

Country Technical Note on
Indigenous Peoples' Issues

Republic of Kenya



Investing in rural people



IWGIA

Country Technical Notes on Indigenous Peoples' Issues

THE REPUBLIC OF KENYA

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Summary

The Republic of Kenya has a multi-ethnic population, among which more than 25 communities identify as indigenous. Indigenous Peoples in Kenya include hunter-gatherers such as Ogiek, Sengwer, Yaaku Waata and Sanya, while pastoralists include Endorois, Turkana, Maasai, Samburu and others. It is estimated that pastoralists comprise 25% of the national population, while the largest individual hunter-gatherer community amounts to approximately 79,000.

Most hunter-gatherer communities live in the forested areas of the Highlands and the coast or near rivers and lakes. This is where they used to hunt (and/or fish) and gather honey and other forest products. The pastoralist groups are found on the arid and semi-arid lands (ASALs), which constitute 84% of the country's area. They are diverse in terms of size, culture and identity.

Indigenous peoples have experienced historical marginalization and discrimination, and as a consequence still suffer nowadays from economic marginalization and socio-political exclusion. Indigenous peoples also have a long history of land dispossession that continues to this day. This dispossession has happened in the name of agriculture, nature conservation, military priorities and development, but also because policy-makers saw the indigenous livelihoods as being primitive and environmentally degrading. For hunter-gatherers, the ban on hunting and their eviction from their ancestral forests have meant that they now live on the edges of these forests, without any legal access to land or reliable sources of livelihood. In the case of the pastoralists, the loss of rangelands and mobility has led many of them to give up their nomadic lifestyle. They have become semi-sedentarized agro-pastoralists like some of the Maasai, or semi-nomadic like some of the Turkana and the Borana. Others again, like many Rendille have been forced by severe droughts and/or recurrent inter-ethnic conflicts to seek refuge in urban centers.

Kenya's indigenous peoples belong to the poorest. They have never received any compensation for their land losses. Nor are they drawing any benefits from the use their lands have been put to as, e.g., game reserves or infrastructure projects. Food insecurity is widespread and food relief has for many become the only option. Others chose to migrate into cities in search of work but discrimination and their lack of education makes it difficult for them to find employment. Compared with the rest of the population, their health and education situation is far worse.

Kenya's process towards democratization and devolution and the adoption of a new Constitution in 2010 marks a new understanding of the marginalization suffered by indigenous peoples. The Constitution as well as other new legal texts contains dispositions that directly address their situation. While the new legal framework, notably regarding community land rights includes many promises for indigenous peoples, there is still a long way before these will materialize. Kenya abstained from voting for the UNDRIP and it has not ratified ILO Convention No. 169. But it has ratified other important international and regional conventions that according to the Constitution should be reflected in the country's legislation. Kenya has a vibrant civil society including a large number of indigenous NGOs and CBOs who played an important role in the democratization process.

ACRONYMS AND ABBREVIATIONS

ACHPR	African Commission on Human and Peoples' Rights
ASAL	Arid and Semi-Arid Lands
AU	African Union
AWF	African Wildlife Fund
CBO	Community Based Organization
CELEP	Coalition of European Lobbies for Eastern African Pastoralism
CFA	Community Forest Association
CPS	Country Partnership Strategy (World Bank)
COSOP	Country Strategic Opportunities Paper (IFAD)
FAO	Food and Agricultural Organization
FBO	Faith Based Organization
FGM	Female Genital Mutilation
GDP	Gross Domestic Product
GEF	Global Environmental Fund
GIZ	German Agency for Technical Cooperation (formerly GEZ)
GoK	Government of Kenya
HDI	Human Development Index
IADC	Integrated Agriculture Development Consult
IBRD	International Bank for Reconstruction and Development
ID	Identity (Card)
IDA	International Development Association
IDP	Internally Displaced Persons
IEA	Institute of Economic Affairs
IEBC	Independent Electoral Boundaries Commission
IFAD	International Fund for Agricultural Development
IGAD	Intergovernmental Authority on Development
ILO	International Labor Organization
IMF	International Monetary Fund
IMLU	Independent Medico-Legal Unit
IPP	Indigenous Peoples Plan
IPPF	Indigenous Peoples Plan Framework
IWGIA	International Work Group for Indigenous Affairs
KADU	Kenya African Democratic Union
KANU	Kenya African National Union
KHRC	Kenya Human Rights Commission
KJAS	Kenya Joint Assistance Strategy
KNBS	Kenya National Bureau of Statistics
KNCHR	Kenya National Commission on Human Rights
LAPSSSET	Lamu Port and Southern Sudan Ethiopia Transport Corridor
LPI	Livestock Production Initiative
MoE	Ministry of Education
MoH	Ministry of Health
MoMS	Ministry of Medical Services
MP	Member of Parliament
MTP	Mid-Term Plan
NACONEK	National Commission for Nomadic Education of Kenya
NCIC	National Cohesion and Integration Commission
NFD	Northern Frontier District

NGO	Non-Governmental Organization
NLP	National Land Policy
OAU	Organization of African Unity
OCHA	Office for the Coordination of Humanitarian Affairs
ODA	Official Development Assistance
OHCHR	The Office of the High Commissioner for Human Rights
OP	Operational Policy
OPEC	Organization of the Petroleum Exporting Countries
PNU	Party of National Union
PPG	Pastoralist Parliamentary Group
TJRC	Truth, Justice and Reconciliation Commission
TNC	The Nature Conservancy
UNDAF	UN Development Assistance Framework
UNDP	UN Development Program
UNDRIP	UN Declaration on the Rights of Indigenous Peoples
UNESCO	UN Educational, Scientific and Cultural organization
UPR	Universal Periodic Review
WB	World Bank
WHO	World Health Organization
WISP	World Initiative for Sustainable Pastoralism
WWF	World Wildlife Fund

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1. Indigenous Peoples of Kenya

1.1. The national context

The Republic of Kenya is an East African country with an area of 582,646 sq. km. It opens onto the Indian Ocean to the east and shares borders with Somalia (north-east), Ethiopia (north), Sudan and Uganda (west) and Tanzania (south). Kenya's geography is extremely diverse. It includes the fertile Central Highlands, with altitudes over 1,500 m and Africa's second highest peak Mount Kenya (5,199 m); a semi-arid belt of savannah grasslands in the south and south-east where wildlife abounds; tropical wetlands along the 400-km-long coastline; and a vast semi-desert plain to the north. Arid and semi-arid lands (ASALs) comprise 84 % of Kenya's total land area. The Rift Valley bisects the Central Highlands in a north-south direction from Lake Turkana in the north-west to Lake Victoria in the south-west. Kenya's main river is the Tana River (700 km), which rises in the Highlands and runs to the Indian Ocean.

Kenya sits almost exactly astride the equator, and temperature, rainfall and humidity variations are extreme, altitudes being a major determinant. There are two rainy seasons—the long rains from late March to early June and the short rains from October to November or early December. However Kenya is severely affected by climate change.

The latest census took place on 2019, and Kenya's population was reported as 47.6 million, with an annual population growth rate of 2.28% per year. Kenya has a very diverse and multi-ethnic population. Although there is no official list of Kenyan ethnic groups, the number of ethnic categories and sub-categories recorded in the country's census has changed significantly over time, expanding from 42 in 1969 to more than 120 in 2019.¹ Among these, several pastoralist and hunter-gatherer communities identify themselves as indigenous peoples. The majority of Kenya's population lives in rural areas, with large concentrations in the Highlands and the Rift Valley around the cities of Kisumu and Nairobi, and on the coast around Mombasa.

Kenya ushered in a new political and economic governance system with the passage of a new constitution in 2010 that introduced a bicameral legislative house, devolved county government, a constitutionally tenured judiciary and electoral body. Kenya is a presidential representative democratic republic, in which elected officials represent the people and the president is the head of state and government. The two official languages, English and Swahili.

