

REPORT OF THE AFRICAN COMMISSION'S WORKING GROUP ON INDIGENOUS POPULATIONS/COMMUNITIES

RESEARCH AND INFORMATION VISIT TO KENYA

1-19 March 2010



African Commission on
Human and Peoples' Rights



IWGIA

International Work Group
for Indigenous Affairs



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African Commission on
Human and Peoples' Rights
(ACHPR)



International
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for Indigenous Affairs

2012

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We extend our thanks to senior government and state officials who met us including, Hon. Mohamed Elmi, the Minister of State for the De-

velopment of Northern Kenya and other Arid Lands, Office of the Prime Minister, Hon Mutula Kilonzo, Minister for Justice, National Cohesion and Constitutional Affairs, Noor Hassan Noor of the Office of the Prime Minister, Interim Coordinating Secretariat of the Mau Complex Conservation and Christian Lambrechts of the United Nations Environmental Programme (UNEP) Nairobi. We are equally grateful to Benjamin Kavu and Grace Nzale of the Kenya Wildlife Service. Korir Abraham Singoei the former executive director of CEMIRIDE and Adam Hussein Adam of the Open Society Initiative for East Africa provided invaluable insights, information and analysis that gave direction to our team. Last but not least, we acknowledge and appreciate the financial assistance of DANIDA as well as the logistical and material support of IWGIA that made this visit possible.

PREFACE

The African Commission on Human and Peoples' Rights (ACHPR or African Commission), which is the human rights body of the African Union, has been debating the human rights situation of indigenous peoples since 1999. Indigenous peoples are some of the most vulnerable and marginalized groups on the African continent, and their representatives have, since the 29th Ordinary Session of the African Commission in 2001, participated in the ACHPR's sessions. The indigenous representatives have given strong testimonies to their situation and the human rights violations they suffer. Their message is a strong request for recognition and respect, as well as a call for improved protection of their civil, political, economic, social and cultural rights. It is also a request for the right to live as peoples and to have a say in their own future, based on their own culture, identity, hopes and visions. Indigenous peoples, moreover, wish to exercise these rights within the institutional framework of the nation state to which they belong. The African Commission has responded to this call. The African Commission recognizes that the protection and promotion of the human rights of the most disadvantaged, marginalized and excluded groups on the continent is a major concern, and that the African Charter on Human and Peoples' Rights must form the framework for this.

In order to achieve a better basis on which to advance discussions and formulate recommendations, the African Commission set up a Working Group on Indigenous Populations/Communities (Working Group) in 2001. The Working Group implemented its initial mandate by producing the comprehensive document "Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities on the human rights situation of indigenous peoples and communities in Africa" (the full report can be downloaded from <http://www.achpr.org>). The report was adopted by the African Commission in November 2003, and published in a book format in 2005. The report is the African Commission's official conceptualization of indigenous peoples' human rights in Africa.

In 2003, the Working Group was given the mandate to:

- Raise funds for the Working Group's activities, with the support and cooperation of interested donors, institutions and NGOs;
- Gather information from all relevant sources (including governments, civil society and indigenous communities) on violations of the human rights and fundamental freedoms of indigenous populations/communities;
- Undertake country visits to study the human rights situation of indigenous populations/communities;
- Formulate recommendations and proposals on appropriate measures and activities to prevent and remedy violations of the human rights and fundamental freedoms of indigenous populations/communities;
- Submit an activity report at every ordinary session of the African Commission;
- Co-operate when relevant and feasible with other international and regional human rights mechanisms, institutions and organizations.

On the basis of this mandate, the Working Group has developed a comprehensive activity programme. This programme includes undertaking country visits, organizing sensitization seminars, cooperating with relevant stakeholders and publishing reports, all with a view to protecting and promoting indigenous peoples' rights in Africa.

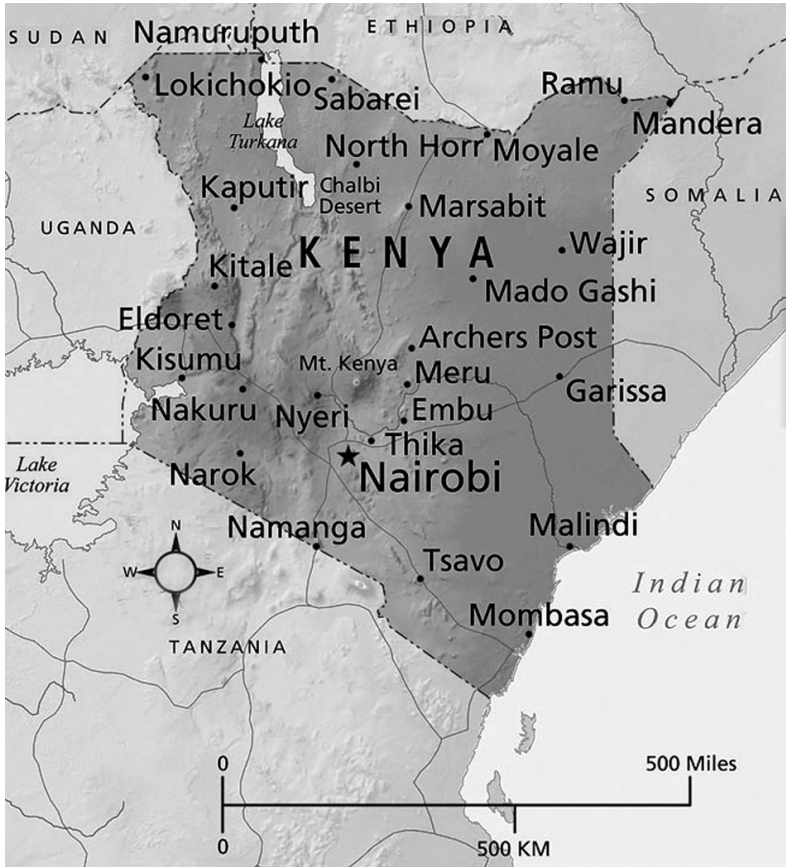
This report is part of a series of country-specific reports produced by the Working Group, and adopted by the African Commission on Human and Peoples' Rights. These country-specific reports emanate from the various country visits undertaken by the Working Group, all of which have sought to engage with important stakeholders such as governments, national human rights institutions, NGOs, intergovernmental agencies and representatives from indigenous communities. The visits have sought to involve all relevant actors in dialogue on indigenous peoples' human rights, and to inform them of the African Commission's position.

The reports not only document the Working Group's visits but are also intended to facilitate constructive dialogue between the African Commission, the various African Union member states, and other interested parties.

To date, the Working Group has undertaken visits to Botswana, Burkina Faso, Burundi, Central African Republic, Democratic Republic of Congo, Gabon, Kenya, Namibia, Niger, Libya, Republic of Congo, Rwanda and Uganda. These country visits have been undertaken during the years 2005-2010, and the reports are published once adopted by the African Commission. Hopefully, the reports will contribute to raising awareness of indigenous peoples' situation in Africa, and prove useful for establishing dialogue and identifying appropriate ways forward for improving indigenous peoples' situation in Africa.

It is hoped that, via our common efforts, the critical human rights situation of indigenous peoples will become widely recognized, and that all stakeholders will work to promote and protect indigenous peoples' human rights in their respective areas.

Commissioner Soyata Maiga
Chairperson of the African Commission's Working Group
on Indigenous Populations/Communities



MAP OF KENYA

EXECUTIVE SUMMARY

One of the core mandates of the African Commission on Human and Peoples' Rights' (ACHPR) Working Group on Indigenous Populations/Communities (WGIP) is to undertake country visits to study the human rights situation of indigenous populations/communities. Pursuant to those visits, the WGIP formulates recommendations and proposals on appropriate measures and activities to prevent and remedy violations of the human rights and fundamental freedoms of indigenous populations and communities. In furtherance of that mandate, the WGIP paid a research and information visit to the Republic of Kenya from March 1-19, 2010 and compiled this report. The research and information visit was undertaken by Dr. Melakou Tegegn, expert member of the WGIP, and Dr. George Mukundi Wachira, member of WGIP's advisory network of experts.

The aim of the visit was as follows:

- To gather information on the human rights situation of indigenous populations in Kenya;
- To hold meetings with the government of Kenya, regional and local authorities, national human rights institution, international organizations, civil society organizations, indigenous populations' organizations and communities as well as other relevant stakeholders;
- To provide information about the African Commission's policy framework on the human rights of indigenous populations;
- To submit a report, including recommendations, to the African Commission.

The researchers focused on group discussions with representatives of various indigenous communities, including the Maasai, Samburu, Ogiek, Endorois, Ilchamus, Elmolo, Munyoyaya, Waata, Somali, Yaaku, Borana, Sengwer, Gabra, Orma, Pokot, Rendille, Burji, Sanye, Mwilwana and Tur-

kana. These meetings were held across the country in Nairobi, Kitengela, Nakuru, Mariashoni in Mau Forest, Baringo, Bogoria, Nanyuki, Isiolo, Dol Dol, and Garissa. The delegation also met community-based organizations (CBOs) working on indigenous peoples issues from Nairobi, Kajiado, Nakuru, Baringo, Nanyuki, Samburu, Pokot, Isiolo, Mt Elgon, Narok, Marsabit, Moyale, Mandera, Garissa, Wajir, Ijara, Tana River, Bura, Hola, and Turkana. In addition, the researchers met government officials including Hon. Mutula Kilonzo, Minister for Justice and Constitutional Affairs, Hon. Mohammed Elmi, Minister of State for the Development of Northern Kenya and Other Arid Lands, officials from the Office of the Prime Minister, the Director of Environmental Planning and Research Co-ordination at the National Environment Management Authority, Commissioners Fatuma Ibrahim and Fatuma Dulo of the Kenya National Commission of Human Rights as well as senior officials from the Kenya Wildlife Service. Meetings were also held with other NGOs and activists who in their work engage with indigenous peoples' human rights issues, such as the Open Society Initiative for East Africa, Arid Lands Institute and CEMIRIDE.

Secondary information was also collected from various sources, including government documents, books, articles, other official and NGO reports on the conditions of indigenous people in Kenya.

At the time of this research and information visit, most Kenyan government officials were preoccupied with the constitutional review process and it was therefore not possible to meet with as many officials as envisaged. Nevertheless, the team met many other stakeholders and also some high-ranking state officials, who shared the views of the government on the situation of indigenous peoples in Kenya.

The mission found that the indigenous communities of Kenya are still facing serious problems that threaten their existence. These threats are historical in nature, emanating from the policies of British colonization, as well as the consequences of the policies of the post-independence republic. The most serious threat comes from the land grabbing of the ancestral land of indigenous communities, which has served as a major vehicle in the drive towards wealth accumulation by the post-independence political elite.

The mission found that a major construct used by the political elite to rationalize the land grabbing drive for the ancestral land of indigenous

communities is to deny recognition of these communities as indigenous. Consequently, the political elite have consistently failed to recognize and ratify any of the international and regional instruments that recognize the human rights of indigenous communities.

One of the findings of this research and information visit includes the harsh measures that the government of Kenya has adopted against indigenous communities who have taken their case to the Kenyan courts. In the case of the Ogiek community who inhabited the Mau Forest for millennia, the design of the government is still to evict them from their ancestral land.

On a positive note, the mission was informed by the Minister of Justice that the Kenyan government accepts the ruling of the African Commission on Human and People's Rights on the rights of the Endorois community to regain their land and habitat and that it would implement the ruling.

It is the mission's finding that the Kenyan government has not come to terms with the notion of indigeneity and that it has not yet developed a particular strategy of development as required by the particular ways of life of indigenous communities.

One of the many functions of the marginalization of indigenous communities is their lack of political representation in the country's parliament. Issues affecting the day-to-day lives of indigenous communities are decided in the absence of deputies representing indigenous communities, or the communities are completely ignored.

Indigenous communities are largely marginalized and discriminated by government institutions and other institutions, such as those of the private sector.

Apart from the land grabbing, the second most debilitating factor in the lives of Kenya's indigenous communities is the lack of access to justice. Moreover, the potential for insecurity and conflict is very high in pastoral areas.

It is also the mission's finding that indigenous women are facing a serious level of marginalization from within the indigenous communities themselves. Deprivation of access to education and public health in general has exacerbated the marginalization of indigenous women and the violence they face.

Indigenous communities also face a serious lack of access to education and health care; their spirituality is not recognized and respected.

The mission found that although the Republic of Kenya is on the threshold of a renaissance through major constitutional and policy reforms following the post-election violence in 2007, the plight and concern of indigenous communities is not addressed as fully as it deserves.

Despite the pace-setter image that Kenya has for the East Africa region in the area of freedom of expression, the country has a deep-seated problem insofar as the rights of its indigenous communities go. The post-2007 election violence crushed this image and reduced Kenya to the same level as many African countries with regard to politics and governance. This shock has served as a major reason for the country to look inwardly in self-examination. The self-examination did not go, as indigenous communities wished, as deep as it should have. The serious undertakings for reform that followed touched on issues related to the rights of indigenous communities but refrained from going deeper as they did on other issues. Problems with political roots deserve political solutions. Our findings indicate that the roots of indigenous peoples' problems in Kenya are deeply political and deserve political solutions that are based on the wishes of the indigenous communities. All the international and regional human rights instruments assert this fundamental fact, i.e. respect for the rights and wishes of indigenous communities. Amazingly, Kenya, which has signed a number of these human rights instruments, conspicuously avoided signing any of the instruments that proclaim the human rights of indigenous peoples.

Based on the findings mentioned above, the Working Group on Indigenous Populations/Communities makes the following recommendations:

Recommendations to the Government of Kenya

- Review its overall approach and orientation towards the state of its indigenous peoples. To this end and for a wider impact, the government should organize a national conference on issues that affect

the indigenous peoples of Kenya, in which prominent and knowledgeable persons on indigeneity take an active part.

- Observe the dispositions of the African Commission on Human and Peoples' Rights on indigeneity and the rights of indigenous peoples in Africa as stipulated in the 2003 Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities adopted by the African Commission at its 28th Ordinary Session in 2003.
- Recognize the pastoral communities and hunter-gatherer communities of Kenya as indigenous.
- Ratify ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries.
- Adopt the United Nations Declaration on the Rights of Indigenous Peoples and ensure its incorporation, through the parliament, into domestic laws.
- Identify indigenous peoples through the census launched and provide disaggregated data on pastoralists and hunter-gatherers.
- Reform its electoral system to facilitate the political representation of indigenous peoples according to their wishes.
- Rearrange the current designations of districts to end the splitting up of indigenous peoples, which greatly affects their chances of political representation.
- Review the current practice of issuing identity cards, which discriminates against indigenous peoples; identity cards should be issued to all members of indigenous communities.
- Fully endorse and implement the Ndungu'u Report and return the ancestral lands of indigenous peoples taken from them through land grabbing or other illegal means.

- Implement the provisions of the Kenya Land Policy.
- Compensate and pay reparations to indigenous peoples for the loss of their ancestral land through gazettement of national parks, reserves, forests, wildlife conservation and tourism ventures.
- Legally recognize and respect the rights of the Ogiek community to live in their ancestral home. The government's plan to evict the Ogiek community from the Mau Forest must be withdrawn. Titles to the Mau Forest land acquired illegally must be revoked and new titles should be issued only to the original inhabitants, the Ogiek. The government should immediately stop commercial logging in the Mau Forest.
- Implement the rulings of the African Commission on the case of the Endorois people, return their ancestral land and respect their right to unrestricted access to Lake Bogoria.
- Immediately halt the hostile acts of the army in the lands of the Samburu and stop the violence against the community and address the inter-communal conflict through dialogue and discussion.
- Consult indigenous communities prior to exploration or exploitation of natural resources on their ancestral and traditional land. Indigenous communities should receive an equitable share of benefits obtained from the exploration and exploitation. Full compensation should be paid to indigenous communities in case of adverse environmental impact on their land, natural resources and traditional livelihoods resulting from these economic activities.
- The management of and benefits derived from protected areas, game reserves and national parks in pastoral and hunter-gatherer areas must involve indigenous communities. Indigenous communities must be compensated for the loss incurred heretofore as a result of the creation of these game reserves.

