



FACULTY OF LAW
University of Lund

Nan Erikson

**Land Conflicts between Commercial Farmers and
Pastoral Maasai - A Case Study on Unauthorised Cultivation
in Simanjiro District, Tanzania**

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Supervisor: Professor Michelo Hansungule

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Abbreviations

CCM	Chama cha Mapinduzi (Party of the Revolution)
CVL	Certificate of Village Land
DED	District Executive Director
ECOSOC	Economic and Social Council
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IIED	International Institute for Environment and Development
ILO	International Labour Convention
IMF	International Monetary Fund
LA	The Land Act
LAMP	Land Management Programme
LHRC	Legal and Human Rights Centre
LTC	Land Tenure Centre, University of Wisconsin
MLHUD	Ministry of Lands, Housing and Urban Development
MP	Member of Parliament
NAFCO	National Agriculture and Food Co-operation
NLUPC	National Land Use Planning Commission
NGO	Non-Governmental Organisation
PMO	Prime Minister's Office
Sida	Swedish International Development Co-operation Agency
TAA	Tanganyika African Association
TANU	Tanganyika African National Union
TAWLA	Tanzanian Women Lawyer Association
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Programme
URT	United Republic of Tanzania
VA	Village Assembly
VC	Village Council
VLA	Village Land Act
VTD	Village Title Deed

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1 Introduction

1.1 Background and Purpose

This graduate thesis constitutes the final credit for a Law Degree at the Faculty of Law at the University of Lund. I have chosen a thesis subject within international law, which was made possible through the Raoul Wallenberg Institute of Human Rights and Humanitarian Law in Lund. Through a Minor Field Studies (MFS) grant from the Swedish International Development Co-operation Agency (Sida), it was possible for me to undertake my thesis work in Tanzania on land right conflicts between pastoral Maasai and farming companies.

Before applying for the MFS grant, I contacted several Swedish organisations that are active abroad. I was particularly interested in land rights and was hoping to link my thesis work with an ongoing project. It was my wish that the thesis eventually could be of interest to people in the host country.

Through Sida in Tanzania I was brought into contact with Orgut Consulting AB, a Swedish company providing technical services and project management services in land management, forestry, agriculture, environment and rural development. Orgut is currently supporting land management projects in four different districts in Tanzania under the Land Management Programme (LAMP). The Programme is supported by Sida, upon request by the Tanzanian Government. Implementation is carried out by the Simanjiro District Council with technical and managerial backstopping provided by Orgut Consulting AB. The objective of LAMP is to assist villagers in increasing land productivity by environmentally sound and sustainable utilisation of natural resources.

In Simanjiro District, *land security*¹ is a major component of the programme and it was thought that a judicial thesis was most needed there. The district is situated in northeastern Tanzania². About 90% of the population belong to the Maasai ethnic group. Since the 1980s, the district has been a target for immigration by large-scale commercial farmers and small-scale farmers from other tribes and regions. Besides agriculture, the area has also attracted wildlife companies, gemstone mining and charcoal production. The land

¹ Land security includes dissemination of information about land rights, land titling of villages, support to women's right to land and verification of allocation of land to large commercial farms. In addition, LAMP includes a *community empowerment* component aimed to support democratic development on village level, *extension services* to improve crop and livestock husbandry and a *district and village capacity building* component to facilitate efficient land allocation control and land use planning. (LAMP, *Land Management & Environment Programme 1996 - 1999*, The District Sub-Programme, Simanjiro District, 1996, p. 38)

² See Annex E for Maps of Tanzania and Simanjiro District.

conflicts between the inhabitant Maasai and the newcomers are increasing in numbers and complexity.

This thesis is mainly concerned with the ongoing land conflicts between the Maasai and large-scale commercial farmers. The district is currently experiencing a situation of largely uncontrolled expansion of cultivated land. Recent measurements have shown that many farms are growing crops outside their allocated area. One important and specific issue in this context is how to legally retract the cultivated piece of excess land. Connected sub-issues include compensation and procedures for dispute settlements.

The present land legislation originates from 1923 and is of British colonial descent. The state of Tanzania has since the beginning of the 1990s planned to reform the land law system within a new land act. The initiative was undertaken within a backdrop of economic liberalisation policies supported by the World Bank and the IMF together with the imperatives for the opening of common markets.³ This process has been slow and affected by several political considerations. However, a new land act divided into two parts has recently been passed in the Parliament of Tanzania. The Acts will enter into law later this year. Till then, the principal functioning land law is the Land Ordinance of 1923.

A purpose of this thesis is that it should be of help to the villagers and administrators in the District of Simanjiro in Tanzania.

1.2 Thesis Layout and Limitations

In the ensuing Chapter, a descriptive image is given on the factual situation in Simanjiro. A historical review and a description of the current land tenure situation are presented in Chapter 3. The analysis of the legal issues involved is presented in Chapter 4. The New Land Acts will also be dealt with here. Finally, land rights and human rights are reviewed in Chapter 5 followed by the Conclusion.

I have chosen to place topics of interest in Annexes with the intention of streamlining the review of the principal legal issue. Relating issues not directly linked to the problem, but yet of importance are therefore placed at the end of this thesis.

This is a legal study focusing on land tenure. However, it is important to deal with the issue of Maasai culture and lifestyle. It is not my intention to present the findings on the Maasai community as an authoritative source of value. The whole Maasai society includes a number of variations. The information in the thesis concerning the Maasai is gathered from written anthropological studies, which may not accurately relate to the special Maasai society in Simanjiro District. Yet, my wish is to give a general picture of the Maasai and their culture and I have neither the knowledge nor

³ Tenga, *Processing a Land Policy: The case of Mainland Tanzania*, 1997, p. 1

the objective to outline the special differences. With respect to the Maasai in Simanjiro District, I apologise for possible inexact information presented in this thesis.

1.3 Sources and Methodology

The thesis is mainly based on literature and articles by various authors from different institutions, both African and non-African. Interviews made in Tanzania are of major importance, which have contributed to my understanding of the specific subject matter. Additionally, information has also been found through the Internet.

Sources of information has been collected through Nordiska Afrika Institutet in Uppsala, Sweden, the Raoul Wallenberg Institute in Lund, the library of the Faculty of Law at the University of Dar es Salaam, Tanzania and the library of Orgut Consulting AB in Tanzania.

Besides excerpts from literature and articles, I have also used Tanzanian land law legislation, case law from Tanzanian Law Report and Government Documents.

The MFS study in Tanzania took place between 25 July and 1 October 1998. I spent the first three weeks in Dar es Salaam where I interviewed different groups of people (University scholars, lawyers, staff from the Ministry of Land, Housing and Urban Development (MLHUD) and other Governmental institutions, donor representatives and NGOs) and searched for material at the University library. Thereafter, I spent a month in Simanjiro District where I interviewed district personnel, local politicians, Maasai families, small and large-scale farmers and NGO representatives. I was based at the district capital, Orkesumet, where the LAMP Office is situated. During this time, I undertook a three day tour to five villages to learn about the local land problems.

The last period of my stay in Tanzania was spent in Dar es Salaam. Additional interviews were made and material gathered in order to collect remaining information and to verify the information received in Simanjiro.

The questions posed to scholars and Ministry staff in Dar es Salaam were concentrated on legal aspects of land rights and procedures. When I talked to representatives of donors and NGOs, I was interested to learn about the general land policy in the country. In Simanjiro, most questions aimed to find out about the current problems concerning land conflicts in the district, how the different target groups viewed the conflicts and how they wanted to resolve them.

A list of documents used and interviews made in Tanzania is attached under Appendices.

2 The Problem of Unauthorised Expansion of Large-Scale Farming in Simanjiro District

2.1 Simanjiro District and the Pastoral Maasai Population

Simanjiro District is a new district, created in 1994, in what was commonly known as the Maasai steppe, which together with 10 other districts make up Arusha Region. It is situated in northern Tanzania and covers an area of 20 600 square kilometres. It falls within the semi-arid ecological zone with an average rainfall of 400-600 mm/year and thus consists primarily of rangeland. The short rains last from October/November to December/January. The long rains fall from March to April. Rainfall is unreliable and irregular and the district often suffers from a shortage of water.

The exact population number of Simanjiro District is not known with certainty and estimates vary between 70 000 to 150 000 people. The population is estimated to increase at an annual rate of 7.9 %, to a large part due to immigration.⁴ Roughly 18% of the households have immigrated into the district during the last five years

Approximately 90% of the population in the district are pastoral Maasai⁵. The whole Tanzanian Maasai population is estimated at about 100 000 while another 200 000 live in Kenya. The Maasai of Simanjiro are of the Kisongo section, (the largest of the Maasai territorial sections) and are followed by other tribes such as the Waarusha (agro-pastoralists), Paru, Chagga, and Nyaruturu. (There are over 120 tribes in Tanzania⁶). The other tribes are commonly small-scale crop farmers, farm labourers, mining workers or charcoal burners. There are also small groups of Ndorobo hunters and gatherers in the area.

⁴ Kahurananga, Sikar and Mang'atinda, Rangeland Utilization, Condition and Carrying Capacity in Simanjiro District, 1996, p. 6

⁵ Maasai are *transhumant* pastoralists, which means that a Maasai as a cattle owner has a fixed base from which he moves his cattle from one pasture to another, depending on the season. Transhumance is different from *nomadism*, which is defined as a member of a tribe that wanders from place to place with no fixed home. (*National Environment Management Council, Proceedings of the National Workshop on Pastoralism and Environment in Tanzania*, 1990, p. 72)

⁶ The total number of inhabitants in Tanzania is 29,6 million, 99 % of the population are of African tribes, 1% are Asian, European and Arabs. The population growth is 3,5 % per year. (The Swedish Institute of International Affairs, *Tanzania*, 1995, p. 5)

Pastoral Maasai move across vast areas of land with their livestock (cows, sheep, goats and/or donkeys) according to the wet and dry seasons. Low rainfall and low carrying capacity of the rangelands in Simanjiro necessitates extensive grazing. Traditionally the herds are moved near permanent water sources during the dry season. When the wet season starts they are moved to the short grass plains where they are more widely separated. (Other reasons for movement of cattle are to avoid diseases, tick and tsetse fly infestation). The entire social and economic structure of the Maasai depends on livestock, which also represents the central cultural value of their society. A household owns a cattle herd but the grazing land is used communally. Traditionally, they are not engaged in agricultural production.

The Kisongo Maasai society is organised in a complicated age class system, which is also the basis of their political organisation. Descent is patrilineal meaning that order of inheritance is determined after the husbands relatives.⁷

Nowadays, the Maasai move less than they used to. Large areas are still needed for grazing but the Maasai tend to stay more permanently in the bomas, to where their animal stock always returns after grazing. Farming - as an alternative occupation to fulfil household needs for food - is becoming more common and some families are even considered to have become agro-pastoralists. (See further Annex A)

The Government considers the Maasai to be of marginal economic importance to the country. There has been national pressure to change their pastoral lifestyle into a sedentary way of living.

2.2 The Growth of Large- and Small Scale Farming

Alienation⁸ of land for agricultural production in Simanjiro started in the 1970s and became more intense following the economic liberalisation in the 1980s. At this time, large tracts of land were allocated to individuals and companies (often owned by expatriates and run for export cash crop production).

Today, there are approximately 80 large-scale farms in the District, amounting to 48 000 hectares under mechanised farming. About two thirds of all large farms are concentrated to the Naberera Division. The sizes of the

⁷ LAMP, *Land Management & Environment Programme 1996 - 1999*, The District Sub-Programme, Simanjiro District, 1996, pp. 3

⁸ Alienation is described in *The Concise Oxford Dictionary* as: Estrangement; transference of ownership. In the *Words and Phrases Legally Defined* alienation means the most usual and universal method of acquiring a title to real estates, where estates are voluntarily resigned by one man and accepted by another. For example through sale, gift, marriage settlement, or other devise of property by the mutual consent of the parties. Legal doctrines in Tanzania have often used the term alienation to describe the States acquisition of land, often referring to cases when local populations have not been consulted. (See further under Chapter 5)

farms vary from 40 hectares to over 10 000 hectares. Most of the farms are not managed by the owner of the land but by an employed farm manager. The large-scale farms produce primarily seed beans for export to Europe together with maize as a rotational crop for local marketing. Large tracts of land acquired for large-scale farming are still underdeveloped, owing to a combination of land speculation, financial problems and the high prestige attached to owning large farms.⁹

Measurements have shown that a number of farms have expanded over and above the original allocation stated in issued title deeds.¹⁰ This development is due to the following factors:

After establishment in Simanjiro District, the owners of the large-scale farms soon realised the advantages and disadvantages of the special conditions in the area. The advantages include a complementarity of seasons, which enables two harvest periods. The winter seed production is suitable for export to Europe and the summer harvest is distributed for national needs. Moreover, this part of Tanzania is a disease-free environment, due to the fact that the soil has not been cultivated earlier. However, the soil is not particularly fertile so farmers are forced to cultivate extensively rather than intensively. In contrast to intensive cultivation methods, this basically means that the soil cannot handle heavy utilisation. It has to be left fallow for a period of three years in order to rest and regain its original nutrition level. The land is cultivated with “dry land farming” methods, including minimum tillage (ripping the surface of the soil rather than ploughing it) and use of low contours to retain the scarce rainfall and preventing soil erosion. These requirements have led to extensive non-irrigated use of vast tracts of basin land, which surround the traditional pastoralist water supply points (water holes, man-made wells and micro water catchments). For the farmer this is advantageous since he does not need to drill bore holes for any supplementary watering that may be required. Extensive cultivation implies investment in large scale farming equipment such as high capacity tractors with ample spare capacity for preparation of additional land in the long periods between the harvesting campaign and the next planting season at the onset of the new rains. From the farmer’s point of view, there is capacity and even a necessity to cultivate more and therefore it is tempting to increase the cultivated area since the extra cost may be limited to fuel and other relatively minor operating expenditure.

Many farm operators applying for expansion of their land titles with the object to cultivate additional land surrounding the original broken land are met by a slow administrative process.¹¹ This fact has led frustrated farmers to go ahead and plant outside the stipulated boundaries with little risk of

⁹LAMP, *Land Management & Environment Programme 1996 - 1999*, The District Sub-Programme, Simanjiro District, 1996, pp. 11

¹⁰ See further Annex C on the procedure of the issuance of individual title deeds.

¹¹ A farmer in Simanjiro had to wait for three years to get his original title deed. Since he had got the consent from the villagers, he took the risk to start farming before receiving the title deed. (Interview, Simanjiro District, 1998)

detection by the District Land Officer. The expanded farms are therefore encroaching on the grazing area used by the Maasai. The Maasai are met by blocked access to waterholes and grazing passages for their cattle. The process is largely uncontrolled since there are few private surveyors available to be engaged by the encroached Maasai pastoralists.