Kenya has made significant political and economic reforms that have contributed to sustained economic growth, social development, and political stability gains over the past decade. Kenya has recorded sustained growth of more than 5 per cent since 2014, which positions the country to become an upper middle-income country (MIC) by 2030.² Until the COVID-19 pandemic, Kenya was one of the fastest growing economies in Africa, with an annual average growth of 5.9% between 2010 and 2018. With a GDP of \$95 billion, Kenya recently reached lower-middle income status, and has successfully established a diverse and dynamic economy. However, its key development challenges still include poverty, inequality, transparency and accountability, climate change, continued weak private sector investment and the vulnerability of the economy to internal and external shocks.

¹ See Samantha Balaton-Chrimes (2021) *Who are Kenya's 42(+) tribes? The census and the political utility of magical uncertainty*, *Journal of Eastern African Studies*, 15:1.

² Kenya has a Human Development Index (HDI) of 0.555 (medium), ranked 145 out of 186 in the world.

1.2. The Indigenous Peoples of Kenya

Indigenous Peoples in Kenya include hunter-gatherers such as Ogiek, Sengwer, Yaaku Waata and Sanya, while pastoralists include Endorois, Turkana, Maasai, Samburu and others. It is estimated that pastoralists comprise 25% of the national population, while the largest individual hunter-gatherer community amounts to approximately 79,000. All these communities are diverse in terms of livelihood, location and size as well as origin. Each may include ethnic groups that have partly or entirely given up their original lifestyles but still remain marginalized and excluded from the more dominant segments of the population. Although, the main differences are between pastoralists and hunter-gatherers (see below) - it should also be noted that the difference between hunter-gatherers and pastoralists is not always clear-cut since some hunter-gatherers keep cattle and many pastoralists mix livestock herding with other subsistence strategies (cultivation, hunting, gathering, etc.).³ A sizable number of indigenous peoples have also become urbanized; among them, some have attained important positions in Kenyan society. Although their social and economic situation differs from that of the majority of their ethnic group, however, they still identify themselves as indigenous.

1.2.1. Hunter-gatherers

The hunter-gatherers include the Ogiek, Sengwer, Yiaku, Waata and Aweer (Boni). Traditional hunter-gatherers live in the forests, hunt for meat and gather honey as well as other non-timber forest products. Included in this category are also small fishing communities living near rivers and lakes. Indigenous hunter-gatherers were traditionally nomadic or semi-nomadic and lived in small dispersed encampments in the dense forests of the Central Highlands such as, for instance, the Ogiek in the Mau Forest Complex and the Yaaku in the forests of Mount Kenya, or such as the Aweer and the Waata in the forests in the hinterlands of the coastal area. Their livelihoods has always depended on their possibility of moving freely around their territory, using different zones according to the seasons, looking for animals to hunt and honey to gather. Hunting used to play a major role and, together with collecting honey and making beehives. Subsisting on hunting and gathering honey as well as plants, herbs and berries (or fishing like the El Molo on Lake Turkana and the Munyoyaya on the River Tana), hunter-gatherers have often fulfilled a special role in relation to the plains pastoralists in supplying honey and other forest products, and this symbiosis has —had an essential supportive and cultural role in the history of highland pastoralism. Nowadays, the hunter-gatherers' traditional way of life is under jeopardy, hunting is often banned and most hunter-gatherers no longer have access to their ancestral forests. Many have therefore been forced to turn to small-scale farming or work as day labourers. Their attachment to the forests, however, remains strong. Many still consider the forest their home and the forest is what forms their identity. The forests are also where their religious activities and rites take place, and where their extensive indigenous knowledge of their environment comes into its own.

1.2.2. Pastoralists communities

The pastoralists mainly occupy the arid and semi-arid lands of northern Kenya and towards the border between Kenya and Tanzania in the south.⁴ These communities include the Turkana,

³ Dorothy L. Hodgson, *Rethinking Pastoralism in Africa: Gender, Culture and the Myth of the Patriarchal Pastoralist* (2000), 6.

⁴ They live in the arid and semi-arid lands (ASALs)—the Maasai in the southern part of the Rift Valley (Narok, Kajiado, Nakuru counties) and in Laikipia county; the Pokot, the Endorois, the Ilchamus and the Turkana in the

Rendille, Borana, Maasai, Samburu, Ilchamus, Somali, Gabra, Pokot, Endorois and others. All these peoples are highly diverse. They differ in size of population and all have their own distinct identity and culture. They also have distinct languages although these differences are bridged by a high incidence of bilingualism.⁵ On the other hand, they also share many features related to their livestock production systems and social organization. The Kenyan pastoralists rear cattle, goats and sheep. Camels were traditionally only kept by a few groups but have become much more common due to their resilience to drought. Livestock are moved in mobile herding groups, usually with the help of children. Some groups practise transhumance. They may have a significant degree of cross-border movement, migrating by foot or, nowadays, by truck from the frequently drought-ridden north and north-east of Kenya. Other groups, like the Maasai, are semi-sedentarized and their mobility is limited. In the areas where there is some potential for agriculture, groups such as the Maasai, the Pokot and the Turkana do some farming.

1.3. Terminology and legal recognition

The notion of ‘indigeneity’ is a sensitive issue, and the official position has often been that the term indigenous peoples is not applicable, as all Kenyans of African descent are indigenous to Kenya. The Government of Kenya (GoK), nevertheless, recognizes the vulnerabilities of minorities/marginalized communities and has in recent years increasingly acknowledged these communities’ special situation. The Constitution (2010) recognizes the vulnerabilities of minorities/marginalized communities, and recognise the specific situation of indigenous communities.⁶

Several Kenyan - marginalized communities have self-identified as indigenous peoples, and have been acknowledged by the African Commission on Human and Peoples’ Rights (ACHPR).⁷ Some hunter-gatherer groups such as the Ogiek partly claim their indigenous status through the fact that they are considered to descend from some of the first inhabitants of the country. The pastoralists, on the other hand, base their indigenous status on the specific nature of their lifestyle and their socio-political and economic marginalization and exclusion. Both groups, however, have found this widely-used international concept appropriate for advocating for an improvement in their human rights situation. Their representatives participate regularly in international forums, such as for instance, the ACHPR ordinary sessions and the annual sessions of the UN Permanent Forum on Indigenous Issues, where they make statements identifying themselves as indigenous peoples.

western and northwestern part of the Rift Valley (Baringo and West Pokot counties); the Samburu, the Rendille, the Gabra and the Borana in the northern part of the Eastern province (Marsabit, Samburu and Isiolo counties), and the Orma and the Somali in the east and north east (Tana River, Garissa, Wajir, and Mandera counties).

⁵ Most pastoralist peoples belong to the Nilotic or the Cushitic language group.

⁶ Article 260 states: “marginalised community” means: (a) a community that, because of its relatively small population or for any other reason, has been unable to fully participate in the integrated social and economic life of Kenya as a whole; (b) a traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole; (c) an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy; or (d) pastoral persons and communities, whether they are: (i) nomadic; or (ii) a settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole (...)

⁷ ACHPR, *Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities*, (2005), 14-19, 106-115.

2. Socio-Economic Issues

The socio-economic situation of Kenya's indigenous peoples is, to a large extent, the result of the failure of government policy (going back to colonial times) to recognize and value indigenous production systems. These systems are based on hunter-gatherers and pastoralists intimate understanding of their environment and their invaluable expertise in maintaining a critical balance between resources and the use made of them, while at the same time reaping important benefits. The hunter-gatherers' knowledge of the forest's natural resources - its animals and its trees, the individual properties and use of thousands of plants, where to find and gather honey, etc. - and how to use them in a sustainable way has not only sustained the hunter-gatherers themselves but has benefited their neighbours, with whom exchange networks have been established and functioned for centuries. As for the pastoralists, they have - through selective stockbreeding - successfully managed and used lands that, because of their arid and semi-arid nature and unpredictable climate, were unfit for agriculture and therefore considered by others to be of low economic potential.