- The government must ensure the participation of representatives of indigenous communities in the political reforms that are underway in the country.
- The government should adopt affirmative action in the field of education for indigenous children. In pastoral areas, mobile and full boarding schools should be introduced to ensure universal primary education. Appropriate educational curricula must be designed to meet the requirements of indigenous communities in order to preserve their language, culture, special history and spiritual legacies.
- Efforts must be made to protect from extinction the language, culture and other legacies of smaller indigenous communities, especially the Ogiek, Sengwer, Ilchamus, Elmolo, Munyoyaya, Waata and Yaaku. The state should form an agency to promote traditional languages, especially those under threat of extinction, in schools and through the mass media, especially state media, in collaboration with universities and institutions of higher learning as well as with members of civil society.
- The government should take active measures to effectively eradicate female genital mutilation in all communities through carefully designed and socially acceptable methods.
- The government should make provisions for adequate health facilities and infrastructure to address the problem of high levels of maternal and infant mortality among indigenous communities due to the inadequacy of such facilities in indigenous peoples' places of habitat. Importantly, the Ministry of Health should initiate official training to strengthen the capacity of traditional midwives and first aid care givers.
- The government, through the ministries of trade and youth affairs, should strengthen the capacity of indigenous youth to harness their potential in traditional knowledge systems and alternative means of economic sustenance. This could be through training and

access to capital and markets for their goods, wares and services especially in tourism and livestock husbandry.

- The state, through the Ministry of Justice, should provide legal assistance to indigenous communities, perhaps through the recently launched legal aid scheme, in order to access justice on a variety of human rights issues such as in defending and reclaiming their traditional land rights and resources.
- Kenya and its East African counterparts, through their ministries of foreign affairs and East African integration, should initiate a joint programme to address cross-border indigenous peoples' issues such as migration, movement, citizenship, equitable access and share of natural resources as well as state services such as education, health and socio-economic rights.

Recommendations to civil society and indigenous communities

- Indigenous communities in Kenya and members of civil society should remain vigilant and hold the state accountable for implementing the recommendations in this report as well as remain at the forefront of challenging continued human rights violations through peaceful action and judicial fora, including at the African Commission on Human and Peoples' Rights.
- Indigenous communities and civil society actors should employ innovative measures, in partnership with development partners, aimed at addressing the socio-economic needs of the communities such as training, development of tools and infrastructure in order to strengthen the capacity of indigenous communities to respond to the challenges they meet, such as maternal and infant mortality, unemployment, etc. and to promote traditional knowledge systems.

- Popularize this report in order to conduct advocacy and sensitization activities with the indigenous communities and state officials on the situation of indigenous communities and continuously lobby for the adoption of appropriate programmes to address the problem of continued marginalization of indigenous peoples in Kenya.

Recommendations to the African Commission on Human and Peoples' Rights

- Follow up on implementation and enforcement of its recommendations on the Endorois ruling. It is also urged to expedite other communications that have been lodged by indigenous communities in Kenya.
- Conduct an official mission to Kenya, in order to continuously monitor the situation of human rights of indigenous peoples in the country.
- Facilitate dialogue with the government of Kenya, civil society and indigenous communities in the country to ensure that the rights of indigenous peoples in all fields are respected.

I. INTRODUCTION

The Working Group on Indigenous Populations/Communities (WGIP) conducted a research and information visit to the Republic of Kenya from March 1-19, 2010 and compiled this report. The research and information visit was undertaken by Dr. Melakou Tegegn, expert member of the WGIP, and Dr. George Mukundi Wachira, member of WGIP's advisory network of experts.

The purpose of the visit was to gather and disseminate information on the human rights situation of indigenous populations in Kenya and submit a report to the ACHPR. This information would be useful for the ACHPR to make recommendations on appropriate initiatives and measures to protect and promote the rights of indigenous peoples in the country. In seeking to gather this information, the research team consulted and engaged with government officials at national and local levels, the national human rights commission, non-governmental human rights organizations, indigenous peoples' organizations, independent experts and the media. The research visit was also an opportunity to share information regarding the work of the WGIP on the rights of indigenous populations in Africa with the various actors in Kenya.

This mission was originally scheduled for March 1-15 but was extended by three more days in the hope of meeting the prime minister, Hon. Raila Odinga. It started with a preparatory meeting with Naomi Kipuri of the Arid Lands Institute in which the original itinerary was updated with a slight change. Within the limited time frame we had, we could only have clustered meetings with indigenous community elders/representatives. We thus devised a rough geographical divide of indigenous regions and clustered representatives accordingly. The first cluster included the Ogiek and Sengwer in the main, and the meeting took place in the Mau Forest Complex. At this meeting, there were more than one hundred persons, most of whom were members of the Ogiek community. The second meeting was entirely with the Endorois and was held in Banyoro, while the visit to the Ilchamus cultural center included a few representatives of

the community. The third cluster covered the Laikipia and northern region and included the Maasai, Samburu, Yaku, Burji and Boran; the meeting was held in Nanyuki. The fourth cluster included the Somali, Wata, Orma, Malacote, Bony and Myoyaya communities and the meeting was held in Garissa. Separate meetings were also held with representatives of the Pokot and Elmolo in Nairobi. In all these meetings, the elders/representatives of indigenous communities presented their plight and answered our questions. On some occasions, deep bitterness was expressed. For instance, at the Laikipia meeting, a Maasai elder of 70 years of age wept as he told of the plight of his community.

Meetings with ministers and other government institutions were also held separately. There was a possibility of meeting the prime minister but his government at the time was too busy with the adoption of the draft Constitution by parliament so a meeting was not possible at that particular time. Attempts were made to meet UN agencies, multilateral and bilateral institutions but time did not permit. We met the Kenya National Human Rights Commission as well as Open Society International and experts such as Sing'oei Korir, the ex-director of CEMIRIDE.

The detailed schedule of the mission was as follows:

- | | |
|---------|---|
| March 1 | Preparatory meeting with Naomi Kipuri, Arid Lands Institute
Introductory meeting with Fatuma Ibrahim, Fatuma Dullo and Mwenda Mwangera of the Kenya National Human Rights Commission |
| March 2 | Meeting with Adam Hussein Adam of the Open Society
Visit to Kitangalla Project, Reto-O-Reto Foundation |
| March 3 | Meeting with Benjamin Kavuu and Grace Nzale, Kenya Wildlife Services |
| March 4 | Meeting with Hon. Mohammed Elmy, Minister of State for the Development of Northern Kenya and Other Arid Lands |
| March 5 | Meeting with Maasai Groups from around Nairobi |
| March 6 | Meeting at Mariashoni, Mau Forest Complex, with elders and representatives of Ogiek and Sengwer communities |
| March 7 | Meeting in Banyoro with elders and representatives of the Enderois community |

- Visit to the Ilchamus cultural center and meeting with its members
- March 8 Attending Women's Day celebration in Isiolo with Samburu women
- March 9 Meeting in Nanyuki with elders and representatives of Samburu, Maasai, Yaku, Burji and Boran
- March 10 Meeting with elders and representatives of Somali, Watta, Orma, Malacote, Bony and Myoyaya communities in Garissa
- March 12 Meeting with Korir Sing'oei Abraham, USAID, former director of CEMIRIDE
Meeting with Noor Hassan Noor, Office of the Prime Minister, Interim Coordinating Secretariat of the Mau Complex Conservation and Christian Lambrechts of the United Nations Environmental Programme (UNEP) Nairobi
- March 14 Meeting with Hon Mutula Kilonzo, Minister for Justice, National Cohesion and Constitutional Affairs
- March 15 Meeting with Kennedy Ondimu, Planning and Research Department, National Environment Management Authority
Meeting with representatives of Pokot and Elmolo communities in Nairobi
- March 17 Press Conference given by Dr. Melakou Tegegn at the Nairobi Hilton

II. BACKGROUND INFORMATION

Kenya is geographically located on the east coast of Africa, along the equator. It covers an area of 583, 000 sq. km and has an estimated population of about 35 million people.¹ The country is currently administratively subdivided into eight provinces: Nairobi, Central, Rift Valley, Nyanza, Western, Coast, Eastern and North Eastern. At the political level, Kenya has 210 constituencies.

The country gained independence from the British on 12 December 1963. Jomo Kenyatta, a Kikuyu, became its first post-colonial leader until his death in 1978. Daniel Arap Moi, a Kalenjin, took over from Kenyatta until 2003 when Mwai Kibaki, another Kikuyu and current president, took the helm.

Ascendance to political power in Kenya is linked to access and distribution of state resources. Elections in Kenya are based on universal suffrage, and are generally held every five years. Access to elective political power is largely dependent on wealth, ethnic affiliation and one's ability to garner more votes than the competition per se. Such considerations often bar some of the minority communities in Kenya from effectively accessing political structures. This issue is revisited in greater depth later in the report, with recommendations for affirmative action to guarantee the effective participation of indigenous communities in Kenya in terms of political decision-making and access to state resources.

Conflict over the equitable sharing of state resources, especially land, has often resulted in violent conflicts. In 2007 for instance, the country was embroiled in one of the most violent political conflicts, triggered by serious allegations of electoral misconduct. While that particular violence was directly linked to the political processes of the elections, the root causes of that conflict run deep into a history that precedes independence but have been fostered by successive government regimes.

1 The results for the 2009 national census are yet to be officially released amidst widespread claims of irregularities by opposition political parties see <http://www.nation.co.ke/News/Kenya%20census%20results%20due%20by%20August/-/1056/885720/-/w89wk5z/-/index.html>

The post-election violence affected six out of the eight provinces in Kenya and was felt in both the urban and rural parts of the country (Agnes Nzisa Rogo. "Transitional Justice and its Implications: The Case of Post Election Violence in Kenya." *Women's World*. Kampala, 2009, Iss. 44; pg. 36-39). As the Commission of Inquiry into Post-Election Violence (CIPEV)'s final report (also known as the Waki Report) indicated, post-election conflict in Kenya was in part a result of a culture of impunity exemplified by "the institutionalization of violence following the legalization of multi-party democracy in 1991" (Government of Kenya, *Report of the Commission of Inquiry into Post-Election Violence (CIPEV)*, 2008). Of key relevance to this report, another principal contributing factor to the violence as identified in the CIPEV report is the legacy of long-term marginalization of certain ethnic groups (IBID: 33). The Report also noted the consequences of the "personalization of Presidential power", leading people to believe it was "essential for the ethnic group from which they come to win the Presidency in order to ensure access to state resources and goods" (IBID: 33-34).

In January 2008, the Kenya National Dialogue and Reconciliation negotiations led to a halt in the violence and the creation of a coalition government between the two main protagonists, Raila Odinga and Mwai Kibaki, forming the Government of National Unity (GNU). The National Dialogue has since created several commissions and committees of inquiry to better understand the events surrounding the elections and the causes of the violence and civil unrest that followed. These included, among others, the Commission of Inquiry on Post-Election Violence (CIPEV), which authored the Waki Report, a Truth, Justice, and Reconciliation Commission (TJRC), Committee of Experts to Review the Constitution, the National Cohesion and Integration Commission and the Interim Independent Electoral Commission, which is creating a new voter register.² An Interim Independent Boundaries Review Commission of Kenya was also created by an Act of Parliament in May 2009 to review the existing constituency boundaries so that they accurately reflect population size and concentration.³ Various other legislative and institutional reforms are also underway, which include judicial and security sector re-

2 See <http://www.iiec.or.ke/> for more information.

3 <http://www.capitalfm.co.ke/news/Kenyanews/Kenya-boundaries-review-team-appointed-4376.html>

forms. One of the most important and significant milestones was marked on 3 August 2010 when Kenyans overwhelmingly voted through a national referendum for the adoption of a new constitution. The new constitution is significant in many ways for indigenous peoples in Kenya: for the first time in Kenya's history, the constitution, among many other progressive provisions, stipulates national values and principles of governance (article 10); expressly acknowledges the rights of minorities and marginalized groups (article 56); protects community land ownership (article 63), incorporates socio-economic rights (article 43), language and culture (article 44), provides for equitable sharing of the national revenue and resources (article 202) and importantly devolves power to the people at the local level (chapter 11). Kenya's indigenous peoples have overwhelming expectations that the implementation of the new constitution will improve their conditions and well-being.

III. CONDITIONS OF KENYA'S INDIGENOUS PEOPLES

The concept of indigenous populations in this report is understood according to the criteria set out by the 2003 Report of the ACHPR and adopted by its 34th Ordinary Session.

The indigenous peoples of Kenya suffer from severe forms of marginalization and economic deprivation as a result of the confiscation of their ancestral land and natural resources, lack of political representation, discrimination and denial of access to justice, perpetual insecurity and conflict. Such marginalization is connected with the twin processes of formation of a modern state and the Kenyan nation, which date back to colonization. The process of state and nation formation began with colonization and continued under the post-independence state. Colonial misrule in Kenya, as in most other African states, exploited ethnic differences to foster division and competition and this is largely to blame for the continued unequal distribution of natural resources, often to the detriment of indigenous peoples. This report provides a brief survey of some of the key issues that continue to affect indigenous peoples in Kenya.

a. Lack of Recognition of Indigeneity

The plight of Kenya's indigenous communities is largely determined by the attitude of the state towards them and the policies it subsequently follows. One of these policy issues is lack of recognition. Lack of recognition and the official attitude towards indigenous communities is intertwined with the wealth accumulation process in post-independence Kenya that is very much in the vested interests of the political elite, which has hitherto dominated political power. Undoubtedly, there are emerging and encouraging positive signals of change in the situation of indigenous peoples in Kenya albeit hitherto slow and haphazard. For instance, the provision in the recently adopted Constitution (through the national referendum of 3 August 2010) on the protection of the rights of minorities

and marginalized groups is a welcome development. However, what prevails at the moment is continued marginalization and exclusion from state and development processes that predate Kenya's independence in 1963.

What is the official view on indigeneity, and indigenous peoples in Kenya?

The old Constitution of Kenya contains no provision on indigeneity and indigenous peoples. However, Kenya is a signatory to the African Charter on Human and Peoples' Rights, whose implementing mechanism is the African Commission on Human and Peoples' Rights (ACHPR). The Working Group on Indigenous Populations/Communities (WGIP) of the ACHPR suggests a criterion for communities and groups in Africa that are identified as indigenous, and which applies to many of the indigenous communities in Kenya. That criterion is also in consonance with that identified by the global indigenous movement, as recently codified in the UN Declaration on the Rights of Indigenous Peoples. According to the African Commission on Human and Peoples' Rights' WGIP, while the concept of indigenous peoples is indeed controversial, especially in Africa, the human rights aspirations and issues of concerns to these groups are not.

