

**INDIGENOUS PEOPLES' RIGHTS TO LANDS,  
TERRITORIES AND RESOURCES  
RELATED TO DISCRIMINATION  
IN EMPLOYMENT AND OCCUPATION:**

***CASE STUDY ON PRACTICES OF PASTORALISM AND  
HUNTING-GATHERING IN KENYA***

**REPORT PREPARED FOR THE INTERNATIONAL LABOUR ORGANIZATION**

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## **List of acronyms**

ACHPR	African Commission on Human and Peoples' Rights
ALRMP	Arid Lands Resource Management Project
ASAL	Arid & Semi Arid Lands
CDF	Constituency Development Fund
CEMIRIDE	Centre for Minority Rights Development
ERS	Economic Recovery Strategy for Wealth and Employment Creation
FAO	Food and Agriculture Organization
GDP	Gross Domestic Product
GOK	Government of Kenya
ILO	International Labour Organization
IMPACT	Indigenous Movement for Peace Advancement and Conflict Transformation
KAPP	Kenya Agricultural Productivity Project
KARI	Kenya Agricultural Research Institute
KNCHR	Kenya National Commission on Human Rights
Kshs.	Kenya Shillings
MDGs	Millennium Development Goals
MP	Member of Parliament
MPIDO	Manyoito Pastoralist Integrated Development Organization
MSC	Magadi Soda Company
NEAP	National Environmental Action Plan
NEMA	National Environmental Management Authority
NGOs	Non-Governmental Organizations
OP	Operational Policy
RLA	Registered Land Act
SRA	Strategy for Revitalizing Agriculture

## **1.0. Background to the study**

This report on practices of pastoralism and hunting-gathering in Kenya is the product of a study commissioned by ILO as part of its studies on the linkages between indigenous peoples' rights to land, territories and resources and discrimination in employment and occupation related to indigenous people's traditional occupations and subsistence. Using the principles of ILO Conventions on Discrimination (Employment and Occupation), 1958 (No. 111) and on Indigenous and Tribal Peoples, 1989 (No. 169) as a reference framework, the study examines national policy and legal frameworks in order to analyze the extent to which traditional forms of occupations and employment (pastoralism and hunting-gathering) in Kenya have been discriminated against vis a vis other mainstream occupations and particularly in relation to their rights to land, territories and natural resources.

Pastoralism and hunting and gathering are both traditional occupations as well as ways of life. Pastoralism has been described as a socio-cultural system consisting of a unique interactive relationship between people, livestock, land and range resources -grass, shrubs, water and salts. Since these resources vary both in time and space, mobility is an important aspect of pastoral production. Mobility facilitates collective use of scanty and dispersed range resources while at the same time ensuring environmental protection (Swift 1977, Spooner 1973; Jacobs 1975; Hoben 1976; Widstrand 1975; Swift 1977; Salih 1990; Kipuri 1989; Kipuri and Sorensen 2005). Over and over again it has been demonstrated that, traditional occupations are seasoned livestock and land management techniques that ensure survival under the episodic environmental vagaries like drought, famine, disease outbreaks, hazardous pests and other man-made disasters (Herr 1992, Tadingar 1994, Wilson 1986).

Despite these sound resource management strategies however, the ideologies of the state have not been sensitive to this reality. Instead, policies and legal instruments which have been developed and implemented over time have been premised on the misguided assumption that pastoralism and hunting-gathering are inefficient and degrading to the environment and they cause overgrazing which exposes the soil to soil erosion and desertification.

This report has conceptualized discrimination in employment and occupation based on a people's indigenous identity or origin and suggests the need for making explicit linkages between indigenous peoples' collective rights to land, territories and natural resources and their rights to exercise (collectively and individually) their traditional economies and forms of employment and occupation. The potential to use Convention No. 111 as an entry point for the protection of indigenous and tribal peoples' right to pursue their traditional forms of employment and occupation – and thereby their right to land, territories and natural resources has not been fully explored. The study is a contribution towards this exploration.

ILO supervisory bodies have emphasized the need to assess the impact of national laws and policies on the situation in employment and occupation of the groups protected under ILO Convention No. 111, including indigenous and tribal peoples. This report makes reference to ILO Convention No. 111 to which Kenya has been party since 2003 and assesses the extent to which Kenya's policy and legal framework adhere to principles enshrined in the Convention.

ILO Convention No. 111's "standard-setting" approach to eliminating discrimination in employment and occupation is guided by the general principle of equality" (ILO 1996: 113), and aims to eliminate discrimination in employment and occupation, on grounds of race, colour, sex, religion, political opinion, social origin or national extraction. For ILO

Convention No. 111, identity is one of the basis upon which discrimination is practised (ILO 1996). Identity includes any discrimination against linguistic communities or minority groups whose identity is based on cultural or ethnic origin (ILO 1996: 59).

Indigenous peoples' rights to maintain and pursue traditional livelihood strategies and related forms of employment and occupation as part of their right to exist and to have their cultures and ways of life recognized and protected should be protected under the convention. Pastoralists and hunters-gatherers depend on their land, territories and natural resources, however, Kenya's limit indigenous peoples' rights to their territories, lands and natural resources and in so doing create harsh conditions that make it difficult for pastoralists and hunters-gatherers to pursue their preferred livelihoods. According to the principles of ILO Convention No. 111, discrimination occurs, among other things, "when the same condition, treatment or criteria is applied to everyone, but results in a disproportionately harsh impact on some persons on the basis of characteristics such as race (ethnicity), colour, sex or religion" (ILO 1996: 11-14). Lack of protection of traditional lands, territories and natural resources upon which traditional occupations depends could amount to discrimination because it denies pastoralists and hunter-gatherers to practice their traditional occupations.

## **1.1 Objectives of the study**

The study provides an analysis of:

- Characteristics of traditional occupations of Maasai, Ogiek, and Endorois (pastoralists and hunters-gatherers).
- Current legal and policy framework concerning the traditional occupations of indigenous peoples in Kenya and international conventions such as the ILO Conventions Nos. 111 and 169.
- Relevant national legislation and policies on discrimination in employment and occupation.
- Relevant national legislation and policies on access to employment and conditions of employment.
- Relevant national legislation and policies on land and natural resource rights.
- Legal and policy challenges related to the exercise of traditional occupations.

It also provides a set of recommendations on points that require further analysis or discussion, and on practical ways to begin addressing the challenges identified in the study.

## **1.2 Significance of the study**

The study provides information that is useful to indigenous peoples themselves by providing a catalogue of information on the international legal framework designed to protect their traditional forms of subsistence and rights to their lands, territories and natural resources. Lack of information is a major hindrance to the realisation of rights generally and the rights of indigenous peoples in particular. The information will also be useful to stakeholders involved in defending, protecting and promoting rights of indigenous peoples. The information will also be important to states in that they will have a source from which to draw information regarding their compliance with international standards for the protection of indigenous peoples. The research is therefore not intended to expose states' failures to protect the rights of indigenous peoples, but rather it assists all parties concerned with tools to utilize to ensure

an effective protection and promotion of the rights of indigenous peoples to continued their traditional practices and occupations of pastoralism and hunting-gathering as recognizable and legitimate forms of employment, occupations and livelihoods.

## **2.0. Methodology**

This section provides methods used to collect data, method of data analysis, and the scope of the study.

### **2.1 Methods of Data Collection**

This is essentially a desk study, complemented by a little field-based data.

- The consultant carried out desk research and generated data on main policy and legal instruments of immediate relevance to the study as well as available materials concerning indigenous peoples' traditional livelihood strategies and occupations. The main sources of data from desk research included journals, newspapers, project documents, research reports and monographs. These materials were accessed from court registries, libraries, government ministry/departmental offices, NGO, libraries, the National Archives, Central Bureau of statistics, purchases from bookshops, documents supplied by the ILO and from the internet.
- Although it was the intention of the consultant to interview personnel of non-governmental organizations (NGOs) working with pastoralists and hunter-gatherers and to hold discussion with indigenous peoples in selected districts, this has not been possible owing to time constraints and other logistics. To obtain information, from personnel of organizations working with pastoralists and hunter-gatherers, the consultant sent out a questionnaire to Christiana Saiti Louwa (El Molo Tourism Rights Development Forum), Michael Tiampati (working with MPIDO), Jenniffer Koinante (working with Yiaku Peoples Association), Johnson Ole Kaunga (IMPACT ), Ben Ole Koissaba (Maa Society Forum), Ole Timoi (Dupoto-Maa), Korir Singoei (CEMIRIDE), Peter Cheruiyot (Ogiek), and Sophia Abdi Noor (Womankind (K)).