Yet, for years, these responsible resource use and management systems have been seen as primitive, uneconomic and inherently degrading to the environment. Instead, colonial and post-colonial governments have pursued policies that favoured sedentary agriculture and intensive stockbreeding, nature conservation, military priorities, etc., and development in general. This has been at the expense of indigenous peoples, who, without recognized collective tenure rights, have been dispossessed of their lands, impoverished and discriminated against. In recent years, mega-infrastructure projects and large-scale investments have placed unprecedented pressure on land historically managed by pastoralists in northern Kenya. Environmental degradation is widespread in pastoralists territories especially through large scale cash crop farming. Massive deforestation of forest communities' areas including the Mau forest complex endangers the life of not only hunter gatherers communities but also indigenous communities downstream and the nation at large.

2.1. Land Rights

Hunter-gatherers and pastoralists depend on the availability of large tracts of land - forestlands and rangelands - where their freedom of movement and their access to the natural resources on which their subsistence relies are not obstructed. Yet, indigenous peoples have, since the advent of colonialism in the late 1890s, experienced a continuing process of land dispossession, forced evictions and mobility restriction, putting their traditional livelihood at risk.

2.1.1. Land dispossession and forced evictions among hunter-gatherers

The dispossession of many hunter-gatherer communities began in the early 1900s with white settlers taking over large tracts of their land in the Central Highlands.⁸ Following independence, productive forest land started to be grabbed by more dominant Kenyan groups. The Ogiek from the Mau Forest Complex and Mount Elgon, the Yaaku on Mount Kenya and the Sengwer in Kapoet Forest have all seen their livelihoods undermined as a result of land alienation for farming purposes, illegal logging and conservation policies, including the ban on hunting. Their ancestral forests were turned into individual land plots or protected areas and national parks, while they themselves were gradually deprived of their previous user rights and eventually forcibly evicted. Infrastructural developments also affect these communities,

⁸ In the early 1900s, Ogiek communities were removed from forests near the Kenya-Uganda railway line so that firewood could be secured for locomotive engines.

leading to forced evictions, often followed by violence. Several international human rights monitoring bodies have raised their concerns about continued reports of forced, and sometimes violent, evictions, in forest areas, such as the Embobut and Mau forests.⁹

2.1.2. Dispossession of land among pastoralists

The dispossession of pastoralist peoples from the Rift Valley and Central Highlands also began in the early days of British rules and white settlements. By 1913, the Maasai had lost almost 75% of their lands and, over the following years, they were to lose large tracts of their rangelands to African farmers and game reserves.¹⁰ In the northern part of the country, and following the establishment of the Northern Frontier District (NFD), pastoralist peoples experienced - in the name of pacification - several restrictive measures that blocked cross-border migrations, confined them to specific —tribal grazing areas, and prevented them from selling livestock to the large markets in the south.¹¹ In many places, grazing and destocking schemes greatly limited pastoralists' mobility and interfered with traditional stock management.

In post-colonial Kenya, the Maasai and other pastoralists have continued to experience land grabs by political elites and land reallocation by leaders to assure political allegiance along ethnic lines.¹² Traditional lands have been lost to expanding farming populations, private ranches, wheat estates, tourist game parks, etc. National governments, lured by investments and aid from the international donor community, have increasingly promoted the modernization of pastoralists' livestock systems and the commoditization of their herds, by introducing group ranches (or collective ranching schemes), first in the Maasai counties (Narok and Kajiado) and later expanding to other parts of the country. Group ranching turned out to be a failure as it altered the ecologically well-adapted indigenous land management systems and, within a few years, several ranches had started to be subdivided into individually owned land parcels. Many of these have subsequently been sold to land speculators and farmers, such as, for instance, in Narok where commercial wheat and barley are now grown on what used to be Maasai land.¹³

Other examples among many include the Maasai's loss of land to more game parks and through a process of fraudulent land —registration by senior government officials; the eviction of the Endorois from Lake Bogoria in the 1970s to make way for a national reserve and tourist facilities; the gradual land dispossession of the Ilchamus due to illegal encroachments, and the brutal removal of several hundred Samburu families from their traditional land in order to give way to a new nature conservancy, the Laikipia National Park. Pollution from greenhouses producing roses and vegetables (a big industry in Kenya) has also led to the pollution of water sources and conflicts over access and rights to water. In the more northern and north-eastern ASALs, too, nature conservation, commercial farming and military training camps have taken over large tracts of rangeland. This has led to the death of many livestock, more pressure on

⁹ See latest report from UN Human Rights Committee (2021), UN Doc. CCPR/C/KEN/CO/4, para. 40; and UN Committee on the Elimination of Racial Discrimination, UN Doc. CERD/C/KEN/CO/5-7 (2017), para. 19

¹⁰ See Albert K. Barume, *Land Rights of Indigenous Peoples in Africa* (2010), 112

¹¹ The Outlying District Ordinance (1902) created the NFD (including Marsabit, Isiolo, Wajir, Mandera and Garissa) as a closed area, with restricted movement in and out of the zone. All European settlement and missionaries were prohibited. NFD was designed to be a buffer zone protecting the fertile Kenyan (White) Highlands from the influence of an influx from the Horn of Africa (Somali) and Ethiopia (Oromo/Galla).

¹² The TJRC indicates that 34 percent of all human rights violations reported to their secretariat concern land. TJRC, Annual Progress Report (2011), 14.

¹³ See, e.g., Barume, *Land Rights* (2010), 114ff.

the few water sources in the region and, ultimately, to raiding and periodic conflicts between the different pastoralist communities. These often violent and lethal conflicts have led many nomadic communities to settle near —security zones - such as trading centers. As a result, around 60 percent of the Marsabit range areas are unutilized and the concentration of settlements exacerbates land degradation. Most indigenous communities have never received any compensation for their land losses,¹⁴ nor have they drawn any benefit from the use of these lands and their natural resources, whether they have been used for large government infrastructure schemes, mining or conservation/tourism purposes.¹⁵

2.1.3. Land Rights Litigation and protests

Indigenous peoples have reacted to their dispossession in many ways—from taking up arms like the Kenyan Somali in 1963,¹⁶ protesting publicly as the Ogiek have done several times, seeking the support of human rights organizations and the UN system,¹⁷ to filing cases before Kenyan courts, and taking their grievances to ACHPR.

The very first law suit was filed in 1912 by members of the Maasai community trying to get the 1904 treaty and the 1911 agreement revoked.¹⁸ In more recent years, several cases have been lodged against the government; as for instance, by the Ogiek in 1997 on the grounds that the allocation of their ancestral lands to individuals that were stranger to their community infringed their constitutional rights. The case was postponed several times and despite numerous attempts to resume the case, no judicial decision has been taken.¹⁹ Efforts to establish a dialogue with the government have not yielded any result either and the Ogiek have now taken their case to the African Commission (ACHPR).²⁰ Just as the Endorois did in 2003 after having failed, too, to obtain redress at the national level. The ruling, delivered by ACHPR in 2010, condemned the expulsion of the Endorois people and ordered the GoK to restore their rights to their ancestral land and to compensate them.²¹ In 2017, the African Court on Human and Peoples' Rights ruled in favour of the Ogiek indigenous people. The Court determined that in evicting the Ogiek community from the Mau Forest, the Kenyan government had violated the rights of the Ogiek to their ancestral lands.

In 2002, Samburu and Maasai in the Laikipia area filed a case against the British Army for damages caused by unexploded ordnances left in their rangelands following military maneuvers.²² In January, 2010, 52 petitioners representing the Maasai community filed a suit in Kenya Superior Court to recover 30,000 acres of Mau Narok, land that was appropriated under British colonialism and continues to be occupied. The case is pending.²³ In 2010, following their violent eviction, the Samburu in Laikipia began legal proceedings against AWF

¹⁴ As opposed to other ethnic groups, the Maasai did not recover their land losses after independence.

¹⁵ See Livingstone, "A Comparative Study" (2005).