The controversy on the concept of indigenous peoples at the international level is reflected in the protracted process of the deliberations of the UN Working Group on Indigenous Populations, which had met in Geneva annually for 20 years before the adoption of the UN Declaration on the Rights of Indigenous Peoples by the UN General Assembly in 2007. The African Commission's WGIP report summarizes the characteristic features of indigenous peoples in Africa as:

"To summarize briefly: the overall characteristics of the groups identifying themselves as indigenous peoples: their cultures and ways of life differ considerably from the dominant society and their cultures are under threat, in some cases to the extent of extinction. A key characteristic for most of them is that the survival of their particular way of life depends on access and rights to their traditional land and the natural resources thereon. They suffer from discrimination as they are being regarded as less developed and less advanced than other more dominant sectors of society.

They often live in inaccessible regions, often geographically isolated and suffer from various forms of marginalization, both politically and socially. They are subject to domination and exploitation within national political and economic structures that are commonly designed to reflect the interests and activities of the national majority. This discrimination, domination and marginalization violates their human rights as peoples/communities, threatens the continuation of their cultures and ways of life and prevents them from being able to genuinely participate in deciding on their own future and forms of development” (Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities, 2003:89).

This research identifies with this description of indigenous peoples in Africa and is the basis upon which it proceeds to identify the communities and groups that need to be focused on in Kenya.

Although Kenya has generally hesitated to formally acknowledge the fact that certain communities are indigenous in terms of the emerging international law developments in this regard, it has increasingly conceded - at least since the formation of a coalition government in 2008 - that certain communities are indeed marginalized and deserve recognition as particularly vulnerable. In fact, pastoral communities and hunter-gatherers are mentioned from time to time in official documents as well as official pronouncements made by officials of the new government. The Constitution, recently adopted during the national referendum of 3 August 2010, while ostensibly more participatory in its drafting and inclusive than the old Constitution, however, only uses the terms “minorities and marginalized groups” (article 56) and falls short of either using the term “indigenous communities” or mentioning the communities as “pastoralists” and “hunter-gatherers” as such. This is an indication that recognition of indigenous peoples is still a future agenda, if ever.

Given the scope of this report and the work of the WGIP - examining the situation of indigenous peoples - it does not seek to explore the distinctions between minorities and indigenous peoples in Kenya save to emphasize that there are certain differences: the traditional way of life, the attachment to ancestral land and resources are indeed crucial for identification as indigenous communities.

Recognition of indigenous peoples in Kenya is crucial particularly relative to restitution of their land and natural resources as well as in adopting affirmative action measures. Despite the non-formal acknowledgment of the importance and strategic place of indigenous peoples and their lands in Kenya, statistics illustrate otherwise. For instance, the area that indigenous communities inhabit constitutes 80% of the country's land mass. They constitute 25% of the total population. The majority of the wildlife parks, reserves and protected forests, which are some of the greatest tourist attractions and by extension foreign exchange earners, are found in indigenous peoples' areas. However, and contrary to those strategically important demographic figures, indigenous communities have "the lowest access to services and over 60% of the population live below the poverty line" (Stavangen, Rodolfo. Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people. Mission to Kenya. 2008:7).

Secondly, the prevailing perception of the Kenyan government with regard to indigenous communities and livelihood systems and indigeneity as a whole is a replica of the colonial construct and stereotype of indigenous peoples. Systems of livelihood not familiar to the Eurocentric discourse are all considered as backward, and/or barbaric. The Kenyan state and political elite, which has hardly decolonized its perceptions of political and sociological categories, still perceive indigeneity and indigenous peoples in the same way as the British colonial authorities perceived them. In other words, the perception that the Kenyan elite have of indigenous communities ignores authentic pre-colonial African tolerance and the recognition and practice of coexistence among communities. It should be pointed out at this point that the same Eurocentric views do not recognize livelihood systems that they do not know or with which they are not familiar.

The fact that indigenous peoples who exercise a different way of life, based on their traditions, culture and means of livelihood, have special needs, simply does not exist in the dominant discourse and development paradigms. This is perhaps one possible reason as to why most Kenyan elites, who are groomed in the dominant discourse and who still hold the levers of state power, are still reluctant to recognize their own indigenous people – the majority of whom, as this research reveals, are still considered backward and in need of being 'civilized' in modern ways and liveli-

hoods. In other words, one of the questions that kept recurring in some of the discussions the research team had with non-indigenous community individuals was “why can’t they embrace modernity and be like the rest of us - where the rest of us in this instance are communities and individuals who have assimilated and adopted Eurocentric languages, traditions and practices”. Such attitudes, which dominate state policy, continue to propagate negative stereotypes and inevitably exclusion and marginalization.

Thirdly, the concept of indigeneity is conveniently counterposed vis-à-vis European settlers. It is obvious and indeed a common understanding on the African continent that Africans resort to the identity of indigeneity when their identity is counterposed with the European settler community such as in South Africa, Zimbabwe, Namibia and Kenya. But this argument is valid only in a colonial or apartheid setting where political power is dominated by European settlers. While colonialism is officially over in Africa, its vestiges are still remnant in post-independent African states in what is often referred to as neo-colonialism. While African elites occupy state political structures, the economic policies and governance philosophy remain rooted in Western ideals and thought, which have little or no place for indigenous peoples who refuse to embrace that paradigm.

The Kenyan elite’s official construct of indigeneity is what George Mukundi describes as follows: “In Kenya, the state has maintained that all Kenyans, irrespective of their tribal affiliations, are treated equally and in essence are indigenous to the country” (Mukundi, George. Kenya: Constitutional, Legislative and Administrative Provisions Concerning Indigenous Peoples, 2009:20). It follows from this that the Kenyan government has not yet recognized its indigenous communities as such. But, this has a debilitating effect on the lives of indigenous communities. As Mukundi says, “The lack of official recognition of indigenous peoples as indigenous or as distinct peoples in Kenya has had the effect of deliberate ‘exclusion in policy processes, non effective consultation in development and [has caused them to] become victims of assimilation’” (ibid., 24). It has also impacted upon indigenous peoples in political processes and decision-making. As such, indigenous peoples have been neglected right since the start of the post-independence state in 1963.

The Kenyan government has for years treated pastoralism or hunting-gathering as unviable traditional ways of life. It in turn resorted to pressurizing indigenous communities to become sedentary farmers producing crops. It has ignored the two livelihood systems of indigenous communities and promoted farming instead, which has resulted in deforestation and poor land use, leading to soil erosion and other forms of environmental degradation. This environmental degradation has been particularly exacerbated by drought or floods. Indigenous peoples have argued that, had pastoralism and hunting-gathering been recognized as viable livelihood systems in the traditional sector, such a situation would not have prevailed.

The Kenyan government is consistent in denying recognition to indigeneity and indigenous peoples in Kenya. So far, it has ratified none of the international instruments on the rights of indigenous peoples. It has persistently avoided ratifying ILO Convention No 169 on Indigenous and Tribal Peoples in Independent Countries. Kenya was also one of the few states to abstain when the UN General Assembly voted for the UN Declaration on the Rights of Indigenous Peoples. The Committee on Economic, Social and Cultural Rights (CESCR), for its part, has recommended that Kenya “consider ratifying ILO Convention No 169 ...” (CESCR. Concluding observations for Kenya, 2008:11). This consistent conduct and attitude against indigenous peoples, displayed both at home and at international fora by the government of Kenya, indicates that non-recognition of the rights of indigenous peoples is deeply ingrained. The government is not likely to recognize indigeneity and its own indigenous peoples even in the near future as the 2010 Constitution still puts indigenous communities in a broad category of “minorities and marginalised groups” (article 56).

b. Dispossession of Ancestral Lands

Before Britain officially colonized Kenya in 1920, it entered into agreements with powerful communities that had their own traditional institutions and system of governance, such as the Maasai. Ostensibly to keep the Maasai communities and their livestock as far as possible away from the railway lines they had constructed, the British used these agreements

to build their power step by step, thereby undermining Maasai power, which dwindled over time, paving the way for the fully fledged colonization of Kenya in 1920. The confiscation of Maasai and other indigenous peoples' land and natural resources, such as forests and lakes, was conducted with a large-scale migration of white farmers from Britain, who were given large tracts of land in return for their service in the two World Wars. Although the agreements between the Maasai and British in 1904 and 1911 were posited as "consensual agreements", historical evidence indicates that coercion was applied by the British to effect the agreements (see: *The Proposed Maasai Land Case, Legal Brief, Saitabao Ole Kanchoro, Maa Civil Society Forum, 2005*).

With the colonization of Kenya, colonial authorities and European settlers seized the most fertile and richest land in terms of wildlife and other natural resources. The original owners and inhabitants of these lands, Maasai and other indigenous communities, were pushed into areas categorized as "native reserves", which was much poorer land.

Like many other African countries, Kenya attained its independence in a struggle that was hard fought and in which several thousands of people lost their lives. The decolonization process that was to be undertaken under the post-independence state was expected to be deep in order to lead to a fundamental deconstruction of the colonial legacy. However, experience has shown that it did not happen that way. On the contrary, colonial land policies continued and the colonial laws and administrative structures were maintained. The main problem lies in the manner in which the "decolonization process" was undertaken. The process accorded the new African elites access to the European-dominated economic sector although private European farms and game reserves still remained in the hands of Europeans.

Following independence in 1963, the Constitution became the supreme law of the land. However, the Constitution of Kenya was not as conclusive on the land question pertaining to indigenous communities. As a result, a series of enactments on the land question were enforced by the Parliament such as the Trust Land Act, the Wildlife Act, the Land Adjudication Act, the Registered Land Act, the Land (Group Representatives) Act and the Land Control Act. The land grabbing of indigenous communities has, however, continued unabated despite these enactments. Close to 50 years into independence, it is only through the re-

cently adopted Constitution of Kenya 2010 and the National Land Policy that the land question has found some form of address, including the land concerns of indigenous communities.

As the former UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen, mentioned, "Most of the human rights violations experienced by pastoralists and hunter-gatherers in Kenya are related to their access to and control of land and natural resources. The land question is one of the most pressing issues on the public agenda. Historical injustices derived from colonial times, linked to conflicting laws and lack of clear policies, mismanagement and land grabbing, have led to the present crisis of the country's land tenure system" (Stavenhagen, 2008:9). Indeed, the plight of Kenya's indigenous communities is directly related to the prevailing land tenure system, which gave rise to a series of human rights violations of indigenous communities. Land grabbing through various mechanisms associated with the state structure and political power as well as logging from forests on which hunters and gatherers depend for their livelihood all continued over the years, inflicting heavy damage on indigenous communities' livelihoods.

With independence, the first president of the Republic, Mzee Jomo Kenyatta, favoured members of his own ethnic group, the Kikuyu, in terms of access to land and to other natural resources that belonged to indigenous communities. This practice intensified in the subsequent periods under former president Daniel Arap Moi (for further reading, please see the 2004 report of the Presidential Commission into the Irregular-Illegal Allocation of Public Land or the "Ndungu Report"). This caused a particular problem in Kenya of ethnicization of wealth accumulation, which caused serious political crisis that the country is still grappling with.

In Kenya, most of the land that originally belonged to indigenous peoples was legislated as Trust Land by the Trust Land Act (Chap. 288) and the Constitution. This framework lays the task of administering trust lands with local authorities, which are supposed to administer the Trust Lands as custodians of the land of the local residents. However, the Trust Land Act and its implementation have become controversial for indigenous communities and have led to a massive loss of lands to private hands, through conservation of the most prime of such lands via the Registered Land Act (Chap. 300). Most of these lands have become private

ranches, conservancies, sanctuaries, private eco-tourism projects, urban settlements and private developments at the expense of the local indigenous communities (Ndung'u Report, 2004, 9-10, 15) According to the Ndung'u land report of 2004, "the local authorities are not supposed to deal with the land as if it is their own and dispose of it as they wish. Yet, over the years, the county councils have dealt with Trust land in ways that defeat the interests of local residents" (Ndung'u, 2004, 15).

Most local authorities following independence were controlled by KANU (Kenya African National Union), the party that ruled the country until 2002, and most KANU officials were beneficiaries of the largesse of the political elites of the time. Contrary to their mandates, defined by the Constitution, the local authorities turned out to be vehicles of the land grabbing in various ways. The experience of these County Councils is summed up by the Ndungu Report as "a total breach of trust as custodians of land on behalf of local residents" (in Stavenhagen, 2008:10). The same applies to forests and adjacent land that was the original habitat of hunters and gatherers. As a result, displacement of indigenous communities from their ancestral land continued unabated. The sanctity of land title to Trust Land that rests on County Councils was never questioned by courts thereby paving the way for an intensification of land grabbing, which has become one of the vehicles of wealth accumulation in Kenya.

The wealth accumulation process began to be ethnicized right after independence. Both processes, the benefiting of those involved in land grabbing from indigenous communities and the depriving of indigenous communities of their land and natural resources, were largely a product of ethnicization. In the first instance, during Kenyatta's regime, government officials and their families from the Kikuyu ethnic group benefited from land grabbing, while indigenous ethnic groups lost their ancestral land resources as ethnic groups. Former President Moi equally extended such arbitrary allocation of land to his political and tribal henchman, mostly to the detriment of the indigenous communities. This has led to a prevalence of poverty among indigenous communities, creating a dangerous situation of simmering conflict for the entire country.

There have been a number of pretexts that the ruling elite have advanced to dispossess the indigenous communities of their land. One outstanding pretext is 'development'. Because the livelihood systems of indigenous communities were considered 'primitive' and sometimes

'barbaric', which incidentally is borrowed language from the colonialists, the ruling elite used the pretext of 'developing' the land held by indigenous communities. Immigration onto Maasai land, for instance, was encouraged on the pretext that Maasai land was 'idle land' and that immigrants could opt for group ranching. This process was supported by the World Bank at the time, notwithstanding its policy with regard to indigenous peoples which provides very clear guidelines on the need to consult and ensure indigenous peoples participate in decisions and issues that affect them, including their land rights (World Bank Operational Manual 4.10 on Indigenous Peoples, World Bank Operational Policies Manual September 1991)

The conversion of many community lands to game reserves and conservancies by private developers also takes away fertile lands from pastoral communities. As a result, pastoralists are pushed more and more to the drylands. Government officials often use the argument that, being trust lands, they can be used by the government at will which, in reality, is in contravention of the Trust Land Act. For example, the Act requires the government to consult communities before setting up military camps but this is not respected.

It is anticipated that the progressive provisions on community land ownership (article 63) in the new Constitution of Kenya will redress most of these challenges due to the fact that it vests such lands directly in the community. Indeed, article 63 departs from the 1963 constitution, which sought to vest such lands in local authorities in order to hold the lands in trust for the community, an arrangement that was prone to abuse and, in fact, divested communities of their lands in favour of individuals.

At this juncture it is useful to trace, albeit briefly, some of the key findings of this research among some of the indigenous communities in Kenya which reflect the present predicament and situation of these communities in the country.

The Case of the Ogiek

The Ogiek are a hunter-gatherer indigenous minority group with a population of about 20,000. About 15,000 of them live in what is known as the Mau Forest Complex and its adjacent environs. Their livelihood involves

hunting, fruit gathering, beekeeping and, in the recent past, small-scale farming. The marginalization of the Ogiek began with the British colonial policy that subjected them to 'reserves'. According to the Carter Land Commission Report of 1933, "These Dorobo [i.e. the Ogiek]... have been driven like chaff before a wind of progression We should now recommend a definite reserve for them" (The Report of the Kenya Land Commission (1933) (Carter Report) 259, paras 972-985). The Mau Forest is their natural and ancestral habitat in which they have lived since time immemorial and on whose livelihood they depend.

In October 2009, the government of Kenya issued a 30-day eviction order through the Kenya Forestry Service to the Ogiek and other settlers in the Mau Forest.

