

**Joint NGO Submission to the Human Rights Council**  
**Universal Periodic Review Mechanism**

**UPR 8<sup>th</sup> Session, 10-21 May 2010**

**Review of Kenya**

**Submitted on behalf of the following organizations:**

Mainyoito Pastoralist Integrated Development Organization  
(MPIDO)

Endorois Welfare Council

Pastoralist Integrated Support Programme

Ogiek People Development Programme

Maa Civil Society Forum

Ndugu Zangu Charitable Trust

Ilchamus Development Consortium Trust

The Pastoralists' and Hunter Gatherers' Ethnic Minorities Network

Centre for Minority Rights Development

International Work Group for Indigenous Affairs (IWGIA)

**Submitted on 2 November 2009**

## **INTRODUCTION**

This stakeholder report is prepared and endorsed by the Kenyan indigenous civil society organizations mentioned below and by other partners who have been at the forefront of the fight for indigenous peoples' rights, which have been violated in diverse ways. These organizations include the Mainyoito Pastoralist Integrated Development Organization, Endorois Welfare Council, Pastoralist Integrated Support Programme, Ogiek People Development Programme, Maa Civil Society Forum, Ndugu Zangu Charitable Trust, Ilchamus Development Consortium Trust, the Pastoralists' and Hunter Gatherers' Ethnic Minorities Network, Centre for Minority Rights Development and the International Work Group for Indigenous Affairs.

The stakeholder report was initiated and developed via a meeting with the submitting organizations that was hosted by the Mainyoito Pastoralist Integrated Development Organization in Nairobi, Kenya.

## **BACKGROUND**

Indigenous peoples in Kenya comprise mainly pastoralists and hunter/gatherer communities. Pastoralists are estimated to comprise 25% of the national population while the largest individual community of hunter/gatherers numbers approximately 30,000 people. The pastoralists primarily occupy the Arid and Semi Arid Lands of Northern Kenya and the area towards the border with Tanzania in the south. Hunter/gatherer groups include the Ogiek, Sengwer, Yaaku, Waata and the El Molo while the pastoralists include the Turkana, Rendille, Borana, Maasai, Samburu, Ilchamus, Somali, Gabra, Pokot, and Endorois, among others. They all face land and resource tenure insecurity, poor service delivery and low political representation. Their situation is steadily deteriorating, with increasing competition for natural resources in their areas, the effects of climate change (such as drought) and growing impoverishment.

There is no specific legislation recognizing and protecting the rights of indigenous peoples in Kenya. However, the indigenous peoples' planning framework, designed and implemented in 2006 by the Office of the President in collaboration with the World Bank, provides a basis for free, prior and informed consultation through which the sustainable development of the indigenous peoples could be achieved.

## **INTERNATIONAL OBLIGATIONS**

Under international law, Kenya is a member state bound by all the international instruments and we hereby call on the relevant bodies of the United Nations to visit Kenya, investigate the allegations in this report and impose severe punishment in order to ensure that the state respects the fundamental rights of its citizens and compensates the victims of any violations, whilst also punishing the perpetrators of such crimes.

Kenya has ratified:

[International Convention on the Elimination of All Forms of Racial Discrimination](#) (1965)

[International Covenant on Civil and Political Rights](#) (1966)

[International Covenant on Economic, Social and Cultural Rights](#) (1966)

[Convention on the Elimination of All Forms of Discrimination against Women](#) (1979)

[Convention on the Rights of the Child](#) (1989)

[Discrimination \(Employment and Occupation\) Convention](#) (1958)

[African Charter on Human and Peoples rights \(2003\)](#)  
[African Charter on the Rights and Welfare of the Child \(1990\)](#)  
(ICC Rome Statute 1998)

Kenya has not ratified:

[ILO Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries](#)  
(1989)

[International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families](#) (1990)

[The International Convention on the Prevention and Punishment of the Crime of Genocide](#)  
(1948)

## **Recommendations**

- Kenya should ratify ILO Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries
- Kenya should comply with the provisions included in the UN Declaration on the Rights of Indigenous Peoples.
- Kenya should implement the recommendations of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people from his mission to Kenya in December 2006 (A/HRC/4/32/Add.3, 26 February 2007)
- Kenya should implement the Concluding Observations of the African Commission on Human and Peoples' Rights on Kenya's inaugural report.