¹⁶ The "Shifta" War (1963-1968) can be seen as one of the consequences of British colonial policy in the NFD.

¹⁷ The Ogiek have complained to the UNHCHR and the ILO.

¹⁸ The case was dismissed. See Barume, *Land Rights* (2010), 87-91.

¹⁹ See Barume, *Land Rights* (2010), 91-95. A similar case was filed in 1999 by another Ogiek community but was dismissed.

²⁰ ACHPR has recently referred the case to the African Court in Arusha. This Court can make binding decisions.

²¹ This is the first ruling to determine who indigenous peoples in Africa are, and what their rights to land are. It is considered to be a victory for all indigenous peoples across Africa. See MRG Web site: <http://www.minorityrights.org>

²² See IWGIA, *The Indigenous World 2001-2002* (2002), 379 and *2002-2003*, (2003), 368. The case was settled out of court with a US\$7 million compensation.

²³ See Maasai Community Partnership Project Web site at <http://maasaicpp.org/>

and ex-President Moi, to plead for their rights to the land. Although the case is still underway, AWF has recently “gifted” the land to the Kenyan government in a move described by the Samburu as an “affront to the justice system”. In 2019, the High Court of Kenya criticized the proponent of the Lamu Port-South Sudan-Ethiopia Transport Corridor project (“LAPSSET” project) on coal mining for violating the rights of the indigenous community on Lamu island. The Court stated that the project proponent had an obligation not only to consult indigenous communities at the point of the project’s conceptualization, but also to hold ongoing consultations with the communities throughout the project cycle.²⁴

2.2. Impact of climate change

Average yearly temperatures in many of Kenya’s arid and semi-arid counties appear to have already exceeded the global target of 1.5 degrees centigrade.²⁵ Climate change is having particularly significant impact on indigenous peoples. Hunter-gatherer communities like the Ogiek of the Mau Forest and the Yaaku of the Mukogodo Forest have noted a number of climate change impacts, including drying of rivers, lack of snow on Mount Kenya, scarcity of food, and changes in rainfall patterns and harvesting seasons. The massive siltation of the Tana River, which has made it change its course and reduced its water level, is a threat to the small indigenous communities whose production systems and livelihoods are linked to the dynamics and functioning of the river-wetlands ecosystem. The situation is worsened by high evaporation rates as global temperatures rise. A series of escalating droughts, including the States of Emergency in 2011 and 2017, have driven communities such as Endorois, who live on the shores of Lake Bogoria in the Rift Valley, and Aweer (Dahalo) traditional hunter-gatherers from Lamu, away from their regions in search of pasture or opportunities to work.

Pastoralists find that the frequent droughts have not only decimated their herds but also made it increasingly difficult to restock. At the same time, they experience that their environment can support fewer and fewer animals, and hence people. Pastoralists have had to reconsider their migration patterns. The Maasai, for instance, are forced to migrate beyond the boundaries of their ranches, crossing the border into Tanzania in order to graze their cattle and find water; wetland areas traditionally used as fall back on in times of drought have dwindled in Turkana as well as in the Tana Delta. As access to water and pasture becomes more restricted, tensions between pastoralist groups increases. In Turkana, territorial disputes have become more common as the lake recedes, taking with it the landscape features that formed traditional boundaries between groups.

Traditional ways of predicting rain and adapting to drought can no longer be used. In the Tana Delta, traditional knowledge regarding planting and flooding seasons is now inadequate due to the unpredictability of local weather conditions.²⁶ In the north, nomads would look for signs of coming drought or rain in the stars, in the entrails of slaughtered animals or in minute changes in vegetation. This allowed them, in time, to negotiate grazing rights in places not so severely hit, and send their cattle to relatives in distant communities. None of this is working anymore.

Climate change, together with land dispossession and mobility restrictions, also results in profound cultural changes. The communal social fabric, mostly based on livestock exchange, has to a large extent become fragmented; increased incidences of suicide have been reported

²⁴ High Court of Kenya at Nairobi, Petition No. 22 of 2012, Judgment, 30 April 2018, para. 329.

²⁵ Overseas Development Institute, 2017.

²⁶ Otengo, “Impacts” (2011), 6.

among Maasai who have lost their herds. A growing number of pastoralists who have lost their livestock now seek into urban centers where food and other help are being handed out and where employment may be available. This is not an entirely new phenomenon,²⁷ but it is being exacerbated by the drought and the increased competition for pastures and water. Counties like Mandera, Wajir, Garissa have experienced a significant urbanization trend, with several previously small settlements now housing 40,000 or more inhabitants.

2.3. Poverty

Despite some progress, Kenya is still battling high poverty rates - some 36% of its population lives below the international poverty line, and 16 percent of Kenya's population lived below 1.90 U.S. dollars per day in 2021, the extreme poverty rate.²⁸ There are no disaggregated data regarding poverty among indigenous peoples but poverty rates are higher in rural areas than in urban ones, and reports are unanimous in denouncing the level of poverty among hunter-gatherers and pastoralists as one of the highest in the country. For example, a Kenya National Bureau of Statistics (KNBS) report in 2020 noted that Turkana County is the poorest and most unequally devolved unit in Kenya, and that the Turkana are among the most economically marginalized communities in Kenya. Due to prolonged isolation and under- investment, the region has some of the lowest levels of human development in Kenya and is the most prone to conflict and insecurity – a situation exacerbated by the recurrent droughts and unpredictable rainfall that have left communities even more vulnerable in their wake.²⁹

The poorest among indigenous peoples are probably those who live as internal refugees, or internally displaced persons (IDPs). They include several hundred evicted Ogiek from the Mau Forest Complex, who have ended up in isolated IDP satellite camps.³⁰ The situation of the Ogiek and the Sengwer living near their former territories is also distressful: without legal access to land and natural resources nor to any other source of livelihood, they often live at the mercy of their non-indigenous neighbors. Rough estimates of cash income indicate that their households may earn about one third of average rural incomes in the country. Pastoralist are also affected by forced eviction, leading to IDP camps. This includes those pastoralists in the northern part of the country who live on the outskirts of towns either because they have lost their livestock due to the drought or have been displaced by inter-ethnic.

Despite pastoralism's contribution to the national economy, pastoralist communities show some of the highest incidences of poverty, and lag behind other communities in a range of development indicators.³¹ Strong disparities exist between the ASAL counties in the north and in the south. This has to do with structural and demographic differences between south and

²⁷ Following the droughts of 1968-73, many Rendille in the Marsabit area settled near small trading towns and “famine-relief towns” set up by Catholic and Protestant missions at watering holes as part of their long-term famine distribution efforts. Agricultural plots were also organized for Rendille and Borana pastoralists. See Elliot Fratkin & Eric Abella Roth, “The Setting. Pastoral Sedentarization in Marsabit District, Northern Kenya” (2005), 42.

²⁸ According to the Kenya National Bureau of Statistics (KNBS) (2018), more than half (53%) of the population— 23.4 million Kenyans—are multidimensionally poor, that is deprived in realisation of at least three basic needs, services and rights. In terms of gender, 54% of girls and women in Kenya are multidimensionally poor, compared to 52% of boys and men.

²⁹ Nancy Omolo, Kenya: For Turkana pastoralists, oil offers no easy solutions to poverty and drought – in *Minority and Indigenous Trends 2019* (Minority Rights Group, 2019)

³⁰ See Human Rights Council, “Report of the Special Rapporteur on the human rights of internally displaced persons. Mission to Kenya” (2012), 17.

³¹ See CELEP “Fact Sheet: Eastern African Pastoralism/its” (2010) at <http://www.celep.info/?p=26>

north. Years of political isolation and economic deprivation have left the northern counties without proper infrastructure, few towns of importance and few economic activities.³² Hence the proportion of non-pastoralist population has remained low, while pastoralists have faced constraints such as the lack of livestock market infrastructure, lack of road infrastructure and their poor access to market information, all of which is negatively affecting the returns they may get from their livestock production. Moreover, for the indigenous communities who are living in counties that has not been greatly affected by COVID-19 and relying on food for sale like livestock and crops, they lack market because the open place market where they use to sell the products were closed to ban on gathering. The has resulted to many of them not meeting their basic needs.