A number of interest groups have exploited the Ogiek land and benefited from the constant eviction of the Ogiek from their lands. From land grabbing by local authorities and individuals who are favoured by the political elites to the exclusion of the Ogiek, to companies involved in illegal logging, and the "introduction of exotic plants and the excision of parts of the forest for private development by outside settlers", the list of such outside beneficiaries is long (Stavenhagen, 2008:12). These activities, in turn, have actually degraded the environment thereby endangering the forest as a water catchment area. Professor Rodolfo Stavenhagen further quotes the UN Special Rapporteur on Adequate Housing, Miloon Khotari, who "signaled in his report on his mission to Kenya that the destruction of the forest has affected the rights of the Ogiek to housing, health, food and a safe environment, threatening to further destroy their cultural identity and the community as a whole" (ibid. 12). Like all indigenous peoples elsewhere who live in harmony with nature and the environment, the Ogiek also lived in the Mau Forest for centuries in harmony with its natural habitat and the environment. Environmental degradation in the forest began with the coming of settlers who were engaged in activities that degraded the environment.

For years, Ogiek representatives requested that the Kenyan government take action to protect them. This involved personal and official lobbying by community leaders, as well as other stakeholders such as the Church. The requests proved futile (Kimaiyo, Towettta. Ogiek land cases

and historical injustices. 2004:25-30).⁴ Members of the community eventually sought to vindicate their rights through the courts, with the first port of call being the High Court in Nakuru in 1997 demanding a 'declaration that the eviction from Tinet Forest by the Government contravenes their rights to the protection of the law, not to be discriminated against and to reside in any part of Kenya and further that their right to life had been violated by the forceful eviction from Tinet Forest'. (*Kemai and others versus Attorney General and Others* Civil Case No 238 of 1999, 1 & 3). They also sought orders that the government should compensate them and pay their legal costs. The community sought the declarations and orders on the basis of 'having lived in Tinet Forest since time immemorial. They claimed that the forest had been the home of their ancestors before the birth of Kenya as a nation, and still was as the descendants and members of that community' (Kimaiyo, Towett J. Ogiek land cases and historical injustices. 2004: 25-30).⁴ The community further submitted that it depended for its livelihood on the forest, since most of its members were food gatherers, hunters, peasant farmers, bee keepers, and their culture was associated with the forest where they have their residential homes. They alleged that their culture was basically one concerned with the preservation of nature so as to sustain their livelihood and that, due to their attachment to the forest, members of the community were a source of the preservation of the natural environment.

The local court dismissed the Ogiek case in March 2000 on the basis that 'the evictions were for the purposes of saving the whole of Kenya from a possible, environmental disaster'. (*Kemai and Others versus Attorney General and Others* Civil Case No 238 of 1999, 22). According to the Court, allowing the Ogiek to continue living in Tinet Forest would spell disaster for the water catchment area, whose protection was necessary for the common good of the nation. From that point on, the government continued with its practice of alienating the Ogiek from their forest. It then began to issue title deeds to Ogiek land. Now, the government claims that non-Ogiek also came forward claiming Ogiek identity and title deeds but, the Ogiek know very well who is Ogiek and who is not. The government also claims

4 The Ogiek attempted numerous extensive out of court efforts mounted by the Community that even involved sending delegations to the then Head of State Daniel Arap Moi but these still did not bear fruits due to the competing political and economic interests of powerful stakeholders over the Ogiek lands.

that this situation created 'confusion' as it was not in a good position to distinguish the Ogiek from the non-Ogiek. Consequently, the government seems to have 'rationalized' the option to evict everyone from the forest.

On July 15, 2008, the office of the Prime Minister of the coalition government formed a "Task Force on the Conservation of the Mau Complex" in response to the acute environmental destruction in the forest that had depleted its water catchment. The Task Force produced a report in March 2009 and presented it to the National Assembly, which adopted it in September 2009, recommending the immediate eviction of encroachers into the forest and the due compensation of all affected persons.

The Case of the Endorois

In 2009, the African Commission on Human and Peoples' Rights issued a landmark recommendation that is of significance to indigenous peoples' rights in Kenya (*Centre for Minority Rights Development [CEMIRIDE] on behalf of the Endorois Community v Kenya* [Communication 276/2003], [Endorois case] para 298). The Endorois community of Kenya had submitted a communication to the African Commission on Human and Peoples' Rights (ACHPR) after failing to find remedy through the Kenyan courts. The community alleged "violations resulting from the displacement of the Endorois community, an indigenous community, from their ancestral lands, the failure to adequately compensate them for the loss of their property, the disruption of the community's pastoral enterprise and violations of the right to practice their religion and culture, as well as the overall process of development of the Endorois people." (Ibid para1, 17).

The African Commission ruled that the evictions were in violation of the African Charter on Human and Peoples' Rights, including the right to property, the right to free disposition of natural resources, the right to religion, the right to cultural life and the right to development. (Ibid para 173 (Religion); 238 (Property) ; 251 (Cultural rights); 298 (Development)). The Commission recommended that the ancestral land rights of the Endorois be recognized and restituted, and that the Endorois community should have unrestricted access to Lake Bogoria, that compensation should be paid to the community for all the loss suffered and that the Endorois community should receive royalties from existing economic activities.

During this research mission, the state, through the Minister of Justice, indicated that it was keen to implement the recommendations of the ACHPR and it is hoped that Kenya will indeed honour its international obligations and set the standard for the rest of the continent to follow in this regard. The Minister of Lands, James Orengo, equally informed the community during its celebrations for the positive verdict from the Commission in April 2010 that his ministry was determined to ensure that the community's historical injustices were remedied through the enforcement of the recommendations of the ACHPR.⁵

The dispossession of Maasai lands

Maasai land dispossessions can officially be traced to the colonial regime's legal framework, the most notorious steps in this process being the 1904 and 1911 Anglo-Maasai treaties which provided for the eviction of the Maasai "to create space for the settlement of European immigrants whose agricultural and other commercial activities were anticipated to galvanize economic development in the new Kenya Colony". (See copies of the 1904 and 1911 Maasai agreements in the Carter Report, 1933 Appendix VIII; For a more detailed exposé of the Maasai treaties, see MPK Sorrenson. *Origins of European Settlement in Kenya*, 1968:190-209; see also Ghai & McAuslan. *Public law and Political Change in Kenya* . 1970: 20-25). The appropriated lands were converted into individual farms and ranches – a process that continues to spark violent clashes whenever the Maasai return to their ancestral lands for grazing purposes, especially during periods of drought. Despite repeated efforts, the Maasai have been unable to reclaim their lands with success.

The appropriation and further dispossession of the Maasai's land was sanctioned through the recommendations of "the Kenya Land Commission of 1932 which was mandated with evaluating current and future land needs of the African population, to determine whether it was feasible to set aside more land for African communities and to evaluate African land claims over land alienated to non-natives". (Mwangi 'The transformation of property rights in Kenya's Maasai land: Triggers and motivations, 2005:35; International Food Policy Research Institute, CAPRI

5 As of November 2011, the government of Kenya had not yet implemented the ACHPR ruling.

Working Paper 11, 11) The recommendations included *inter alia* that the Maasai should be “forced to lease out their land to other communities, particularly the cultivators” in order to “bring tsetse-infested areas into cultivation” and “help relieve overcrowding in other African areas, particularly in the Kikuyu reserve”. (Ibid) To this day, as the Kenyan population grows, especially in urban areas such as Nairobi, the infiltration by other mainstream communities onto Maasai land continues, especially in Kajiado, Kiserian Kitengela, Narok, Ngong, Naivasha, Nanyuki and surrounding environs near the urban centre.

The creation of national parks and reserves has also dispossessed the Maasai of their lands, a situation that is compounded by the blocking of migration corridors, with tragic consequences during drought. In fact in 2008/9, most Maasai communities as well as other pastoralists lost almost all their livestock in Kenya as a result of drought in various parts of the country, a situation that is exacerbated by the fact that they could not access areas where there was pasture in good time due to a lack of migration corridors. Most of the current national reserves and national parks are situated on Maasai land, mainly consisting of plains and semi-arid areas and, increasingly, private ranches and conservancies’ which do not grant access to communities to graze or pass through with their livestock.

The lack of government policy to support pastoralists during difficult times in the form of emergency economic relief or packages to ensure that they do not lose all their livelihoods is further testament to the states’ neglect and marginalization of indigenous communities. During this research visit, indigenous peoples in Kenya decried the fact that, while the state had allocated a quota of animals that the pastoralists could sell to the Kenya Meat Commission, the number was so insignificant that it did not cater for the needs of even a single family. This is unlike when sedentary farmers suffer losses as a result of climate or such other natural calamities, when the state is often very quick to come to their aid in the form of fertilizers, seed and agricultural extension services.

Pastoralist communities in Isiolo

Border demarcations of administrative regions by successive post-independent political regimes in Kenya have also affected some of the indigenous communities negatively. For instance, according to elders from in-

digenous communities interviewed for this report, when the administrative border between Isiolo and Meru was demarcated, a huge tract of land belong to the pastoral community of Isiolo was ceded to Meru. Isiolo lost significant fertile lands, which were reinforced by the administrative border demarcation that put the ceded lands into the territory of the district of Meru. Although the pastoral communities resented and expressed outrage over the loss of their lands, Meru used its representatives in parliament at the time to lobby to retain the *status quo* to the detriment of the un-represented pastoral communities of Isiolo. It is therefore not surprising that many of the communities from Isiolo still hold the belief that the ceding of their fertile lands to the Meru is one of the significant factors behind their poorer economic standards in relation to the Meru to this day.

The pastoral community of Isiolo is presently wary of what they feel is continued official rhetoric with regard to turning Isiolo into a resort city particularly for the purpose of tourism. Constructing an international airport in Isiolo is said to be an important component of the 'resort city' strategy. As a result, the 'strategy' has attracted interest among the elites, the majority from sedentary farming communities, and this has renewed land speculation and land grabbing in Isiolo. Indeed, during the current border demarcation exercise, which started with a consultation of the communities concerned, representatives of the pastoral communities of Isiolo have expressed their demand for reinstatement of the original borders of Isiolo.

c. The dominant notion of development

The dominant discourse on development, which holds that development is possible only through modernity and capital accumulation, took place in the West and led to industrialization. This notion is so embraced and now so widespread throughout the African continent, with African elites so engrossed in its prospects, that they do not even consider if wealth accumulation is ever possible through indigenous livelihood systems. Indeed attendant policies adopted by many African governments violate the principles of the right to development long held by the African Charter on Human and Peoples' Rights (article 22) and clearly stipulated in

the UN Declaration on the Rights of Indigenous Peoples (articles 3, 21, 23). Similarly, the government of Kenya has encouraged projects that it considers generate development, such as mining, logging, and oil exploration, and tourism, often at the expense and displacement of indigenous communities from their ancestral land, destruction of the environment, and destruction of the livelihood systems of indigenous communities, which had sustained life for centuries (Endorois ACHPR communication 276/2003)

Indigenous people have a special attachment to their ancestral lands. Land in the indigenous knowledge system is not just a material for use but also assumes spiritual proportions with special meaning. Deprivation or dispossession of their ancestral land threatens the very existence of their livelihood and spirituality. It also leads to degradation of the environment upon which indigenous livelihoods depend. Kenya continues its dispossession of indigenous ancestral land to this day, starting as it did in the days of colonization a century ago. That situation shows no signs of abating unless the legal regime and political structures acknowledge and objectively respond to the concerns of indigenous communities. The consequence of this dispossession is enormous. It has caused a poverty of colossal proportions among indigenous communities, ecological destruction, communal conflict, insecurity and deep resentment. In some cases, issues of insecurity and the violence unleashed against indigenous communities such as the Samburu by government security forces creates situations that lead to regional and interethnic destabilization (see special report on increase in defense spending by the government of Kenya, *The East African*, April 12-18, 2010).

A major problem in Africa relative to the rights of indigenous peoples is the perception that the dominant elite, including the political elite, propagates on development. In Africa's traditional sector, there are three major population groups, namely peasants/farmers, pastoralists and hunter-gatherers. Although the population of hunter-gatherers is relatively smaller, the peasant and pastoralist population constitute the bulk of Africa's population. The sectors that support and nurture life in Africa are, in the main, peasant agriculture and pastoral livestock production systems. What is crucial for sustainable development in the continent is the sustainability of these systems, complimented by a gradual accumulation process generating economic growth commensurate with the pace of social devel-

opment that traditional society can sustain. The problem in this regard is, however, that the African elite is bent on 'generating industrialization and modernization' at the expense of traditional sectors. They do not even consider indigenous peoples' production modes as productive and as contributing to 'modern development', notwithstanding the undoubted potential of such sectors to contribute to the economy. As such, while peasant agriculture is portrayed as a possible source of accumulation in a few countries, pastoralism on the other hand is portrayed as 'backward' and 'primitive', a stigma that was first coined by colonialists.

In actual fact, however, and as the latest study by the World Institute of Sustainable Pastoralism (World Institute of Sustainable Pastoralism, UNDP, Global Environment Facility, IUCN: A Global Perspective on the Total Economic Value of Pastoralism: Global Synthesis Report Based on Six Country Valuations, 2008, Nairobi) clearly indicates, African pastoralism does in fact contribute a great deal to the national economies of African countries. This study, and other similar research, documents that mobile pastoralism is of better use and a more sustainable mode of life in arid lands than sedentary agriculture, and that pastoralism contributes a great deal to African economies at local and national levels. However, such contributions are not recognized by most African governments. Recognition would involve making market mechanisms available, and the state support associated with them. In Kenya, the livestock production system is the main source of meat supply for the market. (Melakou Tegegn: Pastoralism and Accumulation, Proceedings of the Third National Conference on Pastoral Development, 2003:65).

Pastoral communities do not seem to have that kind of support rendered to them by the state. The bulk of Kenya's pastoral populations live in the northern part of the country and in the semi-arid plains of the Rift Valley. However, it is in this part of the country that means of communication, particularly the availability of roads and infrastructure in general, are very poor. Yet, a road network is crucial for the development of the market. The pastoral communities of Turkana, Moyale, Mandela, Isiolo, Wajir and Garissa largely feel that they are neglected and that minimal if any development work is taking place in their respective areas. Clearly, the areas indigenous people inhabit are largely forgotten in terms of infrastructural development, as well as development in general. We see a similar pattern of neglect in relation to the distribution of resources and

provision of public services. Indigenous areas receive a trickle of resources and the number of schools and clinics are relatively low or completely absent in some cases.

d. Political Representation and Participation in Decision-Making

Similar to the land question, much of the official attitude of the Kenyan government on political recognition of indigenous peoples, their representation and participation in decision-making processes, is derived from the policies of British colonialism. In fact indigenous communities in Kenya see little, if any, difference between the policies of the colonial administration and the post-independent state as far as political recognition, representation and participation goes. Because British colonialists considered indigenous livelihood systems as being incongruent with modernity, their policy remained one of marginalizing indigenous peoples and perpetuating their continued and separate existence as much as possible or obliterating it, assimilating them within the dominant ethnic communities, and compelling them to change their livelihood system without providing an alternative. At the political level, non-recognition remains, to this day, the dominant policy. The post-independent state followed a policy largely similar to that of its colonial predecessor. Hence, lack of political recognition remains widespread, and this involves not recognizing indigenous communities as indigenous, not recognizing their livelihood system, nor their right to political representation or participation in decision-making, particularly on matters that affect their lives.

