the prior approval of the Minister the Board may, from time to time, borrow moneys for the purposes of the Authority by way of loan or overdraft, and upon such security and such terms and conditions relating to the repayment of interest as, subject to any direction by the Minister, the Board may deem fit.

Part II

Control of entry into and residence and settlement within the Conservation Area

Act 1975
No.14 s.10

6. (1) The Authority may, with the consent of the Minister, make rules prohibiting, restricting and controlling entry into and residence within the Conservation Area;
- (2) Nothing in any rules made under this section shall operate so as to prohibit, restrict or control
- (a) the entry into or residence within the Conservation Area, or any part thereof, of public officers on duty or of the Conservator or any person authorized by him; or
- (b) the entry into the Conservation Area of persons holding therein any estate or interest in any land under a right of occupancy granted under section 6 or section 11 of the Land Ordinance, all reasonable access by such persons to such land or the residence of such persons on such land; or
- (c) the entry into the Conservation Area of persons holding, over lands therein, a prospecting right or

Act 1975
No.5 s.10

Cap.113

licence or exploration licence, or a mining lease granted or claim made under the mining laws, all reasonable access by such persons for the purposes of such right, licence, claim or lease, or the residence of such persons in accordance with the rights thereby conferred; or

- (d) the entry into or residence within the Conservation Area of the wives, children, dependants and servants of a person specified in paragraphs (a), (b) or (c) of this subsection, to the same extent as such person is not subject to the operation of such rules; or
- (e) the entry into the Conservation Area upon any public highway of persons travelling through the Conservation Area along such highway; or
- (f) the entry into or residence with the Conservation Area of any person or category of persons specified by the Minister by an order published in the *Gazette*;

Act 1975
No.5 s.10

Provided that nothing in this subsection contained shall be construed as granting or recognizing any right or title to land or any interest in, over or under land within the Conservation Area or as exempting any of the persons specified in this subsection from complying with any other provision of, or restriction imposed under, this Ordinance, or with any rules or orders made thereunder, notwithstanding that such provisions, restrictions, rules or orders may restrict, control or prevent the exercises of any right to which this subsection refers.

- (3) Without prejudice to the generality of the power to make rules under this section, rules made under this section may
 - (a) be made in respect of the whole Conservation Area or any part or parts thereof;
 - (b) empower the Conservator to issue permits permitting persons to enter, or to enter and reside within, the area to which such rules apply, subject to such terms and conditions as the Conservator may think fit;
 - (d) empower the Conservator or any person authorized by him and such other persons as may be specified therein to require any person within the area to which such rules apply to produce any permit issued to him or to satisfy such member or

other person as aforesaid that he is a person to whom such rules do not apply;

- (e) empower the Conservator to erect barriers on roads or tracks into or within the Conservation Area for the control of entry into the area to which such rules apply, to close any such roads or tracks to traffic and to prohibit control and regulate the erection and display of signs and advertisements on or adjacent to roads or tracks within the Conservation Area;
- (f) require the payment of, and prescribe fees to be paid on the issue of a permit to enter or to enter and reside in the area to which such rules apply, and prescribe different fees for different classes of persons or in respect of the different purposes for which persons seek to enter or reside therein;
- (g) attach to the breach of any rule or of any term or condition inserted in a permit issued by the Conservator, penalties not exceeding the penalties prescribed in subsection (1) of section 18;
- (h) authorize the removal by the Conservator or any person as may be specified therein of any person found within the area to which such rules apply in contravention of any such rules;
- (i) provide generally for all matters or things necessary or incidental to the foregoing.

