



General Assembly

Distr.
GENERAL

A/HRC/4/32/Add.3
26 February 2007

Original: ENGLISH

HUMAN RIGHTS COUNCIL
Fourth session
Item 2 of the provisional agenda

**IMPLEMENTATION OF GENERAL ASSEMBLY RESOLUTION 60/251
OF 15 MARCH 2006 ENTITLED “HUMAN RIGHTS COUNCIL”**

**Report of the Special Rapporteur on the situation of human rights and
fundamental freedoms of indigenous people, Rodolfo Stavenhagen**

Addendum

MISSION TO KENYA*

* The summary of this report is being circulated in all official languages. The report itself, which is annexed to the summary, is circulated in the original language.

Summary

The present report describes the official visit to Kenya of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people from 4 to 14 December 2006, at the invitation of the Government. In Kenya, the Special Rapporteur held consultations with national and regional authorities, United Nations agencies, representatives of non-governmental organizations, and members of indigenous communities and organizations in various parts of the country.

The minority hunter-gatherers and pastoralists who live mostly in the arid and semi-arid lands, such as the Elmololo, Yakuu, Sengwer, Maasai and Ogiek, are the indigenous communities of Kenya. Their livelihoods and cultures have been traditionally discriminated against and their lack of legal recognition and empowerment reflects their social, political and economic marginalization.

The principal human rights issues they face relate to the loss and environmental degradation of their land, traditional forests and natural resources, as a result of dispossession in colonial times and in the post-independence period. In recent decades, inappropriate development and conservationist policies have aggravated the violation of their economic, social and cultural rights.

The lack of social and health services in indigenous communities is especially hard on women and children, who suffer gender inequalities and discrimination, especially with respect to property rights, and harmful traditional practices that are also conducive to the increasing spread of HIV/AIDS amongst these communities.

The current Government has embarked on alternative policies for the community-driven development of arid and semi-arid lands, affirmative action policies within the framework of the poverty reduction strategy and the free universal primary education programme. If successful, these policies should be able to redress historical injustices and improve the overall situation of indigenous communities.

The violence associated with social and ethnic conflicts of various kinds and the lack of transitional justice and redress have also impacted on the human rights of indigenous communities.

The Special Rapporteur concludes his report by making a number of recommendations intended to contribute to the improvement of the human rights situation of the indigenous peoples in the country.

Annex

**REPORT OF THE SPECIAL RAPPORTEUR ON THE SITUATION OF
HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS OF INDIGENOUS
PEOPLE, RODOLFO STAVENTHAGEN, ON HIS MISSION TO KENYA
(4-14 DECEMBER 2006)**

CONTENTS

	<i>Paragraphs</i>	<i>Page</i>
I. INTRODUCTION	1 - 7	5
II. INDIGENOUS PEOPLES IN KENYA	8 - 12	6
III. LEGAL AND POLITICAL CONTEXT	13 - 20	7
IV. MAJOR ISSUES AFFECTING THE RIGHTS OF INDIGENOUS PEOPLES IN KENYA	21 - 81	8
A. Legal recognition and political participation	21 - 24	8
B. Land and resource rights: the pastoralists	25 - 35	9
C. Hunter-gatherers and forest peoples	36 - 41	11
D. Environmental rights	42 - 47	13
E. Conservation versus livelihood	48 - 54	14
F. Access to justice and impunity	55 - 64	15
G. Poverty, inequality and access to social services	65 - 77	17
H. The rights of indigenous women	78 - 81	19
V. CONCLUSIONS	82 - 89	20
VI. RECOMMENDATIONS	90 - 132	21
A. Recommendations to the Government	91 - 119	21
B. Recommendations to the Kenya National Commission on Human Rights	120 - 121	25

CONTENTS (*continued*)

	<i>Paragraphs</i>	<i>Page</i>
C. Recommendations to indigenous communities and organizations	122 - 124	25
D. Recommendations to civil society and political parties	125 - 127	25
E. Recommendations to the international community	128 - 130	26
F. Recommendations to the academic community and the media	131 - 132	26

I. INTRODUCTION

1. Pursuant to Commission on Human Rights resolution 2001/57 of 24 April 2001, which established his mandate, and at the invitation of the Government, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people visited Kenya from 4 to 14 December 2006.
2. The purpose of this visit was to better understand the situation of indigenous peoples in Kenya, to learn about policies and practices designed to promote and protect their rights, and to dialogue with government officials at the national and local levels, representatives of indigenous peoples' communities and organizations, development partners and other actors on ways to strengthen the responses to the demands and needs of indigenous peoples.
3. The Special Rapporteur travelled to Nairobi, Kitengela, Narok, Nakuru, Baringo, Mount Elgon, Laikipia, Wajir, Garissa, Marsabit and several rural areas around the country. In Nairobi, he met with the Permanent Secretary in the Ministry of Justice and Constitutional Affairs, the Permanent Secretary in the Ministry of Lands, the Permanent Secretary in the Ministry of Education, the Director of the Kenya Wildlife Service, as well as with high officials in the Ministry of Health and the President's Office of Special Programmes. He also met with the Kenya National Commission on Human Rights (KNCHR) and with Members of Parliament of the Pastoralist Parliamentary Group. In the various provinces he met with the Deputy Provincial Commissioner of the Rift Valley Province, the District Commissioners of Laikipia, Marsabit, Narok, and the Mayor of Garissa.
4. The Special Rapporteur met with the United Nations Resident Coordinator and country team representatives, and held conversations with international agencies including the International Labour Organization (ILO), the Food and Agriculture Organization of the United Nations (FAO), the United Nations Development Programme (UNDP), the United Nations Environment Programme (UNEP), the United Nations Children's Fund (UNICEF), the United Nations Office on Drugs and Crime (UNODC), the United Nations Human Settlements Programme (UN-Habitat), the United Nations Population Fund (UNFPA) and the World Health Organization (WHO), as well as with donor organizations and non-governmental organizations (NGOs).
5. The Special Rapporteur conducted on-site visits to numerous indigenous pastoralist and hunter-gatherer communities in Narok, Laikipia, Mau Forest, Mount Elgon, Lake Baringo, Cherangany Hills and Wajir. He also held meetings with indigenous representatives of the Awer, Boni, Borana, Burgi, Elmolo, Endorois, Ilchamus, Gaaljecel, Gabra, Maasai, Malakote, Munyayaya, Ogiek, Orma, Pokot, Rendille, Sabaot, Sakuye, Samburu, Sengwer, Somali, Talai, Turkana, Watta, Munyayaya and Yakuu. He met with members of other minority communities, such as the Nubians, and with groups of refugees. He also visited the Maasai Mara National Park and the Lake Baringo Game Reserve, where he assessed the impact of protected areas on local indigenous peoples.
6. During his visit, the Special Rapporteur participated in the National Seminar on Indigenous Issues, organized by the Office of the High Commissioner for Human Rights (OHCHR) and UNDP in Nairobi, on 5 and 6 December 2006.

7. The Special Rapporteur would like to acknowledge the hospitality of the Government of Kenya, and especially thank the Ministry of Justice and Constitutional Affairs for its invitation and cooperation, and KNCHR, UNIPACK (United Nations Indigenous Peoples' Advisory Committee - Kenya) and the indigenous peoples' steering committee for the preparation of the visit. He also wishes to thank the many indigenous communities and organizations that gave their time and provided useful information for this report, including Arid Lands Institute, Center for Minority Rights Development (CEMIRIDE), Enderois Development Council, International Movement for Peace Advancement and Conflict Transformation (IMPACT), Maa Civil Society Forum, Ogiek Welfare Development Council, Pastoralist Integrated Development Organization (MPIDO), Sengwer Culture and Information Centre, Truth to be Told Network, and Womankind. UNDP-Kenya deserves a special mention for its invaluable support of the mission at all stages.

II. INDIGENOUS PEOPLES IN KENYA

8. In Kenya all Africans are indigenous to the country, as many Kenyans are inclined to point out to the Special Rapporteur. This is of course true, given that most Africans living in contemporary Kenya are descendants of the original inhabitants, and because in colonial times all Africans, of whatever tribe or ethnic affiliation, were considered as "natives" by the authorities, sharing the same history of colonial subjugation and racial discrimination. At independence all natives became free and equal citizens of the new State. Moreover, due to geographic conditions and historical circumstances, social and cultural distinctions became defining characteristics that differentiated among the many tribes that populate the country. The majority ethnic groups which became integrated into the farming economy occupied the more fertile areas and after independence they regained much of the land which they had lost to the colonial regime.

9. As in some other African countries (see the Special Rapporteur's report on his mission to South Africa, E/CN.4/2006/78/Add.2, paras. 20-32), the contested use of the term "indigenous" in Kenya has implications for policy decisions and therefore for the human rights of the concerned populations. From a human rights perspective, the question is not "who came first" but the shared experiences of dispossession and marginalization. The term "indigenous" is not intended to create a special class of citizens, but rather to address historical and present-day injustices and inequalities. It is in this sense that the term has been applied in the African context by the Working Group on Indigenous Populations/Communities of the African Commission on Human and Peoples' Rights (ACHPR).

10. Within this perspective, pastoralists and hunter-gatherers are normally regarded as indigenous peoples in the international context, and they increasingly come to identify themselves as such in many countries, including in Africa. In Kenya they include pastoralist communities such as the Endorois, Borana, Gabra, Maasai, Pokot, Samburu, Turkana, and Somali, and hunter-gatherer communities whose livelihoods remain connected to the forest, such as the Awer (Boni), Ogiek, Sengwer, or Yaaku. Other groups such as the Nubians consider themselves as a minority that has also been marginalized, but in an urban context. They and other minority groups share demands to end discrimination and exclusion with indigenous peoples in Kenya. The Kenya Government normally refers to indigenous and minority groups jointly as "minorities", "marginalized" or "vulnerable communities".

11. Government authorities and specialists recognize that historically the pastoralist and hunter-gatherer communities in the arid and semi-arid lands and forests were systematically marginalized on the basis of their economic, social and cultural characteristics, inextricably connected to the use of land and natural resources. One government report states that over the years policies directed at these communities were mainly top-down and discriminatory, and they often failed by marginalizing and impoverishing people in arid and semi-arid lands.

12. Indigenous peoples in Kenya have established numerous civil society organizations that are actively involved in promoting human rights, development issues and environmental concerns. Since the transition to a more democratic political regime in 2002, the visibility and public recognition of these organizations has grown, and a number of their leaders and members now cooperate closely with several government institutions.

III. LEGAL AND POLITICAL CONTEXT

13. Whilst Kenya has ratified most international human rights treaties and conventions, it has not ratified ILO Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries, and it has withheld its approval of the United Nations Declaration on the Rights of Indigenous Peoples at the current session of the General Assembly. The Government of Kenya has recently decided to update its reports to the various United Nations human rights committees, some of which are long overdue.

14. Kenya's independence from British rule in 1963 brought about the Africanization of the economy and the public services. The continuation of previous colonial policies, as well as the co-optation of the State apparatus by majority ethnic communities under a one-party system, led to increased tribalism in the distribution of political power, government jobs and wealth, and the widening gulf between rich and poor. This tendency increased during the Government of President Moi, during which numerous ethnic clashes occurred and human rights were severely curtailed.

15. The new Government, elected by a large majority in December 2002, enabled a democratic opening that allowed many pent-up grievances out into the open, including the long-standing demands by indigenous and other ethnic minorities for human rights and the emergence of a vibrant and articulate civil society. The new Government promoted legal reform and the consolidation of institutions of democratic governance, including a constitutional review process, and special inquiries into corruption, land mismanagement and historical injustices.

16. Most indigenous peoples in Kenya live in the arid and semi-arid lands (ASALs) which make up more than 80 per cent of the land mass and are home to more than 25 per cent of the national population, and include almost the majority of wildlife parks and reserves and protected forests. ASAL areas are predominantly pastoralist and agro-pastoralist, mainly suitable for livestock grazing due to low and erratic rainfall. These areas present the highest incidences of poverty and the lowest level of access to basic services in the country. Over 60 per cent of the population lives below the poverty line, which is above the average of 50 per cent nationwide.

17. Pastoralism was for a long time neglected and held in disrepute by the country's economic planners and political elites. Policies aimed at revitalizing ASALs since independence promoted sedentarization and crop farming, failing to take into account pastoralism as a

sustainable form of land use adapted to the environment. Deforestation and poor land use have further increased environmental degradation, making the land more vulnerable to cyclical droughts and floods.

18. The Constitution of Kenya incorporates the principle of non-discrimination and guarantees civil and political rights, but fails to recognize economic, social and cultural rights as such, as well as group rights. The rights of indigenous pastoralist and hunter-gatherer communities are not recognized as such in Kenya's constitutional and legal framework, and no policies or governmental institutions deal directly with indigenous issues. However, in recent years the specific situation and needs of these communities have started to be addressed, as reflected in current discussions on the ASAL and national land policies, and there seems to be growing consensus on the need for affirmative action towards these communities.

19. The specific needs and rights of pastoralists and hunter-gatherers were also taken into account in the constitutional review process that started in 2003. After countrywide consultations that included indigenous organizations, the first draft of a new constitution (the "Bomas draft") included the decentralization of power and group rights, a section on "Minorities and marginalized groups", and a system of affirmative action in employment, economic development, and political representation. It also called for the equal redistribution of lands and resources, and for the redress of historical injustices. A new revised draft prepared by Parliament (the "Wako draft") was overwhelmingly defeated in a referendum in 2005, partly because it failed to address outstanding land issues and the decentralization of power. Since then, the process of constitutional reform remains at a stalemate.

20. The Special Rapporteur is encouraged by the fact that KNCHR and the Ministry of Justice and Constitutional Affairs have begun to consider the promotion and protection of pastoralists and hunter-gatherers in Kenya as part of their activities. It is also encouraging that indigenous issues are being considered as cross-cutting issues in the process of formulation of a National Action Plan and Policy on Human Rights being spearheaded by these two institutions. Various official development initiatives, including the Poverty Reduction Strategy Paper (PRSP), the ASAL Resource Management Project and the draft National Policy for the Sustainable Development of the ASALs, take into account the special characteristics of pastoralism. Similarly, the new land policy currently under discussion refers explicitly to "the rights of minority communities", a concept that covers groups such as hunter-gatherers, forest peoples and pastoralists.

IV. MAJOR ISSUES AFFECTING THE RIGHTS OF INDIGENOUS PEOPLES IN KENYA

A. Legal recognition and political participation

21. The 1989 national census lists 42 tribes in Kenya, but omits many smaller pastoralist and hunter-gatherer communities, such as the Ogiek, El Molo, Watta, Munyayaya, Yakuu, and other small groups such as the Sabaot and Terik, who are not legally recognized as separate tribes. This situation is derived from the colonial policy of promoting assimilation of smaller communities into other dominant groups. Affected tribes claim that the lack of a separate code in official documents identifying them as distinct ethnic groups reduces their visibility in

national policymaking. Many communities from the north, such as the Awer, Galjaeel, Somali, and Oromo, are also prevented from enjoying full citizen rights as a result of the lack of proper identity cards.

22. The existing political system divides many communities such as the Endorois or Sengwer into different administrative and electoral units. This diminishes their effective representation in the Parliament and participation in local decision-making, as they may not have the numbers to vote for leaders from their communities through elective processes. Political parties, according to their numerical strength in Parliament, are vested with the constitutional power to appoint 12 “nominated members” of Parliament to represent “special interests”, which may include marginalized communities. There is also the legal possibility of changing the boundaries of existing constituencies, taking into account the “representation of ... sparsely populated rural areas”, and their “community of interest”. But these safeguards have not yet been fully implemented in favour of smaller indigenous communities.