Indigenous communities decry the fact that, because they are not recognized as separate ethnic groups like the dominant ethnic groups, their visibility has been negatively affected which, in turn, has affected their participation. The current set-up of local administrative borders divides many indigenous communities into different administrative and electoral units. For instance, the Endorois are divided into a number of administrative and electoral units thereby remaining divided. This arrangement has diminished their potential to ever achieve representation in parlia-

ment given the present population and boundary configuration. This in turn has diminished their participation in decision-making, including on issues that affect them. The same goes for a number of indigenous communities, particularly those who are smaller in size, such as the Ogiek, Sengwer, Ilchamus, Yaaku, Elmolo, Waata and the Munyoyaya.

The Ilchamus are one of the smallest indigenous communities in Kenya. They feel dominated by their neighbours and only represent 17% of the local constituency around Lake Baringo. Because they feel that the dominant groups do not represent their interests at the political level, they brought a case before the High Court of Kenya. The High Court ruled in their favour and ordered the Electoral Commission of Kenya “to supervise the appointment of nominated MPs to ensure compliance with the Constitution and to take into account the Ilchamus community’s interests in the next boundary review” (Stavenhagen, 2008: 9). However, the court ruling has yet to be respected.

Lack of political representation and participation similar to that of the Ilchamus is also faced by a number of indigenous communities such as the Endorois, Elmolo of Turkana, Munyoyaya and Waata of Tana River. Lack of political representation has a number of drawbacks for these indigenous communities. It results in a lack of access to resources for development such as the Community Development Fund and the Local Authority Trust Fund, which are controlled and disbursed by elected representatives from the majority populations within the electoral areas. Lack of security, which follows as a result of cattle rustling or when security forces commit atrocities, is another major consequence. The third is a lack of employment in the public as well as the private sectors. As Stavenhagen states, “Since 2003, 2.5 per cent of the government revenues are allocated every year to each constituency through this fund [Community Development Fund, i.e.], but it is difficult for smaller communities who are not represented by an MP to have equal access to development resources and social services” (Stavenhagen, 2008:9).

On a positive note, the 2010 Constitution expressly provides for the equitable sharing of national revenue (article 202). The fact that the allocation will be distributed equitably to the counties promises to ensure that indigenous communities at the local level benefit from the national cake. However, until and unless, even at the county level, there is affirmative action as envisaged by article 203 (h) of the 2010 Constitution to

ensure indigenous communities are represented at all spheres of local and national government, this may still result in the same old story of continued exclusion.

e. Discrimination and Marginalization

In Kenya, the dominant groups subscribe to the dominant discourse/paradigm on development, which disregards other ways of traditional life as 'backward' and 'incompatible with development'. The Kenyan government's official pronouncements, even at international for a, continue to suggest that the state has yet to treat indigenous communities as equal members of its population. In its Report Submitted to the Committee on Economic, Social and Cultural Rights (CESCR), the Kenyan government officially refers to the Nubian and Ogiek indigenous communities as "others". In its comments on the report by the Kenyan government, the CESCR states: "The Committee notes that the Nubians and the Ogiek are not recognized as distinct ethnic communities and that they are referred to as 'others' by the State party". CESCR recommends that, "... the State party recognize the Nubians and the Ogiek as distinct ethnic communities, as well as their right to the preservation, protection and development of their cultural heritage and identity" (Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant, 2008:11). It is important to stress here that while Nubians are considered a marginalized community in Kenya, they do not self-identify as an indigenous community but rather as a minority group.

Discrimination against members of indigenous communities in Kenya is still prevalent, with many of the indigenous communities who engaged with this mission decriing the fact that their communities are often excluded from senior public service appointments. Indeed, among the Muryoyaya and the Waata, the highest public service post of any member of their community was a District Commissioner in the Provincial Administration, which still ranks low compared to the positions occupied in state structures by the larger communities in Kenya. The Ogiek, Yaaku, Muryoyaya, Waata, the Sengwer, the Ilchamus, the Endorois and the El Molo equally decried the fact that, among their communities, there were hardly any notable senior public officials, again an indication that the

state did not exercise affirmative discretion to ensure that indigenous peoples were on an equal footing in the public sphere.

Indigenous communities with smaller populations, such as the Yaaku, Ilchamus, Elmolo, Munyoyaya and Waata, are also concerned at becoming extinct. The number of people who still speak the language is dwindling and, in the case of the Ilchamus, it is less than five. Community leaders attest to the fact that assimilation into bigger communities is the main cause of the imminent extinction. For instance, the Ilchamus are assimilated with the Maasai, and the Endorois with the Kalenjin.

It is instructive that the 2010 Constitution provides that one of the core values of the new Kenya is equality, non-discrimination and protection of the marginalized (article 10 (2)(b)). It is also significant that the new Bill of Rights makes express provision for affirmative action to redress the marginalization and past exclusion of vulnerable groups, including particular ethnic, religious and cultural communities (article 21(3)), which would ostensibly include indigenous communities.

f. Access to Justice

Kenya is still projected as being the standard bearer of democracy and multi-party democracy in the East Africa region. Some even extend this to recognition and respect for fundamental freedoms and human rights. However, the post-2007 election violence shattered such notions. Kenya has a long way to go to attain the status of a real democracy and multi-party system. A crucial component of a democracy is the state of access to justice that the citizens of a given country enjoy. Of key concern is the lack of transposition of international standards into Kenyan domestic law as well as their observance and the high cost of legal proceedings, issues that hamper access to justice for Kenyans generally. For indigenous communities, the matter is much worse.

The Republic of Kenya's record in terms of ratifying and transposing international human rights standards and instruments is average. It has done so with respect to fifteen human rights treaties, including the Universal Declaration on Human Rights, the African Charter on Human and Peoples' Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the

Convention on the Elimination of Racial Discrimination, the Convention on the Elimination of Discrimination against Women, the Convention on the Rights of the Child, the Convention against Torture and the Rome Statute of the International Criminal Court as well as a number of ILO conventions (Draft Policy Paper on Human Rights, Ministry of Justice, National Cohesion and Constitutional Affairs and Kenya National Commission on Human Rights, 2008:12). However, the Republic of Kenya has been consistent in avoiding ratification and transposition of international human rights standards/instruments pertaining to the rights of indigenous peoples. It has consistently avoided ratifying ILO Convention No 169 on the Rights of Indigenous Peoples and tellingly abstained from voting in the UN General Assembly for the UN Declaration on the Rights of Indigenous Peoples.

The Constitution of Kenya grants direct access to the High Court to anyone whose fundamental human rights and freedoms have been violated. Section 84 of the Constitution provides in part that “where a person alleges that [his fundamental right] is being or is likely to be contravened in relation to him, that person may apply to the High Court for redress”. However, and despite such constitutional guarantees, Kenya’s indigenous peoples face insurmountable challenges in seeking protection of their fundamental rights in courts of law. These challenges include a lack of awareness of their human rights, the technical nature of mounting successful court challenges, poverty and a lack of financial resources, given the high cost of mounting litigation, plus the perceived lack of independence of the judiciary.

In practice, while most poor Kenyans generally have limited rights and often do not enjoy access to justice, for most indigenous peoples the problems are exacerbated by the fact that courts of law within indigenous peoples’ places of habitat are few and are located in the urban centres. Access to justice is therefore differentiated and dependent on gender, socio-economic status, legal literacy levels and the presence of judicial infrastructure. The State has even conceded that several barriers prevent women, the poor and people in certain geographical regions from accessing judicial services and justice generally (Min. Of Justice and the Kenya National Commission on Human Rights document, 2008:15). For instance, there are only two courts in the entire North Eastern Province (ibid. 15).

Most indigenous peoples live in rural areas and in environmentally harsh arid lands, where the structure of the state administrative system gets thinner and thinner as one goes from urban to rural areas. The infra-structural and administrative disparity in the structure of the state between urban and rural areas is so high that indigenous people who live on the fringes have little or no state administration, including courts, in their respective areas. As Mukundi points out, "Access to courts for indigenous peoples in Kenya is also hampered by a limited number of courts and judicial officers, especially in the regions and areas they inhabit" (Mukundi, 2009:33). This constitutes a serious handicap as indigenous communities are invariably faced with legal wrangling as a result of land grabbing by government officials and members of farming communities. For this reason, they have to travel long distances that involve extra expenditure to take their cases to the court of law.

The cost of legal proceedings is extremely high by the income standards of indigenous peoples. For instance, when the Ogiek took their case to court in 1997 they had to sell off their few earthly possessions to cater for the filing fees and other costs associated with mounting the case in court even when a pro bono lawyer volunteered to assist with the case. This situation is exacerbated by the fact that Kenya does not yet have a national legal aid scheme to support this kind of case since the present (since 2008) pilot legal aid scheme only targets children, capital offences and women's rights in a few provinces. The only free legal support accorded to individuals in Kenya by the state is for persons accused of capital offences.

Related to these problems is the fact that indigenous peoples, like most other poor Kenyans, also face other concerns such as corruption on the part of judicial and other government officials. Indigenous peoples, given their historical marginalization and predicament, require legal interventions to redress these injustices. This would entail technical assistance when they bring their cases to court especially given the high illiteracy levels and lack of comprehension of the technical procedures requisite for mounting cases in court. However, in Kenya like in most other common law jurisdictions, such technical support from the state is non-existent. Additional problems that indigenous communities face in this respect include the low efficiency of the courts due to a huge case backlog and few legal officers, the lack of accountability of the courts and a per-

ceived bias in the application of the law, discouraging most of these groups from taking their cases to court.

Indigenous communities in Kenya, like most others in Africa, often rely on their African customary law. However, Kenya's legal framework subjugates African customary law to written laws.⁶ The hierarchy of sources of law in Kenya places the Constitution at the pinnacle. Statutes and other written laws, including those borrowed from England, follow. Common law, doctrines of equity and statutes of general application are equally valid in so far as circumstances in Kenya permit. African customary law is placed at the bottom of the applicable laws. This is unfortunate given the wide cross-section of people who still rely on African customary law as a source of law, particularly indigenous communities. Indeed, the fact that most indigenous communities rely on their traditions and customs to seek recognition and protection of their human and peoples' rights and its relegation to the lowest echelons in the hierarchy of applicable laws means that most of these communities have to labour for recognition of their fundamental human rights.

g. Conflict, Security and Militarization

Conflict among various pastoral ethnic groups in Kenya is often characterized by cattle rustling. Some pastoral communities argue that they resort to cattle rustling because their male members are required to submit a number of cows for dowry which they do not have. The practice, which predates colonialism, has persisted for generations but the various communities had devised an age-old traditional conflict resolution mechanism.

The 1970s witnessed turmoil as internal civil wars broke out in Ethiopia, Southern Sudan, Uganda and the *Shifita* (rebel) War in Kenya. The defeat and dispersal of one of the largest standing armies in the continent, Ethiopia, led to a proliferation of small arms in the Ethiopia-Kenya-Somalia cluster. AK 47 automatic rifles were widely believed to have been sold for less than \$50 at the time. Pastoral communities were quick

6 See sec 115(2) Constitution of Kenya, Laws of Kenya, Revised Edition (1998) 1992; sec 3(2) Kenya Judicature Act, Laws of Kenya Cap 8; see also L Juma 'Reconciling African customary law and human rights in Kenya: Making a case for institutional reformation and revitalization of customary adjudication processes' (2002) 14 *Saint Thomas Law Review* 505.

to arm themselves with AK 47s to protect their wealth. This took the standard of weapons used in the communal conflicts to a different level.

Following the partitioning of Africa in the infamous “scramble for Africa” by the colonial powers, the Somali people found themselves into four different countries, namely Somalia, Kenya, Ethiopia and Djibouti. Somalia was further divided into two with the creation of the republic of Somaliland as a result of the incessant civil war that broke out in 1990, leaving the country without a stable and central government. The civil war resulted in a perpetual flow of refugees from Somalia to Kenya, which has complicated the lives and status of the Somali in Kenya.

Ethnic tension broke out in northern Kenya prompted by the desire of Kenyan Somali to join the “Greater Somalia”, as advanced by Somali nationalists, when the Somali Republic was founded in 1960. The idea behind a “Greater Somalia” was to unite all Somalis on the mainland, which was composed of Harghesa Somali (the current Somaliland that was under British colonial rule) and Mogadishu Somali (which was under the Italians), Djibouti (under the French), Ogaden (Ethiopia) and northern Kenya. This is symbolized by the official flag of the Somali Republic, which carries five stars to indicate/claim these five regions. Ethnic Somalis both in eastern Ethiopia (Ogaden) and what the British called the Northern Frontier District of northern Kenya waged ethnic war to unite their respective regions with the mainland Republic.⁷ The ethnic war in northern Kenya, dubbed the *Shifto* War (*Shifto* is an Amharic word for rebel) went on with ferocity and destruction. It was in the context of this regionalized conflict that the governments of Ethiopia and Kenya entered a military pact and kept that alliance even at a time when the two regimes stood at the opposite sides of the Cold War ideological divide.

An opportunity for possible self-determination was provided by a UN referendum held in 1979 for ethnic Somali in Kenya to determine their wishes, i.e. remain in Kenya or join Somalia. According to the Somali elders in Garissa, 87% voted to join Somalia at the time. However, the outcome of the referendum was not acceptable to the British colonial authorities. Consequently, the colonial authorities resorted to violence to

7 As a result, the governments of Ethiopia and Somalia have fought border wars thrice since Somalia's independence in 1960.

quell this quest to join Somalia. In the ensuing conflict, elders claim that 10,500 persons were massacred by the colonial regime.

The desire by Kenyan Somali to join a 'greater Somalia' continued and, in post-independence Kenya, tension continued as Somalis resorted to armed struggle. The government vowed to crush it. This was when a series of massacre were committed against the Somali by the Kenyan security forces in Melka-Mari in 1981. In Garissa, according to the elders, 5,000 were killed in 1982. In Wogalle (Wajir) 1,600 were massacred in 1984. What followed the *Shifita* War in the North left a scar on the history of contemporary Kenya. What is worse, "many of the survivors still suffer physical and psychological consequences, and the widows and orphans have found no support. The true facts have never been established, and none of the alleged perpetrators has been prosecuted" (Stavenhagen, *ibid.*, 15).⁸

Consequently, the Kenyan government adopted a harsh policy towards the Somali community in the North and evaded solution-oriented approaches to the conflict, including public discussion. The issue of ethnicity and ethnic tension in Kenya has been and still is serious for two main reasons. First, the process of wealth accumulation through land grabbing and embezzlement of government resources took an ethnic line from the beginning of independence. The Kikuyu ethnic group to which the first president, Jomo Kenyatta, belonged was thus favoured in the process of wealth accumulation through acquisition of political power. Power was dominated by the Kikuyu ethnic group and those Kikuyu individuals who constituted the political elite were involved in wealth accumulation through land grabbing and other assets. Secondly, the conflict in the North emanated from the desire of ethnic Somalis to join their kith and kin in the Somali Republic, a desire that was nipped in the bud by both the colonial and post-independence governments. The government suppressed public discussion on ethnicity and the problems surrounding it while politicians, on the other hand, were mobilizing community members on grounds of ethnicity during election campaigns. The government followed a high-handed policy in the North-East, which the UN Rapporteur on the situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen, characterized as "a police state"

⁸ The Wagalla massacre was raised in the media in 2011 and the Prime Minister stated publicly that the matter would be fully investigated.

(Stavenhagen, 2008:15). The government ruled the region with emergency laws that gave it the leeway to adopt harsh measures, resulting in gross violations of human rights. This was complemented by a policy of open discrimination against the Somali, particularly with regard to issuing identification cards and freedom of movement within Kenya.