Since large-scale farming and agriculture is in agreement with governmental policies, the pastoral Maasai have difficulties in getting adequate response when claiming and arguing for their right to land.

Yet, in Simanjiro, it is not uncommon that the beneficiaries of large land allocation are well to do and well connected Maasai. They have either large land parcels themselves or may sublease land to commercial farmers. The system of sub-leasing land provides the operating farmers with a high degree of control over the land that they lease.

Small-scale farming is common in villages with large population of non-Maasai immigrants. Many of these immigrant farmers came to the district after having heard of the availability of free, virgin and relatively fertile land in Simanjiro. The crops produced are usually maize and beans to meet the household necessities, with any extra produce being sold for cash to meet other family needs.¹²

2.3 The Ensuing Land Conflicts

The establishment of large-scale commercial farming has had detrimental effects on the pastoral way of living. The pastoral people have suffered large land losses, which has led to reduced access to vital natural resources. Farms have limited or fenced off livestock pastures and thus disrupted the migratory routes to watering points, mineral licks and seasonal pastures.¹³ The land loss is particularly felt during the dry season, when the Maasai need to have access to grass and water resources across a large area. This problem intensifies when there are large numbers of pastoralists affected, because they will then simultaneously find past survival strategies ineffective.¹⁴

Other factors have also affected the pastoral way of life and hindered the Maasai to carry out livestock management in their traditional way. These factors include the establishment of Tarangire National Park, widespread charcoal production and extensive mining activities. Due to the diversity of

¹² Tanzania - Sweden Forestry and Environment Sector Support Programme, *Environmental Impact Assessment of Land Use Related Activities in Simanjiro District*, 1996, pp. 20-21

¹³ Ojalammi, *Territorialism and Land Management in the Dryland Settlements of Tanzania. A Case Study from the Maasai Areas in the Ngorongoro District*, 1993, cap. 7.4

¹⁴ Igoe and Brockington, *Conservation and Development in East African Rangelands: The Human Costs of Economic Liberalisation and Wildlife Preservation in North East Tanzania. Recent Impacts on Pastoral Resource-Use in Simanjiro, Same and Lushoto Districts*, 1996, p. 5

ecological and geographical features, the area provides for resources, which are of interest both to the state, and to ordinary peasants.

3 Land Tenure in Tanzania

3.1 Historical Background

3.1.1 Introduction - From Tanganyika to Tanzania

In 1884, the most powerful nations of Europe gathered to divide Africa amongst themselves. The scramble for Africa left Tanganyika to be given to the Germans, who until the First World War, ruled it as their colony called German East Africa.¹⁵ Germany declared a protectorate over Tanganyika, Rwanda and Burundi in 1891. In 1919, by the Versailles Peace Treaty, the Germans gave up all rights over Tanganyika in favour of the Allies. It was agreed that Great Britain should administer the country as a Mandated Territory (later a Trust Territory of the United Nations) under the surveillance of the League of Nations. Therefore, British Tanganyika was never a settler colony in the same way as Kenya was a colony under Great Britain.¹⁶

The struggle for Independence started in the 1920s but became intense after the Second World War when Tanganyika African Association (TAA) was formed and began struggling for native voting rights and the right to participate in economic and political life. TAA was transformed into Tanganyika National Party Union (TANU) in 1954, supported by the majority of the Tanzanian population. TANU was led by *Julius K Nyerere*, who was to become the first President of Tanganyika when the country achieved independence in 1961. In 1964, Tanganyika and Zanzibar merged into a union and formed Tanzania. In 1965, the country was officially declared a one party system state, but in 1992, a multi-party system was introduced. In 1994, the first multi-party elections took place. The current President, *Benjamin Mkapa*, is a member of the CCM party, the inheritor of TANU.¹⁷

3.1.2 The German Period (1891-1914)

A German Imperial Decree declared in 1895 all land as un-owned and vested in the Empire. Land was granted to planters and settlers; in 1912 there were 4 744 Europeans in Tanganyika, including 758 planters and settlers. Nearly 1.3 million acres of land had been alienated, i.e. divested from the Empire and allocated to foreign farm operators on long-term leases.¹⁸

¹⁵ The Swedish Institute of International Affairs, *Tanzania*, 1995, p. 12

¹⁶ James, *Land Tenure and Policy in Tanzania*, 1971, p. 11

¹⁷ The Swedish Institute of International Affairs, *Tanzania*, 1995, pp. 13-14

¹⁸ Fimbo, *Essays in Land Law Tanzania*, 1992, p. 1

3.1.3 The British Period (1919-1961)

The principal colonial land law, which is still in use in Tanzania today, was presented by The British Administration as the *Land Ordinance of 1923*, a legislation originally based on the Land and Native Rights Ordinance of Northern Nigeria.

The Land Ordinance declared the whole of the lands in the territory of Tanganyika, whether occupied or unoccupied by herders or cultivators, to be *public lands* under the control and subject to the disposition of the Governor. No title to the occupation and use of any such land was valid without the consent of the Governor.¹⁹ The Governor had the power to issue certificates of grants of land on *rights of occupancy* for periods not exceeding 99 years. He could grant or revoke land to enterprises, organisations and individuals and could even define the terms for using the land. The Governor could also hold, use or dispose of territories on rights of occupancy for the benefit of the indigenous people of Tanzania. By 1960, approximately 2.5 million acres of land in long-term rights of occupancy for agricultural - and ranching use had been granted by the British administration, mostly to European and Asian grantees.²⁰

It was legally unclear as to whether the Land Ordinance really safeguarded the customary rights of the native Africans. This raised criticism in the League of Nations and in 1928 an amendment of the Ordinance expanded the meaning of the right of occupancy to include “*the title of a native or a native community lawfully using or occupying land in accordance with native law and custom.*”²¹ Since the amendment, the customary land titles have been called *deemed rights of occupancy*. An occupier of land under customary law was deemed to be holding a right of occupancy although he was not given a certificate.

Although the Land Ordinance stated the principle of protecting native rights concerning land, it did not succeed in establishing a procedure to safeguard that principle. Because the Ordinance still did not define the rights of customary landholders, the legal recognition of these rights did not imply protection against the state by the law. Instead they were held at the discretion of the Governor.²² Thus, the customary system of land tenure fell into the domain of administrative policy rather than becoming regulated in law. In contrast, a granted right of occupancy was protected by a contract between the state and the rightsholder and controlled by law.²³

¹⁹ Sections 2 and 3 of the Land Ordinance, Shivji, *Not yet Democracy, Reforming Land Tenure in Tanzania*, 1998, p. 3

²⁰ Fimbo, *Essays in Land Law Tanzania*, 1992, pp. 2-4

²¹ Land Ordinance (Amendment) Ordinance No. 7 of 1928

²² James, *Land Tenure and Policy in Tanzania*, 1971, p. 19

²³ Shivji, *Not yet Democracy, Reforming Land Tenure in Tanzania*, 1998, p. 3

Granted Rights of Occupancy, governed by statutory law, and Deemed Rights of Occupancy, governed by customary law, were pieces of a terminology created during the colonial period. The same concept exists today under the present land law system. Customary rights did not and still do not have a strong legal security of tenure.

In conclusion, one of the main characteristics of the British colonial land policy was that ownership/possession was different in the formal and informal sectors. The land ownership of the formal sector (urban territories and plantations) was controlled by statute, while in the informal sector (peasants and pastoralists), ownership was established through membership of a “native community“ and called deemed rights of occupancy. Another feature of the British land policy was that nobody could own or possess land unless proof of use was provided. This principle was used to justify land confiscation from natives who were not putting land into “proper“ use.²⁴ Paradoxically, we will see that the Government of Tanzania has used the same argument in expropriating land from the pastoral Maasai. The aim of this policy after Independence has been to develop a legal principle for granting land to the user or tiller.²⁵

3.1.4 Time of Independence (1961)

When Tanzania became independent in 1961. President Julius Nyerere and the new Government were committed to form an independent socialist society where agriculture was supposed to become one of the major cornerstones bringing the country to prosperity. The majority of the population still followed traditional ways of living in small villages but development was going to be pushed forward through mobilising the people through public corporations and agricultural common villages, so called *Ujamaa* villages.²⁶ The concept of *Ujamaa* was going to prevent the emergence of greater inequalities in rural areas of Tanzania. A large number of reforms affecting land tenure were established. Unfortunately, these well-meant plans did not accomplish the intended success but contributed to social and economic downfalls instead.²⁷

3.1.4.1 African Socialism and Land Tenure Reforms

The Arusha Declaration was adopted by the TANU party in February 1967. It presented practical guidelines for the implementation of African Socialism. The component connected to land use was the establishment of *Ujamaa* villages. These villages were based on the principle of the traditional extended family, signified by living together on land owned in common, working for the good of all and practising co-operation in

²⁴ This policy was used by the British in the Meru Land Case, where land was confiscated from the Meru people, in favour of settlers. (Tenga, *Processing a Land Policy: The case of Mainland Tanzania*, 1997, p.2)

²⁵ Tenga, *Processing a Land Policy: The case of Mainland Tanzania*, 1997, p. 2-3

²⁶ *Ujamaa* means common or communal.

²⁷ Swedish Institute of International Affairs, *Tanzania*, 1995, p. 15

production, purchasing and marketing. It involved the transformation of the traditional sector of land tenure into a collective sector.²⁸

The project of *Villagisation* was established as an important land tenure reform of African Socialism. Villagisation aimed at bringing rural people together in villages where they more effectively could be provided with services and state assistance. In 1974, there was a major push for villagisation, which sometimes involved forced settlement. Despite the lofty philosophy and the well-meant intentions of villagisation, the reform led to negative effects on agriculture and the environment.²⁹ Yet, villagisation had a muted effect on Simanjiro District, as it was not strictly enforced.³⁰

The principle of land tenure during this time was that the people as a whole should own all land. Land belonged to the society, not to individuals.

3.1.4.2 Liberalisation and the Policy of a New Land Reform

Due to the war against Uganda (1978–1981), increasing inflation, famine and a declining world economy, the straightforward development of Tanzania took a turning point. The country's economy began to contract. The oil crises, the decline in coffee prices, the cost of the social reforms, and economic malpractice all contributed to the change in the country's economy. Tanzania became dependent on donor aid and in 1986, the World Bank and the IMF started to demand market economy reforms together with other bilateral donors.

Eventually, Tanzania changed policy towards liberalisation and structural adjustment. The Government started to encourage private agricultural production and abandoned monopolies within the agricultural sector.³¹ Privatisation was promoted in order to obtain increased productivity, conservation of natural resources and encouragement for investment.³²

At this time, the Government decided to revise the whole land system and authorised a Presidential Commission to take care of this task in the beginning of 1991. The Commission referred to as the *Land Commission*, spent several years examining the land situation in Tanzania and gathered their findings and recommendations in a two volume book in 1992. However, the results of the work by the Land Commission became regarded as critique against the Ministry of Lands and the Government. The recommendations made were not at all considered by the Government, who

²⁸ James, *Land Tenure and Policy in Tanzania*, 1971, pp. 26-28

²⁹ Lane, *Pastures Lost: Alienation of Barabiag land in the context of land policy and legislation in Tanzania*, Nomadic People, 34/35:1994

³⁰ Igoe and Brockington, *Conservation and Development in East African Rangelands: The Human Costs of Economic Liberalisation and Wildlife Preservation in North East Tanzania. Recent Impacts on Pastoral Resource-Use in Simanjiro, Same and Lushoto Districts*, 1996, Table 2

³¹ The Swedish Institute of International Affairs, *Tanzania*, 1985, pp. 15-17

³² Lane, *Pastures Lost: Alienation of Barabiag Land in the Context of Land Policy and Legislation in Tanzania*, Nomadic People, 34/35:1994

authored the National Land Policy instead. It was completed in 1995 and provided the guidelines for a new land bill.³³

In 1996, a British Consultant, Professor McAuslan was asked, under a contract with the British Overseas Development Administration, to prepare a draft for the new Land Act based on the National Land Policy. The resulting Draft Land Bill was revised by the MLHUD but was not considered to sufficiently follow the principles of the National Land Policy. In 1998, a new land bill was constructed, this time by the Ministry itself, and it is this piece of draft legislation that has been passed before the Parliament for approval. The writing of a new land bill has thus been a lengthy and problematic process.

3.2 The Present Land Legislation in Tanzania

This part of Chapter 3 gives an overview of the present land legislation in Tanzania. The main act referred to is the *Land Ordinance, Cap 113* of 1923. The Land Ordinance is attached in Annex D, while other relevant statutes are merely ascribed in the text.

3.2.1 The Land Ordinance, Cap 113 of 1923

During the period of the British administration of Tanganyika, all land was *public land*, vested in the Governor. When Tanzania became independent in 1961, the new Government accepted and kept the legal framework of the Land Ordinance. The concept of public land was confirmed, with the only exception that the word “Governor“ was replaced by “President“. Thus, the power of granting land on rights of occupancy became vested in the President of Tanzania. All land was held - and still is - on a right of occupancy, either on a statutory or *Granted Right of Occupancy* or on a customary or *Deemed Right of Occupancy*.³⁴

All land declared to be public land is stated in Section 3 of the Land Ordinance. It is further declared in Section 4 that the control of all land is vested in the President, who has the power to administer the land for the use and common benefit, direct or indirect of the natives of Tanzania.³⁵ Strictly interpreted, a citizen does not own the land as such, but owns the *interests* or *rights* in land. Alike under the British period, it is stated that the right to

³³ Sundet, *Politics of Land in Tanzania*, 1997, p. 94

³⁴ Coldham, *Land Tenure Reform in Tanzania: Legal Problems and Perspectives*, The Journal of Modern African Studies, 33, 2 (1995), p. 228

³⁵ The term “native“ means: “Any person who is a citizen of the United Republic of Tanzania and who is not of a European or Asiatic origin of descent.“, (Section 2, Land Ordinance)

land is to be dependent on its use and not supposed to be a commercial commodity.³⁶ Yet, in effect, these rights add up to ownership.³⁷

In his exercise to grant land, the President acts through delegated authorities such as the Commissioner for Lands at the MLHUD and District and Regional Land Allocation Committees. Although land is vested in the President, the MLHUD manages, administers, and allocates land in practice.

3.2.1.1 The Concept of Right of Occupancy

Section 6 of the Land Ordinance provides the means to divide the form of land tenure known as the right of occupancy into two forms of land tenure: Granted right of occupancy which is governed by statutory law and issued by the President and the deemed right of occupancy, which is held under customary law with the customary landholders as lawful occupiers.³⁸

Section 2 of the Land Ordinance provides that a right of occupancy means a title to the use and occupation of land and includes the title of a native or of a native community lawfully using or occupying land in accordance with native law and custom.³⁹

The President must give due regard to native laws and customs existing in a district whenever he exercises his power under the Ordinance⁴⁰.