In general, poverty seriously affects indigenous peoples' food security, resulting in acute malnutrition. As traditional mechanisms and strategies used by pastoralists to mitigate food insecurity are breaking down,³³ seeking food relief has become the only option for many indigenous peoples. This, coupled with the security situation, has led to sedentarization, but also to migration. Many indigenous peoples from the ASALs are in increasing numbers migrating to cities in search of work. Baring a few exceptions, most of them are illiterate and only find menial jobs, working as watchmen, maids or prostitutes.³⁴ The country's largest employer—the Civil Service—hardly employs any people from indigenous communities. This skewed recruitment cuts across all job groups, including those that do not require high educational qualifications.³⁵

Although tourism, which is one of Kenya's leading foreign exchange earner, is almost entirely based on wildlife safari tours to nature conservation areas established on indigenous lands and is promoted through the exotic imagery provided by photographs of indigenous peoples. Yet, local communities, who bear the brunt of the problems caused by wildlife, have only marginally benefited from tourism, also in terms of employment.³⁶

2.4. Health & Education

The country has made significant progress on social indicators especially in education and health, but in general indigenous peoples are still suffering from poor access to health and education.

³² For many years, there were not even any adequate livestock marketing services. The main outlet livestock sale for pastoralists in the North is the Kenya Meat Commission in Isiolo which remained closed for many years. See John K. Livingstone, "A Comparative Study of Pastoralist Parliamentary Groups. Kenya Case Study" (2005), 5. New slaughterhouses are currently been planned or build. See IEA, Budget 2010/11 (2011), 15.

³³ These mechanisms include, e.g., reciprocity, stock loans, and reliance on kin that have been undermined since the local economies of cattle associates and kin too have been disrupted; Strategies used by, e.g., Turkana and Pokot pastoralists in times of food scarcity such as gathering wild fruits, fishing and small scale farming, can no longer be pursued.

³⁴ See Simel, "The Century Long Displacement" (2004), 44-45, and Johnson Mali ole Kaunga "Migration of Indigenous Peoples in Kenya to Urban Areas" (2007), 40.

³⁵ The NCIC's ethnic audit reveals that members of the five dominant ethnic communities occupy 70 % of all jobs in the civil service. See NCIC "Towards National Cohesion and Unity in Kenya. Ethnic Diversity and Audit of the Civil Service" (2011), 34.

³⁶ The Endorois, whose ancestral lands have been turned into a park, were promised 80 % employment in the park but only 10 % of the employees are Endorois. The agreement to give 20 % of the total income from tourism to the community has yet to be fulfilled.

However, access to healthcare facilities is a challenge to most indigenous communities due to the poor infrastructure, distance and the topography within their territories hence putting them at a greater risk. Although health indicators disaggregated by ethnicity are not available, data from the different counties show disparities in the proportion of children with “adequate height for age” and with “all vaccination”, underlining the serious health situation existing in most pastoral areas. Reports also show how rates for under-five child mortality and maternal mortality in some counties can be twice as high as the national average. Sedentarization affects former nomadic pastoralists’ health. Particularly the loss of protein from milk and meat results in greater malnutrition, especially among children: settled Samburu children under 6 are 3 times more likely to be severely malnourished than nomadic children. Studies have also shown that sedentary Turkana are exposed to reduced fertility, increased morbidity (malaria), and child mortality. Indigenous peoples’ access to health care is often limited because of the costs involved,³⁷ and, in the case of nomadic pastoralists, the distances to the nearest dispensary. The government has taken some steps to intensify outreach and mobile clinical services and pilot nomadic clinics have been established, but the delivery of health services at the level of nomadic communities is still largely based on Faith based organizations, NGOs and bilateral donors.³⁸

In terms of **education**, the country has been implementing the Free Primary Education programme since 2003 to promote access to basic education and the Free Day Secondary Education programme since 2008. The 2015 Policy Framework for Nomadic Education provides a specific sector framework to ensure nomadic communities have access to and effectively participate in relevant and quality basic education and training. The policy pays special attention to the themes of inclusion, gender and vulnerability within nomadic communities, especially among girls and children with special needs. To facilitate access to and participation in education, the policy calls for the establishment of more mobile schools and introduction of open and distance learning and for introducing innovative and flexible community-based education interventions. However, recent analysis indicates that Endorois and Turkana minority and indigenous communities are struggling to access quality education and healthcare services, despite increased government budgetary allocations to the two sectors in the country.³⁹ The report highlights that access to quality education and healthcare is jeopardised by several factors. Many Endorois and Turkana have to trek long distances to access schools and healthcare facilities. During the wet seasons, some have to brave crossing flooded rivers to access services due to the poor road infrastructure in these rural counties. Persons living with disabilities and belonging to these communities are often worst affected by this unfortunate state of affairs. For instance, there are no special needs centres in the area of research. Indigenous children with disabilities have inadequate access to assistive devices, such as wheelchairs for those with physical disabilities.

³⁷ It is estimated that 16 percent of the sick do not seek care due to financial barriers, while 38 percent must dispose their assets or borrow to pay for medical bills. Marc Luoma et al. “Kenya Health System Assessment 2010” (2010), 18.

³⁸ MoH, “Reversing the Trends: The Second National Health Sector Strategic Plan of Kenya – NHSSP II 2005-2010” (2005) does not mention mobile clinics. The relative few mobile clinics are mostly run by NGOs and Faith based organizations that play a significant role in health service provision in Kenya and account for approximately 16.5 % and 6% of inpatient and outpatient care respectively. See MoH, “Comprehensive NH Policy” (2010) 31, 195.

³⁹ Geoffrey Kerosi and Samuel Olando, “Access to Education and Health among Minority and Indigenous Communities in Kenya: Assessment of Baringo, Trans-Nzoia, Elgeyo Marakwet and Turkana Counties” - Minority Rights Group International, 2021.

2.5. Violence, Discrimination and Access to Justice

Historically, hunter-gatherers have suffered discrimination and forced assimilation within larger ethnic groups and classified them under the derogatory term “Dorobo”. The “assimilation” policy has also meant that indigenous languages have disappeared. Hunter-gatherers also suffer discrimination and marginalization because of their way of living, which is been seen as “primitive”. So do pastoralists, who are considered to be primitive, too, as well as violent, and lawless. The recurrent conflicts between pastoralist and farming communities cause many human rights violations as mutual accusations of trespassing the land of others often end in hostilities, with casualties on both sides. A good number of these conflicts stem from land issues—and human rights violations—that go back to colonial times.

Human rights are also increasingly being violated in connection with the violent conflicts that characterize in particular the northern part of the country. While cattle raiding still occurs, its nature has changed. It has become commercialized, and the easy access to automatic arms and the large number of young “warriors” involved (some of them form “militia”) has turned raiding into violent acts of banditry with a high number of people being killed, including women and children who traditionally were spared. Many conflicts, though, are not related to cattle raiding traditions only. A complex combination of other causes is also at play and includes increasingly severe and more frequent droughts, competition over control and access to pasture and water, increasing levels of poverty, diminishing role of traditional governance systems, activities of militant groups, ethnocentrism, and unemployment amongst the youth.

The consequences of these inter-ethnic armed conflicts are loss of human lives, widespread destruction of valuable property, including burning of schools, displacements of large segments of the communities, increased hatred between communities, and increased economic hardships as a result of loss of livelihoods leading to high levels of starvation and malnutrition among the displaced groups and unprecedented dependency syndrome on relief food.