The continuation of the government's harsh policies, official discrimination and the fact that the perpetrators of the massacres have never been prosecuted only fueled the resentment of the Kenyan Somali. This state of affairs has created a fertile ground for extreme forces' to operate and instigate violence with serious consequences for the local people, the country as a whole and possibly the entire region.

On the other hand, the long-drawn out conflict within Somalia proper has left that country without a central and stable government for over two decades now. Over the years, Somali fleeing war and conflict in Somalia kept flowing into Kenya as refugees and immigrants and settling there. Irrespective of their huge number, the status of this group of Somali is that of immigrants and should not be confused with ethnic Kenyan Somali whose situation is one of Kenya's indigenous communities that we discussed above.

Insecurity and conflict still rages in other areas with indigenous communities. The occurrence of extreme weather such as drought and floods due to climate change has caused shrinkage of the natural resource base. As a result, the area of pastoral mobility has expanded as they have moved long distances in search of pasture and water for their animals. This has brought them into conflict with farming communities.

Elders and representatives of pastoral communities we talked to give various reasons for the causes of the inter-communal conflicts among pastoral groups. The conflict takes the form of raiding and cattle rustling and this dates back probably centuries and is considered by some as part of the pastoral culture. We were told that customs, such as dowry given by the parents of the bridegroom in the form of cattle, are the main cause of the conflict, as those who do not have cows to pay the dowry opt to raid cattle from a neighbouring pastoral community. This has been going on for centuries, according to the elders, not only between pastoral communities in Kenya but also with pastoral communities in Uganda and Ethiopia. the proliferation of small arms acquired through lawlessness at one point or another as a result of civil wars and revolutions in countries

such as Uganda, Southern Sudan, Ethiopia and Somalia, has exacerbated the conflict. Worse still, the young are increasingly being involved in these conflicts, which the power and role of the elders has diminished a great deal. This is much clearer in areas where political conflicts prevail.

In a nutshell, the causes of the conflicts are cattle rustling, a proliferation of small arms, the inadequate presence of the state to provide security, the diminishing role of elders, competition over natural resources such as pasture and water, the land question, political agitation, ethnicity, and an exacerbation of poverty. The impact of the conflict and violence is enormous on the lives of the pastoral communities, ranging from loss of lives, to massive displacement of people and loss or destruction of property.

The communities involved in these conflicts are the Turkana, Samburu, Pokot and Rendille. In the cross-border conflicts, the Nyangaton, Dasenech and Hamar from Ethiopia and the Karamojong, Dodoth, Tepfeh, Pokot and Matheniko from Uganda and the Toposa of Southern Sudan, are involved. There are also communal conflicts involving the Boran (Isiolo), Somalis (Wajir), Maasai, Gare and Ajouran.

Indeed, the government of Kenya could have played a key role in bringing peace to the warring pastoral communities. The government's shortcoming is related to its overall policy on indigenous peoples. Northern Kenya, being the most marginalized and impoverished region, is at the same time the most neglected. The basis of this neglect is the failure to recognize indigenous communities and their ways of life. As such, there is no consistent policy and action on peace-building, no sensitization and awareness building work among the warring communities, no provision of security to the community, a failure to control flow of small arms, a lack of development projects and other activities pertaining to the duties of a government.

The typical government response to conflicts is to intervene militarily and punish the community that it thinks is at fault. A typical case was the violence unleashed against the Samburu community in 2008 and 2009. According to the Samburus, they were attacked by the Pokots first and retaliated later. At that point, the government intervened and launched a gruesome attack against the Samburus. People lost their lives, cattle were killed, women were raped and property damaged. To this day, the government has not done anything to punish those responsible

for the murder, rape and damage of property. The Samburus allege that the Pokots are protected by the state because they have their own MPs who speak on their behalf in the Parliament. Unfortunately, the Samburus are not represented in the parliament.

The United Nations Committee on Economic, Social and Cultural Rights (CESCR) notes the dangers of the violence unleashed by the security forces in Kenya. In its 41st Session held in Geneva on 3-21 November 2008, CESCR expressed: "concern about the demolition of dwellings and forced evictions of pastoralist communities in the Rift Valley, forest dwellers such as the Mau Forest's Ogiek, and persons living in informal settlements and on road reserves, reportedly without prior notice and provision of adequate alternative housing or compensation". The Committee recommended to the Government of Kenya, "that the state party consider including a provision in its new draft Constitution (which has since been adopted) to ensure that evictions are only used as a last resort, adopt legislation or guideline strictly defining the circumstances and safeguards under which evictions must take place, in accordance with the Committee's General Comment No. 7 on forced evictions (1997), and ensure that each victim or forced evictions is provided with adequate alternative housing or compensation and that he or she has access to an effective remedy" (Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant, 2008:9-10). Those recommendations remain unattended to this day.

Indigenous communities in the Rift Valley province decried the fact that the Kenyan government uses a large tract of land for military training, including British troops. On top of the violence unleashed against indigenous women, the presence, movement and training of the troops has created inconvenience in many ways. This also constitutes a violation of Article 30 of the UNDRIP which states:

1. *Military activities shall not take place in the lands and territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by indigenous persons concerned.*
2. *States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.*

Indigenous communities in Kenya, especially among the communities who inhabit the areas around Laikipia, Isiolo and Moyale, also decry the fact that the state has granted mining and oil exploration concessions to the Chinese without consulting or engaging with the local communities on whose lands the concessions lie. Military installations and exercises by both Kenyan and foreign troops, mainly British, are also being conducted in lands belonging to indigenous communities, especially in Nanyuki, Isiolo and Moyale, with the attendant consequences of insecurity and often violence against women.

Northern Kenya has suffered from serious insecurity, which has been a major cause of concern to the government of Kenya. As a result, military presence in northern Kenya is relatively strong, perhaps also bolstered by the fact that the government considers the lands in that region as belonging to no one. Alternatively, it is considered government land, despite the fact that it should be vested in the communities on the basis of the Trust Land Act and African customary laws. Military exercises are accordingly common practice in the region. However, these exercises have negative consequences for the pastoral communities, especially in the district of Laikipia. There have been instances where hand grenades used during the exercises have exploded, killing people, children in particular, and animals. In 2009, two boys were killed by a grenade that exploded accidentally in an area called Biliko.

During military exercises, the entire grazing land of pastoralists is often cordoned off as a no-go area because it is so dangerous for members of the community to do business as usual. At present, there are five military camps in Isiolo alone, which are located in fertile lands that are normally used for pasture.

h. Indigenous Women

While gender and the rights of women have gained prominence in the last four decades, women remain particularly vulnerable. Indigenous women in Kenya are the victims of layers of oppression and marginalization both by internal and external factors. Discrimination is one huge category of marginalization that they face while a multi-layer violence that is unleashed against them is another. The problem of the girl-child of indigenous communities is

a matter of great concern for the present and future generations of Kenya. Indigenous women need a great deal of external help to improve their conditions and ensure the smooth development of the girl-child.

In indigenous communities, women are discriminated against on almost all levels. Like all traditional societies, the division of labour is strictly on gender lines that are discriminatory. Women are also discriminated against in social positions including positions in traditional institutions of governance and of justice. In one meeting with the Ogiek community held by the research team in the Mau Forest and attended by almost 175 persons, there were no more than ten women present. In another meeting with the Endorois elders attended by around twenty persons, there was not a single woman. Undoubtedly, indigenous women face multiple forms of discrimination. Traditionally and culturally, most indigenous women have had no right to own property, inheritance and have no access to any kind of leadership in the community. While that state of affairs is increasingly changing in Kenya, with courts pronouncing that men and women, irrespective of cultural background, should be accorded equal status in law, in fact, the reality is still very different and is skewed in favour of men.

It is a result of such ingrained discrimination against women that boys are encouraged to go to school and complete their studies while the girl-child is 'domesticated' to do domestic labour and forced into arranged marriages. On top of such discrimination, indigenous women are also the victims of various forms of violence unleashed against them. The most significant form of violence faced by indigenous women is female genital mutilation (FGM). For a number of reasons, depending on the culture of the specific indigenous community, women are subjected to FGM at an early age. On top of the discrimination that they are subjected to, the girl-child faces the knife at an early age, destroying her sexuality and subjecting her to submission and in turn preparing her for early marriage.

Rape is another problem that indigenous women face. At times of violence, in particular, when a certain pastoral community attacks another for cattle rustling or out of communal war, the conquerors resort to raping the women of the vanquished as punishment. When the security forces launch raids and attacks against a given indigenous community such as the ones in Wajir, Garissa and Marasabit, government soldiers have been accused of committing rape as punishment of the community.

Despite the fact that Kenya is a party to a number of international human rights instruments, including those on women rights such as the International Covenant on Civil, Political Rights (ICCPR), the African Charter on Human and Peoples' Rights and the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), its performance with regard to the transposition and implementation of those standards remains dismal. While the government of Kenya established the Ministry of Gender, Children and Social Development in 2008, there is little if any noticeable endeavour to improve the lives of indigenous women. Much needed affirmative action by the government towards indigenous women, health and education services targeting indigenous women, and special effort to help the girl-child attend school is sorely lacking from its programmes.

i. Culture, Spirituality and Language

Culture is a part of the indigenous knowledge system that guides the livelihood system, governance and survival strategies of indigenous communities. Cultural and language rights are important categories of rights for indigenous peoples. For indigenous people, culture constitutes a way of life which is linked to their knowledge system and one that informs their strategy for survival. As traditional communities whose livelihood systems depend on the natural environment, indigenous peoples' culture is imbued with the preservation of nature and the environment. Their lifestyle is in harmony with nature, and their culture informs and articulates their behavior towards nature. Culture thus constitutes a central element in the survival of indigenous peoples.

Language expresses culture and culture as a way of life is also expressed through language. On top of that, indigenous peoples' culture is imbued with spirituality; a cosmology in which the interdependence of culture, nature and spirituality is fused and expressed in a language. The relationship between culture as a way of life, spirituality, nature and language is strong in indigenous peoples' knowledge and livelihood systems. It is through this cosmology that they have managed to sustain life for centuries. An attack on one aspect of this cosmology is an attack on their way of life. Unfortunately, nature and the environment they inhabit

and cherish are often attacked thereby disrupting the lives of indigenous communities.

As traditional societies, indigenous peoples' cultures in Kenya also contain a great deal of harmful practices such as female genital mutilation, early marriage for the girl-child, and a number of traditional practices that, in the main, constitute violations of the rights of women. Such harmful traditional practices should give way to universal respect for the rights of women.

Respect for culture, spirituality and language constitute fundamental human rights for indigenous communities. That is indeed why international instruments such as the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) gave significant importance to these rights. Out of the 46 articles of the Declaration, 13 (i.e. articles 5, 8, 11, 12, 13, 15, 16, 24, 25, 29, 31, 33 and 34) deal with cultural, spiritual and language rights. The Declaration deals with a number of rights that indigenous people should enjoy, including their right to maintain their distinct culture, the right not to be subjected to assimilation or destruction of their culture, the right to practice and revitalize their cultures, traditions and customs; their right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; their right to teach their history and bestow their culture, tradition and customs on the future generation; their right to have access to their traditional medicines; their right to maintain and strengthen their distinct spiritual relationship with their land and natural resources; their right to protect the environment; their right to maintain and preserve their cultural heritage; their right to determine their own identity and their right to maintain their institutions. In addition, the Declaration includes provisions as regards the duties of states to protect the rights of indigenous peoples. Among these duties is the responsibility of fighting and deconstructing bigotry and negative stereotypes created over the years against indigenous peoples. In this respect the use of the media by the state, as well as other institutions, plays an important role in educating society.

However, Kenya still falls short of respecting these rights enshrined in the UNDRIP. In view of the state's duty to combat bigotry and negative stereotypes against indigenous peoples, the performance of the Kenyan state is still far from the expectations of the Declaration. From the point of refraining from conducting some specific activities without the consent

of the indigenous communities, the performance of the Kenyan government is inconsistent with its international obligations. In the first place, the old Constitution of Kenya “does not have provisions addressing cultural rights” (Mukundi, 2009:32). Indigenous culture has been commercialized for promoting tourism, which is inconsistent with article 15 (1) of the ICESCR, which protects indigenous communities from being exploited for the purpose of the tourism industry. As Mukundi states, “The cultures of some indigenous peoples have only been seen in the light of the lucrative tourism industry where the culture and traditions of the Maasai, for example, have been exploited to earn the state revenue” (ibid., 34).

On a positive note, article 44 of the new Constitution provides for respect for language and culture in general. However, it contains no specific provision on the protection of the language and cultures of indigenous peoples in particular, nor does it forbid commercialization of culture for tourism purposes. It contains no provision as to the duty of the state to combat bigotry and negative stereotypes of the various communities.

What is also alarming is the fact that the language and culture of a few indigenous communities such as the Yaaku, El Molo, Sengwer, Ilchamus, Waata and Munyoyaya is fast dwindling and may well become extinct soon unless some drastic measure are taken by the government to preserve these languages and cultures. Some of these communities, such as the Ilchamus, have already opened a cultural center in a desperate attempt to preserve their culture but this requires state support for sustainability.

j. Access to Education

Education plays a crucial role in development. What is more important here, knowledgeableability has become a crucial component of social change and transformation of individuals to active citizenship. Kenya has undoubtedly done a commendable job in making primary education free. This is one huge success and a great leap forward by sub-Saharan African standards; access to education for indigenous communities is still inadequate though. Indeed, indigenous communities still face enormous challenges to send their children to school. Lack of schools in their vicinity constitutes one problem. The other major problem is the design of the

education curriculum, which is still the mainstream curriculum and not yet adapted to the concrete situation and cultural needs of indigenous communities. This is indeed related to the general attitude and policy of the government on its indigenous peoples as a whole.

The level of school enrolment among indigenous children is much lower than the national average. There is also a high drop-out rate among indigenous children and particularly girls. A number of factors are involved in such a situation. Lack of schools, particularly in the vicinity where indigenous communities reside, is a major contributor to lower levels of access to education for indigenous peoples. Even where an indigenous community wants to send their children to school they are obliged to cover long distances, incurring additional expenses such as transportation and meals, which most indigenous communities cannot afford.

Despite the commendable free primary education policy of the Kenyan government, certain costs are thus not covered under the programme, such as school uniforms, food and transport costs. Furthermore, the exclusion of indigenous curricula, i.e. an educational curriculum tailored to the specific needs, interests, history and knowledge system of indigenous communities, affects indigenous children in terms of retention in schools. Given the foregoing, the Kenyan government needs to redouble its efforts to make education accessible to its own indigenous people.

In fact, a joint report by the African Commission on Human and Peoples' Rights, the University of Pretoria and the ILO found that in Africa generally there is "... a lack of or inadequate specialized infrastructure and teaching staff, discrimination and exclusion of indigenous interests in curricula. In general, there is an inadequacy within national schooling systems in terms of addressing the specific needs, ways of life and cultures of indigenous peoples" (Overview Report of the Research Project by the International Labour Organization, the African Commission on Human and Peoples' Rights and the University of Pretoria on the Constitutional and Legislative Protection of the Rights of Indigenous Peoples in 24 African Countries, 2009:79).

International instruments dealing with the rights of indigenous peoples such as ILO Convention No 169 and the UNDRIP and other instruments such as the Convention on the Rights of the Child (CRC) strongly emphasize the right to education of indigenous communities. They go

beyond the general recognition of education for indigenous people; calls are made for “special measures for the protection of the rights of indigenous peoples to education” (ibid., 79). Article 29 of the CRC to which Kenya is a signatory: “Records the rights of the minority or indigenous children to enjoy specific education on their culture, religion and language in community with other members of the indigenous group” (ibid., 79). Article 27 of ILO Convention No 169 establishes that “education programmes and services should be developed and implemented in co-operation with the peoples concerned to address their specific needs. Furthermore, governments should recognize the right of indigenous peoples to establish their own educational institutions and facilities, provided that such institutions meet minimum standards established by the competent authority in consultation with these peoples” (ibid., 79-80).