23. Numerous indigenous communities complain that their needs are not being met and that their rights are not being adequately protected because, being numerically small, they do not have sufficient political representation at the national or provincial levels to make a difference. One such case was presented to the Special Rapporteur by the Ilchamus indigenous community of Baringo who represent 17 per cent of the local constituency and rely mainly on livestock for their subsistence. The community feels marginalized by the dominant groups in the district who do not represent their interests at the political level, and brought suit before the High Court alleging violation of their right to political participation. In a landmark judgement, issued shortly after the Special Rapporteur visited the country, the High Court directed the Electoral Commission of Kenya to supervise the appointment of nominated MPs to ensure compliance with the Constitution, and to take into account the Ilchamus community’s interests in the next boundary review.

24. The main effect of political marginalization is the unequal lack of access to development resources and government employment. This is particularly serious with relation to the Constituency Development Funds (CDF). Since 2003, 2.5 per cent of the government revenues are allocated every year to each constituency through this fund, but it is difficult for smaller communities who are not represented by an MP to have equal access to development resources and social services.

B. Land and resource rights: the pastoralists

25. Most of the human rights violations experienced by pastoralists and hunter-gatherers in Kenya are related to their access to and control over land and natural resources. The land question is one of the most pressing issues on the public agenda. Historical injustices derived from colonial times, linked to conflicting laws and lack of clear policies, mismanagement and land grabbing, have led to the present crisis of the country’s land tenure system.

26. The 2002 report of the Presidential Commission of Inquiry into the Land Law System of Kenya (“Njonjo report”), the 2004 report of the Presidential Commission into the Irregular-Illegal Allocation of Public Land (“Ndungu report”), and the draft National Land Policy include specific provisions concerning land reform, and so do the two constitutional drafts under discussion.

27. During the first half of the twentieth century, colonial authorities and European settlers seized the richest agricultural areas, while the original owners were displaced towards “native reserves” on far poorer land or remained as landless workers. After independence, the fertile agricultural lands of the “White Highlands” were bought back by the Government of Kenya, but they were not, contrary to early promises, returned to their original owners (among them the Maasai communities in the Rift Valley). The unequal distribution of land fostered a sense of relative injustice, and has created conflict over the years between farmers and pastoralists.

28. Most of the abuses after independence took place in Trust Lands, including former native reserves. The Constitution vests the administration of these lands in the County Councils, which acted “in total breach of trust as custodians of land on behalf of local residents” through the irregular adjudication of vast areas in favour of powerful individuals and settlers from other communities, and the establishment of protected areas (Ndungu report, p. 81). The prevailing theory of the sanctity of the title, whereby first registration of land title cannot be challenged in court regardless of fraud or mistake, further sanctioned these abuses. Displacement of original inhabitants has been widespread in the Rift Valley and Kajiado District, and most pastoralist grazing lands in the north and north-eastern regions face similar threats.

29. Since the end of the 1960s, and supported by the World Bank, the Government has promoted the transformation of Trust Lands into group ranches and then individual ownership, thus limiting the land available for traditional mobile grazing. Based on the idea that individual titles, through a “willing buyer-willing seller” approach, would improve the prospects for investment and economic growth, this policy in fact encouraged land grabbing and the massive sale of pastoralist land, particularly in areas neighbouring urban centres.

30. Loss of land through colonization, nationalization and privatization can be illustrated with the example of the Maasai, whose grazing areas were split by a colonial frontier installed between Kenya and Uganda at the end of the nineteenth century. It is estimated that the Maasai lost one third of their territory through coercive treaties in 1904 and 1911 imposed by the colonial regime, and were allowed to retain only small amounts of marginal land in the Kenyan districts of Narok and Kajiado. In Laikipia District, 75 per cent of the land still remains in hands of European owners. The Special Rapporteur personally observed traditional rangelands which were being fenced off, thus restricting the seasonal movements of the livestock herds of the nomadic pastoralist communities, as well as constricting the natural ecosystems of the wildlife, including important migratory routes.

31. After independence in 1963, the formerly closed Maasai districts were opened to immigration from other ethnic groups, based on the false assumption that large areas utilized by the Maasai for seasonal grazing were “idle land”. The Ndungu report documents the faulty adjudication of the Iloodo-Ariak in Kajiado District to hundreds of government officials and their relatives. Though they were not local residents, they were issued title deeds, while “many rightful inhabitants of the area were ... disinherited from their ancestral land” (ibid., p. 141). It is estimated that the Maasai lost another third of their lands in Narok and Kajiado Districts as a result of these processes. In Kajiado alone, 50 per cent of Maasai households did not have land in 1997, as compared to around 8 per cent in the 1980s.

32. On the Athi-Kapti plains, a traditional wildlife dispersal and pastoralist grazing area, the local Ilkaputiei Maasai, who fear the loss of their traditional livelihood, are opposed to the Jamii Bora Trust, an urban housing project for the resettlement of an estimated 30,000 slum dwellers from nearby Nairobi, that receives international financing. The Special Rapporteur, who visited the proposed site, was informed that the project has been challenged in the courts.

33. The Sabaot of the Mt. Elgon area were displaced by the British and are still waiting for compensation and resettlement under the post-independence agreements between the Governments of the United Kingdom and Kenya. They provided the Special Rapporteur with copies of the plea for reparations, restitution and compensation which they presented to these Governments, but they have yet to receive satisfaction.

34. Also in Trans-Nzoia and West-Pokot, the semi-nomadic Pokot people are claiming compensation for similar violations of their right to land. Many of the claims briefly outlined in this report were presented, fully documented, to the Constitution Review Commission of Kenya in 2002 but have yet to be acted upon. One specialist notes: "For decades, the communities quarrelled over the resources and longed for a day when they would gain access once more to their historical land ... But whereas some ethnic communities benefited from some settlement arrangement, there was no effort made to include Pokot, Sabaot or Sengwer ..."

35. A century of dispossession has left a balance of increased landlessness, insecurity, ecological degradation and resentment among indigenous communities. Virtually all the communities interviewed by the Special Rapporteur shared a similar demand for restitution and reparation. The Ndungu Commission on land grabbing suggested the establishment of a Land Titles Tribunal responsible for revocation and rectification of irregular titles. It considers that "land crimes" are as much a part of Kenya's past wrongdoings as economic crimes and human rights crimes, which constitute the country's transitional justice agenda. The draft National Land Policy promotes the creation of a National Land Commission with powers to investigate land disputes and alleged injustices. However, no functioning mechanism is currently in place and, in the absence of legal safeguards, indigenous peoples continue to be at risk of further violations of their land and resource rights.

C. Hunter-gatherers and forest peoples

36. Settlement schemes, logging and charcoal production have put a severe strain on Kenya's rich and varied forests, and have resulted in the loss of the traditional habitat of Kenya's forest peoples, the indigenous hunter-gatherers such as the Awer (Boni), Ogiek, Sengwer, Watta, and Yaaku. While existing laws are oriented to the protection of wildlife and forest resources, many of these communities can no longer live by their traditional livelihoods, and their cultures and language are rapidly vanishing as a result; illegal logging has played a major role in this as well.

37. The way of life of the Ogiek is well adapted to the Mau Forest environment where they have lived for centuries. Numbering about 20,000 countrywide, they have been dispersed and assimilated in recent decades, and dispossessed of their traditional source of livelihood. When the Mau Forest was gazetted as a National Forest in 1974, the Ogiek were evicted from their traditional habitat without prior consultation or compensation, in violation of their basic human rights. They were henceforth prevented from hunting or collecting bee honey for survival in the

forest, and were reduced to a miserable subsistence on the margins of this area rich in plants and wildlife. On the other hand, illegal logging, the introduction of exotic plantations and the excision of parts of the forest for private development by outside settlers have endangered the Mau Forest as a water catchment area, as well as the country's environmental security. The Special Rapporteur on adequate housing, Miloon Kothari, signalled in his report on his mission to Kenya that the destruction of the forest has affected the rights of the Ogiek to housing, health, food and a safe environment, threatening to further destroy their cultural identity and the community as a whole (see E/CN.4/2005/48/Add.2, para. 61).

38. Despite a court injunction in their favour in 1997, the Government has proceeded to alienate Ogiek forest land, and a recent court decision does not recognize the Ogiek's ancestral title to the forest. Still, the Government has distributed title deeds to land to several thousand Ogiek, and some non-Ogiek outsiders have tried to enrol as Ogieks in the hope that they may eventually also be given title deeds. The unresolved conflict between the Ogiek and their neighbours continues to this day. Being considered as squatters on their own land and legally banned from using the forest resources for their livelihood, their attempt to survive according to their traditional lifestyle and culture has often been criminalized and their repeated recourse to the courts has not been successful. Ogiek attribute this vulnerability to the fact that they are not recognized as a distinct tribe and therefore lack political representation. The Special Rapporteur met with members of several Ogiek villages, listened to their grievances and heard their demands for the recognition of their right to land and to maintain their traditional lifestyle in the forest.

39. A similar problem besets the Sengwer of the Cherangany Hills and Kapolet Forest in Trans Nzoia, Marakwet and West Pokot Districts, numbering around 30,000, who have not only been denied access to their traditional hunting and gathering grounds, now converted into a game park, but also their tribal identity. During colonial times the Sengwer were forced to assimilate into larger tribes; they were dispersed from their ancestral territory and expected to take up cattle raising and crop planting. The dispossession of their land continued in the post-colonial period, and like numerous other communities they have over time become victims of cattle rustling. The Special Rapporteur met with the Sengwer community and was informed that their situation may become more complicated by the project to construct a dam on the Kapolet River about which they claim they were not consulted and which may result in further evictions. Nowadays, they not only demand a solution to the land issue, but also claim formal recognition as a separate tribe and adequate political representation in their own district so that their requirements may be attended to by the government authorities, including compensation and consideration in relation to the construction of the dam system.

40. The Watta, a hunter-gatherer population who live dispersed among other groups near Marsabit, Isiolo, the Tana River and Voi, in the precincts of the Tsavo National Park, face similar threats to their livelihood. Not having received licences to hunt for their subsistence, they were considered illegal poachers, committing an offence punishable by law and treated as criminals when they attempted to survive. The El Molo, who practise a subsistence economy of fishing and herding on the eastern shore of Lake Turkana, are threatened by the continuous influx of settlers. They have appealed to the Government to allocate a title deed for the stretch of land between Sarama and Moite (a sacred mountain) to ensure their livelihood and the

sustainability of their community. They also demand to be granted an annual licence for the hippo hunt, which is a rite of passage in the lives of young males and a big cultural event for the whole community.

41. These and other hunter-gatherer communities constitute the most marginalized communities in Kenya, and require urgent government attention to guarantee their enjoyment of basic human rights. The Government is currently developing an Indigenous Planning Framework for the Western Kenya Community-Driven Development and Flood Mitigation Project and the Natural Resource Management Project “to improve social welfare, enhance living standards and promote the sustainable use of water, land, forests and other natural resources through support of small-scale initiatives among the Ogiek and Sengwer. The purpose of the Framework is to ensure that the development process fully respects the dignity, human rights, economies, and culture of indigenous peoples” (Office of the President, draft, December 2006).

D. Environmental rights

42. Indigenous peoples’ reliance on natural resources and their disproportionate poverty make them more vulnerable to the effects of environmental threats such as cyclical droughts and floods, deforestation, soil erosion and pollution, which turn into major human rights concerns. One of the most pressing issues faced by nomadic pastoralists is access to water in ASALs, which is exacerbated by recurrent drought and inadequate government responses as well as the privatization of water points.

43. The El Molo and Turkana, who depend on Lake Turkana for their subsistence, have witnessed the rapid drying out of the lake as a result of prolonged drought and the damming of the tributary rivers, leading to the depletion of fish and increasing intercommunal conflicts. Similarly, the West Borana, dependent on the Wuaso Ngiro River, suffer the effects of the diminishing volume and pollution of the river due to over-abstractions for agriculture upstream.

44. The Munyayaya are affected by the construction of seven hydroelectric dams along the Tana River. Their farms, houses and animals are washed away as a result of the electrical company’s release of water from the dams, caused by heavy rains that rapidly increase the volumes of the water in the dams, forcing them to relocate during some periods. Similar mega-development projects threaten the livelihood of pastoralist communities, such as the Turkwel Hydroelectric project in Turkana District and the proposed Tana Delta sugar project.

45. Gem mining in the Endorois’ traditional lands around Lake Turkana has polluted the river Sandai, on which they depend for their subsistence. Similarly, the Maasai of Laikipia denounce the environmental degradation caused by the extracting of soda from the Magadi deposits, and demand participation and an equal share of the benefits. Flower farms across the Maasai landscape severely limit access to necessities like water, grass and saltlicks, especially those erected around the shores of Lake Naivasha. Dumping of toxic waste has also been denounced in Wajir and Marsabit, owing to the adverse effects this has on pastoralist grazing areas.

46. According to the information received by the Special Rapporteur in the early 1980s in a joint initiative by the Government and FAO to reduce desertification the prosopis plant (*Prosopis juliflora*) was introduced in the Marigat area, homeland of the Il Chamus. A thorny vegetation, the invasive plant rapidly colonized the area and destroyed native flora, causing harm to humans, as well as emaciation and death of livestock. The community, which was visited by the Special Rapporteur, claims to have found no support in addressing the devastating consequences of the wrong policy and filed a lawsuit in 2006 demanding reparation.

47. Pastoralists' lives have also been affected by the consequences of the establishment in the past and at present of military bases and training camps in pastoralist areas like Isiolo, Garissa, Laikipia, Samburu, Turkana and Wajir. Unexploded ordnance left behind after military exercises in pastoralist areas have produced numerous victims among local communities, who complain that they have not received any compensation for their losses and that nobody has assumed responsibility for cleaning up the contaminated lands.

E. Conservation versus livelihood

48. Kenya is widely admired in the world for its national parks and game reserves, which have become a major tourist attraction and therefore important for the national economy. It is estimated that direct and indirect revenues from wildlife conservationist policies amount to 10 per cent of GDP. Protected areas cover over 3.5 million hectares, or 6 per cent of Kenya's total land area. The conservation of wildlife and the preservation of natural parks are considered high priority for the country, and this has involved separating indigenous people from the wildlife and the forests. Many families were evicted by the creation of protected areas, most of which were originally inhabited by pastoralists and hunter-gatherers.

49. The Endorois community has lived for centuries in their traditional territory around Lake Bogoria, which was declared a wildlife sanctuary in 1973. Since then, the community has been pushed to live in the higher lands, a rocky terrain providing insufficient pasture for their animals. The community brought suit against the Government, seeking return to their lands and participation in the benefits derived from the reserve. Failing to obtain redress at the national level, they brought the case before ACHPR in 2003.

50. On the mistaken assumption, held since colonial times, that subsistence hunting by indigenous communities was decimating wildlife, the Wildlife Conservation Act interdicts game hunting inside and outside the protected areas. Those who persist are often arrested and prosecuted as poachers, and in some areas "eco-guards" were armed and actually killed poachers to prevent illegal hunting. Despite centuries of coexistence with wildlife, nomadic pastoralists are not allowed to herd their cattle in the reserves even in game reserves which are managed by the local authorities on behalf of the local communities. In the context of rising human population and escalating poverty, the restrictions imposed on the utilization of national parks and game reserves by pastoralists have severely affected their livelihoods and their chances for survival.

51. Wildlife conservation also has had direct negative impacts on neighbouring communities. The Maasai living close to Amboseli and Maasai Mara denounce the killing and injury of many

of their members and herds as a result of attacks by wild animals, as well as the destruction of their crops. Victims of these episodes claim that they have been insufficiently compensated, if at all.