## **NATIONAL OBLIGATIONS**

The Constitution of Kenya protects a number of fundamental rights; however, many of these rights are not being protected when it comes to indigenous peoples. These include:

### **Chapter V: Protection of Fundamental Rights and Freedoms of the Individual**

<http://kenya.rcbowen.com/constitution/chap5.html>

Article 70 Fundamental Rights and Freedoms of the Individual

Article 72 Protection of Right to Personal Liberty

Article 74 Protection from Inhuman Treatment.

Article 81 Protection of Freedom of Movement

Article 82 Protection from Discrimination on grounds of race. etc.

### **Chapter IX: Trust Land** <http://kenya.rcbowen.com/constitution/chap9.html>

as well as laws such as Trust Land Act (chap 288) and Law Reform Act (chap 26)

## **INSECURITY**

Violence and serious insecurity is widespread in the pastoral areas of Kenya. Cattle rustling is common among the pastoralist communities of Northern Kenya. Insecurity is an issue that the government of Kenya is well informed and aware of and the government intelligence agencies have, in many cases, had prior knowledge of imminent attacks on their citizens and indigenous populations. A case in point is the KANAMPIO MASSACRE that took place in September 2009 in Laikipia, where Pokot cattle raiders launched a violent attack against Samburu pastoralists and massacred 34 innocent men, women and children. In this case, the

District Commissioners publicly admitted that they had had information about the planned massacre a week earlier but that they had negligently failed to act.

Other pastoral communities whose existence is in jeopardy due to the constant cattle rustling include the Borana, Turkana, Rendille and Marakwet. Government officials have blacklisted these pastoralist groups as notorious cattle rustlers rather than confronting the problem and facilitating solutions.

The government is making no serious attempt to prevent the violence and conflicts or bring those responsible to justice. On the contrary, it has repeatedly demonstrated its negligence or acted in a biased manner thereby failing in its constitutional duty to protect all citizens of Kenya. The Pokot community is a case in point in this regard. The Pokot community has been illegally armed with sophisticated weapons, serviced and maintained by the security agencies in their localities, and has been constantly attacking its neighbouring pastoral communities. These attacks are happening with impunity – seemingly because the Pokot are politically well-placed in the inept Kenyan political system.

The victims of the violent conflicts are most often left to fend for themselves and no - or very limited assistance - is provided by the government. Attacks often happen with impunity and victims are left impoverished and traumatized.

If the conflicts and violence are not constructively addressed and if the government continues to fail to intervene responsibly from a position of neutrality, the existing hatred will continue to develop and will compromise future peaceful coexistence and stability among the pastoralist communities of Northern Kenya.

### **Recommendations**

It is a common law principle that the government has vicarious liability and must take full responsibility for the actions of its employees. Kenya should:

- Investigate the cases of violent conflicts. Put in place effective conflict prevention and conflict resolution measures;
- Act in a non-biased way with regard to the conflicts;
- Take the necessary steps to compensate victims of government negligence in order to safeguard the future development of the pastoral communities involved.
- Bring the perpetrators of violence to justice.

### **LACK OF ACCESS TO JUSTICE AND IMPUNITY**

It is clear that the government of Kenya has condoned the impunity of its own officers when they take the law into their own hands. A case in point was the confiscation of Samburu livestock by the government armed security forces in April 2009. The armed security forces - with the support of military helicopters - raided the Samburu people of Archers Post in Samburu district, Northern Kenya with impunity and confiscated their livestock on the pretext that they were recovering stolen animals that the Samburu had allegedly stolen from neighbouring tribes. Some nagging questions, however, remain unanswered: do women and children really get involved in cattle raids? Do they have the capacity to raid? And why, then, does a responsible government attack the whole community, rape women, defile young girls and confiscate their animals – their only source of survival? This is an irresponsible action of a government that has vicarious liability for the actions of its armed forces, and the United

Nations must intervene to ensure that the victims of such ruthless actions obtain justice and that the perpetrators do not go unpunished merely because they hold positions in the government.