Another conflict factor in northern Kenya is the tense relationship between the state and the various pastoralists groups. This goes back to the days of colonial rule but there has been since independence, a series of human rights violations starting with the 1963-1968 “Shifta war”⁴⁰ and the subsequent state of emergency (1968-1992) and culminating with the Wagalla massacre in Wajir in 1984, the Turbi massacre in Marsabit in 2005,⁴¹ the “operation Okoa Maisha” against the Saboat in 2008 and the Samburu killings in 2009-2010. This has deepened the feeling of marginalisation, discrimination and deprivation among the pastoralists, who feel that the government’s response to the current conflict situations has been inadequate, in particular cross-border attacks, and that in many instances it has led to human rights abuses by security forces.⁴² In most cases, these abuses have not been seriously investigated and the victims have found no redress, leading to a widespread sense that impunity prevails.

The practice of forced evictions against Indigenous Peoples such as Sengwer hunter-gatherers has been widespread. These evictions have had serious effects and have caused numerous violations of human rights: the right to security of the person, the right to non-interference with privacy, family and home and the right to the peaceful enjoyment of possessions. The UN

⁴⁰ See ACHPR, *Research Visit to Kenya* (2012), 56-58.

⁴¹ The Wagalla massacre of (Somali) Degodia clan members by security officials left over 3,000 people dead and 21,000 displaced. The Turbi massacre left 90 people dead and over 7,500 displaced.

⁴² Human Right Council, “Report of the Special Rapporteur on ... indigenous people—Mission to Kenya” (2007), 16.

Human Rights Committee has expressed concerns about the lack of access to justice for many indigenous communities, notably when facing forced evictions. It noted “the lack of information on investigations, prosecutions, convictions and punishments of those who violate legal standards during evictions, including in cases where such violence has led to the death of affected individuals.”⁴³ The lack of access to justice has also been highlighted by the UN Committee on the Elimination of Racial Discrimination, which recommended that the government put in place measures to reduce “the distances between national courts and the areas where some minority groups and indigenous peoples live, including by building the human rights-related capacity of alternative justice systems and continuing to establish and operationalize small claims courts to deal with minor disputes.”⁴⁴

2.6. The situation of indigenous women

Pastoralists societies are often highly patriarchal and traditional,⁴⁵ and although women’s status and role may vary within ethnic communities and according to age, most indigenous women enjoy few rights and many traditional customs discriminate directly against the girl child and women in general. The girl child is often denied the right to education and illiteracy is prevalent among indigenous women. Female Genital Mutilation (FGM) usually related with early marriages remains widespread.⁴⁶ Indigenous women have many chores that are physically demanding. They often have many children, are responsible for obtaining food for all household members while also working outside their homes, tending livestock, farming, etc. Yet a Maasai woman, for instance, will have less access to food and will stay hungry, if the amount of food is not sufficient. Most indigenous women have little access to health care and their mortality and morbidity rates are often higher than the national average. They are also often victims of domestic violence.⁴⁷

Indigenous women are also at a disadvantage when it comes to land ownership and inheritance. Few of them have land registered in their names and their rights under communal ownership and group ranches are not defined. Women in indigenous societies have primarily been appreciated because they played an important complementary role within their households and families. This role has been greatly eroded as the consequence of generalized impoverishment and changes in livelihood strategies and indigenous women have become even more vulnerable and subordinated than they used to be. In Maasai communities, the transition from a pastoral subsistence economy to an economy based on market exchange and commercialized production has undermined women’s traditional autonomy based on their extensive rights to parts of the family herd because men tend to control the marketing of livestock, often without informing or consulting with the rest of the family. As a result, many women have not only been disempowered but also impoverished.⁴⁸ Sedentarization has also reduced the relevance of women’s traditional skills and labor experience while compelling them to take on other tasks (e.g., farm labour, small scale income generating activities). Political participation is another

⁴³ UN Human Rights Committee (2021), UN Doc. CCPR/C/KEN/CO/4, para. 40

⁴⁴ UN Committee on the Elimination of Racial Discrimination, UN Doc. CERD/C/KEN/CO/5-7 (2017), para. 15-16

⁴⁵ Among many pastoralists, livestock is often ranked higher than a girl and her only value is the bride wealth, her father can get.

⁴⁶ Despite the 2011 law making it illegal to practice FGM or procure it or take somebody abroad for cutting.

⁴⁷ Mary Simat, “Violence against Indigenous Women and Girls in the Name of Traditional and Cultural Practices” (2012).

⁴⁸ Talle, *Women at a Loss* (1993), 248. The 2010 Constitution, Art. 68.c.iii) and vi) addresses these issues

serious issue for most indigenous women, notably women from hunter-gathering communities who are still facing serious lack of access to political participation.⁴⁹

3. Relevant National Legislation, Policies and legal cases

3.1. The Constitution

The adoption of the new Constitution in 2010 marked the end of several years' deliberations, consultations and drafting, in which indigenous civil society organizations played an important role. It defines the notion of "vulnerable and marginalized minorities" in a way consistent with UNDRIP language (Art. 260). It promotes and protects indigenous languages (Art.7); recognizes the cultural and intellectual rights of marginalized communities (Art. 11) and their right to dual citizenship (Art. 16) which may benefit communities who live on both sides of the border. Articles 19-59 provide for a plethora of rights and freedoms, including Art. 56, which introduces the use of affirmative action programs at all levels.⁵⁰ Devolution—i.e., the transfer of decision-making to authorities at subnational level—will increase the participation of marginalized communities in governance (Art. 147) and the Constitution also provides for marginalized communities' representation within political parties (Art. 91), parliament (Art. 100), county assemblies (Art. 197), and public service (Art. 232).

The Constitution includes an entire chapter on Land and Environment which rests on several principles, among others, (a) equitable access to land; (b) security of land rights; and (f) gender equity in law, customs and practices related to land and property in land (Art. 60). Land is categorized into public, community and private land. Under Art. 63, community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest. This includes lands lawfully held, managed or used by specific communities as community forests, grazing areas or shrines and ancestral lands and lands traditionally occupied by hunter-gatherer communities. However, there are several caveats. Community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively; and the state may still regulate the use of any land in the interest of defense, public safety, public order, public morality, public health or land use planning (Art. 66).

Among other positive innovations are Art. 67, that sets up a Land Commission to make recommendations for the resolution of historical land injustices and recommend appropriate redress; Arts. 69-72 that provide for the sustainable exploitation, utilization, management and conservation of the environment and natural resources and for the equitable sharing of natural resources. The state shall also protect and enhance intellectual property rights and indigenous knowledge of biodiversity and genetic resources of the communities, and encourage public participation in the management, protection and conservation of the environment. Finally, the constitution provides for easier access to justice by lowering formal requirements for and costs of filing cases as well as by broadening options for representation (Art. 48).⁵¹

⁴⁹ K. Sena, Study on the Political Participation of Kenya's Hunter Gatherer Women in international and national Political Spaces, Permanent Forum on Indigenous Issues, UN Doc. E/C.19/2013/CRP. 1

⁵⁰ Affirmative action shall ensure, inter alia, that indigenous peoples participate and are represented in governance and other spheres of life; are provided special opportunities in educational and economic fields; and have access to employment as well as water, health services and infrastructure.

⁵¹ This is important also regarding litigation for human rights, because it enables public interest litigation and litigation on behalf of others without the prerequisite proof of locus standi (Art. 22).

Many of the provisions of the Constitution—including those related to Devolution and the establishment of the Senate—will only take effect after the forthcoming elections. Other provisions depend on the parliament to enact the necessary legislation. This is notably the case of several articles dealing with marginalized communities (e.g., Arts. 63 and 100), and this may take up to five years (Art. 261).

3.2. Other relevant legislation

Kenya has put in place a comprehensive legal and institutional framework to implement the provisions of the 2010 Constitution governing land rights, forest laws and land use.