52. The growth of the tourist industry in connection with the establishment of protected natural areas has created additional problems for these communities. In Maasai Mara the construction of a private tourist resort reportedly associated with top government officials has involved fencing off an area traditionally belonging to the Sekenani village, leading to the loss of access to one of the only three sources of water for everyday human and cattle consumption. Local communities of Endorois similarly claim that the privately owned Laikipia Natural Conservancy Trust severely curtailed their livestock grazing, and access to water sources in the area is only allowed once a week.

53. Local indigenous communities do not participate in the management of the parks and reserves and do not benefit from the revenue, which either accrues to the Kenya Wildlife Service in the case of national parks, or to the local district in the case of national reserves. An exception in this regard is the Maasai Mara, where 19 per cent of the revenue is said to be invested in favour of the local Maasai communities. However, local villagers claim that they do not see the benefit, and 60 per cent of the district remains in poverty.

54. The revision of the Kenyan Wildlife Policy in 2003, adoption of which is still pending, was halted under pressure from indigenous communities. A better practice, from the human rights and ecological perspectives, would be to involve the pastoralist and forest communities in the management and benefits of a conservationist strategy. Thus, wildlife and parks would be preserved, tourist dollars would be obtained, and the livelihood of the local populations would be protected and strengthened. Throughout Kenya's recent history, it would appear that wild animals are protected, while people are not.

F. Access to justice and impunity

55. Historical injustices and marginalization, increased pressure on lands and resources, political manipulation and cross-border dynamics have given rise to a deteriorating security situation and recurrent inter-ethnic conflicts. Episodes of violence in the north, the Rift Valley and coastal areas reached a peak during the 1990s and in 2004-2005, resulting in widespread human rights violations. Communities claim that the Government's response to these situations has been inadequate, and that in many instances it has led to human rights abuses by security forces. 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.

56. The North Eastern Province is one the most marginalized areas of Kenya. It has a long history of conflict dating from the European "scramble for Africa", and still suffers the tragic consequences of the short-lived "Shifita war" between the Government and the Somali secessionists after independence. The region became practically a police State during the following decades, and the application of emergency laws led to gross violations of human rights. While much of this legislation has since been repealed, the consequences of discrimination (such as the issuing of "screening" cards) against Somali Kenyans still lingers.

57. Cattle rustling, banditry and cross-border insurgency have led to hundreds of deaths, thousands of internally displaced persons and a flourishing trade in small arms. Near the Ethiopian border, the Gabra have suffered cross-border attacks by cattle rustlers linked to armed groups that have caused many victims, and they feel themselves to be neglected by government authorities. The neighbouring Burji, as well as the Munyayaya and the Orma in Garissa, presented the Special Rapporteur with similar complaints. One report states that in northern Kenya insecurity has risen, to rank alongside drought as the principal cause of human misery.

58. A comparative analysis of conflicts in Turkana, Marsabit, Garissa and Tana River highlights the high economic, social and cultural costs of these conflicts and the need to invest resources in conflict resolution at the local level. In Wajir, among other instances, a local peace initiative is said to have produced promising results. The long-term solution to these complex conflicts does not consist so much in applying straightforward “law and order” mechanisms, as some officials in the capital seem to believe, but in local peace initiatives with community participation. The final costs will be much lower and the results more long-lasting.

59. Over the years, a number of massacres of unarmed civilians have occurred in the context of enduring ethnic conflicts, like those at Malka-Mari (1981), Garissa (1982), or Turbi (2005). The 1984 Wagalla massacre in Wajir stands as the worst episode of human rights violations in Kenyan history. In the course of three days, security forces detained, tortured and brutally killed many hundreds of Degodia Somali. While the Government recently acknowledged the loss of 360 lives, other sources interviewed by the Special Rapporteur estimate that there were 2,000-3,000 victims. Many of the survivors still suffer physical and psychological consequences, and the widows and orphans have found no support. The true facts have never been established, and none of the alleged perpetrators has been prosecuted.

60. Besides cases of mass killings, there have been countless reports of arbitrary detention, police harassment, and incidents of torture and rape suffered by local residents as a result of the punitive application of security measures. The Special Rapporteur on the question of torture found in 2000 that those acts were widespread in the northern regions as a “form of communal punishment” (E/CN.4/2000/9/Add.4, para. 16). Many police abuses have been reported in relation to social protests associated with land rights claims, and vocal community members have been ill-treated and arrested. In Laikipia, in 2004, Maasai protesters marking the expiration of leases under the 1904 treaty with the British were severely repressed, resulting in the killing of an elder and serious injury to four people. Rape of women and looting in local villages were reported as a result of the security operation that ensued.

61. A number of organizations active in promoting land reform and denouncing abuses against indigenous communities, including the Kenya Land Alliance, Osiligi in Laikipia and MPIDO, have allegedly been the object of systematic harassment and intimidation by the authorities, and donors to those organizations have reportedly been pressured to discontinue funding. In 2005, the director and two other staff members of MS Kenya, a branch of the Danish Association for International Cooperation that supports the promotion of land rights, were accused of “subversive activities”.

62. Exercising the liberties promised by the new Government, people now seek redress for past injustices. In many of the land rights cases involving human rights violations, the

communities concerned still await responses to their numerous complaints to authorities at all levels. This typical lack of response, linked to high levels of public corruption, has led to widespread distrust of government authorities.

63. The issue of redress for past human rights violations led to the creation of a presidential Task Force on the Establishment of a Truth, Justice and Reconciliation Commission (the “Mutua Commission”), which concluded that “[t]he post-colonial state has engaged in the most abominable human rights violations ... known to humanity” (p. 9), and recommended the establishment of a truth commission to inquire into those episodes and to seek redress for the victims. These views have been fully endorsed by KNCHR, which reports that “[p]olitically instigated ethnic clashes have, in the 1990’s, resulted in massive human rights violations such as the death of thousands of people and injury to many more, the destruction of property worth billions of shillings, and the traumatizing of the immediate victims and their relatives” (KNCHR, Strategic Plan 2004-2009). The Government has so far failed to establish a transitional justice mechanism, which has been seen as a major failure in its democratization efforts.

64. With the exception of Kadhis (Islamic) courts, there is only a limited recognition of traditional or customary justice systems in Kenya. National courts may apply customary law only in civil matters in which one of the parties is subject to customary law and “as long as it is not repugnant to natural justice”. There is an increasing demand for the right of communities to be represented in court that is not yet addressed.

G. Poverty, inequality and access to social services

65. The *Kenya UNDP Human Development Report 2001* indicates that the Human Development Index declined from 0.531 in 1990 to 0.514 in 1999, as reflected in the fall in life expectancy, per capita income and school enrolment and the rise in infant mortality and disease incidence. A major concern is the recent increase in poverty in the country, from 26 per cent in 1997 to 35 per cent in 2001. Another source estimates this rate at 57 per cent in 2005. Inequality is on the rise in Kenya, and the top 10 per cent of households control 42 per cent of the total income while the bottom 10 per cent of households control less than 1 per cent. The overall development situation is also characterized by regional, rural-urban, gender and social class inequalities. Due to their historical marginalization and social exclusion, pastoralist, hunter-gatherer and other minority communities consistently show higher poverty rates and lower levels of social and human development than the rest of the population.

66. The *Human Development Report* does not provide disaggregated data about indigenous people, but regional differences provide significant indicators. A large gap exists between the north and the rest of the country. In Garissa District alone, the poverty incidence is 64 per cent and in Marsabit the majority of the population relies on humanitarian relief. Together with the North Eastern Province, the poorest districts in the country are found in Coast, Eastern and Rift Valley Provinces, all ASAL areas that are home to the majority of pastoralists and hunter-gatherers. The Economic Recovery Strategy for 2003-2007 (ERS) defines the situation in the ASALs as one of “rampant poverty” (p. 45).

67. Community representatives interviewed by the Special Rapporteur outlined as causes of indigenous peoples’ poverty the unequal distribution of land and the lack of access to productive

resources; the lack of access to and distribution of social services; ineffective development programmes; and the lack of basic infrastructure and marketing opportunities. The reactivation of the Kenyan Meat Commission has been welcomed by pastoralist communities, who also underlined that it should be made functional in all pastoralist areas.

68. Both the Economic Recovery Strategy and the Poverty Reduction Strategy include specific lines of action to improve equality and reduce poverty in ASAL areas that have a direct bearing on indigenous communities. Government development efforts in these areas are now focused on the ASAL Management Project, financed by the World Bank, which includes a community-based drought early warning system and support for development initiatives at the local level. The project has played a major role in the formulation of the Government's draft ASAL policy, which sets out a comprehensive plan to support pastoralism in these areas through water provision, grazing, rangeland management, animal health and marketing. The policy is, however, still subject to adoption by the Parliament.

69. To implement the Millennium Development Goals, to which it has subscribed, Kenya has launched the Free Universal Primary Education programme. The authorities recognize, however, that the programme has not yet reached all school-age children, especially in the geographically isolated arid and semi-arid lands, given their specific educational needs. Due to disproportionate poverty, families struggle to provide their children with school uniforms, transportation and school supplies. In some areas, children have to walk many kilometres every day to reach a school. Access to education in pastoralist areas is a serious human rights issue, as reflected in low literacy rates. An estimated 1.7 million children remain out of school, the majority of them living in marginalized pastoralist communities. The literacy level for Maasai in Kajiado and Somali in Mandera is only 3 per cent compared with a national average of 79.3 per cent. According to the *Human Development Report*, enrolment rates in North Eastern Province were especially low: only 9.8 per cent for primary school and 4.8 per cent for secondary school.

70. To face the difficulties of providing primary school education to semi-nomadic pastoralist families, some attempts have been made to establish boarding schools and mobile schools that accompany the nomadic families. Both initiatives have their problems. When children attend boarding schools, they cannot help their families with herding the livestock and other chores. Thus families are reluctant to send their children to boarding schools. Girls are especially disadvantaged when cultural constraints such as early marriages prevent them from being able to attend school. Mobile schools require not only committed teachers willing to endure hardship but also support mechanisms that are not easily provided.

71. Whilst universal primary school education may be attainable within a reasonable time frame, access to secondary schooling is more complicated and costly. Many of the communities that the Special Rapporteur visited complained that secondary schooling was out of their reach. Only a select few from pastoralist and hunter-gatherer communities can make it through secondary school, and even fewer manage to achieve a university-level education.

72. There are a number of reasons for this decline of educational achievement over the last years. There has been a reduction of government spending on educational infrastructure and materials; additionally, remote pastoralist areas lack schools and qualified teachers. Moreover, the school curricula are mostly irrelevant for the needs of pastoralists and hunter-gatherers.

73. The Government's 2005 Policy Framework for Education, Training and Research advocates affirmative action strategies, calling for the priority construction of schools in areas where nomadic populations live. Pastoralists are now targeted as marginalized groups on the same footing as slum dwellers and children with special needs, but with no regard to their specific cultural contexts.
74. The official languages of teaching are Kiswahili and English. Local vernacular languages are not officially used in the school system, though some communities manage to provide schooling in their own language as well. The Special Rapporteur received a number of reports complaining about the loss of the vernacular language, for example from the Yaaku and the Watta people, with pleas for action to preserve their languages, which they consider as cultural treasures.
75. Most indigenous peoples still lack easy access to primary health care, due to distance, lack of transport and essential supplies, and high costs. Moreover, health facilities are understaffed and distributed unevenly across districts in ASALs. Maternal health care is lacking, infant mortality is high, and the Orma estimate that 30 per cent of their women die during pregnancy and labour. In the absence of public health, people rely on traditional medicine and the Kenyan Medical Research Institute has recommended its legalization.
76. Indigenous communities, as the rest of Kenya's population, have been strongly affected by HIV/AIDS, though statistical data are lacking. The disease mostly affects poor women, especially in the pastoralist areas where they are excluded from development policies and where certain cultural practices such as initiation rites are conducive to its propagation.
77. Child labour is on the increase among indigenous communities, because domestic herding requires their participation. Orphans and children from poorer households are often hired out, sometimes to commercial herders but also to tea plantations and mining quarries, or as domestic workers. Child labour among indigenous populations has not received the government attention it requires, but ILO and some private organizations have programmes addressing these issues.

H. The rights of indigenous women

78. Gender inequalities and discrimination against women constitute persistent human rights violations, and indigenous women stressed that they also face systematic injustices and abuse within their own communities.
79. Female genital mutilation (FGM), though outlawed since 2001, is still practised widely among numerous indigenous communities such as the Maasai, Samburu, Somali and Pokot, as part of the culturally sanctioned rites of passage. Whereas at the national level 34 per cent of women undergo FGM, the percentage in North Eastern Province rises to an alarming 99 per cent. FGM poses serious problems for the physical and mental health of girls and, being a form of gender violence, it is also a major human rights violation. Some organizations have experimented with various means of abandoning the practice in socially acceptable ways. For instance, UNFPA supports the Tasau Ntomok Girls Rescue Centre in Narok, which promotes an alternative rite of passage for pubescent girls, respecting the value of the tradition but rejecting the violence associated with it.

80. During violent ethnic conflict, rape has become a weapon of aggression and a systematic form of abuse by security forces. Indigenous women complain that rape allegations are not treated seriously in police stations. In cases of rape within their own communities, the redress provided by existing customary laws fails to compensate the victim.

81. Many indigenous women are denied access to property rights as a result of discriminatory statutory and customary law. ILO reports that women suffer marginalization with regard to land ownership due to patrilineal systems of land inheritance, and become virtually destitute in case of widowhood or divorce. Women are further excluded from decision-making in land transactions and the administration of communal ownership and group ranches. A report published by Human Rights Watch in 2002 concludes that discriminatory property laws generate gross violations of women's human rights, relegating them to dependence on men, abhorrent living conditions and increased vulnerability to HIV/AIDS.

V. CONCLUSIONS

82. The pastoralist and hunter-gatherer way of life of Kenya's indigenous peoples has come under heavy strains in recent decades. This is mainly the result of the historical legacy of colonialism, but also of inappropriate land policies and developmental strategies in ASALs and forest areas since independence, which are currently being revised. These policies entailed the systematic land-loss of rangelands and of forest reserves that underpinned the pastoralist and hunter-gatherer livelihoods and their cultural sustainability, leading to serious violations of economic, social and cultural rights and some persistent abuses of civil and political rights.

83. Nomadic and semi-nomadic pastoralism and agro-pastoralism were erroneously considered an obstacle to Kenya's economic development. The assault on the pastoralists' grazing areas involved forced displacements and the drastic reduction of available rangeland for livestock herding. The privatization of land, water and other resources, and the individualization of homesteads led to the fragmentation of traditional communally owned lands, increasing competition and conflict over diminishing resources, the progressive disintegration of community life and the growth of social and economic inequality among indigenous communities. To this must be added the long-term effects of persistent droughts and the environmental deterioration of pastoralist areas and forests, including diminishing water resources.

84. Historical injustices and contemporary dispossession of lands and resources have been a major setback for the full enjoyment of the human rights of these groups. While a number of government initiatives have underlined the importance of such issues, the current land legislation and policies do not adequately address the challenges faced by pastoralist and hunter-gatherer communities. It is still a pending issue to be resolved, but the longer it takes the more difficult it will become for indigenous communities to be guaranteed their right to land, territory and resources.

85. The exclusion of hunter-gatherers and pastoralists from national parks and game reserves as a result of misguided conservationist policies also contributed to their progressive impoverishment and did not offer any alternatives for economic and social development for indigenous communities. This rigid conservationist strategy has come increasingly under critical

scrutiny and alternative proposals for community-driven participatory asset management and development schemes have been put forward in the Government. They point to the importance of including the right to a healthy and secure environment in ongoing discussions concerning the rights of indigenous peoples in Kenya. Destruction of traditional habitats as a result of insensitive development projects, flawed policies and private enterprise are also human rights issues that demand compensation and reparation.