The government of Kenya has to be held responsible for this and the other massacres that have occurred, such as the Wagalla massacre of Somali pastoralists by Kenyan security forces that took place in 1984 in Wajir District in North-Eastern Province, where hundreds if not thousands of people were killed, and the bombing of the Samburu Morans in Samburu East District by the General Service Unit of the police force, where more than 90 people lost their lives.

### **Recommendation**

- The government of Kenya should investigate these massacres and take appropriate action that will ensure justice for the victims of these government-orchestrated massacres.

### **PASTORALISTS' LAND AND RESOURCE RIGHTS**

The Constitution of Kenya vests administration of Trust Land in the County Councils, within their jurisdiction of the pastoral areas. Section **115**. (1) of the current Kenyan Constitution provides that '**All Trust land shall vest in the county council within whose area of jurisdiction it is situated**'. Such local authorities hold the Trust Land in trust for their communities, who are the legal beneficiaries. This land tenure system vests legal land ownership in the community, albeit managed and administered by the trustee, that is, the local authority, or county council.

The draft National Land Policy purports to classify pastoral trust lands as part of the so-called "idle lands" recommended for land banking. The pastoral activities on these trust lands do not appear to be classified as a form of land occupation, according the draft land policy awaiting parliamentary approval.

The pastoral communities categorically and expressly – and with the support of other indigenous communities - state that their grazing land is not idle but forms the very foundation of their livelihood and economic activities.

Pastoral lands are also important in relation to wildlife. The badly conceived concept of "idle lands" in relation to pastoral lands is a misconception that will ignite old memories of how the Maasai lost their land to other ethnic groups.

### **Recommendations**

- It is an historical fact that most social conflicts in Africa are the result of land issues and the international community and Kenya **is hereby urged** to recognize in its National Land Policy the usefulness of pastoralist lands and the way they are being utilized. Kenya should include pastoralist lands in the category of occupied land in its National Land Policy and to recognize pastoralist and indigenous communities' activities on their ancestral lands.)
- Kenya should follow up on the recommendations by the CSECR from November 2008 E/C.12/KEN/CO/1, paragraph 12.

## **FORCEFUL EVICTIONS**

It is on record that the government of Kenya is in the process of evicting the Ogiek indigenous community from their traditional land: the Mau Forest in western Kenya. The evictions are part of the government's efforts to save and preserve the Mau Forest, which is one of the most important water towers in Kenya. People without proper legal title to their land will first be evicted, and the government has established the Mau Conservation Committee to oversee the evictions of those suspected of having acquired the forest land in a non-procedural manner. It should be noted that non-procedural titles were issued by the previous regimes to their political allies and supporters.

The Ogiek are a traditional hunting/gathering community whose ancestral land is the Mau Forest. They have used the Mau Forest in a sustainable manner for centuries and have lived in harmony with the forest. There is, however, now a very real risk that the Ogiek people will be evicted from this forest. The Ogiek are a marginalized community and the plan to evict them and to provide them with individual plots of land in different corners of the county will destroy their very existence as an indigenous tribe. The Ogiek have a right to exist as a tribe, and the plan to break up their community is a violation of this right of existence. The Ogiek people have a right to live together and to uphold their culture and identity and such a right has to be protected.

### **Recommendation**

- The Government of Kenya must protect the rights and future existence of the Ogiek people as a tribe.

Furthermore, without prejudice to the foregoing, the urbanization ideology of creating a "Nairobi Metropolitan Region" is very unfavourable to the adjacent pastoral community of the Maasai. It is down in history that Nairobi is a native Maasai land. The expansion of Nairobi city to include parts of Kajiado District will have a serious impact on the land rights, livelihood and future existence of the Maasai people in Kajiado. The implementation of such plans would be in violation of the right of the affected Maasai people and would be in violation of Article 17 of the Universal Declaration of Human Rights: (1) *Everyone has the right to own property alone as well as in association with others* and (2) *No one shall be arbitrarily deprived of his property*.