Section 6 of the Ordinance allows the President to grant a right of occupancy. All granted rights of occupancy for more than 5 years are required to be registered. This rule is compulsory.⁴¹ A lawful occupation by a native community is not compulsorily required to be registered.⁴² The President may grant land for terms not exceeding 99 years. Before such a grant is made on public land, where there is a native authority, the authority shall be consulted.⁴³ According to a Government Circular from 1953, the Government sees this provision as non-mandatory.⁴⁴

³⁶ The declaration of land as public land does not exclude for the exploitation or alienability of land. Land can be purchased or sold, be given away or mortgaged and also be used for obtaining unearned income. (James, *Land Tenure and Policy in Tanzania*, 1971, pp. 22)

³⁷ Wily, *The Village, Villagers and the Village Land Bill*, 1998, p. 3. When the word *owner* or *ownership* is used in this thesis, it means owner or the ownership of interests in land.

³⁸ Tenga, *Pastoral Land Rights in Tanzania: A review*, 1992, pp. 2-3

³⁹ Section 2, Land Ordinance, 1923

⁴⁰ Section 5, *Ibid.*

⁴¹ Land Registration Ordinance, Cap 334, Section 27

⁴² Those Rights for less than 5 years (Short-term Rights of Occupancy) can only be registered where the Certificate contains an option whereby the occupier may require the President to grant him a further term, which together with the original term will exceed five years. (Tenga, *Pastoral Land Rights in Tanzania: A review*, 1992, p. 5)

⁴³ Section 6, Land Ordinance, 1923

⁴⁴ Government Circular, No 12 of 1953

When a granted right of occupancy has been accepted, the President issues a Certificate of Title, which includes all terms and conditions for the grant.⁴⁵ (See Annex C)

Deemed rights of occupancy are held under customary law where the law deems customary landholders as lawful occupiers. Historically, the idea of traditional land right was that ownership was connected to the corporate ownership of land. Deemed or customary land rights of the native were said to be a permissive and occupational right providing a *usufructuary* title, i.e. right to land provable on use. The rights did not confer to the individual title to land. Later studies have shown that different African communities show various systems of landholding. Therefore, customary land tenure cannot be generalised. The traditional idea of usufructuary title still applies to define customary land rights today.

To be able to be allocated customary held land, one has to be a member of a family, clan or tribe. The customary land rights will be those applicable within these institutions. The allocation must be made valid by the native authority. In pre-colonial times, native authorities consisted of chiefs or other traditional leaders, appointed by traditional right. Their functions were assigned to elected members of Local Government Authorities created under the Local Government Ordinance, Cap 333, enacted in 1953. Nowadays, the current law concerning local authorities is the Local Government (District Authorities) Act, 1982. (See Annex B). The meaning of the “native community“ under the Land Ordinance is considered to be the District Authority, which at a lower level of administration is represented by the Village Council. Therefore, the practices sanctioned by the Village Council in allocation and usage of land are the ones relevant to any legal conception of customary land tenure. To be able to be allocated a piece of land, the person seeking land has to be a member of a community, family, clan or a tribe. Allocation must be made valid by the traditional allocating authorities; the Village Council and District Council.

Deemed rights have not been specifically defined in the Land Ordinance or any official document. Primary emphasis has been directed towards granted rights of occupancy.⁴⁶

3.2.1.2 The Impact of the Dichotomy between Statutory and Customary Law

The two modes of Rights of Occupancy - granted rights of occupancy governed under statutory law and deemed rights of occupancy governed under customary law - are not on equal footing in reality, even though the Land Ordinance provides equal value to the two forms of occupancy. The former grant is statutory and hedged with safeguards, including the right not

⁴⁵ Section 9, Land Ordinance, 1923

⁴⁶ Tenga, *Pastoral Land Rights in Tanzania: A review*, 1992, pp. 6-9

to be deprived of the right of occupancy except for reasons of public interest or for good cause.⁴⁷ Due to lack of such safeguards for deemed rights of occupancy, it is difficult for the holder of a customary title to enforce interests in the land against a grantee under statutory law.⁴⁸ Plus, the unfair result of the dichotomy of customary and statutory law hits the pastoralists in a more severe way. According to the Constitution, anybody can settle down in any part of Tanzania, since territories are not demarcated after ethnicity. The right to settle down is predicated by the consent of the recipient community, which requires a permanent presence in the area. Yet, when it comes to pastures, part of the land is abandoned seasonally in search for water and grass. To the future landowner, the land appears to be unoccupied and consequently free to possess. Considering the Maasai are pastoral and mobile, there has not been a proper recipient community to guard the allocation of land.⁴⁹

For an agricultural community, communal lands are regarded as *public land*. Those lands form a reserve of land for future cultivation. But when it comes to pastoral societies this application does not work. There, communal land, in the form of pasturelands, is the basis for livestock production. This land is not a reserve for future crop production, but already utilised for extensive (recurrent) grazing of livestock which is the major productive activity of the pastoral society.⁵⁰

The written law and land administration during the post-colonial period have shown severe and damaging ambivalence towards the co-existence of statutory and customary law. Land has easily been acquired by the state without taking any account to the indigenous population of the land. The following cases show how the courts have ruled when such circumstances have prevailed.

In the case of *Mulbadaw vs. NAFCO*⁵¹, land was alienated under the guise of a national project to the National Agriculture and Food Co-operation (NAFCO). No consultation with the customary occupants was made and the Government had not followed the procedures of the Land Acquisition Act for compulsory acquisition. The presumption was that the customary owners had no legal rights to the land and therefore the Land Acquisition Act was not applicable.⁵² The High Court and the Court of Appeal⁵³ held that the

⁴⁷ Section 10, Land Ordinance, 1923

⁴⁸ Twaib, *The Dilemma of the Customary Landholder. The Conflict between Customary and Statutory Rights of Occupancy in Tanzania*, p. 86. (In: Debusmann and Arnold, *Land law and land ownership in Africa. Case studies from colonial and contemporary Cameroon and Tanzania*, 1996)

⁴⁹ Tanzania - Sweden Forestry and Environment Sector Support Programme, *Environmental Impact Assessment of Land Use Related Activities in Simanjiro District*, 1996, p. 38

⁵⁰ Tenga. *Pastoral Land Rights in Tanzania*, 1992, pp. 10-13

⁵¹ *Mulbadaw v. NAFCO*, Civil Case No. 10 of 1981, High Court, Arusha

⁵² Shivji, *Not yet Democracy, Reforming Land Tenure in Tanzania*, 1998, p. 10

⁵³ *NAFCO vs. Civil Appeal No. 3 of 1986*, Court of Appeal

customary rights stood on the same footing as granted rights, and therefore should have been subject to the proper procedures required by the Land Acquisition Act. It was further stated that a grant of a right of occupancy made by the President under the Land Ordinance on land held under deemed rights of occupancy is invalid unless the deemed right is lawfully acquired according to the provisions of the Land Acquisition Act. The Act requests consultation and compensation before a customary right may be extinguished. However, the Court of Appeal came down in favour of NAFCO, stating that the claimants had not shown that they were “natives“ entitled to hold customary rights.

In the case of *Nyagwasa vs. Nyirabu*, 1985, the Court of Appeal undermined the principle laid down in the Mulbadaw cases. It was held that a plot of land in a registered village could be granted validly by the President to an outsider, despite the lack of approval of the Village Council for such a disposition. This was based on the ground that the President and the state institutions were the “superior landlords“ under the Land Ordinance.

The two contradictory opinions of the court cases demonstrate ambivalence and confusion towards the legal framework of village land tenure.⁵⁴

⁵⁴ Shivji, *Not yet Democracy, Reforming Land Tenure in Tanzania*, 1998, pp. 14-16

4 Analysis of Unauthorised Expansion of Farming in Simanjiro

a) *UNDER THE CURRENT LAND LEGISLATION*

4.1 Introduction

Recent measurements have revealed several farms in Simanjiro being too big compared to their title deeds. The objective of this chapter is to investigate the legal ways of retracting the excess part of land outside the original title deed and how this procedure could be dealt with. A summarising scheme illustrating the problem is attached at the end of this chapter.

Through various forms of land alienation (of the jointly utilised grazing land), large-scale farmers have been given the opportunity to establish commercial farms in the district. Since the pastoralists leave little evidence of occupation - their migratory pattern leaves large areas idle for long periods of time - this has permitted initial alienation. The general land policy since Independence has promoted crop development over extensive livestock grazing regimes.⁵⁵ For the arriving farmer, the land has appeared unoccupied and he or she has normally had little or no problem in receiving the land on a long-term lease.

Well established since the 1980s, these farms have discovered the advantages and disadvantages of the Simanjiro soil. The soil is appreciated because of its relatively high fertility and because of the lack of soil born diseases. Still, the land is difficult to cultivate, requiring clever tilling techniques, and the soil has to be used very carefully so as not to exhaust nutrients and moisture. With the appearance of empty land all around and spare machinery capacity, it has been tempting for some farmers to expand the cultivation outside the area stated in the certificate of right of occupancy. Some farmers have applied for title deeds for additional land, but due to the slow administrative process of issuing titles, they have lost their patience and gone ahead with unlawful cultivation.

The combined effects of alienation of large areas of land and the unauthorised expansion of farms have had serious detrimental effects on the Maasai. They are now frequently blocked from grazing areas and water sources by cultivated fields. The Maasai have been forced to move to more

⁵⁵ Lane, *Pastures Lost: Alienation of Barabag Land in the Context of Land Policy and Legislation in Tanzania*, Nomadic People, 34/35:1994

marginal lands and often have to use grazing areas on a year round basis instead of saving some areas for dry season grazing.

4.2 Allocation of Land

The MLUHD manages, administers and allocates land on behalf of the President. Through a Circular, the Ministry has set up a system of land allocation committees from village level, through district and regional, to ministerial level.⁵⁶ Proper allocation of land should be applied under the following procedure:

If the land of interest is larger than 10 acres, the individual applicant of land sends an application to the Village Council, which contains information about the name, acreage and the use of the land applied. The Village Council of 25 members has a meeting to discuss and deliberate on the application. If the application is accepted, the Village Executive Officer prepares the minutes of the meeting, which states who were and who were not present. The Village Council Chairman and Secretary sign the minutes if they do not have any objection to the allocation. The minutes and the application are sent to the District Land Development Committee, chaired by the District Commissioner and whose secretary is the District Land Officer, for deliberations. They check if the Village Council had a full quorum of more than 13 members to discuss the application. They also look if the village truly has the specific piece of land. If everything is in order, the land is granted to the applicant. A grant over 100 acres is decided upon by the Regional Land Development Committee and a grant over 500 acres must receive the President's consent.⁵⁷

In summary,
the Village Council alone can grant not more than 10 acres of land.
The District can grant up to 10 - 50 acres.
The Region can grant up to 50 - 100 acres.
The President is the only authority who can grant land exceeding 500 acres.⁵⁸

Whether the allocation is for 10 or 500 acres the approval of the Village Council (and District Council and Regional Commissioner) is always obligatory. In other words, if a large-scale farmer would like to apply for a

⁵⁶ URT, *The Report of the Presidential Commission of Inquiry into Land Matters, Vol. 1, Land Policy and Land Tenure Structure*, 1994, p 25

⁵⁷ The same procedure must be followed where a villager wants to have his land surveyed for the purpose of obtaining an Individual Title or a sub-lease from a Village Title Deed. (See 5.4)

⁵⁸ URT, *The Report of the Presidential Commission of Inquiry into Land Matters, Vol. 1, Land Policy and Land Tenure Structure*, 1994, p. 30, The legal validity of this system is not clear. In law, it would be presumed that the allocating institutions would be carrying out their functions as delegates of the Ministry. The system is of a bureaucratic structure with little direct participation from the actual land users and with ineffectual transparency.

piece of land exceeding 500 acres, he still has to receive the accord from all concerned authorities before he may obtain the consent of the President.⁵⁹

If a landowner would like to obtain an individual title deed, he must apply for a Certificate of a Right of Occupancy and register his piece of land. This is a time-consuming and expensive procedure. In practice only large landholders with over 200 acres register their land. That land will be held under statutory law. The rest of the occupants own deemed rights of occupancy, which are governed by customary law.⁶⁰

4.2.1 Improper Allocation

During past years, Simanjiro District has been subject to several illegal or improper forms of land allocations.

Improper ways of allocation are selected below:

- a) Land has been subject to alienation by the Government.⁶¹
- b) Land has been obtained by Village Chairmen and Secretaries not holding proper meetings and/or forging Village Council minutes or signatures. There have also been cases of collusion between village leaders and district authorities granting land to outsiders, leaving some villagers landless.⁶²
- c) It is also common that land is allocated on false grounds by applications being made in acres, but later changed to hectares and with no documentation as proof. There are 2½ acres for every hectare, which automatically gives the titleholder more than double the size he originally applied for.⁶³
- d) Pure land grabbing where land is used without a title or any forms of permission whatsoever. This has been undertaken by persons in position

⁵⁹ Legal and Human Rights Centre, *Fifth Report of the Land rights training, 1997, Orkesumet - Simanjiro*, p. 27

⁶⁰ URT, *The Report of the Presidential Commission of Inquiry into Land Matters, Vol. 1, Land policy and land tenure structure*, 1994, p. 33

⁶¹ For example, the large-scale farm Royal Sluice was given a 7 000 acre lease in Naberera Village by the former President, Ali Hassan Mwinyi in 1985. (See 4.4.6). (Igoe and Brockington, *Conservation and Development in East African Rangelands: The Human Costs of Economic Liberalisation and Wildlife Preservation in NorthEast Tanzania. Recent Impacts on Pastoral Resource-Use in Simanjiro, Same and Lushoto Districts*, 1996, p. 48 In the case of *NAFCO v. Mulbadaw Village Council*, land was granted to NAFCO with disregard to the Village Council. The Land Ordinance requires the President to have regard to native laws and customs and is obliged to consult the native authority in control of the land, the Village Council. (Sec. 5 and 6, Land Ordinance. 1923) (Fimbo, *Essays in Land Law Tanzania*, 1992, pp. 115-116)

⁶² URT, *The Report of the Presidential Commission of Inquiry into Land Matters, Vol. 1, Land Policy and Land Tenure Structure*, 1994, p 30

⁶³ Illarmatak Lolkonerei, *Report on Simanjiro Land Disputes*, 1993, p. 3

of power or influence, for example Ministers, Regional Commissioners or Police Commanders.⁶⁴ (See also Annex A on Mining)

Land obtained by bribery or forgery is illegally acquired. The illegality of such farms should be heard in court. This is problematic due to the importance of proof. If it can be proven that land has been acquired illegally, this could lead to the eviction of the landholder. However, if evidence is lacking, the appellant will have difficulties in succeeding claiming illegal allocation. It is often hard to obtain the necessary evidence to prove the malpractice, due to missing, non-existent or forged documents. (If proof can be found and used successfully in court, the principle of limitation does not apply. See 4.4.4.)