Act 1975
No.14 s.11

7. (1) The Authority may, with consent of the Minister, make rules requiring the persons who are described in paragraphs (b), (c), (d) and (f) of subsection (2) of section 6 or any of them or any class thereof, who reside in, or seek to enter the Conservation Area, to apply for a certificate of residence.
- (2) Without prejudice to the generality of the power to make rules under this section, rules made under this section may
- (a) be made in respect of the whole Conservation Area or any part or parts thereof;
 - (b) authorize or require the Conservator or such other persons as may be specified therein to issue certificates to such persons as apply therefor and who satisfy the Conservator or other persons as aforesaid that they are persons to whom such rules apply;

Certificate
of
residence
Act 1963
No.43

- (c) require all persons to whom a certificate is issued to produce the same to any person specified in such rules;
- (d) authorize the Conservator to impose conditions in any such certificate requiring the holder thereof to enter or leave the area to which such rules apply at any particular place or places;
- (e) prohibit, regulate or control the entry or residence within the area to which such rules apply of any person who is required to apply for a certificate of residence who is not in possession of such a certificate;
- (f) attach to the breach of any condition contained in any such certificate or to the breach of any rule made under paragraph (c) of this subsection, penalties not exceeding the penalties prescribed in subsection (1) of section 18;
- (g) authorize the removal by the Conservator or any person authorized by him or such other persons as may be specified therein of any person required to apply for a certificate of residence who is not in possession thereof when found in the area to which such rules apply;
- (h) provide generally for all matters or things necessary or incidental to the foregoing.

Act 1975
No. 14 s. 12

8. (1) The Authority may, by order published in the *Gazette*, prohibit, restrict or control residence or settlement in any part of the Conservation Area other than land held under a right of occupancy granted under the Land Ordinance or land which is the subject of a claim made or, a mining lease granted, under the mining laws, for such time and in such manner as it thinks fit.
- (2) Without prejudice to the generality of the power to make orders under this section, orders made under this section may
- (a) be made in respect of any category of residents or settlements;
 - (b) provide for exemption therefrom and for the issue of permits of exemption subject to such conditions as the Conservator may think fit;
 - (c) authorize the removal from any area to which such order applies of any person who takes up or

continues residence or makes or continues any settlement in contravention of any such order or of any condition contained in a permit.

Part III

Control of cultivation and grazing and protection of natural resources

Act 1975
No.14 s.13

9. (1) The Authority may, if in its opinion it is necessary or expedient so to do for the purpose of the conservation of the soil, of resources or the prevention of soil erosion on, the Conservation Area, make order, either in relation to any particular parcel of land or generally in relation to the Conservation Area

- (a) prohibiting, restricting or controlling the use of land for any purpose whatsoever;
- (b) prohibiting, restricting, limiting or controlling
 - (i) the introduction, grazing, watering or movement of stock;
 - (ii) the firing, clearing or destruction of vegetation including stubble;
 - (iii) the use of wells, boreholes, waterholes, water-courses, streams, rivers or lakes;
 - (iv) the gathering of honey or forest produce;
 - (v) the exercise of any rights in relation to forest produce determined under the provisions of the Forests Ordinance;
 - (vi) the introduction or removal of flora or fauna;
 - (vii) the use of agricultural implements or machinery;
 - (viii) the carrying or use of weapons, snares, traps, nets or poison;
- (c) requiring, regulating or controlling:
 - (i) the afforestation or reafforestation of land;
 - (ii) the protection of slopes and closed areas;
 - (iii) the drainage of land, including the construction, maintenance or repair of artificial or

Conservation of soil and the protection of natural resources
Act 1963
No.43 s.8

Cap.389

natural drains, gullies, contour banks, terraces and diversion ditches;

(iv) the uprooting or destruction of any vegetation;

(v) the removal of stock;

(d) prohibiting, restricting or controlling:

(i) the construction or extension of buildings or works, or restricting or controlling the siting thereof;

(ii) the construction or extension of any roads or tracks or restricting or controlling the siting or alignment thereof;

Provided that no order made under paragraph (d) of this subsection

(1) shall operate so as to require any person to demolish, destroy, alter or remove any buildings, works, road or tracks of a permanent nature or any part thereof which were constructed prior to the coming into operation of this Ordinance; or

(II) shall operate so as to prevent the construction or extension of any buildings, works, roads or tracks by the holder of a right of occupancy granted under section 6 or 11 of the Land Ordinance who is required to construct or extend the same by the terms or conditions thereof; or

(III) shall operate to prevent the construction or extension of any buildings, works, roads or tracks by the holder of a claim made or lease granted under the mining laws, within the limits of such claim or lease, which are necessary for the enjoyment of the rights granted under any such claim or lease.