### **2.2 Data analysis**

Data generated from the desk review and responses from questionnaires form part of this study.

### **2.3 Scope of the study**

The study covers the Ogiek and Endorois (hunter-gatherers) on the one hand and the Maasai pastoralists of Kajiado, Narok and Laikipia.

### **3.0 Main Findings of the study**

This section of the study discusses main findings beginning with the traditional occupations of pastoralists, their contributions to the national economy and threats they face as a consequence of discrimination.

#### **3.1 Pastoralism and hunting-gathering in the national context**

It is not easy to draw a clear cut line between pastoralists and hunter-gatherers in Kenya today. This is because pastoralists are sometimes hunters and gatherers and vice versa. Hodgson's definition of pastoralism includes hunting and gathering.

Pastoralism refers to a diverse array of production systems dependent, to varying extents, on particular kinds of livestock (cattle, sheep, goats, and/or camels), often mixed with other subsistence strategies (cultivation, hunting, gathering, fishing, wage labor, etc) (Hodgson 2000:6).

The ability of indigenous peoples to continue practicing traditional occupations and to engage in traditional methods of employment and livelihoods to a large extent depends on the political, economic and social environment they operate in. The political and economic ideology which the Government of Kenya has been pursuing since independence has greatly affected the traditional practices of pastoralism and hunting-gathering. Pastoralism as well as hunting-gathering are economies which produce mainly for subsistence rather than for the market. The government views traditional occupations (pastoralism and hunting-gathering) as primitive and uncivilized and as such needing to be changed or "modernised" (KARI 2006, Ole Kaunga 2007). Unequal treatment of workers based on political opinion or ideology constitutes discrimination in employment and occupation. ILO (1996:17) states that "in protecting individuals against discrimination in employment and occupation on the basis of political opinion, the Convention (C.111) implies that this protection shall be afforded to them in respect of activities expressing or demonstrating opposition to the established political principles, or simply a different opinion".

Laws relating to land and natural resources have been tailored to promote the capitalist mode of production which is market-oriented. Since independence, the primary objective of land laws was to consolidate land and its various resources within the hands of the ruling elite and agrarian communities (Kimaiyo 2004). The laws were designed in favour of agrarian communities which are quintessentially sedentary in nature. Hence, laws and policies concerning land and natural resources found thereon disfavour non-sedentary peoples such as pastoralists and hunter-gatherers. Furthermore, laws also tend to favour individualised land titling, as opposed to recognizing the collective nature of indigenous peoples' claims. Beside this, discrimination against pastoralist and hunting-gathering is based on false assumptions. Some of them are discussed below.

Policy makers rationalize their discourse by arguing that traditional occupations are a hazard to the conservation of land, water, grazing, and wildlife and that these activities do not yield optimum results per unit acre of land (land use/productivity discourse). However, on the contrary, Maasai pastoralists for example practice rotational grazing since they occupy fragile arid and semi-arid lands (Tidrick 1980, Swift 1977, Spooner 1973). To achieve this, the Maasai like most pastoralists regard mobility as a necessary strategy for optimal use of temporal range resources while avoiding over exploitation.

In addition to the environmental argument, policy makers also rationalize their preference for crop farming by arguing that especially cash crop exports contributes more towards the country's Gross Domestic Product (GDP). However, on the contrary, Kenya's agricultural sector accounts for 20-30 % of the domestic product (GDP) while the livestock sector alone makes a contribution of about 50%. The livestock sector receives only 10% of the government's agricultural expenditure and less than 1% of total spending. Yet it is estimated that Kenya's potential to export livestock products if adequately exploited would earn more than the earnings from tea and coffee combined (GoK 2003). The livestock sector accounts for 90% of employment and more than 95% of household incomes in ASALs which host about 25% of the total population of Kenya, which is estimated to be two million (GoK 2003). Most of the livestock slaughtered in major urban areas originate from ASAL areas, with an annual slaughter of about 1.6 million Tropical Livestock Units. Kenya's livestock from ASALs is worth Kshs. 60 billion (US\$ 800 million) (Omiti 2003). The internal livestock trade in the pastoral areas alone nets in about 6 billion Kenya shillings (US\$ 80 million) (Nyariki et al. 2006: ix). The basis for not supporting pastoralism and hunting-gathering as occupations is not based on rational argument proven to be true, therefore, it can be a case of discrimination against based on stereotypes.

Despite the contributions to the national economy, Pastoralists have also been portrayed by the state as unruly communities bent towards causing conflicts and cross-border crimes due to their culture and nomadic way of life. Consequently, the sedentary nature of agrarian communities is preferred against that of pastoralists. Additionally the pastoralist sector is placed under the ministry of Agriculture, and allocated a small share of the budget which is not adequate for livestock marketing, veterinary services and provision of water for livestock. All this is exacerbated by land laws which promote private land ownership over communal tenure. Private and gazetted lands have not only taken a big chunk of land belonging to pastoralists and hunters-gatherers, but have also blocked livestock migratory routes undermining both traditional occupations.

Policy and development experts have also promoted the fallacy that hunting-gathering practices are destructive to forests. Consequently they have promoted use of forest and management practices that have excluded local people, resulting in evictions. The continued de-gazetting of forests for the settlement of farmers has also contributed to the diminishing forest areas in the country at the expense of hunter-gatherer communities. Communities which have benefited from forest de-gazetting for human settlement are those who never inhabited the forests in the first place and whose livelihoods did not depend on forest products. Trespass laws have also been enforced to remove hunter-gatherers from forest/government land. A process that takes violent forms whereby houses are torched and families harassed. Facts about low school enrolment among pastoralists therefore indicate discrimination

### **3.2. ILO Convention No. 111**

The Declaration of Philadelphia affirms the right of all human beings, irrespective of race, creed or sex, to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, economic security and equal opportunity (Article II (a)). ILO Convention No.111 is in line with the ILO's Declaration of Philadelphia and provides everyone with equal opportunities and equal treatment in accessing employment and work. ILO's Indigenous and Tribal Peoples Convention, 1989 (No. 169), complements Convention No.111 by providing details of necessary measures to ensure that the specific human rights and dignity of indigenous and tribal peoples are respected. ILO Convention No.111 applies to

all workers (pastoralists and hunters-gatherers) and to the protection of all aspects of employment and occupation (including pastoralist and hunting-gathering.) The Convention makes reference to discrimination “in employment *and* occupation” and covers not only wage employment, but it also ensures equality of opportunity and treatment in respect of self-employment. Under this Convention, “occupation” refers to the ‘trade, profession or type of work performed by an individual, irrespective of the branch of economic activity to which she or he belongs or her or his professional status’(ILO 2007:13). The term occupation caters for traditional forms of employment and occupation. The right to equal access to particular occupations includes the right to freely choose one’s occupation.

The Convention compels signatory governments to declare and pursue national policies and laws that promote equality of opportunity and treatment in employment and occupation with a view to eliminating discrimination or rather ending unequal treatment and ensuring equal opportunities. Convention No.111 defines discrimination as “any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation” (Article 1.1.a.)

### 3.3 The Maasai

#### 3.3.1. Livelihoods

The Maasai are pastoralists who are found in Southern Kenya and stretch to Northern Tanzania. In Kenya they are found in Kajiado, Narok, Transmara, Laikipia and parts of Baringo districts (ACHPR 2005).