In the above-mentioned cases of improper and illegal allocation of land, both the Government and resident Maasai have been involved. The Maasai referred to in these cases have often been of influential, for example members of the Village or District Councils.

The immediate following of this chapter will only refer to the cases of encroachment on land subject to proper allocation. (Even if this has shown to be a rare procedure of land allocation.)

4.3 Classification of Land

In order to solve the legal problem of unauthorised cultivation of land (encroachment) in Simanjiro District, the first task is to determine the classification of the land in dispute. This enables to decide which law is applicable: Statutory law, (the Land Ordinance and other statutes) or Customary law.

According to doctrine, it is not clear what law governs land tenure in villages. Nevertheless, case law and practice have indicated the application of customary law on village land. Doctrine suggests following applications of laws:

Statutory law is applied on land granted by a Certificate of a Right of Occupancy, resulting in an individual title deed. Statutory law is also applied if there is a presidential grant of land.

Customary law is applied on those rural lands where smallholder farmers and pastoralists traditionally live. If the District and Village Council grants land, customary law is practised on that land.⁶⁵

⁶⁴ Shivji, *Not Yet Democracy, Reforming Land Tenure in Tanzania*, 1998, pp., 36-37

⁶⁵ URT, *The Report of the Presidential Commission of Inquiry into Land Matters, Vol. 1, Land Policy and Land Tenure Structure*, 1994, pp. 45-47

4.3.1 The Village Titling Programme

Simanjiro District is subject to the *Village Demarcation, Titling and Registration Programme*. This programme, which consists of land surveying and demarcating boundaries, registration and issuing of certificates of village title deeds, originates from the National Agricultural Policy (Agripol)⁶⁶ from 1982.⁶⁷ The process is carried out under the existing legal regime established by the Land Ordinance and the Land Registration Ordinance. The Programme was thought to give villagers and villages greater land security. This was believed to be achieved through granting a Right of Occupancy through a Village Title Deed (VTD) to the Village Councils. (The Village Assembly is not a corporate body and can therefore not be granted such a right). It was then predicted that villagers, in turn, would be given sub-titles from 33 to 99 years' duration from the VTD.⁶⁸ Additionally, it was thought that this system would provide security of tenure to individuals, which in turn would lead to effective investments. Another objective was to ensure security of village land from outside encroachment.⁶⁹

The idea of village titling has attracted the Maasai villages. It has been seen as a way of hindering further alienation of land to outsiders. Yet in practice, this wish has not been obtained. The Government has continued to allocate land to commercial farming without consultation with or consent of the affected villages.⁷⁰ Furthermore, since village land is granted to the Village Council, the Council has had the possibility to independently allocate land without the participation of the Village Assembly, which in some cases has led to malpractice by few Village Council members.

The structure of the programme suffers from major conceptual, legal and practical problems. This was clearly revealed in Simanjiro. The conditions of the programme were not been followed and the villagers were confused concerning what legal status should be given to VTD in co-existence with already established individual title deeds. The programme of village titling is established in approximately half the number of villages in Simanjiro District. Therefore, it is necessary to examine the consequences of encroachment on village land with and without a VTD.⁷¹

⁶⁶ Agripol was enunciated in the Report of Task Force on National Agricultural Policy in 1982

⁶⁷ The cost for surveying, demarcating and registering is handled by the villages themselves, often assisted by NGOs. (Information from Interviews in Simanjiro District)

⁶⁸ The land granted by the village as a sub-lease is still vested in the Village Council and is not private property of the occupier.

⁶⁹ URT, *The Report of the Presidential Commission of Inquiry into land matters, Vol. 1, Land policy and land tenure structure*, 1994, p. 23 & p. 47

⁷⁰ Tanzania - Sweden Forestry and Environment Sector Support Programme. *Environmental Impact Assessment of Land Use Related Activities in Simanjiro District*, 1996, p. 52

⁷¹ The issuing of VTDs has been abandoned by the National Land Policy and will no longer exist under the new land legislation. (See 4.7)

4.4 Encroachment on Land in Village with VTD

In Simanjiro District, encroachment means the unauthorised cultivation undertaken by the farmer on excess land *outside* his title deed. When deciding what law is relevant, it is the status of the encroached land that is important, not the land within the title deed.

As stated above the question of which law should be applied is not clear on rural lands, especially after the establishment of village title deeds. This section is an attempt to trace the theoretical legal consequences of encroachment on land with a VTD. The conclusions that are found here are not necessarily those practised in reality.

4.4.1 Applicable Law

A strict interpretation of the system of village titling indicates that a village with a VTD should be governed by statutory law. This interpretation is supported by the fact that the establishment of village titling originates from written statutes, (See 4.3.1.). Furthermore, the issuance of a VTD to a village is similar to the issuance of an individual title deed, (surveying, demarcation, registering and titling. An individual title deed is governed by statutory law). The sub-title granted to individuals in the village is of a limited period of time and likewise implies that statutory law should control the individual sub-title.

The problem of encroachment on land with a VTD will hereinafter be examined according to statutory law.

4.4.2 Provisions Enabling Retraction of Land Governed by Statutory Law

Since large-scale farmers are cultivating land outside the area stated in their Certificate of Right of Occupancy, it is necessary to determine possible ways of retracting the excess part of land. The Land Ordinance points out two provisions concerning retraction of land governed by statutory law:

Section 10; *Revocation of rights of occupancy* and Section 23; Proceedings in case of *Unlawful Occupation*.

4.4.2.1 Revocation

Agriculture is expected to contribute to national development. If a land occupier is not able to fulfil certain conditions related to utilisation and production of the land, it should be revoked in order to be better utilised by somebody else. For example, revocation is used when farmland is abused and causes environmental damages or when the land is abandoned or

neglected.⁷² To retract land to enable agricultural development is the essence of revocation.

It should be noted that revocation is a sanction after there has been a breach of the law. Revocation is only stated in statutory law. The term does not exist within customary land rights.

The procedure of revocation is purely administrative, involving the Land Officer, the MLHUD and the President. The President has the exclusive right and authority to revoke a Granted Right of Occupancy, while the Land Officer initiates revocation. The MLHUD is the administrator of revocation.

There are two situations in the law stating when a granted right of occupancy may be revoked; revocation for *good cause* and revocation in *public interest*.⁷³

Good cause in relation to the revocation of a right of occupancy has received judicial interpretation in the case of *Patman Garments Industries Ltd v Tanzania Manufacturers Ltd*⁷⁴. The Court of Appeal stated that good cause must be objectively determined and should not be a matter of the interpretation by government officials.⁷⁵

The President may revoke the right of occupancy where it is in the *public's interest* to do so⁷⁶. This provision is subjective, as opposed to the determination of good cause.⁷⁷

⁷² URT, *The Report of the Presidential Commission of Inquiry into Land Matters, Vol. 1, Land Policy and Land Tenure Structure*, 1994, Cap. 13

⁷³ Section 10 (1) and (2) of the Land Ordinance, 1923. (Section 10 (2) is not printed in the sample of the Land Ordinance attached in the Annex D) and URT, *The Report of the Presidential Commission of Inquiry into Land Matters, Vol. 1, Land Policy and Land Tenure Structure*, 1994, p. 89

⁷⁴ Court of Appeal, Dar es Salaam, Civil Appeal No. 15 of 1981 (1981) TLR 303

⁷⁵ Tenga, *Pastoral Land Rights in Tanzania: A Review*, 1992, pp. 3-6 The case of *Patman Garments Industries Ltd. v. Tanzania Manufacturers Ltd.* was an issue of double allocation of a plot in Dar es Salaam first made to Patman Garments. However the same plot was offered to the Tanzania Manufacturers. Patman Garments were revoked and asked to remove the structures from the plot by the High Court. The Court of Appeal held that the decision made by the President revoking the right or occupancy was bad in law, because it was made for no good cause and was therefore, an unlawful exercise of the power conferred by Section 10(1) of the Land Ordinance. Finally, Patman Garments were declared the rightful owners of the plot. (Fimbo, *Essays in Land Law Tanzania*, 1992, pp. 95-96) Furthermore, the Court of Appeal established that the President could not revoke any grant of a right of occupancy for good cause unless the conditions prescribed by law for its exercise are fulfilled. Furthermore, it is established that the order of revocation will be declared null and void by the courts if it was to be established improperly or mistakenly. (Fimbo, *Essays in Land Law Tanzania*, 1992, pp. 128-131)

⁷⁶ Revocation for public interest is at the discretion of the President and the term is undefined. One could get the impression that the term should be used for situations such as armed forces in times of war, construction of railroads, highways and government buildings, schools, hospitals and other facilities which serve the general good of society, basic infrastructure or common welfare. Instead, public interest has been used in practice, to correct the mistakes and malpractice of allocation of land. (URT, *The Report of the*

The act of revocation applies to the whole area under the individual title deed. If the land is revoked, the occupier loses the entire piece of land.

4.4.2.2 Unlawful Occupation

According to Section 23 of the Land Ordinance, any person who is found to be in unlawful occupation of public land may be ordered by court to surrender the land within a certain period of time and upon such terms as the court decides just.

In practice, it is the Land Officer, on behalf of the President, who evicts the unlawful occupier. The Land Officer serves a notice upon the occupier requiring him to quit before a stated date. If the notice is ignored the officer files a plaint in the Resident Magistrate's Court asking for the eviction of the person in unlawful occupation. If the person does not surrender, he or she will be guilty of an offence and be liable to pay a fine.⁷⁸

The burden of proof lies upon the defendant who has to show that his occupation was lawful. Has he been in possession of the land for more than 12 years, the claims against him will be dismissed.⁷⁹

The application of unlawful occupation refers to the intrusion upon land held by an individual. Therefore it must be asked if the provision is applicable in the case of encroachment on Maasai land, since that land is communally owned, not individually. In the court case of *Attorney General vs. Akonaay* (1994), it was found 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 in the Constitution of Tanzania. Together with Article 29, stating the right for everybody to enjoy and benefit basic human rights, it could be concluded that a person is entitled not only to own and receive protection for his property but also to be able to enjoy and benefit from it.⁸⁰

The ruling of this court case indicates that it is safe to say that the provision of unlawful occupation is applicable on land used by the Maasai, since that land is held under customary law.

4.4.3 Recommendations on Applicable Provisions

In the case of unauthorised cultivation on excess land in a village issued a VTD, it is decided that statutory law applies. Two possible provisions

Presidential Commission of Inquiry into Land Matters, Vol. 1, Land policy and land tenure structure, 1994, p. 89)

⁷⁷ Tenga, *Pastoral Land Rights in Tanzania: A Review*, 1992, pp. 3-6

⁷⁸ James, *Land Tenure and Policy in Tanzania*, 1971, pp. 102-103

⁷⁹ Section 23 (3), The Land Ordinance, 1923

⁸⁰ Shivji and Kapinga, *Maasai Rights in Ngorongoro, Tanzania*, 1998, pp. 30-31

applicable on retraction of the excess land have been presented: Revocation and Unlawful Occupation.

It is recommended that the provision of unlawful occupation is used in the situation of Simanjiro instead of the provision of revocation. Unlawful occupation applies to the excess piece of land only. There is a possibility to claim for the surrender of land by the unlawful occupier. The burden of proof lies on him to show that he has the right to the land.

Why revocation is unsuitable is described subsequently: Revocation of a granted right of occupancy is primarily put to use when the land occupier is not utilising or developing the land properly. For example, abandonment of farming areas or the use of deficient modes of farming, which causes land erosion. Furthermore, revocation is applicable on the entire title deed, meaning that the whole area belonging to the farmer is revoked, and not only the excess land. The cases in Simanjiro are concerned with retraction of *a piece* of land, *outside* the title area. Nowhere in Section 10 of the Land Ordinance is there a mentioning of partial revocation, or revocation of land outside the title deed.

Consequently, the application of revocation is not suitable in the case of encroachment by the farmers in Simanjiro, since the objectives of revocation are not focused on unauthorised expansion and occupation of excess land. Moreover, reminded by the case of *Patman Garments Industries vs. Tanzania Manufacturers*, revocation should not be exercised, unless the conditions prescribed by law are fulfilled. Additionally, it is easy to forget the farmer in this situation. If he has obtained a title deed, he should feel secure of it and not fear to be evicted on subjective or unclear grounds. Furthermore, District officials have argued that the process of revocation causes financial problems since compensation is required to be paid.⁸¹

Nevertheless, if farmland is abandoned or misused such as some farms in the District, this is a clear-cut case for revocation.

4.4.4 Prescription and Limitation

If land should be subject to unlawful occupation, the principles of prescription and limitation are important and should be examined.

Prescription means the acquisition of property by long and uninterrupted possession. The principle is recognised but not laid down in law. (Customary law does not recognise a concept of prescription). The motive of the doctrine is to protect the developer of the land. Case law ruled that twelve years is the time period from when prescription may be applied. This means that in the event there is clear evidence of unlawful occupation for

⁸¹ URT, *Report of the Presidential Commission of Enquiry into Land Matters, Vol. II, Selected Land Disputes and Recommendations*, 1993, pp. 12

twelve years or more, the unlawful occupier may claim ownership of the land. However, courts have been ambivalent to fixate a twelve-year limit, whereas the period before prescription is uncertain and varies from 12 to 20 years.⁸²

Limitation means the extinction of stale claims. Rights of action are limited in time and are lost if not pursued within due time. Limitation is stated in the Law of Limitation Act, 1971, which also stipulates the period of time for limitation to twelve years.⁸³ In the event of unlawful occupation for less than twelve years, the unlawful occupier loses his right to the piece of land, supposing the lawful owner has taken action within this period of time.⁸⁴

In conclusion, a person seeking to apply the provision of unlawful occupation under the Land Ordinance has to act within 12 years to be able to secure the excess piece of land.

4.4.5 Compensation under Statutory Law

Section 14 of the Land Ordinance provides for compensation for *unexhausted improvements*, if the land user is removed from the land he occupies. Unexhausted improvements means things permanently attached to the land directly resulting from capital or labour. The findings of ordinary cultivation other than standing crops or growing produce are not recognised as unexhausted improvements.

There is no mentioning of compensation for land *per se*. The explanation for this is that land is public and when the President retakes possession from the occupier, compensation for land itself is not due. The basis of compensation for unexhausted improvements lies in the light of the right to use and occupy land, not to own it.

Compensation is not valid for vacant or undeveloped land, since the Land Ordinance defines unexhausted improvements to be any developments made to land enhancing the value of the land. This affects the Maasai severely. What they do to the communal lands - keeping water holes open or building thorn fences to protect the animals at night, does not constitute unexhausted improvements. Therefore, if land is alienated by the President, the Maasai are not entitled to compensation for land.⁸⁵ The land must have been in use for cultivation or grazing during the previous twelve months, for the occupier to be able to claim compensation. Otherwise, the land is considered to be vacant.