(2) Without prejudice to the generality of the power to make orders under this section, general orders made under this section may provide

(a) for such exemptions or conditional exemptions from the operation thereof as may be specified;

(b) for the grant of permits or conditional permits of exemption from the operation thereof and in particular for the exercise of the rights granted by such permits during such time or at such intervals as may be specified;

- (c) for their application to certain periods or seasons of the year or to certain times or at certain intervals;
 - (d) that any act or thing be done at or within such time as may be specified and to the satisfaction of the Conservator, or any person specified therein;
 - (e) that such orders, and any permits issued thereunder, shall be subject to any special orders made under this section.
- (3) Without prejudice to the generality of the power to make orders under this section, special orders made under this section may
- (a) provide for any of the matters specified in paragraphs (a), (c) and (d) of subsection (2) of this section; and
 - (b) require any act or thing to be done and prohibit any act or thing from being done before or after any specified time.

Act 1975
No.14 s.14
Act 1975
No.14 s.15

9A. No person shall use any parcel of land in the Conservation Area for cultivation.

Prohibition
of
cultivation

10. (1) The Authority may if it is of the opinion that any land within the Conservation Area, other than land occupied by a dwelling house, shop or premises used for the accommodation of travellers and visitors, or under a mining claim made, or a mining lease granted, under the mining law, is being or may become despoiled by order, direct that such land shall be a closed area.

(2) Any order made under this section shall specify the area to which it applies and shall state that the occupation and cultivation of land within such area, the depasturing of cattle, the cutting down or destruction of vegetation and the taking of forest produce therein are prohibited.

Executive
powers of
Conservator
Act
1963
No.43 s.10

11. The Authority may take measures within the Conservation Area

Act 1975
No.14 s.13

- (a) for the control, conservation and utilization of water including storm water;
- (b) for the protection of the course and banks of streams, rivers, furrows, waterholes, watercourses, wells and lakes;
- (c) for the mitigation and prevention of soil erosion;

- (d) for the protection of flora and fauna;
- (e) for the control, prevention and extinguishment of grass fires; and
- (f) for the improvement of the soil, vegetation and water resources, and may construct or execute any such works as the Authority thinks necessary or expedient for any of such purposes.

Act 1975
No.14 s.13

Act 1975
No.14 s.13

12. (1) Any person authorized in writing in that behalf by the Authority may at any time enter upon any land within the Conservation Area, other than land occupied by a dwelling house

Rights of
entry
Act 1963
No.43 s.11

- (a) for the purpose of ascertaining whether any measures are necessary or desirable for the conservation or improvement thereof;
- (b) for the purpose of ascertaining whether the land is being used in accordance with the provisions of any order made under section 8, 9 or 10, or for the purpose of communicating such orders;
- (c) together with any necessary workmen, agents, contractors, supervisors or organisers, for the purpose of taking any measures or constructing or executing any works authorized under the provisions of section 11, or of inspecting, repairing or maintaining any works so constructed or executed.

- (2) No compensation shall be payable to the owner of any land or of any interest therein upon which works have been constructed without negligence under the provisions of section 11 and of this section.