86. Historical injustices and increased pressure on land and natural resources have produced uncertainties that nourish ongoing inter-ethnic conflict which in turn fuels expressions of negative ethnicity that are often manipulated by political elites in a widely perceived environment of corruption and impunity. The legacy of grievous human rights violations that occurred in the past, such as the Wagalla massacre of 1984 and others, still weighs heavily on the country, and unless true transitional justice is achieved the human rights picture at the national level will be clouded. Effective means for conflict resolution and peacebuilding at the local level must also be strengthened.

87. Since the 2002 elections a new atmosphere of civil liberties has enabled human rights and indigenous peoples' organizations to have a voice in the national debate and to participate actively in discussions on alternative policies. Still, a number of indigenous communities complain about their "invisibility" and lack of recognition, and they ask for greater participation at the political level.

88. The human and social development indicators of indigenous people lag behind the national average. The draft ASAL policy, the PRSP, the Economic Recovery Strategy for Wealth and Employment Creation and the programme of free universal primary education, among others, are steps in the right direction, and they must be supported with material resources, technical skills, human capital and, above all, political will. These programmes must focus on the special needs and requirements of pastoralist and forest communities if they are to make an impact on the human rights situation of indigenous peoples in the country.

89. Indigenous women are victims of serious human rights violations derived from discriminatory status and customary law, lack of access to social services and decision-making, and harmful traditional practices such as FGM. Difficulties in achieving gender equality among indigenous communities will require special measures within an overall approach of affirmative action and culturally appropriate policies towards these communities.

VI. RECOMMENDATIONS

90. **In view of the above, the Special Rapporteur makes the following recommendations:**

A. Recommendations to the Government

Legal recognition and political participation

91. **The rights of indigenous pastoralist and hunter-gatherer communities to their lands and resources, effective political participation and distinct cultural identity should be constitutionally recognized. Specific legislation should be correspondingly enacted, including affirmative action where necessary.**

92. **The Government should take all the necessary steps, in consultation with indigenous peoples in the country, to ensure prompt ratification of ILO Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries. It should also promote the adoption of the United Nations Declaration on the Rights of Indigenous Peoples by the General Assembly and, through Parliament, ensure the incorporation into domestic law of these instruments.**

93. **The national census should identify pastoralists and hunter-gatherers as distinct indigenous communities and provide disaggregated data in order to understand their specific needs and facilitate the elaboration of appropriate public policies.**

94. **The Government, through the Electoral Commission of Kenya, should regulate the nomination of Members of Parliament by political parties, in particular to ensure adherence to the constitutional provisions on the need to take into account special interest groups in those nominations.**

95. **Existing districts and constituencies should be redefined in order to provide for a more effective representation of the interests of smaller indigenous communities, particularly in cases where they are divided into several administrative units, in line with section 42 of the Kenya Constitution.**

96. **The current procedures for granting national identity cards should be reviewed to remove obstacles affecting indigenous communities, and such identity documents should be provided to members of nomadic pastoralist and forest communities who still lack them.**

Land and resource rights

97. **The Government should fully implement the recommendations of the Ndungu report, giving particular attention to the rights of indigenous and other marginalized communities to their lands and natural resources. The draft National Land Policy should be adopted, retaining the sections on the land rights of pastoralists and hunter-gatherers, and fully implemented.**

98. **Indigenous communities should be consulted prior to the exploration for and exploitation of natural resources on their traditional lands, and should receive an equitable share of benefits obtained from such activities through participatory resource management. They should be fully compensated for any adverse environmental impact on their land, resources and traditional livelihoods resulting from development projects and other economic activities.**

99. **Efficient mechanisms should be established to address historical injustices and settle current land and natural resource disputes resulting from dispossession of lands traditionally owned by pastoralists and hunter-gatherers. These mechanisms should include the possibility of revocation and rectification of irregular titles, as well as the restitution of lands and/or effective compensation to the affected communities.**

100. Stronger guarantees against the dispossession of indigenous communal lands should be incorporated in the land legislation, allowing for room to challenge fraudulent first registrations in the courts. The Government should also ensure that no adjudication or setting apart of trust lands or unalienated government lands should be allowed without the free, prior and informed consent of local communities.

101. The policy of privatization of communal ranches should be carefully revised with the participation of the communities concerned, in order to provide permanent protection and support to communal lands and group ranches and counteract the negative consequences of the “willing seller-willing buyer” practice, particularly in Narok and Kajiado Districts.

Forest areas

102. The rights of indigenous hunter-gatherer communities (particularly the Ogiek in Mau Forest) to occupy and use the resources in gazetted forest areas should be legally recognized and respected. Further excisions of gazetted forest areas and evictions of hunter-gatherers should be stopped. Titles derived from illegal excision or allocation of forest lands should be revoked, and new titles should only be granted to original inhabitants. Illegal commercial logging should be stopped.

Environmental rights

103. The Government’s ASAL policy should include measures to restore the environment and prevent further degradation in pastoralist areas. In particular, it should cooperate with other actors in the elimination of the prosopis weed in the Il Chamus community.

104. The authorities of the Tana River dams should ensure that no water release takes place without previously informing and consulting with the Munyayaya and other communities living along the river. Any damage on indigenous communities’ lands resulting from the operations of the dams should be fully compensated.

105. The State should promote the complete removal of landmines and other military ordnance in pastoralist areas, and victims should be fully compensated.

106. Existing legislation should be amended to ensure the rights of local indigenous communities to access the natural resources in protected areas in their traditional territories. Conservation and the rights of indigenous peoples should be balanced in accordance with the recommendations of the fifth World Parks Conference held in Durban, South Africa in 2003.

107. Pastoralist and hunter-gatherer communities should be involved in decisions concerning the management of and benefits derived from protected areas, game reserves and national parks. They should also be compensated for any loss derived from the creation of such areas, including any human and material losses derived from wildlife activities in the vicinities of these areas.

108. **The Government should aim at a friendly settlement in the case of the Endorois before ACHPR, leading to the establishment of a system of co-management between the authorities and the local communities in the Lake Bogoria Game Reserve.**

Access to justice

109. **The Government should fully implement the recommendations of the “Mutua Task Force” and KNCHR, and establish a Truth, Justice and Reconciliation Commission with the power to investigate and provide redress and compensation to the victims of gross human rights violations. Special attention should be paid to the investigation of the Wagalla and other massacres, the compensation of the victims and the punishment of the perpetrators.**

110. **The Government should ensure that all allegations of torture, rape and other human rights violations are promptly, independently and thoroughly investigated by a body capable of prosecuting perpetrators. The rights of human rights defenders and indigenous activists should be specifically protected.**

111. **The national conflict resolution mechanism should include leaders from indigenous peoples’ communities and be linked to local conflict resolution mechanisms.**

112. **Indigenous communities should have the legal right to represent their interests in cases affecting their collective rights.**

Social services

113. **The Government should adopt the current draft ASAL policy and fully implement it with the participation of pastoralist communities.**

114. **Indigenous communities should participate actively in the design, implementation and evaluation of the poverty reduction strategy and the realization of the Millennium Development Goals.**

115. **Affirmative action should be applied to promote education for indigenous children at all levels, particularly for indigenous girls. Free boarding and mobile schools should be an integral part of the free universal primary education programme. More appropriate educational curricula should be devised, taking into account indigenous peoples’ distinct ways of life.**

116. **Efforts should be made to protect the languages of the smaller indigenous communities from extinction, by appropriate educational, linguistic and cultural policies.**

117. **Indigenous peoples, particularly indigenous women and girls, should be ensured access to adequate health services. The system of mobile clinics in pastoralist areas should be reinforced, and the use of traditional medicine and health-related knowledge should be encouraged and legally recognized.**

Women's rights

118. The Government should reinforce its efforts to achieve the effective eradication of FGM in all communities, by helping promote culturally appropriate solutions such as alternative rites of passage and supporting women's organizations in these tasks.

119. The Government should review existing discriminatory laws and regulations affecting the property rights of indigenous women, particularly those of widows and divorced women.

B. Recommendations to the Kenya National Commission on Human Rights

120. KNCHR should establish a specialized programme dealing with the rights of pastoralists and hunter-gatherers and other minority communities, promote wider knowledge of their human rights situation and strengthen cooperation with their organizations.

121. KNCHR should play a key role in the monitoring of the implementation by all relevant actors of the recommendations made by the Special Rapporteur in this report.

C. Recommendations to indigenous communities and organizations

122. Existing customary laws and practices should be revised to eliminate discrimination against women, especially with regard to their property rights and harmful traditional practices, and ensure their full participation in decision-making at the community and national levels.

123. Indigenous communities and organizations should renew efforts to find constructive solutions to existing conflicts with other communities, taking into account customary practices, the principles of transitional justice and the respect for human rights.

124. Indigenous peoples' organizations are encouraged to develop concrete strategies for data collection, research and documentation to support their advocacy work both at the national and international levels.

D. Recommendations to civil society and political parties

125. Political parties should take a stand in favour of the recognition of indigenous peoples' communities and their rights in the constitutional review, legislative reform and policymaking.

126. Members of the Pastoralist Parliamentary Group are encouraged to revitalize their activities in order to build a common agenda and strategy in favour of pastoralist and other indigenous communities.

127. NGOs and donors should strengthen their relations with indigenous communities, support their development initiatives and promote a better understanding of their demands and aspirations within Kenyan society.

E. Recommendations to the international community

128. **The international agencies and programmes in Kenya should take into account the needs and rights of indigenous peoples and establish specific programmes for them. They are encouraged to engage with UNIPACK and other pastoralist and hunter-gatherer networks and organizations in the formulation and implementation of these policies.**

129. **International agencies and financial institutions should ensure that all projects in indigenous areas respect the principle of free, prior and informed consent of the local communities. Any negative impact caused to these communities as a result of these projects should be duly accounted for and compensated.**

130. **ILO should further its efforts to promote the rights of indigenous communities in Kenya under the provisions of Convention No. 169 and other fundamental international labour standards.**

F. Recommendations to the academic community and the media

131. **The country's universities and research centres should establish focal points for research on and teaching about the needs and rights of indigenous peoples in Kenya.**

132. **The written press and the audio-visual media should avoid any discriminatory or biased reporting on indigenous peoples in Kenya and provide space for their concerns and information that promotes their ways of life and cultural identities.**



Asamblea General

Distr.
GENERAL

A/HRC/4/32/Add.3
26 de febrero de 2007

ESPAÑOL
Original: INGLÉS

CONSEJO DE DERECHOS HUMANOS
Cuarto período de sesiones
Tema 2 del programa provisional

**APLICACIÓN DE LA RESOLUCIÓN 60/251 DE LA ASAMBLEA
GENERAL, DE 15 DE MARZO DE 2006, TITULADA
"CONSEJO DE DERECHOS HUMANOS"**

**Informe del Relator Especial sobre la situación de los derechos humanos
y las libertades fundamentales de los indígenas, Sr. Rodolfo Stavenhagen**

Adición

MISIÓN A KENYA*

* El resumen del presente informe se distribuye en todos los idiomas oficiales. El informe propiamente dicho figura en el anexo del resumen y se distribuye en el idioma original.

Resumen

En el presente informe se describe la visita oficial que efectuó el Relator Especial sobre la situación de los derechos humanos y las libertades fundamentales de los indígenas del 4 al 14 de diciembre de 2006 por invitación de su Gobierno. En Kenya, el Relator Especial mantuvo consultas con diversas autoridades nacionales y regionales, organismos de las Naciones Unidas, representantes de organizaciones no gubernamentales (ONG) y miembros de comunidades y organizaciones indígenas de distintas partes del país.

Las comunidades indígenas de Kenya están constituidas por grupos minoritarios de cazadores-recolectores y de pastores, que viven mayoritariamente en las tierras áridas y semiáridas, como los elmolo, los yakuu, los sengwer, los masai y los ogiek. Sus medios de subsistencia y sus culturas han sido tradicionalmente objeto de discriminación y su falta de reconocimiento legal y autonomía refleja su marginación social, política y económica.

Las principales cuestiones relacionadas con los derechos humanos a que hacen frente se refieren a la pérdida y la degradación ambiental de sus tierras, sus bosques tradicionales y sus recursos naturales como resultado del desposeimiento de que fueron objeto en la época colonial y en el período posterior a la independencia. En los últimos decenios, las políticas de desarrollo y conservación inadecuadas han agravado la vulneración de sus derechos económicos, sociales y culturales.

La falta de servicios sociales y sanitarios en las comunidades indígenas repercute gravemente sobre todo en las mujeres y los niños, que son víctimas de desigualdades de género y discriminación, especialmente en relación con los derechos de propiedad, y de prácticas tradicionales perjudiciales, que propician la creciente propagación del VIH/SIDA en esas comunidades.

El actual Gobierno ha adoptado una serie de políticas alternativas para favorecer un desarrollo de las tierras áridas y semiáridas propiciado por la comunidad, así como políticas de acción afirmativa en el marco de la estrategia de reducción de la pobreza y ha establecido la gratuidad y la universalidad de la enseñanza primaria. De tener éxito, esas políticas podrán corregir las injusticias históricas y mejorar la situación general de las comunidades indígenas.

La violencia vinculada con los conflictos sociales y étnicos de distinta índole y la ausencia de una justicia de transición y de recursos para obtener reparación también han repercutido en los derechos humanos de las comunidades indígenas.

El Relator Especial concluye su informe formulando una serie de recomendaciones con la intención de contribuir a mejorar la situación de los derechos humanos de los pueblos indígenas del país.