### **Recommendation**

- Kenya should abandon the idea of a Nairobi Metropolitan Region and refrain from extending it into the Maasai people's traditional lands since such land encroachment will deprive the Maasai of their means of survival as pastoralists and will compromise their livelihood and future survival as a people.

## **LACK OF LEGAL RECOGNITION AND POLITICAL REPRESENTATION**

Every tribe has a constitutional right of recognition in Kenya and the 1989 national census confirms the legal recognition of these tribes. However, both the Constitution and the 1989 census omit the smaller indigenous tribes such as the Ogiek, El Molo, Watta, Yakuu, among others, and their existence and identity are therefore not legally recognized or protected. It is a fact that in Kenya the existence of and reference to tribal identity is crucial as a social bargaining tool. The above mentioned legally unrecognized tribes lack a separate code in official documents identifying them as distinct ethnic groups, and this lack of legal

recognition has serious consequences for their political representation and for their ability to defend their livelihoods and future existence as a people.

The Illchamus, a marginalized indigenous pastoralist community, has taken the government of Kenya to court to demand its constitutional right to a separate constituency that will ensure their right of political representation. It is a constitutional right the world over to be represented by a leader of your own choice. Although the Illchamus won the case in the High Court in Nairobi, the government of Kenya has failed to implement the High Court ruling and continues – contemptuously - to deny the Illchamus people their right to representation.

### **Recommendation**

- The government of Kenya should be compelled to respect the decision of the Kenyan High Court and to operationalize its ruling.

### **POVERTY AND LACK OF ACCESS TO SOCIAL SERVICES**

The development of arid and semi-arid areas (ASALs) remains a major challenge. The country's livestock sector contributes 10 per cent to GDP, about 42 per cent of total agricultural output and about 30 per cent of all marketed agricultural output. More than 60 per cent of Kenya's livestock is found in the ASALs and employs 90 per cent of the local population. (Kenya Economic Report 2009). Despite this, the mortality rate in indigenous communities in Kenya is increasing due to the inadequacy of public health facilities. Areas inhabited by indigenous communities are poor and marginalized and the government of Kenya has given very limited attention to their development. This can be seen, for instance, in Garissa in northern Kenya, a pastoralist area where 64% of the population lives in abject poverty. The latest Kenya economic report indicates that incidences of poverty is least prevalent in Central Kenya, which is mainly an agricultural area, and that poverty levels are very high in areas like North Eastern, which are arid areas.

Page 45 of the Economic Recovery Report for 2003-2007 clearly indicates that the Arid and Semi Arid Lands commonly referred to as ASAL areas survive on food relief and that poverty is rampant. The cause of this rampant poverty is the unequal distribution of national resources, ineffective development programmes, a lack of basic infrastructure, and inadequate social amenities/ public utilities.

### **Recommendation**

- The United Nations should intervene and call the Kenyan government to task over its failure to equitably distribute the national resources to all Kenyans regardless of their geographical location (and/or economic activity), with a view to attaining the Millennium Development Goals.

### **VIOLENCE AGAINST INDIGENOUS WOMEN**

The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) outlaws all forms of discrimination against women. This international standard stipulates that women's rights are human rights and that they must be upheld by all state parties. The persistent gender inequalities and discrimination against women in Kenya constitute a violation of women's rights.

It is on record that indigenous women in Kenya face systematic injustices and abuse within their communities. One example is that of Female Genital Mutilation (FGM), which was outlawed in Kenya in 2001 but which is still widely practised among numerous indigenous communities such as the Maasai, Samburu, Somali and Pokots as a customary rite of passage. FGM poses a very serious problem for the physical and mental health of victims and it is a form of gender violence that constitutes a major violation of women's fundamental rights.

During the security operations in Archers Post in Samburu East District, women were raped and girls defiled by armed security forces involved in the operation. To date - despite the victims reporting such gross violations of women's fundamental rights - no single security officer has been prosecuted or disciplined. The victims are racked with pain while the perpetrators enjoy their freedom with impunity.

### **Recommendation**

- The government of Kenya must punish the perpetrators of such human rights violations.