Provisions
regulating
subsidiary
legislation
Act 1975
No.14 s.18

13. All subsidiary legislation made under this Ordinance shall be published in the *Gazette* and where such subsidiary legislation has been published in English, the Authority shall, as soon as practicable after such publication, cause to be published in the *Gazette* a Swahili translation thereof:

Provided that

- (a) where any order is made under this Ordinance which does not relate to the whole of the Conservation Area but relates to only a portion thereof or any parcel of land within the Conservation Area, the Authority may, in lieu of causing such order to be published in the *Gazette*, cause copies thereof to be posted at the office of the Conservator, at the office of the branch

of the Party which has jurisdiction over the land to which the order relates and at the headquarters of the District within which such land lies;

- (b) where any order is made which affects only one person and his family (including his domestic staff), the order may be served on such person either by delivery to such person or a member of his household of a copy thereof or by affixing a copy thereof on the outer door or some conspicuous part of the premises in which such person resides or carries on business or works for gain and where so served the order shall be valid and effective notwithstanding that it has not been otherwise published.

14. [Repealed: Act 1975 No.14, s.19]

(Part IV is missing)

Part V

Appeals

Appeals
against
refusal to
grant
permit,
certificate
or other
authority

14. (1) Any person aggrieved by

- (a) the refusal of the Conservator or any other person authorized in that behalf of issue or grant to him any permit, certificate or other authority which may be issued or granted under this Ordinance or any subsidiary legislation made hereunder;
- (b) any condition or term annexed to any such permit, certificate or other authority issued or granted to him, may appeal to the Authority against such refusal or the imposition of such condition or term.

(2) Any person aggrieved by the decision of the Authority on any appeal under subsection (1), may appeal there-against to the Minister.

Appeal
against
orders

14A. Any person aggrieved by any order made under this Ordinance which adversely affects him, may appeal against such order to the Minister:

Act 1975
No.14 s.20

Provided that no appeal under this section shall lie

(a) save where the order, not being a general order, is a special order made in relation to the person aggrieved thereby or any member of his household or in relation to any parcel of land in or over which such person has an interest under a right of occupancy, lease, tenancy or mortgage;

(b) against any order made under section 10.

Powers of appeal

14B. (1) On appeal under section 14 or section 14A the appeals authority may affirm, vary or set aside the decision or order appealed against and where any decision or order is varied, modified or set aside, the appeals authority may give directions in respect of any matter or thing previously done or suffered under the decision or order appealed against.

(2) Subject to any further appeal provided for by this Ordinance, the decision of the appeals authority and any direction given by it shall be final and binding upon all the parties concerned, and shall not be subject to review by any court.

(3) In this section "appeals authority" means

(a) on an appeal to the Authority, the Authority;

(b) on an appeal to the Minister, the Minister.

Special provisions relating to appeals to the Authority

14C. (1) Every appeal to the Authority under this Ordinance shall be heard and determined by the Appellate Committee of the Authority consisting of three members of the Board nominated in that behalf by the Minister:

Provided that the Conservator shall not be eligible for nomination as a member of the Appellate Committee.

(2) The Minister may nominate one of the members of the Appellate Committee to be the Chairman of the Committee.

(3) The decision of the Appellate Committee shall be deemed to be the decision of the Authority and shall take effect accordingly.

Minister may make rules relating to appeals

14D. The Minister may, by rules

(a) prescribe the procedure on an appeal under this Part;

(b) prescribe the fee to be paid on instituting any such appeal;

- (c) prescribe the time within which any such appeal may be instituted.

Part VI [Act 1975 No. 14 s. 20]