The UNDRIP also asserts the crucial role that education plays in advancing the rights and development of indigenous peoples. The Declaration stresses the rights of indigenous children to education without discrimination. From the point of view of self-determined development, it specifically mentions the right of indigenous communities to establish their own educational system, arrange their curriculum and conduct education in the way they see fit in line with their culture and knowledge system. Article 14 (1) states that: “Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own language, in a manner appropriate to their cultural methods of teaching and learning”.

Without access to education, indigenous peoples cannot be part of the process for social change or social development, which can affect their livelihood. In addition, indigenous peoples have a special interest in education. Due to the particularities of their culture, which determines their livelihood, indigenous communities have the right to self-determined development if they so desire.

An important dynamic that needs to change within the indigenous culture is gender relationships and access to education for women and the girl-child. The struggle for gender equality within indigenous communities is an uphill struggle that requires not only tenacity but the knowledgeability of the women in particular. In this regard, access to education for the indigenous girl-child is crucial in order to build social capital on the one hand and transform individuals' perception of gender on the other.

k. Access to Health Care

Health remains one of the most crucial rights for all peoples within a state, given its close nexus with the right to life. Access to adequate and affordable health care in Kenya is dependent on proximity to health facilities and medicines as well as the means to afford it. In Kenya, such facilities are often located in urban centres with almost no mobile health facilities to cater for nomadic pastoralists and communities in far flung regions in the north and semi-arid areas where the infrastructure is non-existent.

Indigenous peoples in Kenya that were interviewed for this report, especially in Nanyuki and Garissa, confirmed that the fact that they inhabited remote places in Kenya meant that they were excluded and did not have access to medical facilities. The cost of accessing medical and health facilities in Kenya is also costly and often beyond the reach of many indigenous communities who may not have the means to travel long distances to purchase certain prescribed drugs that are unavailable in public health facilities. The right to health is additionally not guaranteed under the current Constitution, which means that one cannot even vindicate such a right in the Kenyan courts of law.

The situation of indigenous women is even worse than that faced by other indigenous peoples, such as men, especially when it comes to pregnancy and delivering babies. The fact that there are almost no health facilities in close proximity to most indigenous peoples' habitats in north-eastern Kenya and remote parts of the Coast province and Rift Valley means that they have to walk for long distances even during an emergency, which results in high maternal and child mortality during child birth. The fact also that indigenous knowledge systems, including the use of traditional medicines, do not receive state support for further research means that their knowledge in treating many of the ailments facing these communities cannot be fully exploited.

On a positive note, the new Kenya Constitution for the first time recognizes socio-economic rights (article 43). It provides that "every person has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care". In addition, the new Constitution guarantees that no one shall be denied emergency medical treatment (article 43[2]).

IV. NATIONAL HEALING AND REFORM PROCESS AND INDIGENOUS PEOPLES

Following the 2007 post-election political arrangement, some national healing and political reforms are underway such as the National Land Policy; Constitutional Review Process; Truth, Justice and Reconciliation Commission; Interim Independent Boundaries Review Commission, and the Interim Independent Electoral Commission. These are encouraging beginnings towards more openness, transparency, and recognition/practice of democratic rights for society, which can lead to the prevalence of the rule of law. The rights of indigenous people can best be protected under the rule of law and freedom. The Constitution adopted during the August 2010 referendum constitutes one step forward in the right direction and marks a major milestone in Kenya's history as it will also usher in a new era: the era of the rule of law.

Due to the historical injustices committed against Kenya's indigenous communities, one way of addressing their plight could be through transitional justice processes and mechanisms. Reconciliation and healing could be the remedy through which members of indigenous communities can engage with government representatives. The national healing process that took off with the various transitional justice mechanisms as mentioned offers perhaps the best mechanisms and opportunities to address the plight of indigenous peoples. A brief examination of some of these transitional justice processes and mechanisms is in order here.

a. National Land Policy

The National Land Policy, in general, contains useful provisions which, if implemented, would address some of the key concerns and the plight of indigenous communities relative to the land question. The Policy concedes that certain marginalized communities suffer historical injustices which continue to this day. While it had been expected that that the trans-

fer of power from colonial authorities to national elites would lead to fundamental restructuring of the legacy on land, this did not materialize. The result was in fact a general re-entrenchment and continuity of colonial land policies, laws and administrative infrastructure. This was because the decolonization process of the country represented an adaptive, co-optive and pre-emptive process which gave the new power elites access to the European economy (National Land Policy: 6). The National Land Policy further states that, "The problem of pastoral tenure relations have their roots in the dispossession of pastoral communities of their land and land based resources. The expropriation of high potential areas for natural forests and game reserves, poor infrastructure and services attests to this official neglect. Colonial and post-colonial land administration in the pastoralist areas led to the deprivation of land management rights from the traditional institutions thereby creating uncertainty on the access, control and exploitation of land based resources including grazing lands, water and salt licks among others" (ibid., 21).

As regards the ancestral land of indigenous communities, the Policy promises that, "land issues requiring special intervention, such as historical injustices, land rights of minority communities [such as hunter-gatherers, forest-dwellers and pastoralists] and vulnerable groups will be addressed" (National Land Policy: vi). More specifically on the historically wronged communities, the Policy continues, "the purpose of land restitution is to restore land rights to those that have unjustly been deprived of such rights. It is based on a recognition that the lack of access to land may be due to unfair governmental policies and laws. It underscores the need to address circumstances which gave rise to such lack of access, including historical injustices. The Government shall develop a legal and institutional framework for handling land restitution" (ibid., 13.) It is on this basis that indigenous peoples in Kenya are urging the government to implement the recommendations of the National Land Policy.

b. New Constitution

Despite falling short of recognizing its indigenous people as such, article 56 of the new Constitution that deals with "minorities and marginalised groups" has commendable principles. Article 56 is entirely about affirma-

tive action programmes to be put in place to ensure that minorities and marginalized groups:

- a) participate and are represented in governance and other spheres of life;
- b) are provided special opportunities in educational and economic fields;
- c) are provided special opportunities for access to employment;
- d) develop their cultural values, languages and practices; and
- e) have reasonable access to water, health services and infrastructure (Proposed Constitution, 2010:41).

However, the Constitution does not recognize indigenous communities as indigenous. Instead, it lumps them in a broader category of “minorities and marginalised groups”. The indigenous peoples of Kenya are not minorities and cannot be categorized as such. Kenya’s indigenous communities being pastoralists, hunters and gatherers, they clearly fit the definition of indigeneity as provided by the 2003 Report of ACHPR. Thus, indigenous peoples in Kenya are still not recognized as indigenous by the Constitution.

Many of the indigenous communities’ concerns are addressed in the various provisions of the Constitution, without specifically referring to indigenous communities as such. The biggest concern of indigenous communities is the return of their ancestral lands. Although the Constitution has a provision on land, the main document on land reform is the National Land Policy. The parliament has still to ratify this bill, but the bill contains positive provisions regarding the ancestral lands of indigenous peoples. There is no specific reference to natural resources vis-à-vis the legitimate concerns of indigenous communities.

The issue of self-determination of indigenous peoples is not mentioned in the Constitution. Instead, the Constitution mentions “devolved government” at county level. There is no mention of exercise of the right to self-determination of indigenous communities. The Kenyan political elite is consistent on this matter. If it does not recognize indigeneity, it cannot recognize the self-determination of communities that it does not recognize as indigenous. However, the issue of self-determination, as we have noted above, is inescapable and burning in Kenya.

Having a good Constitution is one thing but implementing it is a different matter altogether. In Africa, states have good clauses in their constitutions but the practice can be the opposite of what is 'intended'. Granted, it is our expectation that Kenya will give true meaning to the affirmative action provisions of the new Constitution. In addition and more importantly, the new constitution entrenches socio-economic rights in a Bill of Rights which would, for the first time in Kenya, ensure that these rights can be vindicated in courts of law in the event of non-compliance.

c. Truth, Justice and Reconciliation Commission

The Truth, Justice and Reconciliation Commission (TJRC) was established by an Act of Parliament in 2008 after the post-election violence. The objectives of the Commission are many but, in the main, are: to redress the injustices done to communities and individuals by any person or institution in the land since independence. The main objective reads, "to promote peace, justice, national unity, healing and reconciliation among the peoples of Kenya by (a) establishing an accurate, complete and historical record of violations and abuses of human rights and economic rights inflicted on persons by the State, public institutions and holders of public office, both serving and retired, between 12th December 1963 and 28th February, 2008 ..." (The Truth, Justice and Reconciliation Bill 2008:9).

Many of the indigenous leaders met by this research mission raised concerns as regards the period that the TJRC aims to look at, December 12, 1963 to February 28, 2008. As noted in the preceding pages, the plight and the confiscation of indigenous peoples' land and natural resources began at the turn of the 19th century when the British colonial powers began grabbing indigenous peoples' lands. Indeed, as far as the context of "reconciliation" goes, it might be valid to look at the period since the colonial annexation of the Kenyan state. However, if we seek the truth about the injustices done against indigenous peoples and if justice is sought accordingly, then the period before independence should have been included for investigation. Indigenous peoples from North-Eastern Province and parts of Eastern province are apprehensive at the prospect of finding truth through the TJRC because they argue that some Acts still prevail such as the Official Secrets Act, the Indemnity Act and the fact

that Kenya has yet to enact a Freedom of Information Act, and that all these could block truthful revelations. The Indemnity Act, for instance, was enacted to grant amnesty against accountability for atrocities committed in northern Kenya during the Shifta war in the 1960s. The Shifta war (1963 to 1967) remains one of the darkest corners of the country's history. Little about the period has been discussed in public or taught in history books. The Indemnity Act, Chapter 44 (1970), says in part: "Act of Parliament to restrict the taking of legal proceedings in respect of certain acts and matters done in certain areas between the December 25, 1963 and December 1, 1967. No proceedings or claim to compensation or injury shall be instituted or entertained by any court or by any authority or tribunal established by or under any law for or on account of or in respect of Act, matter or thing done within or in respect of the prescribed area, after the December 25, 1963 and before December 1, 1967. If it was done in good faith or done in execution of duty in the public interest by a public officer or member of the armed forces." Section 2 of the Act defines the prescribed areas to mean North-Eastern Province, Isiolo, Marsabit, Tana River and Lamu districts.

Indigenous communities from that region contend that the TJRC will not be effective if it does not deal with those atrocities. It remains to be seen how the TJRC will deal with these issues since, if it does not, indigenous communities from the region argue that the TJRC will be meaningless.

Another concern raised by indigenous communities in Kenya is regarding one of the objectives of the TJRC with regards to crimes committed in relation to land. Sub-article 5 (e) states, "... inquiring into the irregular and illegal acquisition of public land and making recommendations on the repossession of such land or the determination of such cases relating thereto;" (ibid., 9). This sub-article mentions *public land* only. In fact sub-article 5 (d), which deals with natural resources, also mentions *public resources* only. If the objective of the Commission is restricted at looking into crimes committed with reference to public land, this constitutes a serious omission because, as far as indigenous peoples are concerned, their land and natural resources that were illegally grabbed were their own and not public land or a public resource.

Sub-article 5 (f) is also vague in that one can only guess who it refers to: "inquiring and establishing the reality or otherwise of perceived economic marginalization of communities and making recommendation on

how to address the marginalization” (ibid., 9). If the subjects are “marginalised communities” we can guess that this is the term the government is officially using to refer to indigenous communities. If that is the case, this needs to be appraised as commendable. However, the truth is that the marginalization of Kenya’s indigenous communities is not just economic as we have illustrated in the preceding pages. It is also political, cultural, and spiritual.

d. Kenya National Cohesion and Integration Commission

The National Dialogue also resulted in the creation of the Kenya National Cohesion and Integration Commission, whose mandate is to “facilitate and promote equality of opportunity, good relations, harmony and peaceful co-existence between persons of different ethnic and racial communities in Kenya and to advise the Government on all aspects thereof.”⁹

The Commission was created by the National Cohesion and Integration Act of 2008, which came into effect on 9 March 2009.¹⁰ Its provisions prohibit discrimination by ethnicity in employment, in access to public resources and in property management, ownership and disposal, among other areas. The act also prohibits ethnic discrimination by way of harassment and victimization, and discourages hate speech. Those who violate the provisions of the act are referred to the Commission for investigation and can be issued notices to stop their actions. The act also gives the National Cohesion Commission a mandate to conduct educational and advocacy work around national integration, to make recommendations to government, and to monitor and review new legislation for potentially discriminatory consequences. Commissioners are appointed for three years per term and can serve a maximum of two terms.

Unlike the TJRC, which is a truth-seeking body that operates for a limited amount of time, the National Cohesion Commission is intended to be a more long-term project that can continuously monitor and report on the state of ethnic discrimination in the country. Its role is not to iden-

9 “Kibaki appoints National Cohesion and Integration Commissioners”. Kenya Broadcasting Corporation. <http://www.kbc.co.ke/story.asp?ID=59798>

10 Kenyan Government. “ACT NO. 12 of 2008 - National Cohesion and Integration Act.” Commencing 9 March 2009. Available at www.kenyalaw.org.

tify those who deserve reparations, or seek out wrongdoers, but rather to provide oversight and ensure public institutions have policies that advance ethnic inclusion and tolerance.

The most obvious challenge for the Cohesion Commission is that it aims to systematize and bureaucratize what is essentially a social and cultural process. Although it can investigate cases, produce reports and issue recommendations, it also seeks to change the hearts and minds of Kenyans, in the wake of years of ethnic divisions and conflict over access to resources. This is a monumental task.

It is hoped that the Commission will create opportunities for frank discussion of ethnic inequalities; its institutions create a neutral forum in which complaints can be raised and facts can be found. Quotas for ethnicity such as those prescribed by the National Cohesion Act with respect to public employment¹¹ are also a useful way to seek permanent change in the ethnic makeup of institutions and avoid the inequalities of ethnic political patronage.

e. Traditional Peacemaking Mechanisms

Various pastoral communities in northern Kenya use traditional peacemaking mechanisms, from the *Kokwo* Supreme Court to reconciliation ceremonies like *miss*, and peace agreements like *Imumai* to prevent and resolve conflicts over land, cattle, resources and other issues. The geographic range of pastoral communities using these mechanisms for peacemaking is quite large. Although inter-ethnic conflict in pastoral communities is of course somewhat different in nature to post-election violence, it is possible that the mediation and negotiation techniques used by pastoralist communities could be adapted and practiced by communities in other parts of Kenya whose inter-ethnic and political conflicts are also incurring a human cost. (Ruto Pkalya, Mohamed Adan, Isabella Masinde. *Indigenous Democracy: Traditional Conflict Resolution Mechanisms - Pokot, Turkana, Samburu and Marakwet Communities*. Practical Action East Kenya. January 2004).

11 The National Cohesion and Integration Act of 2008, Part III (7)(2) states: "No public establishment shall have more than one third of its staff from the same ethnic community." Available at www.kenyalaw.org.

The idea is to use systems of reconciliation and justice that those involved in the conflict can trust, due to their perceived integrity and transparency. As *Indigenous Democracy* reports, "People trust customary institutions of conflict management since they understand and appreciate the mechanisms and framework under which it operates. Since the system is based on the customary law and order, [people think that] definitely nothing but the truth will prevail" (IBID:87). Certainly this sentiment can be replicated when Kenyans decide, on a local scale, how to address the legacy of post-election violence in their communities and with their peers. Since the post-election violence was widespread and affected a variety of communities in both rural and urban areas, local peacemakers should look to community mechanisms where appropriate in order to provide a framework for reconciliation that is based on "the customary law and order".