In terms of **land rights**, there are several significant pieces of relevant legislations. In 2012, three land laws were adopted to put the constitution in action, these are the Land Act, the Land Registration and the National Land Commission Act.⁵² Crucially, in 2016, the government passed the historic Community Land Act, enabling communities to secure legal title to their traditional lands. The law establishes the community as a collective legal entity, capable of being registered and issued with a title document over land and of making decisions regarding the use, control and transfer of the land. The Community Land Act requires communities to register to apply for titles on community lands in order for them to have security of title and control over their land. However, many reports note the slow and inadequate implementation of the act to ensure indigenous peoples can obtain official recognition and registration of their lands.⁵³

Another important area of legislation concerns the management of forests. Kenya has a host of laws and policies (18 in all) that relate to **forest management** with overlapping roles. A significant law is the Forests Conservation and Management Act (2016) which classifies forests as public, private or community forests. In addition, the law provides for community participation in the management of public forests, through community forests associations (CFAs).⁵⁴ The Forest Act also identifies its guiding principles to include good governance and public participation, in accordance with article 10 of the Constitution, as well as community involvement in the management of forests.

4. Climate Change Policies

Kenya is severely affected by climate change. Temperatures have become more extreme and the seasons have changed. There are more unpredictable, extreme weather events. Droughts and dry spells have become much more frequent and affect larger areas than in the past; severe flooding occurs even in the arid zones.

⁵² These three land laws replaced earlier laws that governed land administration in Kenya, including the Government Lands Act (1915) Cap. 280, the Registration of Titles Act (1920) Cap. 281, the Registered Land Act (1963) Cap. 300,; the Land Titles Act (1908) Cap. 282; and the Indian Transfer of Property Act (1882).

⁵³ As of early 2021, fewer than 10 communities were able to register their community lands with the Kenyan government since 2016. See: Rights & Resources Initiative (2021): “Community Land Rights in Kenya: A Summary of 2020 Analyses”. See also: UN Human Rights Committee (2021), UN Doc. CCPR/C/KEN/CO/4, para. 50; and see Kibugi R. (2021). Local communities’ and indigenous peoples’ land and forestry rights: Assessing the law and practice on tenure security in Kenya. Occasional Paper 222 (Bogor, Indonesia: CIFOR).

⁵⁴ In November 2021, the Kenyan parliament proposed a bill that would effectively eliminate the Kenya Forest Service’s (KFS) role as an intermediary between petitioners and parliament in requests to alter forest boundaries

Following the National Climate Change Response Strategy outlining evidence of climate impacts on different economic sectors and proposing various adaptation responses, the government has adopted several National Climate Change Action Plan (NCCAP), with the most recent adopted for the period 2018-2022. There is also a National Adaptation Plan (NAP) adopted for the period 2015– 2030 which builds on this by establishing adaptation priorities. The Plan provides a framework for Kenya to deliver on its nationally determined contributions (NDCs) under the Paris Agreement. The Plan focuses on seven priority climate action areas where government efforts should be directed to achieve low-carbon-resilient development. These priority action areas are disaster (drought and floods) risk management, food and nutrition security, water and the blue economy, forestry, wildlife and tourism, health, sanitation and human settlements, manufacturing, and energy and transport.

In 2016, the Climate Change Act was adopted to provide a regulatory framework for mainstreaming climate change considerations into development planning, budgeting and implementation across all sectors of government. Also of relevance, the National Drought Management Authority Act (2016) exercises overall coordination over all matters relating to drought management.

5. International Treaties & Decisions

5.1. International Treaties

In 2007, Kenya abstained from voting when the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted.⁵⁵ Kenya has not signed or ratified Convention 169 of the International Labor Organization. However, Kenya has ratified the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of Discrimination against Women (CEDAW), the International Convention on the Elimination of All Forms of Discrimination Racial (CERD) and the Convention on the Rights of the Child (CRC).

Kenya has also ratified several universal treaties concerning armed conflicts, and a number of UN conventions and several UNESCO conventions. Kenya is a member of the International Labor Organization (ILO) and has ratified 49 of its conventions, including C29 and C105 (on forced labor), C100 and C111 (on discrimination within employment and occupation), C138 and C182 (on child labor), which are specifically relevant for indigenous peoples. Kenya is also Party to the main international conventions and agreements related to environment, biodiversity and climate change as well as intellectual property rights.

At the regional level, Kenya has ratified or signed the following regional human rights instruments:

- The African Charter on Human and Peoples' Rights (ACHPR)
- The African Charter on Rights and Welfare of the Child
- The Protocol to the ACHPR on the Rights of Women in Africa (signature)
- The Protocol to the ACHPR on the Establishment of an African Court on Human and Peoples' Rights

⁵⁵ Burundi and Nigeria also abstained, while more than 30 African states voted in favor of the Declaration. See Albert K. Barume "Responding to the Concerns of the African States" (2009), 170.

Kenya is member of the regional EACJ (EAC Court of Justice). Kenya has ratified several African conventions and is member of several regional institutions, including the EAC (East African Community), EALA (East African Legislative Assembly) and EACM (East African Common Market), EAPCCO (Eastern Africa Police Chiefs Cooperation Organization); NEPAD (New Partnership for Africa's Development), and the APRM (African Peer Review Mechanism); COMESA (Common Market for East and Southern Africa), and IGAD (Intercontinental Authority on Development).

All these instruments could be of great significance for Kenya's indigenous peoples, since Article 2 of the Constitution stipulates that "The general rules of international law shall form part of the law of Kenya" (5) and "Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution" (6).

5.2. International & Regional Human Rights Decisions

Indigenous peoples have been proactively engaged with international and regional human rights institutions to seek redress to the violations of their human rights filing cases before Kenyan courts, and taking their grievances to the ACHPR. After having failed to obtain redress at the national level, the Endorois took their grievances to the African Commission on Human and Peoples' Rights (ACHPR) which in 2010, condemned the expulsion of the Endorois people and ordered the GoK to restore their rights to their ancestral land and to compensate them.⁵⁶ Likewise, the Ogiek went to court on the grounds that the allocation of their ancestral lands to individuals that were strangers to their community infringed their constitutional rights. The case was adjudicated by the African Court on Human and Peoples' Rights (ACtHPR) who ruled that the rights of the Ogieks has been violated, notably the right to property and cultural rights. However, despite the recommendations by a specific task force established to advise the Government on the implementation of the decision little implementation has yet been undertaken. In 2017, the African Court on Human and Peoples' Rights found that Kenya had breached the Ogiek's rights after repeated evictions from their lands in the Mau forest. In September 2019, an expert meeting was held to formulate solutions that would become the recommendations of the task force on issues raised in the Court decision.

6. National and grass-roots organizations

Kenya has a sizable number of national and local indigenous organizations as well as several support NGOs. This is therefore by no means an exhaustive list.

- **Centre for Minority Rights Development (CEMIRIDE) (2000)** seeks to strengthen the capacity of minorities and indigenous peoples in Kenya and East Africa and secure their rights in all social, political and economic development processes.
<http://www.cemiride.org>
- **Chepkitale Indigenous Peoples' Development Project (CIPDP):** CIPDP is a non-governmental organisation registered by the Chepkita Ogiek in 2003. Its aim is to ensure the realisation of Chepkita people's rights.

⁵⁶ To date, the African Commission on Human and Peoples' Rights' (the African Commission) recommendations to the Kenyan Government on reparations for the eviction of Endorois indigenous people from their ancestral lands in the 1970s remain largely unimplemented.