Enforcement and penalties

15. (1) The Authority may by special order, require any person who has constructed or extended any buildings, works, roads or tracks in contravention of any order made under this Ordinance to modify, demolish or destroy the same within such period as the Authority may specify.
- (2) If any person fails to comply with any such requirement, it shall be lawful for any person authorized in writing in that behalf by the Authority to enter upon any land together with all necessary workmen, agents, contractors, supervisors and organizers and to cause such building, works, road or track to be modified, demolished or destroyed, and the Authority may recover the cost of such modification, demolition or destruction from the person in default by civil suit.
- (3) The Authority may sell any materials recovered from any buildings or works which it has caused to be demolished or destroyed under subsection (2) of this section and shall apply the proceeds of such sale, first towards the expenses thereof, secondly, in payment or part payment of the costs incurred in the execution of the powers contained in subsection (2) and thirdly, shall pay any surplus to the owner of such buildings or works.
16. Where a police officer, the Conservator, an Assistant Conservator or any other person or the Authority or any person authorized in writing in that behalf by the Authority.
- (a) the depasturing of any stock;
- (b) the use of any agricultural implements or machinery;
- (c) the carrying or use of any weapon, snare, trap, net, or poison;
- (d) the gathering of any honey; or

Power to
demolish
works
Act 1963
No.43 s.14

Powers to
seize stock
and
weapons
Act 1963
No.43

- (e) the taking or obtaining of any forest produce, is in contravention of any order made under Part III of this Ordinance, he may seize such stock, implements, machinery, weapon, snare, trap, net, poison, honey or forest produce:

Provided that the person seizing such property shall forthwith report such seizure to the nearest magistrate.

17. A police officer or the Conservator or the Assistant Conservator or any person authorized in writing in that behalf by the Authority, may arrest without warrant any person who he reasonably suspects has committed an offence against this Ordinance or against any rules made thereunder, where

Powers of
arrest
Act 1963
No.43 s.16

- (a) such person refuses to give his name and address or gives a name and address which there is reason to believe to be false; or
(b) there is reason to believe that such person will abscond;

Provided that where an arrest is made under this section, the person making the arrest shall ensure that the person so arrested is taken without undue delay before the nearest magistrate.

Offences
Act 1975
No.14 s.24

18. (1) Any person who
- (a) contravenes or fails to comply with an order made under section 8, 9 or 10; or
- (b) contravenes or fails to comply with any condition of a permit issued under this Ordinance; or
- (c) obstructs any person in the exercise of his powers under section 11, 12, 15, 16 or 17,
- shall be guilty of an offence against this Ordinance and shall be liable on conviction, in the case of a first conviction, to a fine not exceeding five thousand shillings or to imprisonment for a term not exceeding two years or both such fine and imprisonment; and in the case of a second or subsequent conviction to a fine not exceeding twenty thousand shillings or to imprisonment for a term exceeding five years or to both such fine and imprisonment.
- (2) Any person who tampers with or wilfully damages or alters any works constructed or executed by or on behalf of the Authority under this Ordinance shall be guilty of an offence against this Ordinance and shall

be liable on conviction to a fine not exceeding fifty thousand shillings or to imprisonment for a term not exceeding seven years or to both such fine and imprisonment; and any works so tampered with, damaged, or altered may be replaced or repaired by or on behalf of the Authority at the expense of any person convicted under this subsection and the cost so incurred may be recovered upon the order of the court as if it were a fine imposed by the court.

Forfeiture
of stock
and
weapons,
etc.
Act 1963
No.43 s.18

19. Where any person has been convicted of an offence under the provisions of subsection (1) of section 18 in respect of the depasturing of stock, the carrying or use of weapons, snares, traps, nets or poison, the use of agricultural implements or machinery or the gathering of honey or the taking or obtaining of forest produce, the court may order that such stock, weapons, snares, traps, nets, poison, agricultural implements or machinery, honey or forest produce, shall be forfeit to the Republic.

Part VII –

Renumbered as Part VII – Act 1975 No.14 s.75

Miscellaneous

Conduct of
prosecu-
tions
Cap.356
s.11
Cap.20
Act 1968
No.5 s.1
Power to
compound
offences
Act 1963
No.43 s.19

20. The Conservator or an Assistant Conservator may conduct a prosecution for an offence against this Ordinance or any rules made thereunder and shall for that purpose have the powers of a public prosecutor for the purposes of the Criminal Procedure Act.
- 20A. (1) The Conservator and any person authorized in writing in that behalf by the Conservator may, if he is satisfied that any person has an offence against this Ordinance or any rules made under this Ordinance, compound such offence by accepting from such person a sum of money:

Provided that-

- (i) such sum of money shall not exceed two hundred shillings;
- (ii) the power conferred by this section shall only be exercised where the person admits that he has committed the offence and agrees in writing to the offence being dealt with under this section;

- (iii) the person exercising the power conferred by this section shall give to the person from whom he receives such sum of money a receipt therefor and shall as soon as practicable report the exercise of such power to the Conservator (unless the person exercising the power is the Conservator) and to the Regional Commissioner;
- (iv) subject to subsection (2), if any proceedings are brought against any person for an offence against this Ordinance or any rules made under this Ordinance it shall be a good defence if such person proves that the offence with which he is charged has been compounded under this section;
- (v) any sum of money received under this section shall be dealt with as if the sum of money were a fine imposed by a court.

(2) Where an offence under subsection (1) of section 18 is compounded under the provisions of this section, a court may make an order under section 19 as if the person concerned had been convicted by that court of that offence:

Provided that no such order shall be made unless the person concerned has first had an opportunity of being heard.

21. (1) Subject to the provisions of subsection (2) of this section, nothing in this Ordinance shall be deemed to prevent any person from being prosecuted under any other law for any act or omission which also constitutes an offence against this Ordinance or from being liable under such other law to any greater punishment or penalty than that provided by this Ordinance, provided that no person shall be punished twice for the same offence.

Operation
of other
laws
Act 1963
No.43

- (2) The provision of the Ordinances set out in the first and second columns of the Third Schedule hereto shall take effect within the Conservation Area subject to the modifications, additions and amendments set out in the third column thereof.

22. [Repealed; Act 1975 No.14, s. 25]

23. [Repealed; Act 1975 No.14, s. 25]

24. The Minister may make rules generally for the better carrying out of the purposes of this Ordinance and, particular, but without prejudice to the generality of the

Rules
Act 1963
No.43 s.22

foregoing, may make rules requiring the payment of and prescribing fees (in addition to any fees which may be prescribed under section 6) for anything required or permitted to be done under this Ordinance or any orders made by the Authority thereunder.

Act 1975
No.14 s.26

First schedule

The Ngorongoro Conservation Area

All that land within the Masai District of the Arusha Region within the following boundaries:

Commencing on the north at beacon No. SNP.9 the boundary follows the east and south boundaries of the Serengeti National Park to beacon No. SNP. 41; thence due south to a point on the northern shore of Lake Eyasi; thence in a north-easterly direction along the northern shore of Lake Eyasi, and following the Mbulu-Masai district boundary to its junction with the Northern Highlands Forest Reserve; thence in an easterly direction along the southern boundary of the Northern Highlands Forest Reserve to its point of intersection with the top of the Rift Escarpment; thence following the top of the Rift Escarpment to Kerimasi Mountain; thence in a north-westerly direction in a straight line to the point of commencement.

Second schedule

[Deleted: Act 1963 No. 43 s. 23]

Acts 1963
No.43 s.24
1964
Nos.9 and
51, 3rd
Sch.

Third schedule

(Section 21)

| 1 Ordinance | 2 Section | 3 Variation, Modification or amendment |
|------------------------------|--|--|
| Fauna Conservation (Cap.302) | Section 11 Cap.413 Cap.569 | Add immediately below subsection (2), the following new subsection to be numbered (3): “(3) The Chief Game Warden shall not grant any permission under this section in respect of any controlled area situate within the Conservation Area established under the Ngorongoro Conservation Area Ordinance, or within any range development area declared by or under the Range Development and Management Act, 1964 without the consent of the Ngorongoro Conservation Area or the Commission established for such range development area as the case may be.” |
| Local Government (Cap.333) | Section 64(1) Cap.569 | <i>Substitute</i> for the proviso inserted by section 24 (c) of the Ngorongoro Conservation Area Ordinance (Amendment) Act, 1963 (No.43 of 1963) the following proviso: “Provided that before approving any by-law or any amendment to any by-law which affects the natural resources of the Ngorongoro Conservation Area, or of any range development area declared by or under the Range Development and Management Act, 1964, the Minister shall consult the Minister for the time being responsible for the conservation of the natural resources of such area or the |