The economies of Kajiado and Narok Districts are still dominated by pastoralism. In Kajiado alone, between 75% and 76% of the population are dependent on pastoralism as a source of livelihood (Ekaya et al. 2005, Kajiado District Development Plan, 1997-2001). The main livestock kept in the districts occupied by the Maasai are cattle, sheep and goats. Camel, Ostrich and bee-keeping have also been gaining importance although Ostrich farming has been affected by poor markets and low prices (Ekaya et al. 2005). However Maasai pastoralism is negatively affected by livestock diseases, frequent droughts and lack of markets.

Table showing population of livestock in Kajiado District

Type	1999	2000	2001	2002
Cattle	769,096	337,576	356,340	402,406
Goats	560,743	413,832	437,306	577,857
Sheep	655,937	438,926	498,427	506,956
Camels	626	872	771	810
Poultry	225,515	229,281	229,670	260,789
Ostrich	480	379	1,848	2,273

Source: Ekaya et al. 2005:105

#### 3.3.2. Pastoralists and the State

Colonial images of pastoral societies were not without prejudice. They were influenced by dominant European perceptions of how land should best be utilized, and by European attitudes towards wildlife and the natural environment. These images not only shaped colonial

policies in pastoralist areas, but were subsequently inherited and largely accepted by the Kenyan independent state. Discrimination against the Maasai as a pastoralist community began with colonial administrators when Sir. Charles Elliot (Governor) who had an obsessive racist dislike for the indigenous African, and especially the Maasai stated:-

*“There can be no doubt that the Maasai and many other tribes must go under....I have no desire to protect Masaidom. It is a beastly bloody system, founded on raiding and immorality, disastrous both to the Maasai and their neighbours. The sooner it disappears and is unknown except in books of anthropology, the better.”(Eliot, 1905).*

### **3.3.3. Alienation of land, territories and natural resources**

The advent of colonialism in Maasai land was marked by two stages of land alienation. In 1905 the Maasai were moved into two reserves, one to the south of the Railway, and one on the Laikipia plateau to the north. This situation lasted only until 1911, when the Northern reserve was also taken for European farmland, and the Maasai were moved into an enlarged Southern reserve (Cranworth 1919, Sorrenson 1968).

This began the process of ‘parcelling’ land in colonial Kenya - setting down boundaries to separate European from African, and cultivated land from ‘wilderness’, and legislating for maintenance of differing forms of land-use in each area. This immediately transformed part of the Maasai grazing lands into ‘ordered’ farmlands, and had a direct impact upon wildlife as well as the Maasai. In the early 1900s the Maasai Reserves were declared as Game reserves, on the grounds that they were not required for European settlement and were occupied by the Maasai ‘who did not kill game’ (Eliot 1905: 278-9).

Colonial views of developing the Maasai therefore, continued to focus on the need to alter their lifestyle by settlement and encouragement of cultivation. Only with such a transformation could they make a full contribution to the development of the colony, and reciprocate the ‘gift’ of colonialism. For as long as they resisted any move to transform them, the Maasai have long been considered an administrative and development problem (Sandford 1919, Jacobs 1963).

The colonial administration felt that the Maasai would be pacified and their mode of life changed through policies relating to land and livestock. Land appropriation has been responsible for the declining economic sustainability of Maasai pastoralism as a traditional occupation and livelihood system. Following discriminative policies of the colonial administration, the Maasai lost up to one third of their best grazing lands to white settlement. The process continued after independence and any attempts by the Maasai to seek redress for the losses of territory were met with legal use of force and harassment. This amounts to discrimination which violates ILO Convention 111.

During the same period, the Swynerton Plan of 1954 meant to increase productivity initiated ranching in Maasai-land and this set in motion the process of breaking down collective land utilization to be replaced by individual titling. Ranching is still the preferred and officially promoted livestock and land management system despite conclusive research indicating that it is far less efficient and far less productive than indigenous collective use (Western 1982, Migot-Adholla and Little 1981, Galaty 1980 ). Traditional Maasai lands are now home to the most famous national wildlife sanctuaries (Maasai Mara and Amboseli), mining companies

(for example Magadi Soda Mining Company), private ranches, settlement schemes, military training camp sites, and so on.

Areas generally referred to as Arid and Semi-Arid Lands (ASALs) are inhabited mainly by pastoralists. In relation to education and vocational training, these areas continue to experience an acute problem of under-enrolment, low school attendance, low completion rates and poor performance in national examinations (Ngome 2006).

**Table showing Primary School enrolment Rates by ASAL and Non-ASAL districts**

<b>Areas and districts</b>	<b>Girls</b>	<b>Boys</b>	<b>Total</b>
<b>ASAL: Mainly occupied by pastoralists</b>			
Wajir	10.8%	19.8%	15.30%
Ijara	18.2%	30.6%	24.40%
Turkana	29.9%	40.0%	34.95%
<b>Non-ASAL: Mainly occupied by mainstream population</b>			
<b>Machakos</b>	130.8%	134.8%	132.8%
<b>Bungoma</b>	132.5%	150.1%	141.30%

Source: Ngome 2006:14

### 3.4. The Ogiek and Endorois

#### 3.4.1. Hunter Gathers and the State

The Ogiek are one of Kenya’s indigenous communities who traditionally depended on forests for their livelihoods. They live on the Eastern side of the MAU Escarpment in the Rift Valley Province of Kenya and they number approximately 15,000 to 20,000 (ACHPR 2005:15). The Endorois community, on the other hand, is also hunting gathering people with an estimated population of approximately 60,000 people. The community lives in and around Lake Bogoria area in the Baringo and Koibatek administrative districts, as well as in the Nakuru and Laikipia administrative districts within the Rift Valley Province of Kenya. These are very poor districts.

Before the advent of the colonialists, Ogiek were already involved in the local and regional trading networks, bartering honey and meat for agricultural products. Honey is eaten, stored for future use, brewed into beer and traded. It is said to have been the main product for the barter trade.

Government’s forest and wildlife policies have led to eviction the of the Ogiek from their traditional hunting grounds in the forests and banned wildlife hunting thereby negatively discriminating against Ogiek’s traditional occupations. According to Article 1 of C.111, both polices are discriminating because they have the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. The Ogiek, who formerly ranged from broad areas of uninterrupted forests as full time foragers, have increasingly been constricted to areas with home ‘bases’ involving agriculture and livestock rearing and outlying areas where some honey gathering is still practiced. The constant alienation of land and restrictions of access to natural resources have further increased the sedentarization, marginalization, social discrimination and impoverishment of the Ogiek.

The Ogiek still occupy part of the Mau Forest where one finds their bee and honey barrels, sacred shrines, and ancestral graves. This land is however being taken over in the name of “conservation and preservation”. In reality the Government has already allocated part of this land to outsiders who are politically influential and connected to be used for other purposes. Individuals are now practicing agriculture by planting pyrethrum, tea and flowers. The growing of pyrethrum and charcoal burning are human activities which have side effects to bee keeping due to the poison and smoke emitted. In most cases, natural resources and the protected areas have been developed without adequate attention to and respect for the rights of indigenous peoples.

Historically, the Endorois are hunter-gatherer communities who have also relied on beekeeping for honey. Very few Ogiek and Endorois are working as civil servants, and are little represented in local government and other decision making processes. On the contrary, they are forced to be represented by their neighbors and other dominant ethnic groups in the local and central administration.

Assimilation policies and lack of recognition of separate and distinct identities of hunter-gatherers that began in the colonial period continue to the present. They were/are marginalized owing to their way of life and their livelihood system. Hunting was made illegal and all policies, sector strategies and projects were designed to solemnly address the needs and interests of agriculturalists and/or pastoralists. This is in spite of the fact that there are people in Kenya who traditionally depend entirely on non-agricultural and non-pastoral use of forests. The situation of hunters-gatherers was made worse by government’s limited understanding of hunters-gatherers livelihood strategies.

Due to the reduction of land and increasing hunting pressure, the Ogiek and Endorois have gradually diversified their economy by adding agriculture and/or herding to their traditional hunter-gatherer lifestyles. They cultivate small millet and maize gardens. They now lead sedentary lifestyles in mid-altitude forest and –in turn- a further increase of agriculture, which is supported through some livestock rearing, illegal hunting, and bee-keeping. Honey gathering is still a key activity carried out in the traditional way with few of them using modern bee-hives and/or processing the honey for regional markets. It is in view of this that Bluckburn (1974:151 quoted in KARI 2006) asserted that “without honey and condition of getting it, Ogiek life would be entirely different.”