⁸² James, *Land Tenure Policy in Tanzania*, 1971, p. 270

⁸³ *Ibid.*, p. 274

⁸⁴ James and Fimbo, *Customary Land Law of Tanzania*, 1973, p. 556

⁸⁵ Mwaikusa, *Community Rights and Land Use Policies in Tanzania: The Case of Pastoral Communities*, *Journal of African Law*, No. 2, Vol. 37, 1993, p. 147

Payment of compensation is provided to the outgoing occupier. He is paid by the President, who previously has received payment from the incoming occupier.⁸⁶

If a person has unlawfully occupied land, it is stated in section 23 of the Land Ordinance that it is he who has to pay a fine since he has been guilty of an offence. An unlawful cultivator occupies land at his own risk and subsequently cannot claim compensation for the unexhausted improvements he has made. However, case law has accepted claims for compensation for encroachment if special requirements are fulfilled. These requirements are first that the occupation was made under mistake and secondly, that the rightful owner must have known that a stranger had been cultivating his land but has made no protest. These requirements are cumulative and cannot exist without the other. In other words, if the person encroaching on land, aware that he is not the owner, he does not have any right to compensation, even if he can establish that the rightful owner accepted his presence.⁸⁷

4.4.6 Encroachment by Farmers in Naberera Village

Naberera Village is situated in the central part of Simanjiro. The village is severely affected by the large-scale land loss to commercial farms and is described here as an example of a village subject to dubious allocation of land and land alienation by the Government.

Naberera Village is a registered and titled village. Because of its natural features and strategic location, the village attracted many large-scale commercial agricultural enterprises following the economic liberalisation and structural adjustment in 1985. The first enterprise was a Dutch seed company called Royal Sluice. The company was given a 7 000 acre lease in 1985 by President *Ali Hassan Mwinyi*. During the following years, over 20 expatriate and Tanzanian companies established business in Simanjiro. (The Tanzanian citizens, who have established themselves in the district, are not necessarily of African descent, but also of Indian, Arab and European origin.) The end result of large-scale alienation is that the bulk of the wet season dispersal areas and seasonal water sources are under agricultural production. Local herders have to obtain permission from the farm to drive their herds past the farm gates. Since the establishment of Royal Sluice, the farm has expanded its land holdings. The size of expansion is unclear.⁸⁸

⁸⁶ URT, *The Report of the Presidential Commission of Inquiry into Land Matters, Vol. 1, Land policy and land tenure structure*, 1994, pp. 82-83

⁸⁷ James, *Land Tenure and Policy in Tanzania*, 1971, p. 296-297

⁸⁸ Igoe and Brockington, *Conservation and development in East African rangelands: The Human Costs of Economic Liberalisation and Wildlife Preservation in North East Tanzania. Recent impacts on pastoral resource-use in Simanjiro, Same and Lushoto Districts*, 1996, pp. 48-47

In the pending case of *Mary Labdaki vs. Naberera Village Council*⁸⁹ 12 farms are accused by a group of village members of excessively cultivating land outside their title deeds. Three of the accused farms were visited during the field study in Simanjiro District; Okutu farm, Tandala and Shokat farm. Two of the farms were owned by British farmers and the third by an Indian Tanzanian. One of the farmers accused of cultivating excess land explained that he had applied for an additional piece of land of 300 acres. The procedure was too lengthy, so the farmer started to cultivate without the additional Certificate of Right of Occupancy. The land had been surveyed and the farmer said that he had all the necessary approvals from all required authorities, except just the Certificate. Therefore, he had started to farm on the excess piece of land.

Despite the pending case, the farmers did not feel insecure concerning their title deeds of land. (All the farms had individual title deeds, granted rights of occupancy). One farm had even been paid a visit by the Regional Commissioner who had urged the farmer to continue to invest and develop his farm.

The farmers experienced little conflict with the Maasai except for the current lawsuit. However, they all wished for a final court decision soon, so that all parties involved would know what to do.

One farmer meant that the existence of big farms benefited the Maasai. He permitted grazing of cattle on his fields after harvest and helped the Maasai financially when hospital care and other services were needed. Another farm left dams open for the Maasai as a way of “saying thanks”.⁹⁰

4.5 Encroachment on Land in Village without VTD

4.5.1 Applicable Law

If a village title does not have a VTD, the village land is administered under customary law, i.e. Maasai customary law. If an individual receives an individual title deed within the boundaries of the village, the land under his title is administered under statutory law. Confusion has been caused due to the question which law applies if he expands over his title boundaries. Since he is encroaching upon customary land, it must be concluded that customary law is applicable. Additionally, the fact that the encroachment affects people usually governed by customary law indicates that customary law should be

⁸⁹ *Mary Labdaki & 8 Others v. Naberera Village Council & 12 Others*, Civil Case No. 10 of 1996. The case is financed by exterior sponsors. (Interviews in Naberera, Simanjiro District, 1998)

⁹⁰ Interviews in Naberera Village, Simanjiro District, 1998.

applied. The Land Commission and case law also suggest the application of customary law.

4.5.2 Retraction of Land Governed by Customary Law

Maasai customary land rights are more thoroughly explained in Annex A. In conclusion, communal land is held and controlled by a corporate unit. It is not allocated for use to a unit lesser than the corporate unit itself, for example an individual. Traditionally, individual land ownership does not exist in the Maasai society, since the exercise of herding of cattle requires utilisation of vast areas without dividing borders. The elders in the village decide the way land should be used and direct specific migrating patterns according to the seasons.⁹¹

Nevertheless, allocation of individual plots among pastoralists exists today, due to the increase of agricultural small-scale production. If a Maasai desires a piece of land, he turns to the Village Council who may allocate not more than 10 acres of land. This land is assumed to be governed by customary law. It is held in perpetuity and is not subject to limited duration of 99 years or to development conditions, such as land granted under statutory law.

4.5.2.1 Trespassing

If a farmer cultivates land outside his title deed in a village without a VTD, customary law is applicable. The farmer is encroaching on communal land, therefore the Maasai may claim *trespassing* on land.

In the case of *Yohama s/o Bachubira v. Pio s/o Kamara*⁹² it was held that trespassing was not a question covered by any specific customary law. Two principles were established:

- a) A man is entitled to make what he considers the best use of his land; and
- b) If he trespasses or encroaches on his neighbour's land, he may be restrained and will be liable for all loss or damage to his neighbour.⁹³

The liability of a landholder for trespassing or encroaching appears when his neighbour has certain general rights, which the law attaches to the neighbours holding of land. These rights are “natural rights of property“. Encroachment may mean overhanging or intrusion in or upon the soil. The general rule is that a landholder shall not use or maintain his property in a way that causes unreasonable damage to his neighbours property or crops. A

⁹¹ Legal and Human Rights Centre, *Fifth Report of the Land rights training, 1997, Orkesumet - Simanjiro*, p. 22

⁹² (1922) Digest 222 (Haya Law)

⁹³ James and Fimbo, *Customary Land Law of Tanzania*, 1973, pp. 510-511

breach of this rule would make the defaulter liable to damages and the court may order the removal of any encroachment.

Case law states the protection of the principle of sanctity of property rights. If a person accumulates excessive communal land, a piece of it ought to be given to someone else.⁹⁴ He may be made to give up portions thereof by the land-allocating authority.⁹⁵

The cases referred to above examine trespassing on individual land. However, analogous with the reasoning behind application of unlawful occupation on communal land (see 4.4.1.), trespassing should be considered to be applicable on encroachment on the customary land of the Maasai as well.

The Customary Law (Limitation of Proceedings) Rules of 1963 states that the application of the Law of Limitation Act is of general application when the claim of limitation is founded upon customary law. Hence, the Maasai must act within 12 years in order to be successful while claiming trespassing. Like the provisions of unlawful occupation, trespassing applies to the extent of the excess land, not the whole area within the individual title deed.

As stated above, the principle of prescription does not exist as a concept in customary law.

4.5.3 Compensation under Customary Law

Under Maasai customary law, ownership is not dependent on use. Sale of land is recognised, as well as compensation for labour and the results originating from labour.⁹⁶

It has been suggested that the offering of alternative lands would be an appropriate way of compensating the Maasai for the loss of land. Yet, it is important to note that alternative land will not necessarily respond to the needs of the Maasai. If the alternative area is not fertile or lacks essential water sources, such land is of no worth to the pastoralists.⁹⁷

Early case law concerning trespassing on land and claims for compensation for improvements were rejected. Court judgements stated that the trespasser cultivated land on his own risk and was not entitled to compensation. Later

⁹⁴ *Mtongori Nyamagaini v. Richi*, (1966) L.C.C.A. No. 62/1965 (Musoma district, Mara region)

⁹⁵ *Semali s/o Kitongota v. Aiwinyi s/o Nderingo* (1946) App. Cas. No. 36/1946; *Israel Kasitai v. Sungare* (1954) Digest no. 67. (James, Land Tenure and Policy in Tanzania, 1971, pp.283)

⁹⁶ URT, *The Report of the Presidential Commission of Inquiry into Land Matters, Vol. 1, Land policy and land tenure structure*, 1994, pp. 82-84

⁹⁷ *Ibid.*, p. 93

judicial approach differs and does not deny compensation for made improvements.⁹⁸ (See 4.4.5) There are no indications that the principles of compensation after unlawful occupation should not apply to compensation after trespassing.

4.5.4 Procedure for Settling of Land Disputes

When resolving land disputes, the principal machinery is the judicial system. The Primary Court has jurisdiction over land governed by customary law. Practically all land disputes in rural lands not held under granted rights of occupancy start by application to the Primary Court. Appeals are supposed to be issued first to the District Courts, then the High Court and eventually to the Court of Appeal.

The judicial path for statutory land matters originates from the District Court to the Resident Magistrate Court, the High Court and eventually to the Court of Appeal.

However, there is no certain, known or accessible way of machinery for settling disputes. Overlapping legislation and land reforms have led to the involvement of several instances - from the villages to the Ministry - in dispute settlements. The executive function has a more dominant role concerning solutions of land disagreements than the functions of the courts. This causes overlapping of jurisdiction and powers, which in turn results in confusion and delays of rulings.⁹⁹

For the Maasai there are disadvantages of taking disputes to court. The procedures are lengthy, expensive and unfamiliar to the Maasai. Moreover, if the proper procedures were to be followed in the case of encroachment of land by large-scale farmers, the Maasai villagers would have to turn to the Land Officer for help. This procedure does not help the Maasai, since the Land Officer is obliged to the farmers as well. Because the productions from farms benefit the district in forms of taxes and rent, the district is unwilling to hinder the development of farming.

It is better for the Maasai that disputes are resolved at the local level, within the villages. Village leaders such as Chairmen and Secretaries receive and deal with some land disputes. I was also told that land disputes in Simanjiro were managed internally by the villagers by "sitting down" and discussing the problem until consensus was reached.

⁹⁸ James and Fimbo, *Customary Land Law of Tanzania*, 1973, p. 606-607

⁹⁹ URT, *The Report of the Presidential Commission of Inquiry into Land Matters, Vol. 1, Land policy and land tenure structure*, 1994, pp. 101-105

4.5.4.1 Alternative Ways of Settling of Land Disputes

Since, the procedures provided in law for settling disputes are unsatisfactory for the Maasai, it is necessary to suggest alternative ways of reaching solutions.

In the case of encroachment by farms on pastoral ground, a solution reached by the concerned parties would be preferable. A direct dialogue should be established between the farmers and the Maasai. The decisions would be achieved on the local level and would be well understood by the parties involved. The function of the Land Officer could be to bring the parties together for discussions. (In the new Land Act, a Mediation Panel may be established as an alternative way of taking care of land disputes, see 4.6.1.)

If a farmer wishes to extend his cultivated piece of land, the communities must benefit from these enlargements of farms in one way or another. For example, the farms can permit grazing after harvest, contributing to the building of schools, financing hospital and veterinary services and so on. In order for these requirements to be effective, they should be defined explicitly in the form of by-laws.¹⁰⁰ (See Annex B)

Land use plans suggesting where there should be farming land and pastureland should be decided by the villagers of in Simanjiro. This could prevent further disputes, as herders and farmers would know where to undertake respective activity.¹⁰¹

B. UNDER THE NEW LAND ACTS OF 1999

4.6 Introduction to the New Land Legislation

In 1991 the Presidential Land Commission was appointed by the President to investigate, review and analyse land disputes, tenure and law policy in Tanzania. The Land Commission presented a very thorough report and a proposal for a land reform in *The Report of the Presidential Commission of Enquiry into Land Matters*. The Report was disregarded by the Government and sidelined by the National Land Policy conceived by the MLHUD. Eventually, the Ministry wrote a New Land Act Bill divided into two parts. These Acts were passed by the Parliament in February 1999 after being tabled in late 1998. The Acts will not enter into force until they have been translated into Kiswahili.

¹⁰⁰ Igoe and Brockington, *Conservation and development in East African Rangelands: The Human Costs of Economic Liberalisation and Wildlife Preservation in North East Tanzania. Recent impacts on pastoral resource-use in Simanjiro, Same and Lushoto Districts*, 1996, pp.99

¹⁰¹ Interviews, Simanjiro District, 1998

The information provided in this chapter is derived from second hand sources.¹⁰²

4.6.1 The New Land Acts

The new Land Act consists of two parts. The Land Act (LA) and the Village Land Act (VLA).

The LA is the main framework of law and provides for the legal regime of holding property. For instance the principles on which land law will be administered, the policy and approach to tenure that will apply and a new machinery for land disputes.

However, most land in Tanzania, will fall under the VLA, which concerns village land. This act sets out how land may be owned and how tenure will be administered. Nevertheless, the two acts are interdependent and should be interpreted together. Both of them derive from the National Land Policy of 1995, which has retained the principle of root ownership of all land in the hands of the President as a trustee for the nation. The citizens will continue to own solely interests or rights in land, but not land as such. As in the present land law system, these rights add up to ownership in effect, especially the customary right holders who are declared to hold their rights in perpetuity.

4.6.1.1 The Village Land Act

The VLA presents some significant changes compared to the Land Ordinance. All modifications are not mentioned here due to the limitation of space. Therefore, only the regulations that particularly affect the pastoral way of life will be presented in the section below:

- a) Customary and statutory law will be stated to be of equal value in the law. Customary rights are going to continue where they currently operate. Traditional ways of holding land will be recognised and supported in law. Identification and protection of communal lands as property managed by the community is encouraged.
- b) Full, fair and prompt compensation shall be provided to any person whose right of occupancy or customary use of land is revoked or acquired through the Land Acquisition Act.
- c) Some land administration will be centralised in the Commissioner of Lands at the MLHUD, but most will be delegated to the village level. Virtually no administrative function will be provided to the District Councils.

¹⁰² During my study in Tanzania, there was no written information available for the public concerning the acts.