Annex

**REPORT OF THE SPECIAL RAPPORTEUR ON THE SITUATION OF
HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS OF INDIGENOUS
PEOPLE, RODOLFO STAVENHAGEN, ON HIS MISSION TO KENYA
(4-14 DECEMBER 2006)**

CONTENTS

	<i>Paragraphs</i>	<i>Page</i>
I. INTRODUCTION	1 - 7	5
II. INDIGENOUS PEOPLES IN KENYA	8 - 12	6
III. LEGAL AND POLITICAL CONTEXT	13 - 20	7
IV. MAJOR ISSUES AFFECTING THE RIGHTS OF INDIGENOUS PEOPLES IN KENYA	21 - 81	8
A. Legal recognition and political participation	21 - 24	8
B. Land and resource rights: the pastoralists	25 - 35	9
C. Hunter-gatherers and forest peoples	36 - 41	11
D. Environmental rights	42 - 47	13
E. Conservation versus livelihood	48 - 54	14
F. Access to justice and impunity	55 - 64	15
G. Poverty, inequality and access to social services	65 - 77	17
H. The rights of indigenous women	78 - 81	19
V. CONCLUSIONS	82 - 89	20
VI. RECOMMENDATIONS	90 - 132	21
A. Recommendations to the Government	91 - 119	21
B. Recommendations to the Kenya National Commission on Human Rights	120 - 121	25

CONTENTS (*continued*)

	<i>Paragraphs</i>	<i>Page</i>
C. Recommendations to indigenous communities and organizations	122 - 124	25
D. Recommendations to civil society and political parties	125 - 127	25
E. Recommendations to the international community	128 - 130	26
F. Recommendations to the academic community and the media	131 - 132	26

I. INTRODUCTION

1. Pursuant to Commission on Human Rights resolution 2001/57 of 24 April 2001, which established his mandate, and at the invitation of the Government, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people visited Kenya from 4 to 14 December 2006.
2. The purpose of this visit was to better understand the situation of indigenous peoples in Kenya, to learn about policies and practices designed to promote and protect their rights, and to dialogue with government officials at the national and local levels, representatives of indigenous peoples' communities and organizations, development partners and other actors on ways to strengthen the responses to the demands and needs of indigenous peoples.
3. The Special Rapporteur travelled to Nairobi, Kitengela, Narok, Nakuru, Baringo, Mount Elgon, Laikipia, Wajir, Garissa, Marsabit and several rural areas around the country. In Nairobi, he met with the Permanent Secretary in the Ministry of Justice and Constitutional Affairs, the Permanent Secretary in the Ministry of Lands, the Permanent Secretary in the Ministry of Education, the Director of the Kenya Wildlife Service, as well as with high officials in the Ministry of Health and the President's Office of Special Programmes. He also met with the Kenya National Commission on Human Rights (KNCHR) and with Members of Parliament of the Pastoralist Parliamentary Group. In the various provinces he met with the Deputy Provincial Commissioner of the Rift Valley Province, the District Commissioners of Laikipia, Marsabit, Narok, and the Mayor of Garissa.
4. The Special Rapporteur met with the United Nations Resident Coordinator and country team representatives, and held conversations with international agencies including the International Labour Organization (ILO), the Food and Agriculture Organization of the United Nations (FAO), the United Nations Development Programme (UNDP), the United Nations Environment Programme (UNEP), the United Nations Children's Fund (UNICEF), the United Nations Office on Drugs and Crime (UNODC), the United Nations Human Settlements Programme (UN-Habitat), the United Nations Population Fund (UNFPA) and the World Health Organization (WHO), as well as with donor organizations and non-governmental organizations (NGOs).
5. The Special Rapporteur conducted on-site visits to numerous indigenous pastoralist and hunter-gatherer communities in Narok, Laikipia, Mau Forest, Mount Elgon, Lake Baringo, Cherangany Hills and Wajir. He also held meetings with indigenous representatives of the Awer, Boni, Borana, Burgi, Elmolo, Endorois, Ilchamus, Gaaljecel, Gabra, Maasai, Malakote, Munyayaya, Ogiek, Orma, Pokot, Rendille, Sabaot, Sakuye, Samburu, Sengwer, Somali, Talai, Turkana, Watta, Munyayaya and Yakuu. He met with members of other minority communities, such as the Nubians, and with groups of refugees. He also visited the Maasai Mara National Park and the Lake Baringo Game Reserve, where he assessed the impact of protected areas on local indigenous peoples.
6. During his visit, the Special Rapporteur participated in the National Seminar on Indigenous Issues, organized by the Office of the High Commissioner for Human Rights (OHCHR) and UNDP in Nairobi, on 5 and 6 December 2006.

7. The Special Rapporteur would like to acknowledge the hospitality of the Government of Kenya, and especially thank the Ministry of Justice and Constitutional Affairs for its invitation and cooperation, and KNCHR, UNIPACK (United Nations Indigenous Peoples' Advisory Committee - Kenya) and the indigenous peoples' steering committee for the preparation of the visit. He also wishes to thank the many indigenous communities and organizations that gave their time and provided useful information for this report, including Arid Lands Institute, Center for Minority Rights Development (CEMIRIDE), Endorois Development Council, International Movement for Peace Advancement and Conflict Transformation (IMPACT), Maa Civil Society Forum, Ogiek Welfare Development Council, Pastoralist Integrated Development Organization (MPIDO), Sengwer Culture and Information Centre, Truth to be Told Network, and Womankind. UNDP-Kenya deserves a special mention for its invaluable support of the mission at all stages.

II. INDIGENOUS PEOPLES IN KENYA

8. In Kenya all Africans are indigenous to the country, as many Kenyans are inclined to point out to the Special Rapporteur. This is of course true, given that most Africans living in contemporary Kenya are descendants of the original inhabitants, and because in colonial times all Africans, of whatever tribe or ethnic affiliation, were considered as "natives" by the authorities, sharing the same history of colonial subjugation and racial discrimination. At independence all natives became free and equal citizens of the new State. Moreover, due to geographic conditions and historical circumstances, social and cultural distinctions became defining characteristics that differentiated among the many tribes that populate the country. The majority ethnic groups which became integrated into the farming economy occupied the more fertile areas and after independence they regained much of the land which they had lost to the colonial regime.

9. As in some other African countries (see the Special Rapporteur's report on his mission to South Africa, E/CN.4/2006/78/Add.2, paras. 20-32), the contested use of the term "indigenous" in Kenya has implications for policy decisions and therefore for the human rights of the concerned populations. From a human rights perspective, the question is not "who came first" but the shared experiences of dispossession and marginalization. The term "indigenous" is not intended to create a special class of citizens, but rather to address historical and present-day injustices and inequalities. It is in this sense that the term has been applied in the African context by the Working Group on Indigenous Populations/Communities of the African Commission on Human and Peoples' Rights (ACHPR).

10. Within this perspective, pastoralists and hunter-gatherers are normally regarded as indigenous peoples in the international context, and they increasingly come to identify themselves as such in many countries, including in Africa. In Kenya they include pastoralist communities such as the Endorois, Borana, Gabra, Maasai, Pokot, Samburu, Turkana, and Somali, and hunter-gatherer communities whose livelihoods remain connected to the forest, such as the Awer (Boni), Ogiek, Sengwer, or Yaaku. Other groups such as the Nubians consider themselves as a minority that has also been marginalized, but in an urban context. They and other minority groups share demands to end discrimination and exclusion with indigenous peoples in Kenya. The Kenya Government normally refers to indigenous and minority groups jointly as "minorities", "marginalized" or "vulnerable communities".

11. Government authorities and specialists recognize that historically the pastoralist and hunter-gatherer communities in the arid and semi-arid lands and forests were systematically marginalized on the basis of their economic, social and cultural characteristics, inextricably connected to the use of land and natural resources. One government report states that over the years policies directed at these communities were mainly top-down and discriminatory, and they often failed by marginalizing and impoverishing people in arid and semi-arid lands.
12. Indigenous peoples in Kenya have established numerous civil society organizations that are actively involved in promoting human rights, development issues and environmental concerns. Since the transition to a more democratic political regime in 2002, the visibility and public recognition of these organizations has grown, and a number of their leaders and members now cooperate closely with several government institutions.

III. LEGAL AND POLITICAL CONTEXT

13. Whilst Kenya has ratified most international human rights treaties and conventions, it has not ratified ILO Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries, and it has withheld its approval of the United Nations Declaration on the Rights of Indigenous Peoples at the current session of the General Assembly. The Government of Kenya has recently decided to update its reports to the various United Nations human rights committees, some of which are long overdue.
14. Kenya's independence from British rule in 1963 brought about the Africanization of the economy and the public services. The continuation of previous colonial policies, as well as the co-optation of the State apparatus by majority ethnic communities under a one-party system, led to increased tribalism in the distribution of political power, government jobs and wealth, and the widening gulf between rich and poor. This tendency increased during the Government of President Moi, during which numerous ethnic clashes occurred and human rights were severely curtailed.
15. The new Government, elected by a large majority in December 2002, enabled a democratic opening that allowed many pent-up grievances out into the open, including the long-standing demands by indigenous and other ethnic minorities for human rights and the emergence of a vibrant and articulate civil society. The new Government promoted legal reform and the consolidation of institutions of democratic governance, including a constitutional review process, and special inquiries into corruption, land mismanagement and historical injustices.
16. Most indigenous peoples in Kenya live in the arid and semi-arid lands (ASALs) which make up more than 80 per cent of the land mass and are home to more than 25 per cent of the national population, and include almost the majority of wildlife parks and reserves and protected forests. ASAL areas are predominantly pastoralist and agro-pastoralist, mainly suitable for livestock grazing due to low and erratic rainfall. These areas present the highest incidences of poverty and the lowest level of access to basic services in the country. Over 60 per cent of the population lives below the poverty line, which is above the average of 50 per cent nationwide.
17. Pastoralism was for a long time neglected and held in disrepute by the country's economic planners and political elites. Policies aimed at revitalizing ASALs since independence promoted sedentarization and crop farming, failing to take into account pastoralism as a sustainable form

of land use adapted to the environment. Deforestation and poor land use have further increased environmental degradation, making the land more vulnerable to cyclical droughts and floods.

18. The Constitution of Kenya incorporates the principle of non-discrimination and guarantees civil and political rights, but fails to recognize economic, social and cultural rights as such, as well as group rights. The rights of indigenous pastoralist and hunter-gatherer communities are not recognized as such in Kenya's constitutional and legal framework, and no policies or governmental institutions deal directly with indigenous issues. However, in recent years the specific situation and needs of these communities have started to be addressed, as reflected in current discussions on the ASAL and national land policies, and there seems to be growing consensus on the need for affirmative action towards these communities.

19. The specific needs and rights of pastoralists and hunter-gatherers were also taken into account in the constitutional review process that started in 2003. After countrywide consultations that included indigenous organizations, the first draft of a new constitution (the "Bomas draft") included the decentralization of power and group rights, a section on "Minorities and marginalized groups", and a system of affirmative action in employment, economic development, and political representation. It also called for the equal redistribution of lands and resources, and for the redress of historical injustices. A new revised draft prepared by Parliament (the "Wako draft") was overwhelmingly defeated in a referendum in 2005, partly because it failed to address outstanding land issues and the decentralization of power. Since then, the process of constitutional reform remains at a stalemate.

20. The Special Rapporteur is encouraged by the fact that KNCHR and the Ministry of Justice and Constitutional Affairs have begun to consider the promotion and protection of pastoralists and hunter-gatherers in Kenya as part of their activities. It is also encouraging that indigenous issues are being considered as cross-cutting issues in the process of formulation of a National Action Plan and Policy on Human Rights being spearheaded by these two institutions. Various official development initiatives, including the Poverty Reduction Strategy Paper (PRSP), the ASAL Resource Management Project and the draft National Policy for the Sustainable Development of the ASALs, take into account the special characteristics of pastoralism. Similarly, the new land policy currently under discussion refers explicitly to "the rights of minority communities", a concept that covers groups such as hunter-gatherers, forest peoples and pastoralists.

IV. MAJOR ISSUES AFFECTING THE RIGHTS OF INDIGENOUS PEOPLES IN KENYA

A. Legal recognition and political participation

21. The 1989 national census lists 42 tribes in Kenya, but omits many smaller pastoralist and hunter-gatherer communities, such as the Ogiek, El Molo, Watta, Munyayaya, Yakuu, and other small groups such as the Sabaot and Terik, who are not legally recognized as separate tribes. This situation is derived from the colonial policy of promoting assimilation of smaller communities into other dominant groups. Affected tribes claim that the lack of a separate code in official documents identifying them as distinct ethnic groups reduces their visibility in

national policymaking. Many communities from the north, such as the Awer, Galjheel, Somali, and Oromo, are also prevented from enjoying full citizen rights as a result of the lack of proper identity cards.

22. The existing political system divides many communities such as the Endorois or Sengwer into different administrative and electoral units. This diminishes their effective representation in the Parliament and participation in local decision-making, as they may not have the numbers to vote for leaders from their communities through elective processes. Political parties, according to their numerical strength in Parliament, are vested with the constitutional power to appoint 12 “nominated members” of Parliament to represent “special interests”, which may include marginalized communities. There is also the legal possibility of changing the boundaries of existing constituencies, taking into account the “representation of ... sparsely populated rural areas”, and their “community of interest”. But these safeguards have not yet been fully implemented in favour of smaller indigenous communities.

23. Numerous indigenous communities complain that their needs are not being met and that their rights are not being adequately protected because, being numerically small, they do not have sufficient political representation at the national or provincial levels to make a difference. One such case was presented to the Special Rapporteur by the Ilchamus indigenous community of Baringo who represent 17 per cent of the local constituency and rely mainly on livestock for their subsistence. The community feels marginalized by the dominant groups in the district who do not represent their interests at the political level, and brought suit before the High Court alleging violation of their right to political participation. In a landmark judgement, issued shortly after the Special Rapporteur visited the country, the High Court directed the Electoral Commission of Kenya to supervise the appointment of nominated MPs to ensure compliance with the Constitution, and to take into account the Ilchamus community’s interests in the next boundary review.

24. The main effect of political marginalization is the unequal lack of access to development resources and government employment. This is particularly serious with relation to the Constituency Development Funds (CDF). Since 2003, 2.5 per cent of the government revenues are allocated every year to each constituency through this fund, but it is difficult for smaller communities who are not represented by an MP to have equal access to development resources and social services.

B. Land and resource rights: the pastoralists

25. Most of the human rights violations experienced by pastoralists and hunter-gatherers in Kenya are related to their access to and control over land and natural resources. The land question is one of the most pressing issues on the public agenda. Historical injustices derived from colonial times, linked to conflicting laws and lack of clear policies, mismanagement and land grabbing, have led to the present crisis of the country’s land tenure system.

26. The 2002 report of the Presidential Commission of Inquiry into the Land Law System of Kenya (“Njonjo report”), the 2004 report of the Presidential Commission into the Irregular-Illegal Allocation of Public Land (“Ndungu report”), and the draft National Land Policy include specific provisions concerning land reform, and so do the two constitutional drafts under discussion.

27. During the first half of the twentieth century, colonial authorities and European settlers seized the richest agricultural areas, while the original owners were displaced towards “native reserves” on far poorer land or remained as landless workers. After independence, the fertile agricultural lands of the “White Highlands” were bought back by the Government of Kenya, but they were not, contrary to early promises, returned to their original owners (among them the Maasai communities in the Rift Valley). The unequal distribution of land fostered a sense of relative injustice, and has created conflict over the years between farmers and pastoralists.

28. Most of the abuses after independence took place in Trust Lands, including former native reserves. The Constitution vests the administration of these lands in the County Councils, which acted “in total breach of trust as custodians of land on behalf of local residents” through the irregular adjudication of vast areas in favour of powerful individuals and settlers from other communities, and the establishment of protected areas (Ndungu report, p. 81). The prevailing theory of the sanctity of the title, whereby first registration of land title cannot be challenged in court regardless of fraud or mistake, further sanctioned these abuses. Displacement of original inhabitants has been widespread in the Rift Valley and Kajiado District, and most pastoralist grazing lands in the north and north-eastern regions face similar threats.

29. Since the end of the 1960s, and supported by the World Bank, the Government has promoted the transformation of Trust Lands into group ranches and then individual ownership, thus limiting the land available for traditional mobile grazing. Based on the idea that individual titles, through a “willing buyer-willing seller” approach, would improve the prospects for investment and economic growth, this policy in fact encouraged land grabbing and the massive sale of pastoralist land, particularly in areas neighbouring urban centres.

30. Loss of land through colonization, nationalization and privatization can be illustrated with the example of the Maasai, whose grazing areas were split by a colonial frontier installed between Kenya and Uganda at the end of the nineteenth century. It is estimated that the Maasai lost one third of their territory through coercive treaties in 1904 and 1911 imposed by the colonial regime, and were allowed to retain only small amounts of marginal land in the Kenyan districts of Narok and Kajiado. In Laikipia District, 75 per cent of the land still remains in hands of European owners. The Special Rapporteur personally observed traditional rangelands which were being fenced off, thus restricting the seasonal movements of the livestock herds of the nomadic pastoralist communities, as well as constricting the natural ecosystems of the wildlife, including important migratory routes.

31. After independence in 1963, the formerly closed Maasai districts were opened to immigration from other ethnic groups, based on the false assumption that large areas utilized by the Maasai for seasonal grazing were “idle land”. The Ndungu report documents the faulty adjudication of the Iloodo-Ariak in Kajiado District to hundreds of government officials and their relatives. Though they were not local residents, they were issued title deeds, while “many rightful inhabitants of the area were ... disinherited from their ancestral land” (ibid., p. 141). It is estimated that the Maasai lost another third of their lands in Narok and Kajiado Districts as a result of these processes. In Kajiado alone, 50 per cent of Maasai households did not have land in 1997, as compared to around 8 per cent in the 1980s.