- **Endorois Welfare Council (EWC) (2003)** was originally created to respond to human rights violations arising from the community's forced eviction from Lake Bogoria for the creation of a Game Reserve in 1973. Today it also promotes leadership and training on conflict resolution, advocacy and literacy among the marginalized groups within the Endorois community (women, youth and the disabled). Contact: Wilson Kipkazi: kipkaziwk@gmail.com and excbogoria@hotmail.com
- **Friends of Lake Turkana Trust (2009)** works with the objective of strengthening and advancing the environment and natural resources agenda in the Turkana basin. <http://www.friendsoflaketurkana.org>
- **IMPACT:** To create sustainable and community-led climate resilience solutions, IMPACT launched an alliance of Indigenous organisations. This coalition, known as the Pastoralists Alliance for Resilience and Adaption in Northern Rangelands (PARAN), organises pastoralist communities to advocate for their rights, builds capacity to manage natural resources, fosters Indigenous leadership, and preserves traditional cultures and livelihoods. <https://www.impactkenya.org/>
- **Indigenous Fishers Network (IFP) (2004)** has as its main objective to take the lead in spearheading the participation of indigenous fisher communities in the reforms processes, with specific emphasis on the constitution review and land reforms. <http://www.fishersrights.or.ke/>
- **Indigenous Information Network (1996)** works with information dissemination and networking within different fields in support of Indigenous and Minority Peoples in the region. <http://indigenous-info-kenya.net/>
- **League of Pastoralist Women of Kenya (LPWK) (2007)** seeks to improve governance in Kenya by building pastoralist women's leadership capacity and fostering participation in a broad sense, with a focus on economic and social empowerment as well as political engagement. <http://www.lpwk.org/>
- **Manyoito Pastoralist Integrated Development Organization (MPIDO) (1996/2000)** deals with the marginalization and dehumanization of Maa pastoralists in Kenya and particularly in Kajiado North, Narok, Nakuru and Naivasha. MPIDO works for a just and equitable society that recognizes and upholds human rights and the fundamental freedom of indigenous peoples'. <http://mpido.org/>
- **OGIEK Peoples' Development Program (OPDP) (1999)** is dedicated to the preservation of the Ogiek culture, the protection of nature and the improvement of socio-economic opportunities by way of building the synergies of the Ogiek youth and women through education. <http://www.ogiekpeoples.org/>
- **Pastoralists Development Network of Kenya (PDNK) (2003)** is an advocacy NGO network comprising pastoralists NGOs and CBOs and non-pastoralist institutions and individuals supporting pastoralists' development process in Kenya. It draws its membership from the ASAL region. <http://www.pdnkenya.org/>
- **Resource Conflict Institute (RECONCILE) (2001)** conducts policy research, advocacy and public interest environmental education and litigation to promote policies, laws and practices which empower citizens to participate in environmental and natural resources governance. <http://www.reconcile-ea.org/>
- **Sengwer Indigenous Peoples Programme (SIPP)** - which built on the work of a handful of community leaders and elders. SIPP has been supporting a greater range of community leaders, elders and activists to mobilise, educate and support the community to actively assert their rights.

- **Womankind Kenya (1989)** was founded by local Somali pastoral women committed to improving the living standards and the level of decision making of their fellow pastoral women and the girl child in the North Eastern province.
<http://www.womankindkenya.org>

7. International organisations

7.1. United Nations

The United Nations (UN) programs emerging from partnerships between GoK and UN agencies working in Kenya are coordinated and harmonized within the United Nations Development Assistance Framework, UNDAF. The UNDAF 2018-2022 articulates commitment of the UN to support the people of Kenya realize their development agenda. The UNDAF integrates the global programming principles and approaches of: leave no one behind; human rights, gender equality and women's empowerment; sustainability and resilience; and accountability towards realization of SDGs.

The United Nations Office at Nairobi in Nairobi, the capital of Kenya, is one of four major United Nations office sites where numerous different UN agencies have a joint presence.

The United Nations Office of the High Commissioner for Human Rights (OHCHR) has been present in Kenya since 2008 in the aftermath of the 2007/08 elections' violence. The Senior Human Rights Adviser's mandate focuses on assisting national actors to comply with human rights obligations under international law and strengthening the capacity of the United Nations Country Team in Kenya to integrate human rights in their programs and policies.

The Kenya UN Country Team (UNCT) includes: Food and Agriculture Organization of the UN (FAO); International Fund for Agricultural Development (IFAD) International Organization for Migration (IOM); Office for the Coordination of Humanitarian Affairs (OCHA); UN Entity for Gender Equality and the Empowerment of Women (UN WOMEN); Joint UN Programme on HIV/AIDS (UNAIDS); UN Development Programme (UNDP); UN Environment Programme (UNEP); UN Educational, Scientific and Cultural Organization (UNESCO); UN Fund for Population (UNFPA); UN Human Settlements Programme (UN-HABITAT); UN High Commission for Refugees (UNHCR); UN Information Centre (UNIC); UN Children's Fund (UNICEF); UN Industrial Development Organization (UNIDO); UN Office for Drugs and Crime (UNODC); UN Office in Nairobi (UNON); UN Office for Project Services (UNOPS); UN Volunteers (UNV); World Food Programme (WFP); and World Health Organization (WHO).

7.2. International Financial Institutions and regional development agencies

The **World Bank** Group's Country Partnership Strategy (CPS) 2014-2018 was extended to FY20 through a Performance and Learning Review in 2018, and further extended under the WBG COVID-19 Crisis Response Approach Paper, which supports the government's second and third Medium-Term Plans spanning 2013-2022, which operationalize the country's longer-term Vision 2030. In 2021, the International Development Association (IDA)/International Bank for Reconstruction and Development (IBRD) portfolio stands at \$6.9 billion in 35 projects: 27 national and eight regional projects.

In general, despite growth in international financial institutions (IFIs) disbursements between 2018 and 2020, bilateral and multilateral aid was erratic and characterised by both increases and decreases in contribution over the same period, and the aid landscape in Kenya is increasingly leaning more towards aid loans than grants.¹ Bilateral grants are decreasing, while loans from IFIs are on the rise.

8. IFAD and IPAF projects and operations in Kenya

IFAD projects:

https://www.ifad.org/en/web/operations/w/country/kenya#anchor-projects_and_programmes

In 2019, The Government of Kenya launched the Agriculture Sector Transformation and Growth Strategy 2019-29. It aims at increasing the opportunities for small-scale farmers, pastoralists and fisherfolk by increasing agricultural output and boosting household food resilience. In support of this, IFAD currently has six diverse ongoing projects in the Country funded by supplementary donor resources:

1. **Kenya Cereal Enhancement Programme – Climate-Resilient Agricultural Livelihoods Window (KCEP-CRAL):** US\$153.2 million (European Union through IFAD: US\$33.3 million; IFAD US\$63.8 million; ASAP grant of US\$10.0 million; Government of Kenya: US\$4.5 million, financial institutions: US\$5.5 million; and the beneficiaries: US\$36.1 million). The goal is to increase incomes and reduce poverty among 185,000 rural households including those in the arid and semi-arid lands (ASALs) by i) contributing to national food security through increase crop production, ii) supporting smallholder farmers to graduate from subsistence to commercially oriented and climate resilient agricultural practices through improvements in productivity, post-harvest management practices and market linkages for targeted value chains and iii) empowering county governments and communities to sustainably and consensually manage their natural resources and build resilience to climate change.
2. **Upper Tana Catchment Natural Resource Management Project (UTaNRMP):** US\$68.8 million (IFAD US\$32 million; Spanish Trust Fund US\$18.0 million; Government of Kenya and beneficiaries US\$ 11.34 million and beneficiaries. The goal of the project is to contribute to the reduction of rural poverty in the Upper Tana river catchment and has so far benefited 219,000 out of a target of 300,000 poor rural households whose livelihoods revolve around the use of the natural resources in the Upper Tana River catchment. The Project has two development objectives which reflect the poverty-environment nexus, namely: increased sustainable food production and incomes for poor rural households and; empower communities to sustainably manage and use water and natural resources through the provision of environmental services.
3. **Aquaculture Business Development Programme (ABDP):** US\$143.3 million (IFAD US\$40.0 million; Food and Agriculture Organization of the United Nations US\$400,000); the Government of Kenya US\$31.4 million and by the beneficiaries themselves US\$43.6 million. ADBP comprises of two mutually supportive investment components that blend public- and private-sector investments right across the aquaculture value chain with community-wide initiatives that promote good nutrition

¹ Analysis from International Aid Transparency Initiative (IATI) data, Analysis of aid flows to Kenya before and during Covid-19: <https://devinit.org/resources/aid-kenya-covid-19/> (last consulted March 2022)

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