- d) It is stated that the rights of the pastoralists to occupy and use land must be regarded no less favourably than the rights of agriculturists.¹⁰³ A framework will enable different uses in the same land to be legally embedded in joint land use management agreements. There will also be provisions for land associations to enable rights to be titled over large tracts of land shared by a large group of different persons or villages.¹⁰⁴

4.6.1.2 Certificate of Village Land

Of special relevance to the situation of cultivation of excess land in Simanjiro is the abolition of the Village Title Programme. The currently existing VTDs will automatically be converted into Certificates of Village Land (CVL).

The differences between the VTD and the CVL are explained in the following: The VTD gives ownership rights to the Village Council, The CVL will only vest jurisdiction to the Village Council, meaning the right, power and responsibility to manage land tenure within the village. The jurisdiction of the Certificates will not give ownership to the Village Council, but jurisdiction in perpetuity. The Village Council may be replaced and even sued by villagers for failure of managing land.

The new system is hoped to give way for individuals to obtain stronger rights over their individual property. Individuals will receive maximum ownership meaning customary rights in perpetuity. Customary rights will therefore be seen as equivalent to statutory rights. The intent is to be able to register this ownership of land under customary law.

The Village Titling system required formal survey and mapping which limited the number of villages receiving title deeds. The issuing of CVL only requires an agreement by the Village Council together with neighbouring Village Councils. The boundaries do not have to be demarcated, only agreed upon.

4.6.2 Retraction of Land in Village with CVL

The Land Commissioner will issue every village a CVL. Already existing VTDs will automatically be converted to a CVL. Of major importance is that land under a CVL will be stated to be governed by customary law. In regard to individual title deeds, these will continue to exist until their end of term. The LA does not allow new individual title deeds to be granted on village land anymore. Instead, a non-villager granted land in a village will hold that land under customary law. Non-citizens (who do not count as non-villagers) are unable to acquire customary rights of occupancy. They may acquire land in a village through a lease or through renting.¹⁰⁵

¹⁰³ Wily, *An Explanatory Guide to the Content of the Tanzanian Bill for the Village Land Act*, 1998, p. 45

¹⁰⁴ Wily, *An Explanatory Guide to the Content of the Tanzanian Bill for the Village Land Act*, 1998, p. 20

¹⁰⁵ *Ibid.*, p. 15-17

Considering the facts above, customary law will be applicable in the case of unauthorised cultivation of excess land. If a village does not have a CVL, customary law will also be due, since the situation will be identical as to when land is lacking a VTD. (See 4.5) Consequently, whether land is issued a CVL or not, customary law will always apply on rural lands under the new land acts.

Analogous to the case under 4.5 the Maasai may claim trespassing if someone intrudes on their land, when the new land acts have entered into force. The VLA also lists unlawful occupation as an offence. The repercussions consist of fines or imprisonment not exceeding three years.

4.6.3 Procedure for Settling of Land Disputes

New machinery specifically established for land disputes is provided for in the new Land Acts. At the local level the Primary Land Courts and District Land Courts will function. They reach up to the Land Division of the High Court on regional level.

In addition, each village may establish a Mediation Panel aimed to solve disputes outside the court system. The decisions made by the Mediation Panel are not legally binding. This panel can be a group of elders or any other group, which the community wants to fulfil with the mediation function.¹⁰⁶

¹⁰⁶ Wily, *The Village, Villagers and the Village Land Bill*, 1998, pp. 1-9

5 The Land Rights of the Maasai in Light of International Law

5.1 Introduction

Land rights have rarely been addressed in universal or regional human rights laws or procedures. This stems from the fact that land rights are of a vast and complicated nature, nationally attached to the specific country in question. The variety of forms of property and their social importance makes it difficult to establish a universal human right to individual property.¹⁰⁷

Land rights do not easily fit into the topological distinctions usually drawn between civil and political rights on the one hand and economic, social and cultural rights on the other. Persons or groups who own a specific land parcel, with a title duly registered in law, may be considered to have a civil right to such land. Persons, who are dependent on access to land for survival, without any alternatives, are considered to have economic, social and cultural rights to the land in general. In that case, the Maasai in Simanjiro would be thought to have the economic, social and cultural right to land while the immigrant farmers would be considered to have the civil right to land.

To the extent where land rights are mentioned in international law, the following instruments are of importance:

5.1.1. International Instruments

The *Universal Declaration of Human Rights* (UDHR) establishes the right to property as an international human right. Article 17 states that:

- a) Everyone has the rights to own property alone as well as in association with others; and
- b) No one shall be arbitrarily deprived of his property.

Article 2 of the Declaration declares that everyone is entitled to all the rights and freedoms of the Declaration, without distinction of any kind.

Article 11 of the *International Covenant of Economic, Social and Cultural Rights* (ICESCR) declares the right to an adequate standard of living, the right to food and the right to freedom from hunger. This provision may be linked to the right to land.

¹⁰⁷ Ecosoc, *The Right of Everyone to Own Property Alone as Well as in Association with Others*, 1992, p. 90

5.1.2. Regional Instruments

The *African Charter on Human and People's Rights* provides in Article 13, Section 3 that every individual shall have the right of access to public property and services in strict equality of all persons before the law.¹⁰⁸

Article 14 states that the right to property shall be guaranteed and may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

Article 21 (2) stipulates that in case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to adequate compensation.

However, the above mentioned provisions relate generally to property rather than specifically to land.¹⁰⁹ Though ratified by Tanzania, the International Covenant on Civil and Political Rights (ICCPR), - discussed in 5.2 – the ICESCR and the African Charter on Human and People's Rights are not considered to be directly applicable in Tanzania. Their function is to reflect ways of interpreting the provisions of the Constitution.

5.1.3. The Constitution

Article 24 (1) of the Constitution of Tanzania declares the right of every person to own or hold any property lawfully acquired. Section 2 makes it unconstitutional for the state to acquire property for any purpose except under the authority of law, which provides procedures and conditions for the payment of fair and adequate compensation. Furthermore, Article 29 stipulates that every person in Tanzania has the right to enjoy and benefit from basic human rights.

All human beings are born free and all are equal stated in Article 12 (1). The rights of equal treatment are provided for in Article 13 (1). Article 14 stipulates that everyone has the right to exist and to receive from the society protection for his life, in accordance with the law. Concerning the establishment of large and small-scale farms in Simanjiro District, the right to freedom of movement, stated in Article 18 (1), is of importance. It is stated that every citizen of the Tanzania has the right to live anywhere in the country. This fundamental freedom enables immigrating people from other regions to settle down in the plains of Simanjiro.

According to the case of *Mtikila vs. Attorney General* (1993), human rights provisions in the Constitution must be given generous and purposive construction. 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.¹¹⁰

¹⁰⁸ Ecosoc, *The Right of Everyone to Own Property Alone as Well as in Association with Others*, 1992, p. 15

¹⁰⁹ Plant, *Land rights in Human rights and development, The review*, International Commission of Jurists, No 51, 1993, p. 19

¹¹⁰ Shivji and Kapinga, *Maasai Rights in Ngorongoro, Tanzania*, 1998, pp. 30-32

It is safe to say that the Maasai's survival as a distinct cultural entity depends on continued use of the lands, which they have occupied since the 1800s. The land laws apply equally to all citizens of Tanzania. For the Maasai, this equal treatment has led to deteriorating effects on the traditional pastoral way of life. Currently, the Maasai are not given special legal protection by national land law.

5.2 Land Rights Concerning Indigenous People and Minorities

Land rights are more specifically referred to in the case of *indigenous people* and *minorities*.

The *ILO Convention on Indigenous and Tribal Peoples No. 169* is a fundamental instrument for indigenous people. It emphasises the need for special protection of indigenous and tribal land rights by the state. It also provides safeguards against the arbitrary removal of indigenous and tribal peoples from their traditional lands, together with certain procedural guarantees.¹¹¹

Article 27 of the ICCPR is the principal provision of universal importance guaranteeing *minorities'* rights in international law. It states:

“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language“.

This provision does not directly refer to the right to land. However, the Human Rights Committee, which deals with complaints concerning the ICCPR have stated that Article 27 may be applied in disputes regarding land rights.¹¹²

Minorities have been described as a group numerically inferior to the rest of the population in a State and are thus in a non-dominant position. The members of the minority possess ethnic, religious or linguistic characteristics differing from those of the rest of the population.¹¹³ Furthermore, the minority frequently shows a sense of solidarity, directed towards preserving their culture, traditions, religion or language.¹¹⁴

¹¹¹ Plant, *Land rights in Human rights and development, The review*, International Commission of Jurists, No 51, 1993, pp. 19-20

¹¹² *Writings in Human and Minority Rights*, University of Lapland, 1994, p. 95

¹¹³ This causes problems in States where there is a large number of different groups. In a state like Tanzania, the population is made up of over 120 tribes and one could therefore argue that each one of them could claim minority status.

¹¹⁴ Capotorti, *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities*, 1991, p. 1

Indigenous land rights are recognised in international law, but there is an absence of recognition of land rights for minorities. Indigenous people are separated from minorities since they are closely knit to the land they hold and its resources. They are considered to have lived on the land from time immemorial and enjoy stronger rights of protection and autonomy against the state, than the ones minorities are entitled to.¹¹⁵

The differences of consequences deriving from the two quoted international instruments may lead to a wish to be defined as an indigenous people rather than as a minority. Internationally, the Maasai are recognised as a minority and indigenous people since they lack a historical relationship to land.¹¹⁶ Still, the Maasai claim that they have a social and cultural connection to the land and should be regarded as indigenous people.¹¹⁷ According to a particular doctrine a minority that has a close bond to the land it lives off and if its traditional way of living is dependent on this land, then its land rights could be recognised under Art. 27 of the ICCPR.¹¹⁸

It is true that the Maasai would benefit stronger land rights if they were to be regarded as indigenous people. (Note that stronger land rights may only be provided if the State actually recognises the Maasai as indigenous people and actively provides for special protection.) Nevertheless, some scholars are of the opinion that the issue concerning the status of the Maasai as minority or indigenous people tend to be disadvantageous for the Maasai. Using these terms sets them apart from the social and political mainstream of the country. The Maasai have suffered from prejudice and lack of development but their human rights situation should not be seen as different from the rest of the Tanzanian population. It is therefore more appropriate to build bridges between the Maasai and the rest of the society at the same time as their particular claims are highlighted. Participation of local communities in owning and controlling land should help to realise these recommendations.

For the Maasai, there may first be a struggle for the rights of every equal citizen and secondly, general claims for human rights as applied to the rest of Tanzanian society. In this way, the particular Maasai conflicts would be linked to the rest of the civil society, instead of isolated from it.¹¹⁹ Basic rights and human rights are provided for in the Constitution and work as a basis for the Maasai to claim the right to land.

I am bound to agree with the above mentioned ideas. From my experience in Simanjiro, through general observations and interviews with villagers and NGOs, I conclude that the arguments of whether the Maasai are a minority

¹¹⁵ Plant, *Land rights and minorities*, Minority Rights Group Report, 1994, pp. 6 and 27

¹¹⁶ The Maasai originate from Kenya but moved 460 years ago southwards and established themselves in Tanzania around 1800.

¹¹⁷ Interviews with the NGO Illarmatak, Terrat, Simanjiro District, 1998

¹¹⁸ *Writings in Human and Minority Rights*, University of Lapland, 1994, p. 96

¹¹⁹ Shivji and Kapinga, *Maasai Rights in Ngorogoro, Tanzania*, 1998, pp. 70-71

or indigenous may be more of interest to NGOs soliciting funds from donor agencies. Illarmatak, for instance, appears to have determined that the Government is an adversary and is reluctant to enter into a dialogue with it. In my view, this approach causes additional friction and is unlikely to lead to results or solutions for the rest of the Maasai population. A dialogue between the Maasai and Government would be preferable in order to exchange opinions and together find a settlement. Without the Maasai taking the opportunity to present their needs to the Government, such a settlement may never be achieved.

6 Conclusion

The Pastoral societies differ from the rest of the population in Tanzania. Pastoralists are dependent on large tracts of land, while the majority of the rest of the inhabitants are farmers and rely on certain marked parcels of land for agricultural production. The Maasai culture and social life revolves around cattle and cattle herding. In order to survive, the Maasai must utilise the land marginally, alternating between wet and dry season. The need and access of water is essential for the cattle and the Maasai population.

The land of Simanjiro District, initially occupied by the Maasai has been subject to governmental land alienation and allocations in various forms. Numerous large-scale farms have been established in the area and are currently expanding their cultivated fields without authorisation or any control mechanism. Government policies and the introduction of large-scale farming have disrupted the traditional way of living for the Maasai.

The current land legislation has enabled the establishment of farms through its failure to protect deemed or customary rights of occupancy. The land laws apply equally to all citizens in Tanzania, but are in practice in favour of agricultural production and individual farmers. The laws have shown to be most disadvantageous for the Maasai. Since they do not leave any tracks on the land they graze upon, the law has recognised this as vacant land, free to be allocated to permanent cultivators. The pastoral society is not considered to be an asset to the national economy and is often disregarded by the Government and District Officials.

Large-scale farms are already well established in Simanjiro District. Even if the allocation of their land has been made possible through dubious methods, it is unlikely that these farms will be evicted. The farms enjoy the support of the Government and are considered to upraise economical and agricultural development to the country.

Still, to retract excess pieces of land is important for the Maasai to be able to maintain their cultural and social customs. Therefore it is important to retract excess land and to prevent further encroachment by farmers. It is also important to impede additional allocation of land made without the consent of the Maasai villagers.

This thesis has shown that there are legal possibilities for the Maasai to retract land from encroaching farms. Two final methods of retraction are suggested; through the provision of unlawful occupation under statutory law if a village has a VTD and through claiming trespassing under customary law if a village lacks a VTD. According to the new land acts, customary law will for certain be applied on all rural lands in the future. Paradoxically, the different ways of retracting land all lead to the same results; the unlawful

occupier or trespasser has to surrender the excess piece of land. However, according to case law, the wrongful occupier may be entitled to compensation for unexhausted improvements if certain conditions are fulfilled.

Even if legal procedures are available, court operations are of little advantage for the Maasai. The cases brought to court are lengthy, expensive and depend on exterior financial support. Speedier and more familiar outcomes of the disputes would be better achieved by using alternative settlements on village level. An improved climate between the farmers and pastoralists could be achieved by constructional dialogues between these parties. Land use plans could be decided upon in order to best utilise the land for multi-tenure use. Here, it is important to let the villagers themselves decide what the land should be used for.

Further allocation to big commercial farms may be prevented by village by-laws prohibiting allocation of land over a certain acreage (See Annex B). By-laws also provide for participation on village level by requiring the involvement of the Village Assembly in order to be put to use.

The improper actions of the Village Council members could be prevented through correct elections set up so that the voters would be able to choose those members who are committed to work for the well being of the whole village. The villagers should be enlightened on land laws and regulations and require that the Village Council members follow and ensure a strict observance of the procedures laid down in laws and customs.