32. On the Athi-Kapti plains, a traditional wildlife dispersal and pastoralist grazing area, the local Ilkaputiei Maasai, who fear the loss of their traditional livelihood, are opposed to the Jamii Bora Trust, an urban housing project for the resettlement of an estimated 30,000 slum dwellers from nearby Nairobi, that receives international financing. The Special Rapporteur, who visited the proposed site, was informed that the project has been challenged in the courts.

33. The Sabaot of the Mt. Elgon area were displaced by the British and are still waiting for compensation and resettlement under the post-independence agreements between the Governments of the United Kingdom and Kenya. They provided the Special Rapporteur with copies of the plea for reparations, restitution and compensation which they presented to these Governments, but they have yet to receive satisfaction.

34. Also in Trans-Nzoia and West-Pokot, the semi-nomadic Pokot people are claiming compensation for similar violations of their right to land. Many of the claims briefly outlined in this report were presented, fully documented, to the Constitution Review Commission of Kenya in 2002 but have yet to be acted upon. One specialist notes: “For decades, the communities quarrelled over the resources and longed for a day when they would gain access once more to their historical land ... But whereas some ethnic communities benefited from some settlement arrangement, there was no effort made to include Pokot, Sabaot or Sengwer ...”

35. A century of dispossession has left a balance of increased landlessness, insecurity, ecological degradation and resentment among indigenous communities. Virtually all the communities interviewed by the Special Rapporteur shared a similar demand for restitution and reparation. The Ndungu Commission on land grabbing suggested the establishment of a Land Titles Tribunal responsible for revocation and rectification of irregular titles. It considers that “land crimes” are as much a part of Kenya’s past wrongdoings as economic crimes and human rights crimes, which constitute the country’s transitional justice agenda. The draft National Land Policy promotes the creation of a National Land Commission with powers to investigate land disputes and alleged injustices. However, no functioning mechanism is currently in place and, in the absence of legal safeguards, indigenous peoples continue to be at risk of further violations of their land and resource rights.

C. Hunter-gatherers and forest peoples

36. Settlement schemes, logging and charcoal production have put a severe strain on Kenya’s rich and varied forests, and have resulted in the loss of the traditional habitat of Kenya’s forest peoples, the indigenous hunter-gatherers such as the Awer (Boni), Ogiek, Sengwer, Watta, and Yaaku. While existing laws are oriented to the protection of wildlife and forest resources, many of these communities can no longer live by their traditional livelihoods, and their cultures and language are rapidly vanishing as a result; illegal logging has played a major role in this as well.

37. The way of life of the Ogiek is well adapted to the Mau Forest environment where they have lived for centuries. Numbering about 20,000 countrywide, they have been dispersed and assimilated in recent decades, and dispossessed of their traditional source of livelihood. When the Mau Forest was gazetted as a National Forest in 1974, the Ogiek were evicted from their traditional habitat without prior consultation or compensation, in violation of their basic human rights. They were henceforth prevented from hunting or collecting bee honey for survival in the

forest, and were reduced to a miserable subsistence on the margins of this area rich in plants and wildlife. On the other hand, illegal logging, the introduction of exotic plantations and the excision of parts of the forest for private development by outside settlers have endangered the Mau Forest as a water catchment area, as well as the country's environmental security. The Special Rapporteur on adequate housing, Miloon Kothari, signalled in his report on his mission to Kenya that the destruction of the forest has affected the rights of the Ogiek to housing, health, food and a safe environment, threatening to further destroy their cultural identity and the community as a whole (see E/CN.4/2005/48/Add.2, para. 61).

38. Despite a court injunction in their favour in 1997, the Government has proceeded to alienate Ogiek forest land, and a recent court decision does not recognize the Ogiek's ancestral title to the forest. Still, the Government has distributed title deeds to land to several thousand Ogiek, and some non-Ogiek outsiders have tried to enrol as Ogieks in the hope that they may eventually also be given title deeds. The unresolved conflict between the Ogiek and their neighbours continues to this day. Being considered as squatters on their own land and legally banned from using the forest resources for their livelihood, their attempt to survive according to their traditional lifestyle and culture has often been criminalized and their repeated recourse to the courts has not been successful. Ogiek attribute this vulnerability to the fact that they are not recognized as a distinct tribe and therefore lack political representation. The Special Rapporteur met with members of several Ogiek villages, listened to their grievances and heard their demands for the recognition of their right to land and to maintain their traditional lifestyle in the forest.

39. A similar problem besets the Sengwer of the Cherangany Hills and Kapolet Forest in Trans Nzoia, Marakwet and West Pokot Districts, numbering around 30,000, who have not only been denied access to their traditional hunting and gathering grounds, now converted into a game park, but also their tribal identity. During colonial times the Sengwer were forced to assimilate into larger tribes; they were dispersed from their ancestral territory and expected to take up cattle raising and crop planting. The dispossession of their land continued in the post-colonial period, and like numerous other communities they have over time become victims of cattle rustling. The Special Rapporteur met with the Sengwer community and was informed that their situation may become more complicated by the project to construct a dam on the Kapolet River about which they claim they were not consulted and which may result in further evictions. Nowadays, they not only demand a solution to the land issue, but also claim formal recognition as a separate tribe and adequate political representation in their own district so that their requirements may be attended to by the government authorities, including compensation and consideration in relation to the construction of the dam system.

40. The Watta, a hunter-gatherer population who live dispersed among other groups near Marsabit, Isiolo, the Tana River and Voi, in the precincts of the Tsavo National Park, face similar threats to their livelihood. Not having received licences to hunt for their subsistence, they were considered illegal poachers, committing an offence punishable by law and treated as criminals when they attempted to survive. The El Molo, who practise a subsistence economy of fishing and herding on the eastern shore of Lake Turkana, are threatened by the continuous influx of settlers. They have appealed to the Government to allocate a title deed for the stretch of land between Sarama and Moite (a sacred mountain) to ensure their livelihood and the

sustainability of their community. They also demand to be granted an annual licence for the hippo hunt, which is a rite of passage in the lives of young males and a big cultural event for the whole community.

41. These and other hunter-gatherer communities constitute the most marginalized communities in Kenya, and require urgent government attention to guarantee their enjoyment of basic human rights. The Government is currently developing an Indigenous Planning Framework for the Western Kenya Community-Driven Development and Flood Mitigation Project and the Natural Resource Management Project “to improve social welfare, enhance living standards and promote the sustainable use of water, land, forests and other natural resources through support of small-scale initiatives among the Ogiek and Sengwer. The purpose of the Framework is to ensure that the development process fully respects the dignity, human rights, economies, and culture of indigenous peoples” (Office of the President, draft, December 2006).

D. Environmental rights

42. Indigenous peoples’ reliance on natural resources and their disproportionate poverty make them more vulnerable to the effects of environmental threats such as cyclical droughts and floods, deforestation, soil erosion and pollution, which turn into major human rights concerns. One of the most pressing issues faced by nomadic pastoralists is access to water in ASALs, which is exacerbated by recurrent drought and inadequate government responses as well as the privatization of water points.

43. The El Molo and Turkana, who depend on Lake Turkana for their subsistence, have witnessed the rapid drying out of the lake as a result of prolonged drought and the damming of the tributary rivers, leading to the depletion of fish and increasing intercommunal conflicts. Similarly, the West Borana, dependent on the Wuaso Ngiro River, suffer the effects of the diminishing volume and pollution of the river due to over-abstractions for agriculture upstream.

44. The Munyayaya are affected by the construction of seven hydroelectric dams along the Tana River. Their farms, houses and animals are washed away as a result of the electrical company’s release of water from the dams, caused by heavy rains that rapidly increase the volumes of the water in the dams, forcing them to relocate during some periods. Similar mega-development projects threaten the livelihood of pastoralist communities, such as the Turkwel Hydroelectric project in Turkana District and the proposed Tana Delta sugar project.

45. Gem mining in the Endorois’ traditional lands around Lake Turkana has polluted the river Sandai, on which they depend for their subsistence. Similarly, the Maasai of Laikipia denounce the environmental degradation caused by the extracting of soda from the Magadi deposits, and demand participation and an equal share of the benefits. Flower farms across the Maasai landscape severely limit access to necessities like water, grass and saltlicks, especially those erected around the shores of Lake Naivasha. Dumping of toxic waste has also been denounced in Wajir and Marsabit, owing to the adverse effects this has on pastoralist grazing areas.

46. According to the information received by the Special Rapporteur in the early 1980s in a joint initiative by the Government and FAO to reduce desertification the prosopis plant (*Prosopis juliflora*) was introduced in the Marigat area, homeland of the Il Chamus. A thorny vegetation, the invasive plant rapidly colonized the area and destroyed native flora, causing harm to humans, as well as emaciation and death of livestock. The community, which was visited by the Special Rapporteur, claims to have found no support in addressing the devastating consequences of the wrong policy and filed a lawsuit in 2006 demanding reparation.

47. Pastoralists' lives have also been affected by the consequences of the establishment in the past and at present of military bases and training camps in pastoralist areas like Isiolo, Garissa, Laikipia, Samburu, Turkana and Wajir. Unexploded ordnance left behind after military exercises in pastoralist areas have produced numerous victims among local communities, who complain that they have not received any compensation for their losses and that nobody has assumed responsibility for cleaning up the contaminated lands.

E. Conservation versus livelihood

48. Kenya is widely admired in the world for its national parks and game reserves, which have become a major tourist attraction and therefore important for the national economy. It is estimated that direct and indirect revenues from wildlife conservationist policies amount to 10 per cent of GDP. Protected areas cover over 3.5 million hectares, or 6 per cent of Kenya's total land area. The conservation of wildlife and the preservation of natural parks are considered high priority for the country, and this has involved separating indigenous people from the wildlife and the forests. Many families were evicted by the creation of protected areas, most of which were originally inhabited by pastoralists and hunter-gatherers.

49. The Endorois community has lived for centuries in their traditional territory around Lake Bogoria, which was declared a wildlife sanctuary in 1973. Since then, the community has been pushed to live in the higher lands, a rocky terrain providing insufficient pasture for their animals. The community brought suit against the Government, seeking return to their lands and participation in the benefits derived from the reserve. Failing to obtain redress at the national level, they brought the case before ACHPR in 2003.

50. On the mistaken assumption, held since colonial times, that subsistence hunting by indigenous communities was decimating wildlife, the Wildlife Conservation Act interdicts game hunting inside and outside the protected areas. Those who persist are often arrested and prosecuted as poachers, and in some areas "eco-guards" were armed and actually killed poachers to prevent illegal hunting. Despite centuries of coexistence with wildlife, nomadic pastoralists are not allowed to herd their cattle in the reserves even in game reserves which are managed by the local authorities on behalf of the local communities. In the context of rising human population and escalating poverty, the restrictions imposed on the utilization of national parks and game reserves by pastoralists have severely affected their livelihoods and their chances for survival.

51. Wildlife conservation also has had direct negative impacts on neighbouring communities. The Maasai living close to Amboseli and Maasai Mara denounce the killing and injury of many

of their members and herds as a result of attacks by wild animals, as well as the destruction of their crops. Victims of these episodes claim that they have been insufficiently compensated, if at all.

52. The growth of the tourist industry in connection with the establishment of protected natural areas has created additional problems for these communities. In Maasai Mara the construction of a private tourist resort reportedly associated with top government officials has involved fencing off an area traditionally belonging to the Sekenani village, leading to the loss of access to one of the only three sources of water for everyday human and cattle consumption. Local communities of Endorois similarly claim that the privately owned Laikipia Natural Conservancy Trust severely curtailed their livestock grazing, and access to water sources in the area is only allowed once a week.

53. Local indigenous communities do not participate in the management of the parks and reserves and do not benefit from the revenue, which either accrues to the Kenya Wildlife Service in the case of national parks, or to the local district in the case of national reserves. An exception in this regard is the Maasai Mara, where 19 per cent of the revenue is said to be invested in favour of the local Maasai communities. However, local villagers claim that they do not see the benefit, and 60 per cent of the district remains in poverty.

54. The revision of the Kenyan Wildlife Policy in 2003, adoption of which is still pending, was halted under pressure from indigenous communities. A better practice, from the human rights and ecological perspectives, would be to involve the pastoralist and forest communities in the management and benefits of a conservationist strategy. Thus, wildlife and parks would be preserved, tourist dollars would be obtained, and the livelihood of the local populations would be protected and strengthened. Throughout Kenya's recent history, it would appear that wild animals are protected, while people are not.

F. Access to justice and impunity

55. Historical injustices and marginalization, increased pressure on lands and resources, political manipulation and cross-border dynamics have given rise to a deteriorating security situation and recurrent inter-ethnic conflicts. Episodes of violence in the north, the Rift Valley and coastal areas reached a peak during the 1990s and in 2004-2005, resulting in widespread human rights violations. Communities claim that the Government's response to these situations has been inadequate, and that in many instances it has led to human rights abuses by security forces. 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.

56. The North Eastern Province is one the most marginalized areas of Kenya. It has a long history of conflict dating from the European "scramble for Africa", and still suffers the tragic consequences of the short-lived "Shifta war" between the Government and the Somali secessionists after independence. The region became practically a police State during the following decades, and the application of emergency laws led to gross violations of human rights. While much of this legislation has since been repealed, the consequences of discrimination (such as the issuing of "screening" cards) against Somali Kenyans still lingers.

57. Cattle rustling, banditry and cross-border insurgency have led to hundreds of deaths, thousands of internally displaced persons and a flourishing trade in small arms. Near the Ethiopian border, the Gabra have suffered cross-border attacks by cattle rustlers linked to armed groups that have caused many victims, and they feel themselves to be neglected by government authorities. The neighbouring Burji, as well as the Munyayaya and the Orma in Garissa, presented the Special Rapporteur with similar complaints. One report states that in northern Kenya insecurity has risen, to rank alongside drought as the principal cause of human misery.

58. A comparative analysis of conflicts in Turkana, Marsabit, Garissa and Tana River highlights the high economic, social and cultural costs of these conflicts and the need to invest resources in conflict resolution at the local level. In Wajir, among other instances, a local peace initiative is said to have produced promising results. The long-term solution to these complex conflicts does not consist so much in applying straightforward “law and order” mechanisms, as some officials in the capital seem to believe, but in local peace initiatives with community participation. The final costs will be much lower and the results more long-lasting.

59. Over the years, a number of massacres of unarmed civilians have occurred in the context of enduring ethnic conflicts, like those at Malka-Mari (1981), Garissa (1982), or Turbi (2005). The 1984 Wagalla massacre in Wajir stands as the worst episode of human rights violations in Kenyan history. In the course of three days, security forces detained, tortured and brutally killed many hundreds of Degodia Somali. While the Government recently acknowledged the loss of 360 lives, other sources interviewed by the Special Rapporteur estimate that there were 2,000-3,000 victims. Many of the survivors still suffer physical and psychological consequences, and the widows and orphans have found no support. The true facts have never been established, and none of the alleged perpetrators has been prosecuted.

60. Besides cases of mass killings, there have been countless reports of arbitrary detention, police harassment, and incidents of torture and rape suffered by local residents as a result of the punitive application of security measures. The Special Rapporteur on the question of torture found in 2000 that those acts were widespread in the northern regions as a “form of communal punishment” (E/CN.4/2000/9/Add.4, para. 16). Many police abuses have been reported in relation to social protests associated with land rights claims, and vocal community members have been ill-treated and arrested. In Laikipia, in 2004, Maasai protesters marking the expiration of leases under the 1904 treaty with the British were severely repressed, resulting in the killing of an elder and serious injury to four people. Rape of women and looting in local villages were reported as a result of the security operation that ensued.