| | | |
|----------------------|---------------|---|
| | Cap.413 | Minister responsible for animal husbandry, as the case may be, and in the event of any conflict between any such by-law or any rule or order made under the Ngorongoro Conservation Area Ordinance or such Act aforesaid, the provisions of such Act aforesaid, the provisions of such rule or order shall prevail." |
| Forests (Cap.389) | Section 19 | Add immediately below subsection (3), the following new subsection to be numbered (4): |
| | Cap.413 | "(4) No person or authority shall issue any licence in respect of a forest reserve situate within the Conservation Area established under the Ngorongoro Conservation Area Ordinance, or within any range development area declared by or under the Range Development and Management Act, 1964 without the consent of the Ngorongoro Conservation Area or the Commission established for such range development area as the case may be." |
| | Cap.569 | |

Fourth schedule

Act 1975 No.14, s. 27

Construction

1. In this Schedule unless the context otherwise requires "appointing authority" means, in relation to the Chairman of the Board, the President and in relation to any other member, the Minister; "member" includes the Chairman.

Composition of Board

2. (1) The Board shall consist of
 - (a) a Chairman, who shall be appointed by the President;
 - (b) the Conservator, who shall also be the Secretary of the Board; and

(c) not less than six and not more than eleven other members appointed by the Minister.

(2) In making appointments under subparagraph (b) of paragraph 1 the Minister shall ensure that the members appointed are persons who will, in his opinion, perform their functions under the Ordinance having regard to the national interest.

Proceedings
not to be
invalid by
reason of
irregularity

3. No act or proceeding of the Board shall be invalid by reason only of the number of members not being complete at the time of such act or proceeding or of any defect in the appointment of any member or of the fact that any member was at the time disqualified or disentitled to act as such.

4. (1) A member of the Board shall, unless his appointment is sooner determined by the appointing authority, or he otherwise ceases to be a member hold office for such period as the appointing authority may specify in his appointment, or if no period is so specified for a period of three years from the date of his appointment, and shall be eligible for re-appointment:

Tenure of
appoint-
ment

Provided that in the case of a member who is a member by virtue of his holding some other office, he shall cease to be a member upon his ceasing to hold that office.

(2) Any member of the Board may at any time resign by giving notice in writing to the appointing authority and from the date specified in the notice or, if no date is so specified, from the date of the receipt of the notice by the appointing authority, he shall cease to be a member.

5. Where any member absents himself from three consecutive meetings of the Board without reasonable excuse the Board shall advise the appointing authority of the fact and the appointing authority may terminate the appointment of the member and appoint another member in his place.

Absence
from three
consecutive
meetings

6. Where any member is, by reason of illness, infirmity or absence from the United Republic, unable to attend any meeting of the Board the appointing authority may appoint a temporary member in his place and such temporary member shall cease to hold office on the resumption of office of the substantive member.

Appoint-
ment of
temporary
member

7. The Board shall elect one of its members to be the Vice-Chairman and any member elected as Vice-Chairman shall, subject to his continuing to be a member, hold office of Vice-Chairman for a term of one year from the date of