### **3.4.2. Alienation of their land, territories and natural resources**

Huge parts of the land used before the advent of colonialism by hunter-gatherers was allocated to white settlers (KARI 2006:14). The colonial administration affected Ogiek groups in different ways. Between the 1920s and 1940s, many of them were displaced from their forest lands by European farmers; initially they had limited direct government interaction, but felt colonial policies through the ever increasing encroachment by their neighbors, who were forced into the forests by the government in order to create space for the farms in the plains. Often in disrespect of their legal utilization rights, they were forced out of the forest with little or no compensation and with little or no land to go to or resources to live on. Today, some of the gazetted area is claimed to be protected for the customary territorial and foraging rights of the Ogiek, yet the Ogiek are kept away from the area. At the same time, no efforts have been made to protect the areas against possible encroachment and logging., which is normally done by the dominant elite groups.

The Endorois, on the other hand, lost possession of their historic lands following the establishment of Lake Bogoria National Game Reserve without compensation. Because of the eviction, the Endorois have been prevented from accessing their original lands, natural resources, and cultural/spiritual sites. Further, the current mining operations on the Endorois land threatens to irreparably damage the integrity of the land as well as damage the Endorois property. The Government has been systematically using excessive force on the Endorois with the object of denying or preventing them from resettling in their ancestral land in the Mochongoi Forest since 1973. With no other option, the Endorois have been forced to live along the cliffs of the mountains or in a crowded and far less fertile land with no access to health facilities, water, grazing land and other essential necessities. According to C.111, each member for which the Convention is in force undertakes to declare and pursue a national policy designed to promote equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof. However, on the contrary, the Government of Kenya has failed to provide equality of opportunity to the Endorois to practice their traditional occupation and employment by denying them access and utilization of their traditional lands, territories and natural resources as provided for in ILO Convention No. 169 and the United Nations declaration on the Rights of Indigenous Peoples (UN DRIP).

### **3.5. Kenya's Policy framework in relation to traditional occupations of indigenous pastoralists and hunter-gathers.**

Article 2 of ILO Convention No.111 calls on States which have ratified the Convention to pursue national policies designed to promote equality of opportunity and treatment in respect of employment and occupation.

Kenya's policies on Arid and Semi-Arid lands (ASALs), forest, wildlife, environment, mining, ranching, agriculture and other sectors have been discriminatory against pastoralism and hunting-gathering. For example the forest and wildlife policies, proscribe access and utilization of forests by hunting-gathering communities.

#### **3.5.1. The Forest Policy**

Before the enactment of the forest law in 2005, the old forest policies pursued by the colonial and post independence governments championed an exclusionist agenda whereby forests were owned and protected by the state through forest officers assisted by forest warders with guns to keep forest communities out (Sena 2006). This exclusionist policy was further strengthened by the recommendations of the 1932 Morris Carter Commission constituted by the Ministry of Lands under the colonial government which perceived the Ogiek and Sengwer as primitive and backward people. It recommended that these people be moved to other places to pave way for the more potential and agrarian minded people. This contributed towards discrimination against traditional practices of hunting and gathering. The government's bias against traditional practices left about 5,000 Ogiek people homeless while some of them were forced to take up agriculture and some became livestock keepers. A large number who preferred to hunt and forage were left without any means of survival.

The post-independence forest policy drafted in 1968 also championed the exclusionist agenda including the Forest Act, CAP 384. This policy failed to guard against that which it was enacted for namely poaching, timber logging and charcoal burning. The policy failed to

guarantee efficient forest management and utilization in the modern era thereby raising the question as to why hunting-gathering communities were evicted from forests.

The goal of the 2006 Forest Policy is “to enhance the contribution of the forest sector in the provision of economic social and environmental goods and services” and one of the objectives of this policy was to contribute to poverty reduction, employment creation and improvement of livelihoods through sustainable use, conservation and management of forests and trees (Forest Policy 2006: 3). A shortcoming of this Forest Policy and the Forest Act (2005) from the perspective of international standards such as the Convention on Biological Diversity (CBD), is its unclear position towards user rights and settlements in forests. The forest policy views poverty reduction in monetary terms and any economic activity that is not monetary oriented is deemed uneconomical. This could constitute discrimination against non-wage labour of which hunting and gathering is a part. The problem with poverty reduction strategies stems from the conventional definition of poverty itself. The poor are those who subsist on less than a dollar a day. There are those communities and workers who view economic wellbeing in terms of access to honey, fruits and herbs. These workers include the Sengwer and Endorois. The efforts of governments have been geared towards bringing indigenous communities out of their traditional occupations into the “modern” cash economy. Generally, forest policies in Kenya have only achieved insecurity of tenure for those engaged in traditional occupations.

### **3.5.2. The Wildlife Policy (Sessional Paper No. 3 of 1975).**

The Government is now in the process of reforming the existing wildlife laws in Kenya. The existing policy on wildlife is embodied in Sessional paper No. 3 of 1975 entitled “*A Statement on future Wildlife Management in Kenya*”. Subsequently, the Wildlife Conservation and Management Act of 1976, Cap 376 established the legal provisions for the implementation of the policy. It will be noted that, the current Act and Policy are biased in favour of wildlife, at the expense of local people. Since most game parks were established in Maasai traditional territories, pastoralism in these areas has been adversely affected.

The policy promotes poor terms and conditions of employment for Maasai traditional workers. It also causes insecurity of tenure and prevents the Maasai from advancing in terms of welfare. The right of any person not to suffer discrimination on the grounds mentioned in Convention No. also relates to advancement earned in the course of employment. For the case of Maasai pastoralists, wildlife has contributed to countless losses of both human life and livestock. On the aspects of compensation, the Act treats people and property differently. For example, there is no compensation available for the destruction caused by wildlife to crops or to property such as livestock. For instance, in the recent past, at Kitengela, Kajiado District, numerous herds of cattle belonging to the Maasai community from the Kaputiei section were indiscriminately attacked by stray lions from the Nairobi national Park. They lost colossal sums of money and other resources, subjecting them to abject poverty.

Although currently the government pays compensation in cases of death to human beings caused by wildlife, the amount, which is equivalent to US\$350, is inadequate. The amount of compensation for loss of life and injury is also seen as too little - particularly for injuries leading to permanent disability. The compensation is neither adequate to attain quality medical attention nor for investment in income generating projects. The rates assessment and payment of claims for compensation is determined by the District Wildlife Compensation Committees. Moreover the process of administering the compensation claims is bureaucratic and may take years before concluded which is very discouraging.

### **3.5.3. The National Land Policy**

Kenya has not had a single and clearly defined National Land Policy since independence. What has existed since the colonial period are land laws whose existence has resulted in a complex scenario for land management and administration. These land laws have created many problems including dispossession of land from indigenous communities, disparities in land ownership, and landlessness. To address these problems, Kenya has embarked on the formulation of a National Land Policy through a wide consultative process with an aim of producing a policy whose vision is *“to guide the country towards efficient, sustainable and equitable use of land for prosperity and posterity”*. Stakeholders from public, private and civil society contributed towards the policy formulation through thematic group-based discussions, regional workshops and written submissions. In the past, several initiatives have been tested to address the land question in Kenya. These initiatives have been pursued by commissions of inquiry appointed by Presidents of the Republic of Kenya which include the Njonjo Commission of Inquiry into the Land Law System in Kenya (Chaired by Charles Njonjo); the Constitution of Kenya Review Commission; and the Presidential Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (chaired by Ndun’gu). Reports of all these commissions informed the process that came up with the draft national land Policy. The draft land policy addresses land rights of minority communities such as hunter-gatherers, forest dwellers, pastoralists and vulnerable groups especially with regard to matters such as access to land and participation in decision making process over land and land-based resources.