61. A number of organizations active in promoting land reform and denouncing abuses against indigenous communities, including the Kenya Land Alliance, Osiligi in Laikipia and MPIDO, have allegedly been the object of systematic harassment and intimidation by the authorities, and donors to those organizations have reportedly been pressured to discontinue funding. In 2005, the director and two other staff members of MS Kenya, a branch of the Danish Association for International Cooperation that supports the promotion of land rights, were accused of “subversive activities”.

62. Exercising the liberties promised by the new Government, people now seek redress for past injustices. In many of the land rights cases involving human rights violations, the

communities concerned still await responses to their numerous complaints to authorities at all levels. This typical lack of response, linked to high levels of public corruption, has led to widespread distrust of government authorities.

63. The issue of redress for past human rights violations led to the creation of a presidential Task Force on the Establishment of a Truth, Justice and Reconciliation Commission (the “Mutua Commission”), which concluded that “[t]he post-colonial state has engaged in the most abominable human rights violations ... known to humanity” (p. 9), and recommended the establishment of a truth commission to inquire into those episodes and to seek redress for the victims. These views have been fully endorsed by KNCHR, which reports that “[p]olitically instigated ethnic clashes have, in the 1990’s, resulted in massive human rights violations such as the death of thousands of people and injury to many more, the destruction of property worth billions of shillings, and the traumatizing of the immediate victims and their relatives” (KNCHR, Strategic Plan 2004-2009). The Government has so far failed to establish a transitional justice mechanism, which has been seen as a major failure in its democratization efforts.

64. With the exception of Kadhis (Islamic) courts, there is only a limited recognition of traditional or customary justice systems in Kenya. National courts may apply customary law only in civil matters in which one of the parties is subject to customary law and “as long as it is not repugnant to natural justice”. There is an increasing demand for the right of communities to be represented in court that is not yet addressed.

G. Poverty, inequality and access to social services

65. The *Kenya UNDP Human Development Report 2001* indicates that the Human Development Index declined from 0.531 in 1990 to 0.514 in 1999, as reflected in the fall in life expectancy, per capita income and school enrolment and the rise in infant mortality and disease incidence. A major concern is the recent increase in poverty in the country, from 26 per cent in 1997 to 35 per cent in 2001. Another source estimates this rate at 57 per cent in 2005. Inequality is on the rise in Kenya, and the top 10 per cent of households control 42 per cent of the total income while the bottom 10 per cent of households control less than 1 per cent. The overall development situation is also characterized by regional, rural-urban, gender and social class inequalities. Due to their historical marginalization and social exclusion, pastoralist, hunter-gatherer and other minority communities consistently show higher poverty rates and lower levels of social and human development than the rest of the population.

66. The *Human Development Report* does not provide disaggregated data about indigenous people, but regional differences provide significant indicators. A large gap exists between the north and the rest of the country. In Garissa District alone, the poverty incidence is 64 per cent and in Marsabit the majority of the population relies on humanitarian relief. Together with the North Eastern Province, the poorest districts in the country are found in Coast, Eastern and Rift Valley Provinces, all ASAL areas that are home to the majority of pastoralists and hunter-gatherers. The Economic Recovery Strategy for 2003-2007 (ERS) defines the situation in the ASALs as one of “rampant poverty” (p. 45).

67. Community representatives interviewed by the Special Rapporteur outlined as causes of indigenous peoples’ poverty the unequal distribution of land and the lack of access to productive

resources; the lack of access to and distribution of social services; ineffective development programmes; and the lack of basic infrastructure and marketing opportunities. The reactivation of the Kenyan Meat Commission has been welcomed by pastoralist communities, who also underlined that it should be made functional in all pastoralist areas.

68. Both the Economic Recovery Strategy and the Poverty Reduction Strategy include specific lines of action to improve equality and reduce poverty in ASAL areas that have a direct bearing on indigenous communities. Government development efforts in these areas are now focused on the ASAL Management Project, financed by the World Bank, which includes a community-based drought early warning system and support for development initiatives at the local level. The project has played a major role in the formulation of the Government's draft ASAL policy, which sets out a comprehensive plan to support pastoralism in these areas through water provision, grazing, rangeland management, animal health and marketing. The policy is, however, still subject to adoption by the Parliament.

69. To implement the Millennium Development Goals, to which it has subscribed, Kenya has launched the Free Universal Primary Education programme. The authorities recognize, however, that the programme has not yet reached all school-age children, especially in the geographically isolated arid and semi-arid lands, given their specific educational needs. Due to disproportionate poverty, families struggle to provide their children with school uniforms, transportation and school supplies. In some areas, children have to walk many kilometres every day to reach a school. Access to education in pastoralist areas is a serious human rights issue, as reflected in low literacy rates. An estimated 1.7 million children remain out of school, the majority of them living in marginalized pastoralist communities. The literacy level for Maasai in Kajiado and Somali in Mandera is only 3 per cent compared with a national average of 79.3 per cent. According to the *Human Development Report*, enrolment rates in North Eastern Province were especially low: only 9.8 per cent for primary school and 4.8 per cent for secondary school.

70. To face the difficulties of providing primary school education to semi-nomadic pastoralist families, some attempts have been made to establish boarding schools and mobile schools that accompany the nomadic families. Both initiatives have their problems. When children attend boarding schools, they cannot help their families with herding the livestock and other chores. Thus families are reluctant to send their children to boarding schools. Girls are especially disadvantaged when cultural constraints such as early marriages prevent them from being able to attend school. Mobile schools require not only committed teachers willing to endure hardship but also support mechanisms that are not easily provided.

71. Whilst universal primary school education may be attainable within a reasonable time frame, access to secondary schooling is more complicated and costly. Many of the communities that the Special Rapporteur visited complained that secondary schooling was out of their reach. Only a select few from pastoralist and hunter-gatherer communities can make it through secondary school, and even fewer manage to achieve a university-level education.

72. There are a number of reasons for this decline of educational achievement over the last years. There has been a reduction of government spending on educational infrastructure and materials; additionally, remote pastoralist areas lack schools and qualified teachers. Moreover, the school curricula are mostly irrelevant for the needs of pastoralists and hunter-gatherers.

73. The Government's 2005 Policy Framework for Education, Training and Research advocates affirmative action strategies, calling for the priority construction of schools in areas where nomadic populations live. Pastoralists are now targeted as marginalized groups on the same footing as slum dwellers and children with special needs, but with no regard to their specific cultural contexts.
74. The official languages of teaching are Kiswahili and English. Local vernacular languages are not officially used in the school system, though some communities manage to provide schooling in their own language as well. The Special Rapporteur received a number of reports complaining about the loss of the vernacular language, for example from the Yaaku and the Watta people, with pleas for action to preserve their languages, which they consider as cultural treasures.
75. Most indigenous peoples still lack easy access to primary health care, due to distance, lack of transport and essential supplies, and high costs. Moreover, health facilities are understaffed and distributed unevenly across districts in ASALs. Maternal health care is lacking, infant mortality is high, and the Orma estimate that 30 per cent of their women die during pregnancy and labour. In the absence of public health, people rely on traditional medicine and the Kenyan Medical Research Institute has recommended its legalization.
76. Indigenous communities, as the rest of Kenya's population, have been strongly affected by HIV/AIDS, though statistical data are lacking. The disease mostly affects poor women, especially in the pastoralist areas where they are excluded from development policies and where certain cultural practices such as initiation rites are conducive to its propagation.
77. Child labour is on the increase among indigenous communities, because domestic herding requires their participation. Orphans and children from poorer households are often hired out, sometimes to commercial herders but also to tea plantations and mining quarries, or as domestic workers. Child labour among indigenous populations has not received the government attention it requires, but ILO and some private organizations have programmes addressing these issues.

H. The rights of indigenous women

78. Gender inequalities and discrimination against women constitute persistent human rights violations, and indigenous women stressed that they also face systematic injustices and abuse within their own communities.
79. Female genital mutilation (FGM), though outlawed since 2001, is still practised widely among numerous indigenous communities such as the Maasai, Samburu, Somali and Pokot, as part of the culturally sanctioned rites of passage. Whereas at the national level 34 per cent of women undergo FGM, the percentage in North Eastern Province rises to an alarming 99 per cent. FGM poses serious problems for the physical and mental health of girls and, being a form of gender violence, it is also a major human rights violation. Some organizations have experimented with various means of abandoning the practice in socially acceptable ways. For instance, UNFPA supports the Tasau Ntomok Girls Rescue Centre in Narok, which promotes an alternative rite of passage for pubescent girls, respecting the value of the tradition but rejecting the violence associated with it.

80. During violent ethnic conflict, rape has become a weapon of aggression and a systematic form of abuse by security forces. Indigenous women complain that rape allegations are not treated seriously in police stations. In cases of rape within their own communities, the redress provided by existing customary laws fails to compensate the victim.

81. Many indigenous women are denied access to property rights as a result of discriminatory statutory and customary law. ILO reports that women suffer marginalization with regard to land ownership due to patrilineal systems of land inheritance, and become virtually destitute in case of widowhood or divorce. Women are further excluded from decision-making in land transactions and the administration of communal ownership and group ranches. A report published by Human Rights Watch in 2002 concludes that discriminatory property laws generate gross violations of women's human rights, relegating them to dependence on men, abhorrent living conditions and increased vulnerability to HIV/AIDS.

V. CONCLUSIONS

82. The pastoralist and hunter-gatherer way of life of Kenya's indigenous peoples has come under heavy strains in recent decades. This is mainly the result of the historical legacy of colonialism, but also of inappropriate land policies and developmental strategies in ASALs and forest areas since independence, which are currently being revised. These policies entailed the systematic land-loss of rangelands and of forest reserves that underpinned the pastoralist and hunter-gatherer livelihoods and their cultural sustainability, leading to serious violations of economic, social and cultural rights and some persistent abuses of civil and political rights.

83. Nomadic and semi-nomadic pastoralism and agro-pastoralism were erroneously considered an obstacle to Kenya's economic development. The assault on the pastoralists' grazing areas involved forced displacements and the drastic reduction of available rangeland for livestock herding. The privatization of land, water and other resources, and the individualization of homesteads led to the fragmentation of traditional communally owned lands, increasing competition and conflict over diminishing resources, the progressive disintegration of community life and the growth of social and economic inequality among indigenous communities. To this must be added the long-term effects of persistent droughts and the environmental deterioration of pastoralist areas and forests, including diminishing water resources.

84. Historical injustices and contemporary dispossession of lands and resources have been a major setback for the full enjoyment of the human rights of these groups. While a number of government initiatives have underlined the importance of such issues, the current land legislation and policies do not adequately address the challenges faced by pastoralist and hunter-gatherer communities. It is still a pending issue to be resolved, but the longer it takes the more difficult it will become for indigenous communities to be guaranteed their right to land, territory and resources.

85. The exclusion of hunter-gatherers and pastoralists from national parks and game reserves as a result of misguided conservationist policies also contributed to their progressive impoverishment and did not offer any alternatives for economic and social development for indigenous communities. This rigid conservationist strategy has come increasingly under critical

scrutiny and alternative proposals for community-driven participatory asset management and development schemes have been put forward in the Government. They point to the importance of including the right to a healthy and secure environment in ongoing discussions concerning the rights of indigenous peoples in Kenya. Destruction of traditional habitats as a result of insensitive development projects, flawed policies and private enterprise are also human rights issues that demand compensation and reparation.

86. Historical injustices and increased pressure on land and natural resources have produced uncertainties that nourish ongoing inter-ethnic conflict which in turn fuels expressions of negative ethnicity that are often manipulated by political elites in a widely perceived environment of corruption and impunity. The legacy of grievous human rights violations that occurred in the past, such as the Wagalla massacre of 1984 and others, still weighs heavily on the country, and unless true transitional justice is achieved the human rights picture at the national level will be clouded. Effective means for conflict resolution and peacebuilding at the local level must also be strengthened.

87. Since the 2002 elections a new atmosphere of civil liberties has enabled human rights and indigenous peoples' organizations to have a voice in the national debate and to participate actively in discussions on alternative policies. Still, a number of indigenous communities complain about their "invisibility" and lack of recognition, and they ask for greater participation at the political level.

88. The human and social development indicators of indigenous people lag behind the national average. The draft ASAL policy, the PRSP, the Economic Recovery Strategy for Wealth and Employment Creation and the programme of free universal primary education, among others, are steps in the right direction, and they must be supported with material resources, technical skills, human capital and, above all, political will. These programmes must focus on the special needs and requirements of pastoralist and forest communities if they are to make an impact on the human rights situation of indigenous peoples in the country.

89. Indigenous women are victims of serious human rights violations derived from discriminatory status and customary law, lack of access to social services and decision-making, and harmful traditional practices such as FGM. Difficulties in achieving gender equality among indigenous communities will require special measures within an overall approach of affirmative action and culturally appropriate policies towards these communities.

VI. RECOMMENDATIONS

90. **In view of the above, the Special Rapporteur makes the following recommendations:**

A. Recommendations to the Government

Legal recognition and political participation

91. **The rights of indigenous pastoralist and hunter-gatherer communities to their lands and resources, effective political participation and distinct cultural identity should be constitutionally recognized. Specific legislation should be correspondingly enacted, including affirmative action where necessary.**

92. **The Government should take all the necessary steps, in consultation with indigenous peoples in the country, to ensure prompt ratification of ILO Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries. It should also promote the adoption of the United Nations Declaration on the Rights of Indigenous Peoples by the General Assembly and, through Parliament, ensure the incorporation into domestic law of these instruments.**

93. **The national census should identify pastoralists and hunter-gatherers as distinct indigenous communities and provide disaggregated data in order to understand their specific needs and facilitate the elaboration of appropriate public policies.**

94. **The Government, through the Electoral Commission of Kenya, should regulate the nomination of Members of Parliament by political parties, in particular to ensure adherence to the constitutional provisions on the need to take into account special interest groups in those nominations.**

95. **Existing districts and constituencies should be redefined in order to provide for a more effective representation of the interests of smaller indigenous communities, particularly in cases where they are divided into several administrative units, in line with section 42 of the Kenya Constitution.**

96. **The current procedures for granting national identity cards should be reviewed to remove obstacles affecting indigenous communities, and such identity documents should be provided to members of nomadic pastoralist and forest communities who still lack them.**

Land and resource rights

97. **The Government should fully implement the recommendations of the Ndungu report, giving particular attention to the rights of indigenous and other marginalized communities to their lands and natural resources. The draft National Land Policy should be adopted, retaining the sections on the land rights of pastoralists and hunter-gatherers, and fully implemented.**

98. **Indigenous communities should be consulted prior to the exploration for and exploitation of natural resources on their traditional lands, and should receive an equitable share of benefits obtained from such activities through participatory resource management. They should be fully compensated for any adverse environmental impact on their land, resources and traditional livelihoods resulting from development projects and other economic activities.**

99. **Efficient mechanisms should be established to address historical injustices and settle current land and natural resource disputes resulting from dispossession of lands traditionally owned by pastoralists and hunter-gatherers. These mechanisms should include the possibility of revocation and rectification of irregular titles, as well as the restitution of lands and/or effective compensation to the affected communities.**

100. Stronger guarantees against the dispossession of indigenous communal lands should be incorporated in the land legislation, allowing for room to challenge fraudulent first registrations in the courts. The Government should also ensure that no adjudication or setting apart of trust lands or unalienated government lands should be allowed without the free, prior and informed consent of local communities.

101. The policy of privatization of communal ranches should be carefully revised with the participation of the communities concerned, in order to provide permanent protection and support to communal lands and group ranches and counteract the negative consequences of the “willing seller-willing buyer” practice, particularly in Narok and Kajiado Districts.