Vice-
Chairman

- his election and shall be eligible for re-election.
- | | | |
|-----|--|-------------------------------------|
| 8. | <p>(1) The Chairman shall preside at all meetings of the Board.</p> <p>(2) Where at any meeting of the Board the Chairman is absent, the Vice-Chairman shall preside.</p> <p>(3) In the absence of both the Chairman and the Vice-Chairman at any meeting of the Board the members present may, from amongst their number, elect a temporary Chairman who shall preside at the meeting.</p> <p>(4) The Chairman, Vice-Chairman or a temporary Chairman presiding at any meeting shall have a casting vote in addition to his deliberative vote.</p> | Power of Chairman and Vice-Chairman |
| 9. | <p>(1) The Board shall meet not less than once during every year and at such additional times as may be fixed by the Chairman or, if he is absent from the United Republic or unable for any reason to act, the Vice-Chairman.</p> <p>(2) The Chairman or, in his absence from the United Republic, the Vice-Chairman may, and shall upon application in writing by at least five members, convene a special meeting of the Board at any time.</p> <p>(3) The Secretary of the Board shall give to each member adequate notice of the time and place of meeting.</p> | Meetings and procedure of Board |
| 10. | At any meeting of the Board not less than one-half of the members in office for the time being shall constitute a quorum. | Quorum |
| 11. | Subject to the provisions relating to a casting vote, all questions at a meeting of the Board shall be determined by a majority of the votes of the members present. | Decisions of Board |
| 12. | <p>Notwithstanding the foregoing provisions of this Schedule, decisions may be made by the Board without a meeting, by circulation of the relevant papers among the members and the expression of the views of the majority thereof in writing:</p> <p>Provided that any member shall be entitled to require that any such decision be deferred and the subject matter be considered at a meeting of the Board.</p> | Decisions by circulation of papers |
| 13. | <p>(1) The seal of the Authority shall be of such shape, size and form as the Board may determine.</p> <p>(2) The seal shall be authenticated by the signature of the</p> | Seal of the Authority |

Chairman, or the Secretary or any officer of the Authority authorized to act in that behalf by the Board.

- | | |
|--|---|
| 14. All documents (other than those required by the law to be under seal) to be executed by the Authority and all decisions of the Board shall be signified under the hand of the Chairman, or the Secretary, or any member of the Board or officer of the Authority authorized in that behalf by the Board. | Significa- tion of other documents |
| 15. (1) The Board shall cause minutes of all proceedings of meetings of the Board to be entered in a book kept for that purpose. (2) Any such minutes if purporting to be approved by, and signed by the Chairman of the next succeeding meeting of the Board shall be evidence of such proceedings and, until the contrary is proved, the meeting to which the minutes relate shall be deemed to have been duly convened and all proceedings thereat to have been duly transacted. | Record of proceed- ings of Board |
| 16. Subject to the provisions of this Schedule the Board may regulate its own proceedings. | Board may regulate its proceed- ings |
| 28. Notwithstanding the amendment of the various provisions of the Ordinance by this Act any subsidiary legislation made under any of the said provisions and in force immediately before the commencement of this Act shall continue in force as if made under such provision of the Ordinance as amended by this Act. | |

Passed in the National Assembly on the sixteenth day of July, 1975.

W. J. Maina
Clerk of the National Assembly

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The Ngorongoro Conservation Area (NCA) in the north-east of Tanzania is considered the 'eighth wonder of the world' and a great tourist attraction. It is also home to some 40,000 Maasai pastoralists, who have been struggling for their human and civil rights since 1958 when they were resettled in the Area by the colonial government.

Maasai rights in Ngorongoro, Tanzania is a pioneering examination of the rights of the Maasai inhabitants and other residents as they relate to land, freedom of association and movement within the NCA. More particularly, the book clarifies the restricted rights of residents to property, to the means of securing a livelihood and participation in decisions which affect their lives. The study also provides an evaluation of the legal powers and administrative practices of the NCA Authority (NCAA) set against the principles of the rule of law and democratic governance. The authors argue that limitations placed on the Maasai by the NCAA can be justified only if there is prior consultation and participation of the Maasai residents in the relevant decision-making processes.

The authors recommend an innovative reorganisation of the NCAA to manage the Area. The centerpiece of this would be provision for proper representation and participation of the Maasai and other residents in deciding on the best means to conserve and develop this important natural resource.

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