The Policy addresses the critical issues of Land Administration, access to land, land use planning, restitution of historical injustices, environmental degradation, conflicts, unplanned proliferation of informal urban settlements, outdated legal and institutional framework and information management. It also addresses constitutional issues such as compulsory land acquisition as well land tenure. It recognizes the need for security of tenure for all Kenyans from all socio-economic groups, women, pastoralists, informal settlement and other organized groups. The Policy provides a range of general statement of principles as well as defaulted policy proposals for equitable access, control, management, rights and sustainable use of land. It’s a framework that meets the needs and aspirations of Kenyans on matters related to land for the achievement of equity, stability, poverty reduction and economic growth. It provides the basis upon which complex land laws in Kenya will be reviewed towards enacting new laws in order to have a comprehensive land law in Kenya. Although the policy is not a panacea to all the problems of land, it provides the framework and direction for dealing with issues of land ownership, security of tenure, land use and development and environmental conservation on as sustainable basis. Now one is now under preparation and is yet to pass through all the stages before adoption. As a result, it is not yet possible to discuss the impact of the land policy on traditional occupations.

### **3.5.4. ASAL policies**

Pastoralism has been negatively impacted by Arid and Semi Arid Lands (ASAL) policies which have been designed with the aim of transforming rangelands into ‘green’ and agriculturally productive areas. Misconceptions about pastoralism inherent in ASAL policies have degenerated into negative consequences on pastoralism, - contrary to the principles of ILO Convention No. 111.

The first misconception about traditional pastoralism, held by policy makers and ASAL development experts, is that nomadic livestock management systems are environmentally destructive because pastoralists are inefficient users of natural resources. Overgrazing is seen as the main cause of land degradation. However, the main cause of overgrazing is the continued diminishing of land traditionally used by pastoralists. In addition, it has been shown that pastoralism is more effective and equitable in sharing of resources and has great benefits to society compared with ranching. Lending, borrowing, sharing milk and meat, and herd migration ensure that the products of pastoralist systems are widely distributed (KARI 2006:5). Policy makers have failed to accept livestock mobility as a rational and efficient use of dry-land resources and prefer to prescribe 'foreign' rangelands management practices and technologies. These policies portray communal land ownership as leading to over-exploitation and less productivity than privately owned land. While rangeland pastures were not open access as the old argument goes, it is still used to justify disregard of pastoralism as a viable livelihood system in need of government intervention.

Policies designed for ASALs have also ignored the knowledge of pastoralists regarding natural resource management. Instead, policy makers and development experts have regarded themselves as possessing the monopoly of knowledge necessary for developing ASALs. Ekaya *et al.* (2005) state that pastoralists possess valuable information on ASAL natural resources and natural resource management but they lack strategies to make use of that information towards improving the state and management of natural resources in ASALs and the welfare of pastoralists. Such strategies would harmonize traditional and modern knowledge on natural resource use and management which would then form the basis of curricula for vocational training to benefit pastoralists. Convention No. 111 encourages Member States who have ratified it to formulate a national policy for the prevention of discrimination in employment and occupation through promoting workers' access to vocational training and placement services (ILO Convention No.111 Article 3(e)). This should allow access to vocational training and employment of their own choice on the basis of individual suitability for such training or employment.

Policy makers have introduced irrigated farming, modern ranching and other economic activities to replace pastoralism. Thus the focus by seeking to policy makers develop ASAL areas by imparting knowledge to pastoralism that changes their occupations rather than one that builds their capacity to engage in more productive pastoralism is contrary to the principles enshrined in Convention No. 111.

The second misconception holds that pastoral production is not economically rational because it does not contribute as much towards national economy as agriculture and tourism. If harnessed wisely and made more efficient, traditional pastoralism could enhance pastoralist livelihoods, as well as boost the rural economies of communities living in Kenya. Estimated total beef supplies in Kenya indicate that approximately 50% derive from pastoralists' cattle that are trekked or trucked over large distances to markets (Mbogoh *et al.* 2005:31).

Policy misconceptions about traditional pastoralism practiced by the Maasai of Kenya have generated a lot of negative consequences which include the following:

- Encouragement of crop farmers to encroach into pastoralist areas - particularly wetlands that traditionally provided dry-season grazing. Pastoralists' land has been alienated from traditional use and concentrated into the hands of the rich leading to absentee landlords who have few links with local communities.

- Most policies have led to the expropriation of substantial portions of strategic pastoral grazing land for crop farming, game reserves, military training, forest land and mining. This in turn restricts pastoralist's herds in smaller territories resulting in environmental degradation. For hunters-gatherers, expropriation of land has made some of them either to shift to other livelihood systems or become squatters and refugees in their own country.
- The negative thinking of policy makers, within and outside government, towards pastoralists has served to justify why the government puts most of its resources into promoting development in high rainfall areas where human population is high and returns to investment are deemed better at the expense of pastoralism. It has been pointed out that although Maasai pastoralists in Kenya have a system of herding that is designed to cope with fluctuations in climate; ASAL-based policies have rendered them more vulnerable. Restricted by borders and boundaries, they are no longer able to move away from drought as they used to. Because of expansion of farming and other forms of land enclosure, many of their dry season reserves have been lost (Abkula and Hamena 2005:20). Pastoral production systems depend on mobile herding as a viable and economically sound livelihood strategy.

After many years of pursuing the wrong policies for ASALs and pastoralism some policy-makers are beginning to realize that a major threat to ASAL development is not pastoralism but rather “the increasing conversion of ASAL grazing/pasture land to cultivation” because

*“the number of crop farmers that can be supported by these areas annually is significantly smaller than the number of pastoralists that can only periodically use the pasture resources. Other considerations are that pastoralism tends to protect soil and water resources better than cropping and allows continued wildlife use of the areas” (Ekaya et al. 2005:X).*

### **3.6. Kenya’s legal framework in relation to traditional occupations of indigenous peoples**

This section focuses on how Kenya’s legal framework is related to discrimination in traditional occupations and employment in relation to indigenous peoples’ rights to their land, territories and natural resources.

Pastoralists and hunters-gatherers in Kenya face discriminatory treatment based on their indigenous identity, culture, way of life and background. Accordingly, a situation or treatment is discriminatory if it involves three elements: *facts* which constitute a difference in treatment, a *ground* on which the difference of treatment is based (sex, race, etc.) and the negative *result* of the treatment an impairment of equality of opportunity and treatment).

Education plays an important role in employment and occupation. A worker’s level of education affects remuneration and productivity. Under Article 1.3 of Convention No.111, the terms “employment and “occupation” includes access to vocational training, access to employment and particular occupations, and terms and conditions of employment. Drawing from Articles 3 (e) and 1.3 of the Convention, it has been stated that “if parts of the population are prevented from attaining the same level of education as others, this constitutes discrimination within the terms of the Convention, since these differences will be extended

into employment opportunities” (ILO 1996:26). Facts about low school enrolment among pastoralists therefore indicate discrimination.

### **3.6.1. The Kenyan Constitution**

The Constitution of Kenya promotes the principle of equality through its various chapters. The Bill of Rights (Chapter 5 of the Kenya Constitution) introduces the fundamental rights and freedoms of the individual, which apply regardless of race, tribe, place of origin or residence or other local connections. Section 82(3) provides that the expression “discriminatory” means affording different treatment to different persons attributable wholly or mainly to their descriptions by race, tribe, place of origin or residence, political opinions, colour or sex. Under Section 82(1), no law shall make any provision that is discriminatory either of itself or in its effect. Despite the above legal framework, this report raises the concern that Kenya’s laws need review for purposes of giving full effect to the principle of non-discrimination (in this case on the basis of occupation and employment). It is important to analyze some of the laws in order to illustrate the disparity between what the constitution stands for and what the laws stands for.

Land laws emphasize individual land ownership as opposed to communal land ownership. Article 14 of the Kenyan Constitution protects the right to property and provides that an individual may not be deprived of their property unless by law when the State may compulsorily acquire property for public purposes by compensating the person deprived of the property. This article gives muscle to the state to deprive indigenous peoples their land, territories and natural resources upon which their traditional occupations are based.