The Maasai have difficulties successfully claiming their rights to land, since they do not hold the administrative posts of the District. This is due to the fact that the Maasai lack proper education. The absence of education makes it difficult for the Maasai to safeguard their own interests and communicate with the Government concerning their right to land. They have had to depend on international or local NGOs to handle their matters.¹²⁰

In my opinion, the need for education is the key solution to the conflicting situation in Simanjiro District. It is necessary for *all* Maasai to become aware of their basic rights and those rights referring to land. This will lead to participation in land matters and hinder further misconduct by governmental officials and local authority members.

In order to achieve a final solution to the land disputes in Simanjiro District, both the Government and the Maasai population must meet for an agreed resolution. The Government needs to acknowledge the Maasai as a group in necessity of special recognition. An equal application of the law evidently affects the Maasai negatively. Therefore, special provision in law should be provided to ensure the land rights and security of land for the Maasai.

¹²⁰ See further Annex A

The Maasai gain little progress for their whole population when arguing for the recognition as indigenous people. Instead, the Maasai need to accept the availability of land to all tribes of Tanzania. The Maasai should not distance from the Government but express and present their specific needs for land in order to be acknowledged and provided with safeguards. Only by education and by taking part in the national social activities will the Maasai be able to claim their rights more effectively.

The new land law acknowledges pastoralists and their needs. The provisions are of no help if they are not put to use in reality. Hopefully, the State will recognise the special needs of the Maasai and use these provisions in favour of aggrieved pastoralists in Simanjiro District. Yet, before the new land acts have been put in force, it is too early to conclude such an outcome.

7 Appendices

Interviews

Dar es Salaam, August 3 - 18, 1998 and September 15 - 21, 1998

Academics

Dr. R. W. Tenga, *Advocate of High Court of Tanzania, Senior Lecturer*, Faculty of Law, University of Dar es Salaam

Prof. Kirande, *Universal College of Lands and Architectural Studies*, UCLAS

Mr. I. Simba, *Universal College of Lands and Architectural Studies*, UCLAS

Prof. P. McAuslan, *University College London*, draftsman of the Land Act based on the National Land Policy

Dr. Z. S. Gondwe, *Senior Lecturer*, Faculty of Law, University of Dar es Salaam

Mr. S. Mchome, *Lecturer in Law*, Faculty of Law, University of Dar es Salaam

Dr. S. Mvungi, *Dean*, Faculty of Law, University of Dar es Salaam

Government Officials

Mrs. S. Llongway, *Commissioner of Land*, MLHUD

Mr. Kifanga, *Officer at Department of Survey and Mapping*, MLHUD

Mr. F.K. Mutakyamilwa, *Legal Officer*, ML HUD

Mr. Kamaka, *Officer at Department for Typographical and Geographical Service*, MLHUD, draftsman of the New Draft Land Bill - basis for the LA and VLA

Ms. E. Tibasana, *Land Use Planner*, NLUPC

Donor Agencies

Mr. L. Bondesson, SIDA

Dr. G. Sundet, UNDP,

NGOs and Others

Mrs. H. Kijo-Bisimba, *Legal and Human Rights Centre*, LHRC

Ms. Tumaini, *Lawyer*, *Tanzanian Women Lawyer Association*, TAWLA

Simanjiro District, August 19 - September 14, 1998

District Staff

Mr. Gaibinus Ndunguru, *District Land Surveyor*

Mr. Ernest T. Laizer, *District National Resource Officer*

Mr. Kaanael Kaaya, *District Community Development Officer*

Mr. Lgatoo, *District Water Engineer*

Mr. S Sembekari, *District Water Technician*
Mr. Cloudy, *Crop Specialist at District Agriculture and Livestock Office*
Mr. F. J. Andrew, *Mechanisation Officer at District Agriculture and Livestock Office*
Mr. Isowe, *District Lands Officer*
Mr. S. J. Kamote, *District Commissioner*
Mr. J. P. V. Mabuya, *District Administrative Officer*
Mr. Sopey Kurianga, *District Chairman*
Honorable Parseko V. Kone, *MP, Simanjiro District*
Mr. Williams, *District Executive Director*
Mr. Christopher Ole Sendeka, *CCM Chairman, Member of National Executive Committee of CCM and Counsellor for Naberera Ward.*

NGOs in Simanjiro District

Mr. Lazaro Ole Mongoi, *Tanzanian Christian Refugee Service, TCRS*
Alamuayak N. Loomutun, *Meschack Tureto and Susana T. Thomas, Illarmatak, Orkesumet*
Mr. Martin Saping'o, *Ana Sirikwa, Mr. William Sikirari, Mary Labudaki, Illarmatak, Terrat*

Village Councils and village members in:

Orkesumet, *VC Chairman, VC Secretary and 6 VC Members*
Namalulu, *VC Secretary*
Narakau, *VC Chairman and 5 VC Members*
Loiborsiret, *VC Chairman*
Loborsoit, *VC Chairman, CCM Employee, 1 VC Member*
Naberera, *Village Executive Officer, CCM Chairman, 2 VC Members*
Interpreter in Orkesumet: Mr. G. Ndunguru,
Interpreter in Namalulu, Narakau, Loborsiret, Loborsoit and Naberera: Mr. P. Man'gatinda

Large-Scale Farmers

Mr. Daljit Singh Mand, *Owner of Dodoma Transport, Namalulu*
Mr. Hassan Ahmed, *Manager at Okota and Olmosori Farms owned by Mr. Gerald Miller, Naberera*
Mr. David Doig, *Owner of Tandala Farm, Naberera*
Mr. Malek J. Shokat, *Owner of Shokat Farm, Naberera*

Small-Scale Farmers

Orkesumet, *7 men and 1 woman*

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Mary Labdaki & 8 Others v. Naberera Village Council & 12 Others Civil
Case No. 10 of 1996

8 Annex

A. The Maasai Society

Introduction

The Maasai society is built on an ecological balance between man, livestock and the physical environment. Their lives centre around livestock, both socially and economically. Cattle, sheep and goats are the basis of their means of support. Milk, meat and blood are their dietary ideals but grains, mostly in form of maize, are used as a supplement to meet household needs.¹²¹

Land for the Maasai should be seen as a broad concept of territory and includes water, salt-points and pastures. The use of the rangelands requires manoeuvrability and mobility.¹²²

Customary Use of Rangeland

In order to adapt to unreliable environmental conditions and to use the range to the maximum, the Maasai pastoralists have developed and practise a flexible system of seasonal grazing and watering. Land use is *transhumant*, meaning that movement over the plains is dependent on time and locality. During the wet season, the livestock herds are dispersed on the lower-lying areas in order to use the short-lived grass and surface water. During the time of the dry season, the Maasai and their cattle go to the hills, where there are marshy pockets and permanent water sources.¹²³ This rotational system

¹²¹ Århem, *Pastoral Man in the Garden of Eden*, 1985, pp. 15

¹²² Ndagala, *Territory, Pastoralists and Livestock, Resource Control among Kisongo Maasai*, 1990, p. 71.

¹²³ This system has been accused to produce negative ecological effects. Whether this is so, will not be discussed here, but it may be assumed that possible negative environmental effects of such herding practices may intensify when there is pressure on the grazing resources, and particularly if the rotational system of pasture exploitation is threatened. (Talle, *Women at a Loss: Changes in Maasai Pastoralism and their effects on gender relations*, 1988, p. 31) However, this particular land use system should not be considered free for all access as in the Hardins theory of the *Tragedy of Commons*, meaning when resources degrade, due to individual users inclination to take advantage of society by optimising personal gains. (Ndagala, *Territory, Pastoralists and Livestock, Resource Control among Kisongo Maasai*, 1990, p. 71). Territory is not “common“ or “open“, since the use is controlled by specific groups which decide when and how to use the portions of land. Within the communal area there is home territory and many tenure types are both communal and private property. (Lane, *Pastures Lost: Alienation of Barabiag land in the context of land policy and legislation in Tanzania*, *Nomadic People*, 34/35, 1994)

allows the grass to recuperate in between utilisation periods. Nevertheless, the area requires sparse settlements for sustainable utilisation.¹²⁴

Land rights are held communally while the individual families exercise livestock management. Grazing in the same areas leads to a common interest in the care and management of the range. It is important to distinguish between control of resources and their ownership. The Maasai in one community control the resources but do not own them in the sense that others may be excluded from utilising them.¹²⁵

The system of grazing is highly dependent on water supplies for survival of livestock. The Maasai elders are responsible for avoiding congestion of livestock in the permanent settlement areas and to ensure that the grass grows in time for the next dry season.¹²⁶ However, the Maasai have never recognised exclusive rights to water sources.¹²⁷

Political Organisation of the Maasai

The Maasai political system is flexible and pragmatic. There are no hereditary leaders, instead authority rests with age-set leaders.¹²⁸ The leaders are men of moral conduct and personal qualities. Influence grows with seniority, increased knowledge and wisdom. A decision making body regarding pasture and water management is taken care of by the elders' council, based on the oldest age group.¹²⁹

The members of the age-group systems are not always members of the Village Councils and local government. However, they are always very respected while Village Council members may lack this traditional authority. Since 1993, more age-group leaders have been elected into Village Councils.¹³⁰

Living and Housing Conditions

The Kisongo Maasai in Simanjiro live in circular clusters of houses enclosed by a fence. Each cluster is called *enkang* in Maasai language or *boma* in

¹²⁴ Talle, *Women at a Loss: Changes in Maasai Pastoralism and Their Effects on Gender Relations*, 1988, p. 31

¹²⁵ *Ibid.*, p. 53

¹²⁶ Illarmatak Lolkonerei, *Report on Simanjiro Land Disputes*, 1993, p.1

¹²⁷ Talle, *Women at a Loss: Changes in Maasai Pastoralism and Their Effects on Gender Relations*, 1988, p. 53

¹²⁸ All males and females are graded according to age. Men are graded in the following order of seniority: uncircumcised boys, circumcised young men (the so-called ilmurran, warriors), adult men and old men. Females have two main age-grades; uncircumcised girls and women. (Ndagala, *Territory, Pastoralists and Livestock, Resource Control among Kisongo Maasai*, 1990, p. 93)

¹²⁹ Århem, *Pastoral Man in the Garden of Eden*, 1985, p. 18

¹³⁰ Problem arises when the traditional leaders are not acquainted with the written constitution, legislation or the modern system of government. Illiteracy is a great problem, which may further prevent communication between Maasai leaders and other villagers. (Muir, *A Situational Analysis of Pastoralism in Simanjiro District*, 1994, p. viii).

Swahili.¹³¹ The location of the boma is determined by the presence of a permanent water source. The centre of the boma forms a nighttime enclosure for cattle. A boma is made up of several independent domestic groups held together by their common interest of exploiting the immediate environment. A domestic group consists of a man, his wife or wives, children and relatives. Other domestic groups within the boma are not necessarily relatives, but might as well be friends or others who have decided to join the particular boma. There is an informal head of each boma, usually the most respected elder.¹³²

Livestock are led out from the boma and taken out to the pastures in the mornings, after the women have milked them. They are herded by boys, younger men or elders and taken back to the boma in the evening.¹³³

Bomas consist of a mixture of wealthy, middling and poor households. The wealthy households provide assistance to poorer households in return for labour.¹³⁴

Due to administrative controls and cultivation by large-scale farmers, freedom of moving from one boma to another is restricted and the flexibility of bomas as residential units has been reduced. The fences around the bomas now reflect permanent or fixed membership to residential units. This has also led to Maasais becoming closer to other tribes with different traditions who may influence their pastoral way of life.¹³⁵

In Simanjiro, some Maasai expressly stated their wish to conserve their way of living, while others, mostly younger Maasai aimed towards more modern lifestyles. Although they still underlined that they were of Maasai origin, the young also stressed the need for development and their wish for it. Many were positive towards the introduction of agricultural methods, womens' ownership of land and modern way of clothing and living and the need for high level education. They were concerned to explain that not all Maasai were unwilling to see progress in life. However, ownership of cattle still appeared to be an important factor and even if a Maasai who had "gone modern" did not herd himself, he was bound to have a relative managing a group of cattle for him.¹³⁶

¹³¹ An illustration of a Boma is attached in Annex E

¹³² Ndagala, *Territory, Pastoralists and Livestock, Resource Control among Kisongo Maasai*, 1990, p. 51

¹³³ *Ibid.*, p. 55

¹³⁴ Muir, *A Situational Analysis of Pastoralism in Simanjiro District*, Tanzania, 1994, p. xxi

¹³⁵ Ndagala, *Territory, Pastoralists and Livestock, Resource Control among Kisongo Maasai*, 1990, p. 201

¹³⁶ Interviews, Simanjiro District, 1998

Livestock as a Measure of Wealth and the Impact of Agricultural Pressure on Maasai

Cattle is the key asset in Maasai culture on which the entire society is built upon. Wealth for a Maasai is measured in the number of cattle (preferably bulls) and the number of wives and children. This shows his ability to meet household needs. Cash also counts as an indication of wealth in instances where money has infiltrated the Maasai life. Cultivated fields are not considered to be of particular treasure but are regarded as a substitute for the livestock economy.

Since early 1980s, pastoralists have been developing agro-pastoralism in form of grain cultivation. It is important to point out that cultivation supplements other income but only to reduce the need to sell cattle for cash. Wealthier households tend to expand their area of cultivation and sell fewer cattle. Poorer households, who can not afford cultivation, are forced to sell cattle for grain. The gap between rich and poor is likely to expand.¹³⁷ Nevertheless, there are other contrary views regarding the introduction of agriculture; the poor pastoralists, who always have depended on the rich, are enabled through agricultural production to independently produce subsistence food. Hence, the gap between rich and poor concerning livestock may be bridged by agricultural pursuits.¹³⁸

Over the past thirty years livestock herds have declined. This is due to various factors, such as increases in human population, weakening cattle health and higher mortality and increased cattle sales to meet cash expenditure needs. There is no evidence that the decline in grazing areas has led to a decline in cattle herds and therefore pushed pastoralists into cultivation.¹³⁹

It is estimated that 60% of the pastoralists in Simanjiro have insufficient number of cattle to meet their household needs.¹⁴⁰

The Importance of Education

After Independence, Tanzania was determined to form a country with one common language, Swahili, that would unite the great number of tribes. The efforts were successful and in 1987 over 90 % of the adult population could read and write. Obligatory school attendance was introduced in 1977 and

¹³⁷ Muir, *A Situational Analysis of Pastoralism in Simanjiro District*, 1994, pp. x

¹³⁸ Ndagala, *Territory, Pastoralists and Livestock, Resource Control among Kisongo Maasai*, 1990, p. 202

¹³⁹ Muir, *A Situational Analysis of Pastoralism in Simanjiro District*, 1994, pp. xi

¹⁴⁰ Tanzania - Sweden Forestry and Environment Sector Support Programme. *Environmental Impact Assessment of Land Use Related Activities in Simanjiro District*, 1996, p. 29

primary school attendance was free until beginning of the 1990s. Today parents have to pay for uniforms and books for the children. Traditionally, the Maasai have never prioritised education. They have been reluctant to sending their children to school since the children have been needed as herdsmen for cattle. Even if Maasai children go to school they often fall behind due to the fact that the Maasai are away certain periods of the year.