V. VISION 2030 AND INDIGENOUS PEOPLES

In 2009, the government of Kenya revealed its country road map towards economic growth and prosperity in the body and soul of what it calls Vision 2030. Vision 2030 is a plan and strategy, strictly economic, aspiring to take Kenya along the road of economic growth and prosperity well into the 21st century. In November 2009, the Office of the Prime Minister also came out with a document supplementary to the main Vision 2030 document entitled “Vision 2030: Northern Kenya and Other Arid Lands”.

Like the main document, “Vision 2030: Northern Kenya and Other Arid Lands” falls far too short of being a vision for social development. It is a conventional economic plan and strategy for what it refers to as Arid Lands. The vision is for the arid regions of Kenya as a whole but not for indigenous communities as such and falls short of addressing the communities as pastoralists. The Vision does not include hunter and gatherer communities.

The document outlines the Foundations of Development in areas of infrastructure; security, peace building and conflict management; human resource development; labour and employment; public sector reforms; natural resource management and labour reforms; drought management and climate change; and science, technology and innovation. Undoubtedly, the Vision aspires to address the fundamental issues of social development as regards the hitherto neglected pastoral regions of the country and deals with huge questions such as building infrastructure and other major structural components of development in the conventional sense, and promises that this vision “offers a chance to turn history on its head” (Vision 2030: Northern Kenya and Other Arid Lands: 2).

The document admits that the pastoral regions have been neglected for too long and promises a comprehensive approach to “develop” them. It has mapped out three main pillars for such development, namely economic, social and political. Livestock production and marketing, dryland livelihoods, tourism, financial services, manufacturing, mining, trade and business process outsourcing are mentioned as important areas of focus under the vision for constituting the economic pillar. A number of

questions arise as to how this vision can succeed at the end of the day. One crucial question is the return of the ancestral land of pastoral communities which, as we have seen earlier, is considered under the Land Policy. As the Ndung'ú Land Report indicates, land grabbing of indigenous peoples' land in particular is at the heart of the wealth accumulation by the Kenyan elite and neither Vision 2030 nor the Land Policy indicate how returning the ancestral land to indigenous communities is going to be done. Short of this, however, all the other sectors mentioned under the economic pillar may take place, as they did in other regions of the country, with capital and investment that is dominated by the elite.

The second pillar that the document mentions is the social pillar. The social pillar mentions the following: education and training; health; population, urbanization and housing; and gender, youth and vulnerable groups. These are all positive measures but it is not clear as to whether or not the approach considers indigenous values and knowledge systems to take the lead, particularly in education and whether or not the education curriculum includes the teaching of indigenous cultures and history as proclaimed in the UN Declaration on the Rights of Indigenous Peoples, as this is so crucial for the dignity of indigenous peoples.

The third pillar is the Political Pillar. Under this pillar, the document mentions governance and the rule of law; decentralization and attitudinal change. Improving governance and making the rule of law prevail are indeed monumental tasks that can have huge impact on the lives of Kenya's indigenous communities. These should again be seen together with the articles on governance of the recently adopted constitution. However, what is crucial for indigenous communities in this respect is recognition of their traditional institutions of governance and linking these with the new initiatives, taking the role of overseeing the implementation of these reforms.

"Vision 2030: Northern Kenya and Other Arid Lands" constitutes a major step forward in the evolution of the government's perspectives on social development in indigenous areas and this needs to be noted positively. The government of Kenya must be encouraged to move forward in adopting landmark policies in the areas of recognition of indigeneity, indigenous knowledge systems including their traditional governance systems, land and natural resource rights, free, prior and informed consent, political representation and self-determination as these are key issues for the adoption of a comprehensive development policy for indigenous communities.

VI. MEETING WITH GOVERNMENT OFFICIALS

The first meeting with senior government officials was held with H.E. Hon. Mohammed Elmy, Minister of State for the Development of Northern Kenya and Other Arid Lands. The meeting was held in his office and was very brief as he had to rush back to the parliamentary session. Mohammed Elmy explained to us the significance of the establishment of the ministry and, given the challenges that Kenya as a country and indigenous communities faces, he believed that this was the right direction. According to him, the basic problem as regards lack of recognition of indigenous peoples and lack of clear policies supportive of indigenous peoples' rights is a lack of knowledge about indigenous peoples. Although lack of knowledge is a major challenge, he also identified lack of development work and lack of legislation, policies and laws pertaining to the rights of indigenous peoples as major challenges.

A meeting was also held with Mr. Noor Hassan Noor, Office of the Prime Minister, Interim Coordinating Secretariat of the Mau Complex Conservation and Christian Lambrechts of the United Nations Environmental Programme (UNEP) Nairobi. Christian Lambrechts briefed us about the Mau Forest Complex, the problems involved and about the government's plan for the Mau Forest. Mr. Noor explained that the main concern of the government was the preservation of the Mau Forest as a water tower and he pointed out that evicting everyone, including the Ogiek, from the forest was the government's plan.

The last meeting with a senior government official was held with Hon. Mutula Kilonzo, Minister for Justice, National Cohesion and Constitutional Affairs. The meeting was held in his office. He emphasized that indigenous communities' issues are important and that the government had allocated what he called an "equalization fund" for indigenous communities, along with youth and women. To our surprise, he said that Kenya accepted the definition of indigeneity made by the ACHPR. To our question regarding indigenous peoples' ancestral land, the minister answered that the issue of land was everybody's concern and that it was

being addressed through legislative measures. We asked him a question in relation to the issue raised with us by pastoral elders and representatives regarding the period that the mandate of the Truth, Justice and Reconciliation Commission (TJRC) covers. According to the proclamation that promulgated the TJRC, its mandate is to look at injustices committed since 12 December 1963, i.e. Kenya's day of independence. But the plight of indigenous communities began during the colonial period. The minister said that his government was flexible in this regard.

With regards to the tense situation in Northern Somalia, he explained that there had been illegalities with regard to issues of nationality and citizenship accumulated over the last forty years and that it was a major problem that his government was facing in this regard. He mentioned difficulties in identifying Kenyan Somalis from Somalis from Somalia, and the practice of illegal activities including money laundering and arms smuggling. He believes that the situation needs to stabilize before reforms are introduced, which would not seem to correspond with what Vision 2030 says. He believes that Kenya is targeted by terrorists and that there needs to be a regional approach to solving the problems of terrorism. He praised Kenyan Somalis for being patient and forbearing. According to him, the problem lies in miscommunication. The minister repeated what Mr. Noor had told us about the Mau Forest problem and said that anybody living illegally in the water tower (i.e. the Mau Forest) would be removed.

To the question of why the verdict of a Kenyan court as regards the need for political representation for the Ilchamus pastoral community had not yet been implemented, he said he regretted the delay but he promised that it would be addressed. To the question on what his government would do as regards the ruling by the ACHPR in the case of the Endorois community, he unhesitatingly said that his government "accepts the ruling and will implement it". To the question of why the Kenyan government had not submitted periodic reports on the state of human rights in Kenya to the ACHPR sessions, he said he did not know.

VII. CONCLUSION

In the past fifty years since independence, Kenya has developed social, economic and political institutions that are ostensibly better organized than those of its neighbours. Since 1992, there has been considerable space for the nascent civic sector to participate in the social development process that has served as a boost for growth and development in the economic, social and political spheres. Kenya thus occupies an important place in the regions of East Africa and the Horn of Africa combined. Kenya's economy is performing well and it is less dependent on donor funds for its development. To that extent, it is a pace-setter in the region.

At the political level, too, the multi-party system introduced in 1992 is still holding despite the deplorable violence following the 2007 elections. Whether the post-election violence goes down in Kenya's history as the birth pangs of a new democratic dispensation to be born as a result of the major political reforms currently underway or as one of those political hiccups engineered by the elite that dominated power in Kenya is a matter that remains to be seen. Nevertheless, it is observed that Kenya is indeed sitting on a ticking time bomb unless drastic political reforms are conducted.

The kernel of the problem for indigenous communities in Kenya is lack of recognition; the government does not recognize indigeneity, neither does it provide any legislative and policy support for their rights. This has opened the door for the Kenyan elite to violate the rights of indigenous communities to their ancestral land, natural resources and so on. Dispossession of ancestral land has become a function of the accumulation of wealth for the political elite and the pauperization of indigenous communities. Lack of political representation of indigenous communities has served as a major tool of political disempowerment. Discrimination, marginalization, lack of access to justice, the prevalence of conflicts and the injustices committed thereof all derive from a lack of political representation. As a result, indigenous communities are forgotten as far as development, equality of women, access to education and primary health care are concerned.

The issue of indigenous peoples' rights, both in terms of respecting their rights and addressing their historically legitimate demands for restitution, is crucial for the country as a whole. At the moment, there is a huge disparity between what is prevailing, politically and economically, under the elite and what is aspired through Vision 2030. Indeed, if what is aspired both through Vision 2030 and other political reforms goes through, Kenya will certainly be a different country where the rule of law prevails with huge immediate and long-term impacts not only on the lives of its indigenous communities but also on the well-being of the people of Kenya as a whole.

What is conspicuously missing from the grand political reforms underway are crucial issues pertaining to the rights and well-being of indigenous peoples. We have included these missing links in the recommendations below to the government of Kenya.

VIII. RECOMMENDATIONS

Based on the findings mentioned above, the Working Group on Indigenous Populations/Communities makes the following recommendations:

Recommendations to the Government of Kenya

- Review its overall approach and orientation towards the state of its indigenous peoples. To this end and for a wider impact, the government should organize a national conference on issues that affect the indigenous peoples of Kenya, in which prominent and knowledgeable persons on indigeneity take active part.
- Observe the standpoints of the African Commission on Human and Peoples Rights on indigeneity and the rights of indigenous peoples in Africa as stipulated in the 2003 Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities adopted by the African Commission at its 28th Ordinary Session in 2003.
- Recognize the pastoral communities and hunter-gatherer communities of Kenya as indigenous.
- Ratify ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries.
- Adopt the United Nations Declaration on the Rights of Indigenous Peoples and ensure its incorporation, through the parliament, into domestic laws.
- Identify indigenous peoples through the census launched and provide disaggregated data on pastoralists and hunter-gatherers.

- Reform its electoral system to facilitate the political representation of indigenous peoples according to their wishes.
- Rearrange the current designations of districts to end the splitting up of indigenous peoples, which greatly affects their chances of political representation.
- Review the current practice of issuing identity cards which discriminates against indigenous peoples; identity cards should be issued to all members of indigenous communities.
- Fully endorse and implement the Ndungu'u Report and return the ancestral lands of indigenous peoples taken from them through land grabbing or other illegal means.
- Implement the provisions of the Kenya Land Policy.
- Compensate and pay reparations to indigenous peoples for the loss of their ancestral land through gazettelement of national parks, reserves, forests, wild life conservation and tourism ventures.
- Legally recognize and respect the rights of the Ogiek community to live in their ancestral home. The government's plan to evict the Ogiek community from the Mau Forest must be withdrawn. Titles to the Mau Forest land acquired illegally must be revoked and new titles should be issued only to the original inhabitants, the Ogiek. The government should immediately stop commercial logging in the Mau Forest.
- Implement the rulings of the African Commission on the case of the Endorois people, return their ancestral land and respect their right to unrestricted access to Lake Bogoria.
- Immediately review the security situation in Northern Kenya and stabilize the situation through a universal pacification policy that addresses the plight of the historically wronged pastoral and other indigenous communities there, lift the discriminatory practices

against the ethnic pastoral communities there and introduce a serious practice of continuous dialogue with the community.

- Immediately halt the hostile acts of the army in the lands of the Samburu and stop the violence against the community and address the inter-communal conflict through dialogue and discussion.
- Consult indigenous communities prior to exploring for exploitation of natural resources on their ancestral and traditional land. Indigenous communities should receive an equitable share of benefits obtained from the exploration and exploitation. Full compensation should be paid to indigenous communities in case of adverse environmental impact on their land, natural resources and traditional livelihoods resulting from these economic activities.
- The management of and benefits derived from protected areas, game reserves and national parks in pastoral and hunter-gatherer areas must involve indigenous communities. Indigenous communities must be compensated for the loss incurred heretofore as a result of the creation of these game reserves.
- The government must ensure the participation of representatives of indigenous communities in the political reforms that are underway in the country.
- The government should adopt affirmative action in the field of education for indigenous children. In pastoral areas, mobile and full boarding schools should be introduced to ensure universal primary education. Appropriate educational curricula must be designed to meet the requirements of indigenous communities in order to preserve their language, culture, special history and spiritual legacies.
- Efforts must be made to protect from extinction the language, culture and other legacies of smaller indigenous communities, especially the Ogiek, Sengwer, Ilchamus, Elmolo, Munyoyaya, Waata

and Yaaku. The state should form an agency to promote traditional languages, especially those under threat of extinction, in schools and through the mass media especially state media in collaboration with universities and institutions of higher learning as well as with members of civil society.

- The government should take active measures to effectively eradicate female genital mutilation in all communities through carefully designed and socially acceptable methods.
- The government should make provision for adequate health facilities and infrastructure to address the problem of high levels of maternal and infant mortality among indigenous communities due to the inadequacy of such facilities in indigenous peoples' places of habitat. Importantly the Ministry of Health should initiate official training to strengthen the capacity of traditional mid wives and first aid care givers.
- The government through the ministries of trade and youth affairs should strengthen the capacity of indigenous youth to harness their potential in traditional knowledge systems and alternative means of economic sustenance. This could be through training and access to capital and markets for their goods, wares and services especially in tourism and livestock husbandry.
- The state through the Ministry of Justice should provide legal assistance to indigenous communities perhaps through the recently launched legal aid scheme in order to access justice on a variety of human rights issues such as in defending and reclaiming their traditional land rights and resources.
- Kenya and its East African counterparts through their ministries of foreign affairs and East African integration should initiate a joint programme to address cross border indigenous peoples issues such as migration, movement, citizenship, equitable access and share of natural resources as well as state services such as education, health and socio economic rights.

Recommendations to civil society and indigenous communities

- Indigenous communities in Kenya and all members of civil society should remain vigilant and hold the state accountable for implementing the recommendations in this report as well as remain at the forefront of challenging continued human rights violations through peaceful action and judicial fora including at the African Commission on Human and Peoples' Rights.
- Indigenous communities and civil society actors should employ innovative measures in partnership with development partners aimed at addressing the socio-economic needs of the communities such as training, development of tools and infrastructure in order to strengthen the capacity of indigenous communities to respond to the challenges they meet such as maternal and infant mortality, unemployment, etc. and to promote traditional knowledge systems.
- Popularize this report in order to conduct advocacy and sensitization's activities with the indigenous communities and state officials on the situation of indigenous communities and continuously lobby for the adoption of appropriate programmes to address the problem of continued marginalization of indigenous peoples in Kenya.

Recommendations to the African Commission on Human and People's Rights

- Follow up on implementation and enforcement of its recommendations on the Endorois ruling. It is also urged to expedite other communications that have been lodged by indigenous communities in Kenya.
- Conduct an official mission to Kenya, in order to continuously monitor the situation of human rights of indigenous peoples in the country.

- Facilitate dialogue with the government of Kenya, civil society and indigenous communities in the country to ensure that the rights of indigenous peoples in all fields are respected.