No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where “the taking of possession or acquisition necessary in the interests of defense, public safety, public order, public morality, public health, town and country planning or development or utilization of property as to promote the public benefit; and the necessity thereof is such as to afford reasonable justification for the causing of hardship that may result to any person having in or right over the property (Section 75(1))

Compulsory acquisition of land and forests from pastoralists and hunter-gatherers has deprived these communities the very basis upon which their occupations depend. In this regard, there are several elements which may be at odds with the principles of Convention No. 111. Firstly, it creates difficult terms and conditions under which pastoralists and hunter-gatherers can work. This is because in some cases, the government compulsorily acquires land that is used by pastoralists during dry season grazing or gazettes forests upon which hunters-gatherers depend for honey and other resources essential for livelihoods. In addition, the security of tenure of pastoralism and hunting-gathering is also affected. “In the context of the promotion of equality of opportunity and treatment in employment, security of tenure denotes a guarantee that dismissal will not occur on discriminatory grounds, but must be justified by reasons relating to the operational requirements of the enterprise, the worker’s conduct or his or her ability or fitness to carry out his or her duties (ILO 1996:35). The government affects security of tenure of the Ogiek when it evicts them from forests or when it annexes land belong to the Maasai because in so doing these communities are kicked out of their non-wage earning occupations. This is despite the recognition of non-wage labor by ILO Convention No.111. Pastoralists and hunter-gatherers can no longer sustainably live on their traditional occupations and are continuously relying on government and NGO relief food.

*In 1977, the Government forces invaded Western Mau forest (home to the Ogiek) and torched their houses, and arrested members of this community on charges of squatting in the forest (government land) illegally. This rendered many families destitute due to loss of animals and property and children dropped out of school due to non-payment of school fees (Kimaiyo 2004:22)*

From the above we note that just as any other occupation hunting and gathering as practiced by the Ogiek enables families to eat and take their children to school. When they are jobless, such as when they are evicted from their lands, territories and natural resources, they can no longer fend for themselves. It is important to look at some specific legislation which contributes to insecurity of tenure for those working in traditional occupations of pastoralism and hunting-gathering.

Article 5 of the Kenyan Constitution provides for the implementation of certain conditions (which do not constitute discrimination) especially when they are intended to meet particular requirements of persons for whom it is recognized that special protection or assistance is necessary. Such measures which are intended to protect disadvantaged workers include facilitating access to education and vocational training opportunities. Education experts in Kenya have advocated for the introduction of mobile schools for pastoral children. Vocational training for pastoralist and hunter-gatherers should not be confined to conventional education. This should include capacity building of traditional practices of pastoralism and hunting-gathering especially animal health and natural resource management.

ILO Convention No.111 identifies legislation as an important ingredient that can promote elimination of discrimination in employment and occupation. The several ways through which ILO C.111 can be implemented include national constitutions, labour laws, collective labour agreements, human rights legislation and regulations and case-laws (ILO 1996:80). The government of Kenya promotes the principle of equality through its laws and constitutions and ratification of international conventions as illustrated below.

### **3.6.2. Laws relating to land**

It has been emphatically pointed out that “the most pressing concern for indigenous communities is land” (its use for occupation) “because it is both an asset and a spiritual element that defines their cultural heritage and identity” (Kimaiyo 2004:32). Indigenous peoples are calling on their governments to recognize their collective rights to land and natural resources because it guarantees capability of those groups to survive as peoples and to be able to exercise other fundamental collective rights such as the right to exercise their traditional occupation (KNCHR and CEMIRIDE 2006).

ILO Convention No.111 has not been domesticated in the country’s land laws. Land laws, therefore, continues to promote discrimination in employment and occupations. Lack of domestication of these international legal instruments has denied Kenya’s indigenous peoples their rights to exercise their traditional occupations and to use these instruments to seek legal redress when their rights are violated. Even where national legal instruments have discouraged discrimination, they have not been implemented when dealing with issues affecting the practice of traditional occupations. Human rights groups in Kenya are already concerned with the state of pastoralists and hunters/gatherers. They state that “the most important thing for indigenous peoples is not how they are defined or known but rather the recognition or protection which they are accorded through legislation and policies. It is how far Kenyan legal systems try to articulate the concept of indigenous peoples in the national

legal system” (KNHRC and CEMIRIDE 2006:38). Many of the land laws originate from the colonial administration. A review of the Crown Lands Ordinance of 1915 reveals much.

### 3.6.3. The Crown Lands Ordinance 1915

Under this ordinance, all the lands occupied by native tribes of the Protectorate and lands reserved for the use of members of any tribe in the territory became Crown land. At the same time, the Ordinance decreed the creation of Native Reserves which affected restricted movements of pastoral communities and their livestock. In fact it was ruled in one of the cases tried in colonial days that, the effect of 1915 Crown Land Ordinance and the Kenya (Annexation) Order in council of 1920 by which no private rights were reserved, was clearly to vest, *inter alia*, “land for use of the Natives in Crown...if that be so all native rights in such reserved land whatsoever disappeared and natives in occupation of such Crown lands became tenants-at-will of the Crown” (Okoth-Ogendo, 1986; Isaka Wainaina Versus- Murito & Attorney General 1922, 239, 9KLR 102). This ordinance ensured that much of the land under use by pastoralists and hunter-gatherers was transferred to the government. This affected advancement of traditional occupation of pastoralism.

For a system to be free of discrimination it must first eliminate vertical occupational segregation which, while principally affecting women, also has an impact on certain minority groups and Indigenous peoples. The tendency has been for the government to promote advancement of agrarian communities at the expense of pastoralists and hunters-gathers. It is in view of this that poverty ranks high in areas occupied by pastoralists and hunters-gatherers. Rough estimates, according to KARI (2006:4), indicate that whereas indigenous peoples’ households may earn about a third of average rural incomes in the country, most of them are landless and without legal access to natural resources or any other source of income. Since most of the Ogiek, the Maasai and Endorois are found in Baringo district we can use statistics from this region to illustrate the increasing poverty levels among pastoralists and hunter-gatherers.

Level of Poverty in the Baringo District

Year	Adult	Households living below poverty line	Individuals living below poverty line
1997	66,310 (37%)	15,626 (32%)	88,181 (37%)
2000 (estimates)	123,570 (62%)	30,558 (54%)	164,498 (62%)

Source: Ekaya *et al.* 2005: 41

### 3.6.4. The 1919 Registration of Titles Ordinance

The Ordinance was introduced to supersede all existing land law regimes throughout the country. Its main objective was to secure private ownership of land through issuance of land title deeds. Those who benefited were white settlers rather than Africans who still believed in communal land ownership. This contributed to annexation of African lands for white settlers especially those who came into the country after the First World War those who suffered further land losses were pastoralists.

### 3.6.5. The Native Lands Trust ordinance, 1938

Under this Ordinance, indigenous peoples and their livestock were confined in native reserves where their lives were controlled and managed by colonial administrators and their agents.

This ordinance affected pastoralists to a great extent because Maasai pastoralism who depended on rotational grazing were unable to move in search of grazing and water during the dry season. Any attempts by pastoralists to migrate in search of grazing and water were charged with trespass on private lands. As a result most of their livestock was decimated by droughts. The Kenya Trust Land Act, Cap 288 originates from this ordinance which re-designated “Native Lands” as all land formerly known as “Native Reserves” and removed them from the Crown Lands Ordinance, 1915.

### **3.6.6. The Registered Land Laws, Cap 300**

This Act affected the land tenure systems of indigenous peoples as it advocated for individual land holdings. The Act provided for registration of all lands formerly held under the Customary Trust Land. The RLA gives an absolute title, interest and ownership for individual proprietorship to the occupier. The Act aims at making further and better provision for the registration of title to land, and for the regulation of dealings in land so registered. As a result of this law, many private interests have been generated in land traditionally used by pastoralists and hunter-gatherers. This same land and resources is what provides sustainable livelihood for Indigenous peoples in their traditional occupations. Security of tenure in employment can be enhanced further if tenure for land that supports pastoralism and hunting-gathering is made secure. ILO Convention No. 111 raises the concern over terms and conditions of employment and security of tenure in employment is one of the conditions. Provision of legislation that enhances private interest in communally held land jeopardizes the chances of survival of traditional occupations. 36,780 ha of Eastern Mau forest were lost to timber logging and human settlement (Sena 2006). These settlements do not include the Ogiek who traditionally resided in the forest. It is also a contradiction that the Ogiek were evicted from the forest in order to preserve and conserve it yet evidence reveals that the forest is under threat.