Consequently, the Maasai have been left behind in education and are therefore limited in knowledge outside the pastoral society. Greater interest in the need for education is commencing, but it is no longer financially assisted by the Government. Therefore, many parents can not afford to send their children to school. Only 5 % of children continue to secondary school.¹⁴¹

Because, the Maasai are commonly poorly educated they have difficulties in safeguarding their needs through the District administration. They are unable to apply for the key administration posts in the District and can not work for the benefit of their own people. They also lack sufficient knowledge of land rights and legal procedures. There is a low degree of organisation of pastoralists to cope with new constraints and they often mistrust their political representatives at village and district level.¹⁴²

Other Factors contributing to Land Conflicts in Simanjiro District

Mining

The effects of the activities from large-scale farming are not the only causes to the land conflicts in Simanjiro. In Loiborsiret, a village close to Tarangire National Park, the villagers are experiencing land disputes with miners. In 1988, approximately 600 uninvited immigrants miners came to the village in search for gemstones, such as rubies and rodalite. They settled down in an area where they thought they could find the valuable minerals and started to dig mining pits about two metres deep. The mining pits were unproductive, but the miners remained in the area and started farming instead. The holes were abandoned without being covered up. Today the mining fields endanger both herders and their cattle and block the Maasai from getting to grazing areas and water sources. During the past years, the settlement, called Kangala, has expanded and today the former miners want to form their own village. The Maasai are frustrated, meaning that the miners are land grabbers who were never invited by the village in the first place. Neither were the Maasai consulted on the issue of letting land become subject for mining. Furthermore, they were aggrieved by the fact that the village of Loiborsiret

¹⁴¹ Swedish Institute of International Affairs, *Tanzania*, 1985, p. 7

¹⁴² LAMP, *Land Management & Environment Programme 1996 - 1999*, The District Sub-Programme, Simanjiro District, 1996, pp. 7

has a village title deed issued by the Government. At the same time, the Government has granted mining rights. Evidently, there is an overlap of rights on the same piece of land.¹⁴³

Mining activities are regulated by the Mining Act of 1979. The Act states provisions for searching for and mining minerals and for purposes incidental to or connected with searching for, or mining minerals. Special grants or licenses are issued by the state for the purpose of mining. The law contains restrictions on the lawful owner of the land in cases of mining success but there should be an accept between the miner, the government and the village.¹⁴⁴

According to the MLHUD, mining rights prevail over farming rights, provided that there are minerals to be found. If there are no minerals in the area, the mining pits should be refilled and the miners should leave the area. The inhabitants of Kangala have occupied and encroached on the land illegally, without following the proper procedures.¹⁴⁵

Wildlife Conservation

The village of Loiborsiret also experiences problems with wildlife conservation activities. The village borders the Tarangire National Park but villagers are not allowed to let their cattle graze in the park. The area of the park was an important wet season dispersal area for the Maasai.¹⁴⁶ Since wild animals do not know of borders, they are often a threat to humans and their livestock. The Maasai are not compensated for the decreased size of grazing land or for the damage that wildlife causes. Wildlife conservation generates money but the Maasai do not receive any revenue. About 25% of the income from wildlife goes to the district, not to the villages who are mostly affected.¹⁴⁷

Charcoal Production

Charcoal is used as fuel. The wood is cut from trees and pre-burnt into charcoal. Charcoal production is detrimental to the environment. The first trees to be cleared for production are usually the *Acacia tortilis*. This tree provides highly nutritious fodder eaten by cattle but when cut the land is left without anything to feed the livestock but grass. The *Acacia* also protects the

¹⁴³ Interviews in Loiborsiret, Simanjiro District, 1998.

¹⁴⁴ URT, *The Report of the Presidential Commission of Inquiry into Land Matters, Vol. 1, Land policy and land tenure structure*, 1994, p. 222

¹⁴⁵ Interviews with the MLHUD, Dar es Salaam, 1998

¹⁴⁶ Igoe and Brockington, *Conservation and development in East African Rangelands: The Human Costs of Economic Liberalisation and Wildlife Preservation in north-east Tanzania. Recent Impacts on Pastoral Resource-Use in Simanjiro, Same and Lushoto Districts*, 1996, p. 37

¹⁴⁷ Interviews in Loiborsiret, Simanjiro District, 1998. Wildlife and pastoral man have long lived in interaction with each other. The Maasai have never hunted for food but kill game if they threaten the safety of humans or cattle. (Talle, *Women at a Loss: Changes in Maasai Pastoralism and Their Effects on Gender Relations*, 1988, p. 34)

soil from erosion.¹⁴⁸ It is estimated that about 120 trees are cut daily in the district for the urban markets of Arusha and Moshi. Charcoal business prevails in the area as employment at the large-scale farms is seasonal and charcoal production offers an alternative income source.¹⁴⁹

The Simanjiro Environmental Council, a committee of the District Council, has outlawed charcoal burning in the District but the prohibition is ineffective. In Naberera Village, the District Council has recently issued licenses permitting charcoal cutting, which directly contradicts the village by-law, explicitly prohibiting charcoal cutting. Similar to the case of wildlife conservation, charcoal production generates money to the producers and to the District. The village does not receive any of these revenues.¹⁵⁰ The denial of the village by-law by the District Council is an act of contradiction and unacceptable.¹⁵¹ (See Annex B)

B. The Local Government (District Authorities) Act of 1982

The Structure of Rural Local Governments

Local Governments were introduced in their present structure through the Local Government (District Authorities) Act in 1982. The Act provides legislation for local government and other matters concerning organisation of local government. The rural Local Government consists of the District Council and the Village Council. Decision making in village and district councils take place in council committees.¹⁵²

The districts in Tanzania are divided into divisions, wards and villages. A District Council consists of members elected from each ward in the district, members nominated by the party organisations in the area, members appointed by the Government, the Member of Parliament and the Chairman of the Village Council.

The functions and powers of the District Council relating to land matters include implementation of plans of economic and social development,

¹⁴⁸ Tanzania - Sweden Forestry and Environment Sector Support Programme. *Environmental Impact Assessment of Land Use Related Activities in Simanjiro District*, 1996, p. 26

¹⁴⁹ Igoe and Brockington, *Conservation and Development in East African Rangelands: The Human Costs of Economic Liberalisation and Wildlife Preservation in North East Tanzania. Recent Impacts on Pastoral Resource-Use in Simanjiro, Same and Lushoto Districts*, 1996, p. 50

¹⁵⁰ Interviews in Naberera, Simanjiro District, 1998

¹⁵¹ Interview at the Faculty of Law, University of Dar es Salaam, 1998

¹⁵² LAMP, *Tanzania: Land Management & Environment Programme 1996 - 1999*, 1996, p.2

making of by-laws and approval of by-laws coming from the village councils.¹⁵³

A Tanzanian village is governed by a Village Assembly and the Village Council. The Assembly is composed of all adult members over the age of eighteen and ordinarily resident in the village. The Council has 25 members, with an obligatory minimum of a third of female members. A Village Council is elected every three years by the Village Assembly. The Chairman and the Secretary of the Party branch, if there is one in the village, may become chairman and secretary of the Assembly and Council. The control of land is handled by the Village Council, or more accurately by the sub-committee for land matters.¹⁵⁴ The Village Assembly does not have any power over land matters.

The Village Council is subject to the over-arching powers of the District Council and the directions from the MLHUD.¹⁵⁵ For example, the Minister may make rules to any particular Village Council and give directions of general nature. The Village Council must adhere to every such directive.¹⁵⁶

The functions of the Village Council include economic and social development of the village, ensuring the welfare and well-being of the village residents, planning of activities in agricultural or other activities and encouraging the residents of the village to participate in communal enterprises.¹⁵⁷

The structure of Local Governments suffers from lack of public participation. This has, among other deficiencies such as confusion and overlapping jurisdiction of the various committees and councils allowed the flawed procedures of land allocation.¹⁵⁸

In Simanjiro District, the District Council is administered by the District Executive Director (DED), He is administratively appointed and currently descends from another tribe and region. Since the Maasai do not have the proper education, they do not hold the administrative posts of the district organisation, only the political posts. It would most surely be easier for the Maasai to guard their main interests concerning land matters if they were to participate on an administrative level. In Simanjiro, there were strong opinions that the administrative personnel did not work for, or see to the interests of the Maasai.

Together with the DED, the Land Officer, the Surveyor, the Land Planners, Valuers and Estate Managers primarily deal with issues and problems

¹⁵³ Fimbo, *Essays in Land Law Tanzania*, 1992, pp. 38-39

¹⁵⁴ The administrative structure of a village was regulated by the Villages and Ujamaa Villages Act of 1975. Presently the structure is provided by the Local Government (District Authorities) Act, 1982. (Fimbo, *Essays in Land Law Tanzania*, 1992, p. 39)

¹⁵⁵ URT, *The Report of the Presidential Commission of Inquiry into Land Matters, Vol. 1, Land Policy and Land Tenure Structure*, 1994, pp. 94

¹⁵⁶ Local Government (District Authorities) Act, 1982, Act 7. (Fimbo, *Essays in Land Law Tanzania*, 1992, p. 40)

¹⁵⁷ Fimbo, *Essays in Land Law Tanzania*, 1992, p. 40

¹⁵⁸ Shivji, *Not yet Democracy, Reforming Land Tenure in Tanzania*, 1998, pp. 22

centred on land tenure. The key person is the Land Officer. There are no specific academic qualifications required for a person to become a land officer and legal training in land law is not necessary. Instead, training is picked up on the job and in some cases courses are taken in land law. This is crucial, since the land officer is the person who specifically deals with land matters such as allocations and revocation.¹⁵⁹

Village By-Laws

Village by-laws enable the villages to formulate their own laws, applicable at village level. The powers and procedures of village by-laws are stated in The Local Government (District Authorities) Act, 1982. A Village Council may make by-laws¹⁶⁰ and shall convene a meeting of the Village Assembly for discussion of the proposed by-law. After a meeting of its own, the Village Council submits the proposed by-law, with or without amendments by the Village Assembly, to the District Council for approval. If the District Council approves the by-law proposal, it will come into operation on a date agreed upon by the District Council upon the recommendation of the Village Council.¹⁶¹

Where in the opinion of the Minister, it is necessary for the purpose of the better development and fostering of the system of local governments, the Minister may make the required by-law. It could be by-laws necessary in all villages or by-laws addressing a specified subject that are needed in all villages.¹⁶²

Breach of a village by-law leads to either a fine not exceeding two thousand shillings or a penalty which includes such a measurement as may be deemed to be most fitting as exemplary or deterrent to potential wrongdoers.¹⁶³

By-laws must be within the jurisdiction of the village and are not allowed to contradict national legislation. By-laws concern, for example, environmental effects on land and education.

The laws provide for local governance and permit villages to form regulations needed in the specific village and which respond to any special conditions in the village area. Opposed to village land allocation, the Village Assembly plays a significant part in the decision making of by-laws. The Assembly has an opportunity to decide on the objectives and the form of the by-law and can therefore collectively decide upon certain contemporary and important local issues. The problems of gathering the Village Assembly to discuss the proposed by-laws should not be underestimated. Villagers are

¹⁵⁹ URT, *The Report of the Presidential Commission of Inquiry into Land Matters, Vol. 1, Land policy and land tenure structure*, 1994, pp. 97-99

¹⁶⁰ Section 163, Local Government (District Authorities) Act, 1982

¹⁶¹ Section 164, Ibid.

¹⁶² Section 165, Ibid.

¹⁶³ Section 167, Ibid.

often spread over the whole village area and not only resident in the centre. It can therefore be difficult to call the whole village together. Therefore, there are chances that not all village inhabitants will be heard or enabled to express their opinions

By-laws have a preventing effect. In the case of the village of Kitwai B, the village decided upon a prohibition of allocation of land more than five 5 acres of size. Through this provision, the village wants to prevent further allocation of land to large-scale farmers.

The function and meaning of by-laws are dependent on the acceptance and understanding of the laws. If neither the District Council nor the Village Council follow and respect them, there is not much sense or meaning of the system of by-laws.¹⁶⁴

C. Procedures for Application for a Certificate of a Right of Occupancy

Section 9 of the Land Ordinance gives the President a right to issue a Certificate of Occupancy when granting a right of occupancy.

The current procedure to obtain a title deed is provided for in the Land Registration Ordinance, Cap 334 of 1959. Applications are at the initiative of the interested party who wishes to be granted rights over a piece of land. He contacts the Land Officer who interviews the applicant. If the Land Officer finds the applicant to be a suitable person for the grant a tentative agreement is reached. A *letter of an offer of a right* is made for the applicant's acceptance.¹⁶⁵ The letter informs him that his application for a right on the terms agreed upon is approved. If the applicant accepts the conditions, he pays the fees for the Certificate of Occupancy that will be issued. The Certificate is signed by the Commissioner for Land at the MLHUD and the rightsholder and registered in the Registry of Titles.

The following provisions are implied:

- a) that the occupier binds himself to the President to pay compensation for any damage caused by individuals or communities in the exercise of the

¹⁶⁴ Collected Interviews in Simanjiro District, 1998

¹⁶⁵ A letter of an offer of a right should be distinguished from an *Offer of a Right of Occupancy*. If land is not surveyed, an Offer of a Right of Occupancy is granted. The Offer of a Right of Occupancy is a formal and final document setting out agreed terms and conditions. Like a Certificate of a Right of Occupancy, it is registered, but in the Registry of Documents, provided that it contains a description of the land sufficient for its proper identification. A letter of an offer of a right refers to allocation of surveyed land and will eventually result in the grant of Certificate of Occupancy. (James, *Land Tenure and Policy in Tanzania*, 1971, p. 122)

rights granted to him and to accept the ruling of the President as to the amount of such compensation;

- b) that the occupier binds himself to pay the President on behalf of the previous occupier the amount to be payable in respect of any unexhausted improvements existing on the land at the date of his entering into occupation and
- c) that the occupier binds himself to pay to the President the rent fixed by the President and any rent which may be fixed with the provisions of the Land Ordinance.

The Certificate of Occupancy is not the right of occupancy itself, but a document evidencing the right. The certificate is necessary for registration of the right. With a Certificate, the rightsholder has an interest, which is mortgageable or chargeable.¹⁶⁶

¹⁶⁶ James, *Land Tenure and Policy in Tanzania*, 1971, pp. 116-118