

UP IN SMOKE? MAASAI RIGHTS IN THE OLKARIA GEOTHERMAL AREA, KENYA

The Olkaria geothermal power generation project is touted as the largest such project in the world. Located approximately 120 km west of Nairobi, in Nakuru County, Kenya, the Olkaria geothermal field covers approximately 75 sq. km and was gazetted as a Geothermal Resource Area in 1971. Three power stations are currently adding 158 MW¹ to the national grid while a fourth is under construction. The Kenya Electricity Generating Company (Kengen), a wholly-owned state corporation, operates three of the four power stations while Orpower4 Inc, a wholly-owned subsidiary of US-based Ormat Technologies, will operate the fourth.

The Olkaria geothermal power projects generate income by selling electricity to the Kenya Power and Lighting Company, a government-owned power distribution monopoly. Olkaria is also registered as a Clean Development Mechanism (CDM) project under the Kyoto Protocol to the United Nations Framework Convention on Climate Change.²

The Olkaria geothermal power generation project is being funded by the Government of Kenya, and through loans from the World Bank, European Investment Bank, Deutsche Investitions- und Entwicklungsgesellschaft mbH,³ KfW Entwicklungsbank (KfW Development Bank) and the Overseas Private Investment Corporation.⁴

While the Olkaria geothermal power project lights up the nation, however, the Maasai people living in the area have consistently raised concerns that the project is dimming their lives. Olkaria has been their only home since the 18th century. And not only are they having to



1 Olkaria I (45 MW) and Olkaria II (65 MW), with a third private plant Olkaria III (48 MW)

2 An international agreement linked to the United Nations Framework Convention on Climate Change, which commits its Parties by setting internationally binding emission reduction targets: <http://cdm.unfccc.int/Projects/DB/DNV-CUK1276170328.71/view>. Olkaria II Geothermal Expansion project includes a number of parties under the CDM besides the host party Kenya: Canada, Netherlands, Italy, Denmark, Finland, Sweden, Luxembourg, Switzerland, Austria, Germany, Belgium, Japan, Norway and Spain.

3 German Investment Corporation.

4 An agency of the United States government.



leave to make room for the project, they are having to leave under very unfair terms, for a number of reasons:

- 1) Despite ancestral ownership and occupation of the land for hundreds of years, they do not legally own the area as the government allocated it to members of another community in the 1970s. The government did this by virtue of the Crown's title to lands in Kenya.
- 2) They have not been consulted properly and have not given their free, prior and informed consent to the project or the relocation.
- 3) They have not been offered proper compensation. They have to vacate 4,300 acres of land in order to be resettled on only 567. And although they will gain modern housing, a school and several scholarships, the compensation package does not include water or other provisions necessary for the continuation of a sustainable livelihood. For a community whose whole life revolves around livestock, a diminished land base and sudden change of living conditions will most likely result in poverty and destruction of their livelihood, culture and identity.

Serious human rights violations

On 26th July 2013, thugs allegedly contracted by a project developer descended on one of the Maasai vil-

lages in Olkaria known as Narasha. The thugs torched houses, beat up community members and maimed and killed dozens of their livestock. The TV images of Maasai men, women and children wailing in despair as they witnessed the destruction angered the nation. The thugs committed this violence under armed police protection.⁵ The homes of 256 families were burnt and over 2,000 people were left homeless.⁶ The damage was estimated at over US\$ 100,000.⁷ Despite its promises, the Government of Kenya has done nothing to effectively address the human rights violations committed or to compensate the victims in accordance with international standards. The country office of the World Bank, which is one of the main funders of the project, has so far remained silent.⁸

Violations of international human rights law

This matter raises serious human rights issues under international and domestic law that have to be considered by governments and investors when pursuing projects on indigenous peoples' territories. These include:

5 Who really ordered Narasha Evictions? Standard Newspaper, 3rd August 2013. http://www.standardmedia.co.ke/mobile/?articleID=2000090049&story_title=who-really-ordered-the-narasha-evictions

6 Survival International: <http://www.culturalsurvival.org/news/campaign-update-kenya-entrenched-impunity-and-corruption-kengen-carries-out-census-narasha>

7 Op. Cit.

8 Op. Cit.



- 1. Rights to land, territories and resources** – International human rights law states, and several court decisions both internationally and locally have ruled, that the Crown's title does not extinguish the ancestral land rights of indigenous peoples. Modern international human rights norms oblige governments to recognize ancestral title. Investors must therefore recognise and respect this when investing in indigenous territories.
- 2. Duty to consult** - The right to be consulted and the duty to consult has evolved as a key legal norm in international and domestic law. Courts in various jurisdictions have ruled that indigenous peoples are entitled to compensation when there is a failure to consult them. States bear legal responsibility for this failure and, as such, have a duty to ensure that the corporations and investors they deal with do consult the affected communities. These consultations must be conducted in good faith, in culturally appropriate ways - including in a language understood by the local Maasai - and the community must be afforded legal counsel.
- 3. Benefit sharing** – Although Environmental and Social Impact Assessments (ESIA) were undertaken and community packages included - packages that comprised relocation to a new land and the provision of a school, hospital and scholarships - these were not re-

sponsive to the needs and world views of the Maasai people. This is because the ESIA teams lacked local expertise: none of their members had lived a pastoralist lifestyle or even understood the Maasai language. It is unclear whether the final ESIA reports were even validated by the community. The ESIA ought to have looked at how the project would disenfranchise the community and how the community needed to be compensated for this in sustainable and culturally appropriate ways. It is the state's responsibility to provide schools and clinics for its citizens and these should not be considered as part of the project's benefits. ESIA's should focus on long-term community participation in the project and related activities. This requires a shift in thinking away from satisfying basic community needs such as housing, schools and hospitals and towards designing benefit-sharing interventions based on the long-term fulfilment of rights, as agreed upon in consultation processes.

Need for a human rights-based approach

A commitment to a human rights approach to business is key. Encouragingly, various windows for dialogue are now opening. These include the Forum for Business and Human Rights and other processes at both international and national levels. These opportunities need to be maximized.

For the Olkaria Geothermal Project, a human rights-based approach to business must involve:

1. Recognition of the Maasai's ancestral rights to the land that encompasses the geothermal generation area.
2. Transparent and effective consultation processes that recognize their right to free, prior and informed consent. This will remedy the violations already committed and prevent further human rights abuses from being visited upon the Maasai by the geothermal projects.
3. The design of new benefit-sharing arrangements that ensure sustainability not only for the geothermal power extraction company but also for the way of life of the communities, it being noted that the provision of schools, hospitals and roads is not a project benefit

but an inherent responsibility of the state towards its citizens.

4. For Kenya as a whole, a discussion is needed on the ownership of sub-surface resources as a critical step not only for the communities on whose territories the resources are found but also for the county governments and the country at large. Currently, under the Kenyan Constitution, all minerals and mineral oils belong to the national government, as do all geothermal resources, under the Geothermal Act. This results in a conflict over extraction rights between the national government, county government and communities on whose territories the resources are found.

Kanyinke Sena

LLM Student, James E. Rogers College of Law, University of Arizona,
Chair of the UN Permanent Forum on Indigenous Issues