### **3.6.7. The Group (Representatives) Act, Cap. 287**

The Land (Group Representatives) Act, Chapter 287 of the laws of Kenya is the legislative instrument that governs communal land in pastoral areas. The concept of Group Ranches involved the setting aside of a certain piece of land, communally owned by a group of people and recorded and registered as the legal owners through membership of the particular area. The original idea behind group ranching was to achieve some measure of sedentarization of Maasai pastoralists and to enable them to secure development loans by using their land title deeds as collateral.

The Group Ranch Act failed to address the pastoralist problems as it eventually encouraged privatization/individualization of land contrary to communal land tenure that Maasai pastoralism depended upon. Communal land tenure ensured that the community had access to water and grazing especially during dry seasons. Due to increasing levels of poverty among pastoralists, titles acquired through the application of this Act are being bought by people from agrarian communities leading to displacement of pastoralists. This leads to insecurity of tenure (referred to earlier) among those still employed in the pastoralism sector. Those who have suffered as a result are women and children because title deeds are registered in the husband's/father's name. This could also imply discrimination against women.

The end result was the division of the ranches into small uneconomic individual holdings. Ranching also encouraged inequitable access to resources especially to grazing land and water

consequent upon the privatization of rangelands. The programme also increased overgrazing due to restrictions of livestock movement. In other words, the 'collective group rights' were essentially transformed into 'ranches', effectively doing away with indigenous occupations and forms of employment. The Act therefore has resulted in discrimination.

### **3.6.8. Laws relating to Environment and Biodiversity Conservation**

Traditional occupations are very much dependent on sustainable environmental management and biodiversity conservation. The Ogiek depend on forests in order to practice their occupations such as hunting and gathering. Sena (2006) has argued that modern forest management practices as practiced by the Government of Kenya are not as good as those based on traditional knowledge of the Ogiek. The Convention on Biological Diversity (CBD) recognizes the contribution of knowledge and innovation by indigenous people in natural resource management. It also ensures the right of indigenous peoples to consent or withhold their consent when their natural resources are used and also to participate in the benefits derived from such use. The Ogiek managed their forests while deriving livelihoods from them. The expertise for doing so is an essential contribution to knowledge. During the colonial period, and for a couple of decades after independence, large chunks of the Mau forest were destroyed under Kericho and Bomet country councils (owned by white settlers).

### **3.6.9. Environmental Management and Co-ordination Act 1999**

This Act makes provision for indigenous communities to seek redress from courts against development projects which have environmental and economic impacts on their traditional occupations. One example is the Jamii Bora micro-finance Project - a micro finance institution designed to establish a housing project in the midst of land belonging to Maasai pastoralists. Due to intervention from locals, NGOs and pastoralists themselves, the project was stopped by the National Environmental Management Authority following an Environmental Impact Assessment which showed that the project would negatively impact on the livelihoods of pastoralists in the area. Flower farms, chicken businesses mining enterprises are all taking land out of pastoralism and hunting and gathering. The fact that Kenya has ratified, should be sufficient to hold the state responsible in protecting traditional pastoralism.

### **3.6.10. Laws relating to Labour and Employment**

These laws are biased in favor of wage labour. They cover aspects of recruitment, training, promotions, salaries, and retirements among other things. The laws, however, do not make any provisions for the traditional occupations practiced by the Ogiek, Endorois and the Maasai as envisaged by the ILO Convention No. 111. This could be attributed to failure by the Government of Kenya to domesticate ILO Convention No. 111. Special mention of traditional economies is found in ILO Convention No.169 which states that "traditional activities ...such as hunting, fishing, trapping and gathering, shall be recognized as important factors in the maintenance of their cultures and in their economic self reliance and development. Governments shall ensure that these activities are strengthened and promoted" (ILO: 2000). One of the ways through which the government can achieve this is through implementation of ILO Convention No.111.

### **3.6.11. Laws relating to natural resources- water, forests, wildlife and minerals**

In general terms, laws relating to natural resources vest a lot of power in the government, through various ministers, on matters of use, access and ownership of natural resources. The government has applied provisions of these laws to annex land and natural resources found in traditional territories of indigenous peoples. Traditional economies are the basis of indigenous peoples' economic survival, especially in rural areas. However, these economies are threatened by a number of factors which include dispossession of their land rights, environmental degradation and sometimes prohibition of use and access to natural resources. These natural resources include water, minerals, wildlife and forests. An example is provided below to demonstrate the effect of taking way natural resources upon which traditional economies depend.

*Ranching in Laikipia and its impact on the Endorois community*

Ranching has adversely affected the livelihood systems of the Endorois. The Laikipia Natural Conservancy Trust is a ranch which has illegally appropriated approximately 100,000 hectares from the Endorois. A lot of people have been beaten and tortured to death, assaulted, raped, arrested and jailed whenever they have trespassed into the ranch. They also had their livestock confiscated. It is estimated that 8,200 herds of cattle have been forcefully taken away. During the illegal expansion of the ranch, a permanent river called **Loileber**, which was an important source of water for the community, was made part of the ranch. As a result, the endorois have been subjected to harsh terms and conditions when practicing their traditional occupations. Article 1.3 of Convention No. 111 provides that 'employment' and 'occupation' includes the terms and conditions of employment. Private enterprises not only reduce land acreage and interference with rotational grazing but also pollute resources upon which traditional occupations depend. This has a negative impact on the rights of the Endorois to their lands, territories and natural resources upon which traditional occupation depends.

Below are some of the Acts which threaten the survival of traditional economies as a result of dispossession of land and natural resources.

**3.6.12. The Forest Act Cap 385**

The Act was enacted and became operational on 1<sup>st</sup> March, 1942. It has been amended several times - in 1962, 1957 and 1964. It aims at providing for the establishment, control, and regulation of the central forests. Section 4 of the Act empowers the Minister from time to time, by notice in the Gazette, to declare any unalienated Government land to be a forest area. Likewise, the Minister is mandated to degazette a forest. The tradition has been for the government to gazette a forest thereby taking it away from indigenous peoples and then degazette it for resettlement which in effect amount to issuance of titles to politically correct individuals. This has happened in Mau forest which traditionally supported the Ogiek people's livelihoods and may be seen as contrary to the principles of ILO Convention No. 111.

**3.6.13. The Water Act. Cap. 372.**

Under Sections 3 to 7 of the Water Act, ownership and control of water is vested in the Government. There is no provision where the community is vested with power in as far as control, use and management of the water resources is concerned. The community needs to be allowed to own, control and manage water resources that bear on the survival of traditional

economies. In many instances, the government has promoted activities in areas occupied by pastoralists that use and pollute water traditionally used for watering livestock thereby creating poor working conditions for pastoralists.

#### **3.6.14. The Mining Act, Cap 301**

Section 4 of the Act states that all unextracted minerals (other than common minerals) under or upon any land is vested in the Government of Kenya. The government can invoke this section to acquire any land in so far as it harbours minerals. The Act provides for continued land annexation from indigenous communities in respect of mineral exploration and mining. One examples is Magadi Soda Mining Company in Maasai-land which occupies a lot of land traditionally used by the Maasai for grazing. The company pays rent to the government whereas the community is not adequately compensated. Both ILO Conventions Nos. 169 and 111 are based on an understanding that dispossession of land from indigenous peoples threatens the survival of their economies and uphold their interests.

#### **3.6.15. The Wildlife (The Conservation and Management) Act Cap. 376**

The Act, among other things, gives the Minister responsible for wildlife the power to declare any area a National Park and when an area shall cease being a National Park. Section 62 of the Act was amended such that in case of any damage caused to the livestock or property by wildlife, there is no provision for compensation. Where there is any personal *injuries* or loss of the dependants of the victim can only be paid a meagre sum of Kenya shillings thirty thousand (*Kshs. 30, 000 or US \$400*). In this regard, the provisions of the Act are inconsistent with the right to life, protection of individuals and property as provided for in the chapter of the Bill of Rights in the Constitution. The wildlife Act also makes provision for the prevention of livestock grazing in game parks. Game parks host some of the most important resources upon which indigenous peoples depended for the survival of traditional economies. These resources include water and salt licks which the Maasai depended on for their livestock.

This section looks at some of the challenges that hinder effective implementation of ILO Convention No. 111 with regard to the traditional occupations of pastoralism and hunter-gathering in Kenya.

### **3.7. Legal and policy challenges related to the exercise of traditional occupations in Kenya**

#### **3.7.1. Domestication of International legal instruments:**

Article 19(5)(d) of the ILO Constitution requires member states to “take such action as may be necessary to make effective the provisions” of all ratified Conventions. Kenya has ratified ILO Convention No.111 but has not anchored it into its legal system. Domestication of international conventions that affect indigenous peoples has become a major concern for many organizations working for the rights of indigenous peoples in Kenya.

For example, the Kenya National Commission on Human Rights (KNCHR) has decried the need to both ratify relevant international Treaties and Conventions and has stated that the immediate challenge is to seek domestication of international norms concerning indigenous peoples and minorities in local Kenyan law. This is because domestication is “the most

important proof of state commitment towards complying with generally held values” (KNCHR and CEMIRIDE 2006: 40). Domestication accords victims of violations of human rights a chance to seek redress in the corridors of justice.

One way in which such a challenge could be addressed would be to begin with addressing the lack of capacity of law makers, and the judiciary in respect of Kenya’s international treaty obligations, and the content of such treaties.

### **3.7.2. Under-representation of indigenous peoples in organs of governance**

Pastoralists and hunters-gatherers inhabit administrative regions in which they are the minority. As a result, they cannot marshal a significant enough number of votes to enable them elect one of their own to any organ of government leading to their under-representation. Many of their representatives are neither pastoralist nor hunter-gatherers and cannot articulate their issues. As a result, issues affecting pastoralist and hunters-gatherers are not included in policy and legal developments instruments.

### **3.7.3. Corruption in the judiciary**

Corruption in the judiciary poses a great challenge to proper dispensation of justice in Kenya. There has been abuse of land laws by senior government officials and influential people to the detriment of indigenous peoples.

### **3.7.4. Unequal benefit sharing from natural resource**

The Government of Kenya has been trying to ensure that local communities benefit as far as it is possible, from the natural resources found within their areas. For instance, communities living near and around the country’s National Parks and Reserves have been getting a share of revenue generated from wildlife conservation. However, this has been a small fraction of the total revenue generated. Furthermore, this revenue is entrusted to local authorities, which are equally corrupt. The result is that the net benefit to local communities has been negligible. If benefit sharing from natural resources to local pastoral and hunting-gathering communities can be stepped up, then the same can be used to improve infrastructure that can benefit pastoralists and hunter-gatherers and promotes their traditional occupations.

### **3.7.5. Low level of awareness of International Conventions like ILO Convention No. 111**

Despite having ratified ILO Convention No.111, the level of awareness of this Convention among NGOs working with indigenous communities in Kenya is low. It is hoped that this study will form the basis of generating awareness through wider dissemination and between discussions the ILO and the government.

## **4.0 Recommendations for further action**

- *Awareness raising on ILO C.111*

There is need for organizing a capacity building workshop or workshops on ILO Convention No. 111 in order to build an understanding of the same Convention among indigenous

peoples, the Government and organizations working with indigenous peoples and to lobby for its domestication.

▪ ***Intensive reform on employment and labour laws through consultation***

The Government of Kenya, working with representatives of indigenous peoples, under the guidance of ILO, should develop laws, policies and practices which provide possibilities for indigenous peoples to engage in their traditional occupations and activities for livelihood without hindrance. In this endeavour, the Government of Kenya, ILO and other stakeholders should work together to ensure that the existing policies governing traditional occupations and employment are in line with ILO Convention No. 111 and other international legal instruments to which Kenya is party.

▪ ***Land law reform***

As has been seen clearly throughout this study, land laws and policies favouring individual over collective ownership, and promoting inappropriate economic and other strategies in ASALs and other lands inhabited by pastoralists and hunter-gatherers, should be reviewed by the Government, in full consultation with relevant stakeholders, in order to better accommodate the needs of pastoralists and hunter-gatherers, and reflect their land use strategies.

▪ ***Advocacy for Constitutional Review***

There is need for constitutional review in order to enshrine practices to promote principles of Affirmative Action and interests and priorities of indigenous peoples in the Kenyan constitution. The Constitution and laws of Kenya should be reformed in order to recognize indigenous peoples of Kenya by:

- Inserting this concept in the Preamble and defining it expressly. It should recognize their origins, lifestyles, customary and traditional rights and ways of life.
- Stipulating Self determination for indigenous peoples in the reviewed Constitution. It should promote the establishment of Federal governments with proportionate system of participation in decision making processes, equal distribution of national resources, making the local authorities autonomous and representation at all levels should be emphasized.
- By Enhancing the Traditional Communal and Governance System, the reviewed Constitution should take cognizance of the traditional and communal systems and principles of governance and social structures
- Recognizing and promoting Group Interest Rights, can be done by expanding Chapter V of the current Constitution on the Bill/Fundamental rights and freedoms of the individual. There is need to recognize and have the rights of Indigenous peoples clearly ingrained.

▪ ***Ratification and domestication of other ILO Conventions relevant to traditional occupations***

Indigenous peoples of Kenya through their representative organizations should also lobby for the ratification of other ILO Conventions, in particular ILO Convention No. 169, which

remains the most comprehensive treaty for indigenous peoples for securing their rights as peoples and for practicing their traditional occupations.

- ***Special measures***

Special measures and mechanisms that would redress the various forms of discrimination described in this study against traditional occupations of indigenous peoples in Kenya, should be identified by the Government, in full consultation with indigenous peoples. Such measures should be fully institutionalised and implemented in a systematic manner.

- ***Development of mechanisms through which indigenous peoples can seek legal redress against discrimination***

Mechanisms should be provided for seeking redress whenever there is discrimination against pastoralists and hunters-gatherers. Such efforts should include establishment of institutional mechanisms such as National Indigenous Peoples Rights Commissions and where applicable institutions with specific mandates for protecting pastoralists and hunter-gatherers. The provisions within the law giving capacity to these institutions to ensure adherence to the law in protecting indigenous peoples need to be captured.

- ***Reform of employment and labour laws***

The Labour laws and particularly the Employment Act which aims at consolidation of employment matters should be reviewed to encompass the provisions of the ILO Conventions No. 169 and 111.

- ***Full implementation of the Principles of free, prior and informed Consultation/consent***

This principle is currently not being fully implemented by government and other development agencies. Indigenous peoples should be involved in the formulation, implementation and evaluation of all spheres of development plans and programmes in order to protect and respect their collective rights to land, territories and natural resources.

- ***Adoption of the recommendation at the 5<sup>th</sup> World Parks Congress 2003***

Recommendations of this Congress are relevant to the exercise of traditional occupations and forms of employment which include inter alia:

- All existing and future protected areas shall be managed and established in full compliance with the rights of indigenous peoples, mobile peoples and local communities.
- All protected areas authorities encouraged to adopt policies and practices which provide for greater recognition and accommodation of the local interests and concerns, provide voices for stakeholders in decision making, incorporate traditional knowledge and practices for sustainability, ensure a more equitable distribution of benefits and costs, management rights and responsibilities and incentives mechanisms;
- Protected areas shall have representatives chosen by indigenous peoples and local communities in their management proportionate to their rights and interests by the year 2010;
- Participatory mechanisms for the restitution of Indigenous peoples' traditional lands and territories that were incorporated in protected areas without their free, prior and informed consent established and implemented by the year 2010.

- Military activities should not be allowed to take place in the lands and territories of Indigenous peoples unless they have freely agreed upon by all the peoples concerned.
- No storage or disposal of hazardous materials should take place in areas occupied by indigenous communities.

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