Forest areas

102. The rights of indigenous hunter-gatherer communities (particularly the Ogiek in Mau Forest) to occupy and use the resources in gazetted forest areas should be legally recognized and respected. Further excisions of gazetted forest areas and evictions of hunter-gatherers should be stopped. Titles derived from illegal excision or allocation of forest lands should be revoked, and new titles should only be granted to original inhabitants. Illegal commercial logging should be stopped.

Environmental rights

103. The Government’s ASAL policy should include measures to restore the environment and prevent further degradation in pastoralist areas. In particular, it should cooperate with other actors in the elimination of the prosopis weed in the Il Chamus community.

104. The authorities of the Tana River dams should ensure that no water release takes place without previously informing and consulting with the Munyayaya and other communities living along the river. Any damage on indigenous communities’ lands resulting from the operations of the dams should be fully compensated.

105. The State should promote the complete removal of landmines and other military ordnance in pastoralist areas, and victims should be fully compensated.

106. Existing legislation should be amended to ensure the rights of local indigenous communities to access the natural resources in protected areas in their traditional territories. Conservation and the rights of indigenous peoples should be balanced in accordance with the recommendations of the fifth World Parks Conference held in Durban, South Africa in 2003.

107. Pastoralist and hunter-gatherer communities should be involved in decisions concerning the management of and benefits derived from protected areas, game reserves and national parks. They should also be compensated for any loss derived from the creation of such areas, including any human and material losses derived from wildlife activities in the vicinities of these areas.

108. The Government should aim at a friendly settlement in the case of the Endorois before ACHPR, leading to the establishment of a system of co-management between the authorities and the local communities in the Lake Bogoria Game Reserve.

Access to justice

109. The Government should fully implement the recommendations of the “Mutua Task Force” and KNCHR, and establish a Truth, Justice and Reconciliation Commission with the power to investigate and provide redress and compensation to the victims of gross human rights violations. Special attention should be paid to the investigation of the Wagalla and other massacres, the compensation of the victims and the punishment of the perpetrators.

110. The Government should ensure that all allegations of torture, rape and other human rights violations are promptly, independently and thoroughly investigated by a body capable of prosecuting perpetrators. The rights of human rights defenders and indigenous activists should be specifically protected.

111. The national conflict resolution mechanism should include leaders from indigenous peoples’ communities and be linked to local conflict resolution mechanisms.

112. Indigenous communities should have the legal right to represent their interests in cases affecting their collective rights.

Social services

113. The Government should adopt the current draft ASAL policy and fully implement it with the participation of pastoralist communities.

114. Indigenous communities should participate actively in the design, implementation and evaluation of the poverty reduction strategy and the realization of the Millennium Development Goals.

115. Affirmative action should be applied to promote education for indigenous children at all levels, particularly for indigenous girls. Free boarding and mobile schools should be an integral part of the free universal primary education programme. More appropriate educational curricula should be devised, taking into account indigenous peoples’ distinct ways of life.

116. Efforts should be made to protect the languages of the smaller indigenous communities from extinction, by appropriate educational, linguistic and cultural policies.

117. Indigenous peoples, particularly indigenous women and girls, should be ensured access to adequate health services. The system of mobile clinics in pastoralist areas should be reinforced, and the use of traditional medicine and health-related knowledge should be encouraged and legally recognized.

Women's rights

118. **The Government should reinforce its efforts to achieve the effective eradication of FGM in all communities, by helping promote culturally appropriate solutions such as alternative rites of passage and supporting women's organizations in these tasks.**

119. **The Government should review existing discriminatory laws and regulations affecting the property rights of indigenous women, particularly those of widows and divorced women.**

B. Recommendations to the Kenya National Commission on Human Rights

120. **KNCHR should establish a specialized programme dealing with the rights of pastoralists and hunter-gatherers and other minority communities, promote wider knowledge of their human rights situation and strengthen cooperation with their organizations.**

121. **KNCHR should play a key role in the monitoring of the implementation by all relevant actors of the recommendations made by the Special Rapporteur in this report.**

C. Recommendations to indigenous communities and organizations

122. **Existing customary laws and practices should be revised to eliminate discrimination against women, especially with regard to their property rights and harmful traditional practices, and ensure their full participation in decision-making at the community and national levels.**

123. **Indigenous communities and organizations should renew efforts to find constructive solutions to existing conflicts with other communities, taking into account customary practices, the principles of transitional justice and the respect for human rights.**

124. **Indigenous peoples' organizations are encouraged to develop concrete strategies for data collection, research and documentation to support their advocacy work both at the national and international levels.**

D. Recommendations to civil society and political parties

125. **Political parties should take a stand in favour of the recognition of indigenous peoples' communities and their rights in the constitutional review, legislative reform and policymaking.**

126. **Members of the Pastoralist Parliamentary Group are encouraged to revitalize their activities in order to build a common agenda and strategy in favour of pastoralist and other indigenous communities.**

127. **NGOs and donors should strengthen their relations with indigenous communities, support their development initiatives and promote a better understanding of their demands and aspirations within Kenyan society.**

E. Recommendations to the international community

128. The international agencies and programmes in Kenya should take into account the needs and rights of indigenous peoples and establish specific programmes for them. They are encouraged to engage with UNIPACK and other pastoralist and hunter-gatherer networks and organizations in the formulation and implementation of these policies.

129. International agencies and financial institutions should ensure that all projects in indigenous areas respect the principle of free, prior and informed consent of the local communities. Any negative impact caused to these communities as a result of these projects should be duly accounted for and compensated.

130. ILO should further its efforts to promote the rights of indigenous communities in Kenya under the provisions of Convention No. 169 and other fundamental international labour standards.

F. Recommendations to the academic community and the media

131. The country's universities and research centres should establish focal points for research on and teaching about the needs and rights of indigenous peoples in Kenya.

132. The written press and the audio-visual media should avoid any discriminatory or biased reporting on indigenous peoples in Kenya and provide space for their concerns and information that promotes their ways of life and cultural identities.



Assemblée générale

Distr.
GÉNÉRALE

A/HRC/4/32/Add.3
26 février 2007

FRANÇAIS
Original: ANGLAIS

CONSEIL DES DROITS DE L'HOMME
Quatrième session
Point 2 de l'ordre du jour provisoire

**APPLICATION DE LA RÉOLUTION 60/251 DE L'ASSEMBLÉE GÉNÉRALE
DU 15 MARS 2006 INTITULÉE «CONSEIL DES DROITS DE L'HOMME»**

**Rapport du Rapporteur spécial sur la situation des droits de l'homme
et des libertés fondamentales des populations autochtones,
Rodolfo Stavenhagen**

Additif

MISSION AU KENYA*

* Le résumé du présent rapport est distribué dans toutes les langues officielles. Le rapport proprement dit, qui est joint en annexe au résumé, est distribué dans la langue originale.

Résumé

Le présent rapport rend compte de la visite officielle effectuée au Kenya par le Rapporteur spécial sur la situation des droits de l'homme et des libertés fondamentales des populations autochtones du 4 au 14 décembre 2006 à l'invitation du Gouvernement kényan. Au cours de sa mission, le Rapporteur spécial a tenu des consultations avec les autorités nationales et régionales, des membres du personnel d'organismes des Nations Unies, des représentants d'organisations non gouvernementales, ainsi que des membres de communautés et d'organisations autochtones dans différentes parties du pays.

Les chasseurs-cueilleurs et les pasteurs de groupes minoritaires qui vivent pour la plupart dans les terres arides et semi-arides, tels que les El Molos, les Yakus, les Sengwers, les Masaïs et les Ogieks constituent les communautés autochtones du Kenya. Ces communautés ont de tout temps fait l'objet de discriminations visant leurs moyens de subsistance et leur culture, et leur manque de reconnaissance juridique et d'autonomie traduit leur marginalisation sociale, politique et économique.

Les principaux problèmes de droits de l'homme qui se posent à elles sont liés à la perte et à la dégradation de leurs terres, forêts traditionnelles et ressources naturelles, consécutives à la spoliation qu'elles ont subie à l'époque coloniale et pendant la période qui a suivi l'indépendance. Au cours des dernières décennies, des politiques de développement et de conservation inappropriées ont entraîné une aggravation des violations de leurs droits économiques, sociaux et culturels.

Le manque de services sociaux et sanitaires au sein des communautés autochtones pénalise surtout les femmes et les enfants, qui sont victimes d'inégalités et de discriminations fondées sur le sexe, notamment en matière de droits de propriété, ainsi que de pratiques traditionnelles préjudiciables qui, par ailleurs, favorisent la propagation du VIH/sida dans ces communautés.

Le gouvernement actuel s'est engagé dans des politiques d'un type nouveau axées sur un processus de développement des terres arides et semi-arides piloté par les communautés, une action positive dans le cadre de la stratégie de réduction de la pauvreté et le programme d'accès universel et gratuit à l'enseignement primaire. Si elles portent leurs fruits, ces politiques devraient permettre de corriger des injustices historiques et d'améliorer de manière générale la situation des communautés autochtones.

La violence liée aux conflits sociaux et ethniques de diverses natures et l'absence de mécanismes de justice transitionnelle et de réparation ont également porté atteinte aux droits de l'homme des communautés autochtones.

Le Rapporteur spécial termine son rapport par une série de recommandations tendant à améliorer la situation des droits de l'homme des peuples autochtones dans le pays.

Annexe

**REPORT OF THE SPECIAL RAPPORTEUR ON THE SITUATION OF
HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS OF INDIGENOUS
PEOPLE, RODOLFO STAVERNHAGEN, ON HIS MISSION TO KENYA
(4-14 DECEMBER 2006)**

CONTENTS

	<i>Paragraphs</i>	<i>Page</i>
I. INTRODUCTION	1 - 7	5
II. INDIGENOUS PEOPLES IN KENYA	8 - 12	6
III. LEGAL AND POLITICAL CONTEXT	13 - 20	7
IV. MAJOR ISSUES AFFECTING THE RIGHTS OF INDIGENOUS PEOPLES IN KENYA	21 - 81	8
A. Legal recognition and political participation	21 - 24	8
B. Land and resource rights: the pastoralists	25 - 35	9
C. Hunter-gatherers and forest peoples	36 - 41	11
D. Environmental rights	42 - 47	13
E. Conservation versus livelihood	48 - 54	14
F. Access to justice and impunity	55 - 64	15
G. Poverty, inequality and access to social services	65 - 77	17
H. The rights of indigenous women	78 - 81	19
V. CONCLUSIONS	82 - 89	20
VI. RECOMMENDATIONS	90 - 132	21
A. Recommendations to the Government	91 - 119	21
B. Recommendations to the Kenya National Commission on Human Rights	120 - 121	25

CONTENTS (*continued*)

	<i>Paragraphs</i>	<i>Page</i>
C. Recommendations to indigenous communities and organizations	122 - 124	25
D. Recommendations to civil society and political parties	125 - 127	25
E. Recommendations to the international community	128 - 130	26
F. Recommendations to the academic community and the media	131 - 132	26

I. INTRODUCTION

1. Pursuant to Commission on Human Rights resolution 2001/57 of 24 April 2001, which established his mandate, and at the invitation of the Government, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people visited Kenya from 4 to 14 December 2006.
2. The purpose of this visit was to better understand the situation of indigenous peoples in Kenya, to learn about policies and practices designed to promote and protect their rights, and to dialogue with government officials at the national and local levels, representatives of indigenous peoples' communities and organizations, development partners and other actors on ways to strengthen the responses to the demands and needs of indigenous peoples.
3. The Special Rapporteur travelled to Nairobi, Kitengela, Narok, Nakuru, Baringo, Mount Elgon, Laikipia, Wajir, Garissa, Marsabit and several rural areas around the country. In Nairobi, he met with the Permanent Secretary in the Ministry of Justice and Constitutional Affairs, the Permanent Secretary in the Ministry of Lands, the Permanent Secretary in the Ministry of Education, the Director of the Kenya Wildlife Service, as well as with high officials in the Ministry of Health and the President's Office of Special Programmes. He also met with the Kenya National Commission on Human Rights (KNCHR) and with Members of Parliament of the Pastoralist Parliamentary Group. In the various provinces he met with the Deputy Provincial Commissioner of the Rift Valley Province, the District Commissioners of Laikipia, Marsabit, Narok, and the Mayor of Garissa.
4. The Special Rapporteur met with the United Nations Resident Coordinator and country team representatives, and held conversations with international agencies including the International Labour Organization (ILO), the Food and Agriculture Organization of the United Nations (FAO), the United Nations Development Programme (UNDP), the United Nations Environment Programme (UNEP), the United Nations Children's Fund (UNICEF), the United Nations Office on Drugs and Crime (UNODC), the United Nations Human Settlements Programme (UN-Habitat), the United Nations Population Fund (UNFPA) and the World Health Organization (WHO), as well as with donor organizations and non-governmental organizations (NGOs).
5. The Special Rapporteur conducted on-site visits to numerous indigenous pastoralist and hunter-gatherer communities in Narok, Laikipia, Mau Forest, Mount Elgon, Lake Baringo, Cherangany Hills and Wajir. He also held meetings with indigenous representatives of the Awer, Boni, Borana, Burgi, Elmolo, Endorois, Ilchamus, Gaaljecel, Gabra, Maasai, Malakote, Munyayaya, Ogiek, Orma, Pokot, Rendille, Sabaot, Sakuye, Samburu, Sengwer, Somali, Talai, Turkana, Watta, Munyayaya and Yakuu. He met with members of other minority communities, such as the Nubians, and with groups of refugees. He also visited the Maasai Mara National Park and the Lake Baringo Game Reserve, where he assessed the impact of protected areas on local indigenous peoples.
6. During his visit, the Special Rapporteur participated in the National Seminar on Indigenous Issues, organized by the Office of the High Commissioner for Human Rights (OHCHR) and UNDP in Nairobi, on 5 and 6 December 2006.

7. The Special Rapporteur would like to acknowledge the hospitality of the Government of Kenya, and especially thank the Ministry of Justice and Constitutional Affairs for its invitation and cooperation, and KNCHR, UNIPACK (United Nations Indigenous Peoples' Advisory Committee - Kenya) and the indigenous peoples' steering committee for the preparation of the visit. He also wishes to thank the many indigenous communities and organizations that gave their time and provided useful information for this report, including Arid Lands Institute, Center for Minority Rights Development (CEMIRIDE), Endorois Development Council, International Movement for Peace Advancement and Conflict Transformation (IMPACT), Maa Civil Society Forum, Ogiek Welfare Development Council, Pastoralist Integrated Development Organization (MPIDO), Sengwer Culture and Information Centre, Truth to be Told Network, and Womankind. UNDP-Kenya deserves a special mention for its invaluable support of the mission at all stages.

II. INDIGENOUS PEOPLES IN KENYA

8. In Kenya all Africans are indigenous to the country, as many Kenyans are inclined to point out to the Special Rapporteur. This is of course true, given that most Africans living in contemporary Kenya are descendants of the original inhabitants, and because in colonial times all Africans, of whatever tribe or ethnic affiliation, were considered as "natives" by the authorities, sharing the same history of colonial subjugation and racial discrimination. At independence all natives became free and equal citizens of the new State. Moreover, due to geographic conditions and historical circumstances, social and cultural distinctions became defining characteristics that differentiated among the many tribes that populate the country. The majority ethnic groups which became integrated into the farming economy occupied the more fertile areas and after independence they regained much of the land which they had lost to the colonial regime.

9. As in some other African countries (see the Special Rapporteur's report on his mission to South Africa, E/CN.4/2006/78/Add.2, paras. 20-32), the contested use of the term "indigenous" in Kenya has implications for policy decisions and therefore for the human rights of the concerned populations. From a human rights perspective, the question is not "who came first" but the shared experiences of dispossession and marginalization. The term "indigenous" is not intended to create a special class of citizens, but rather to address historical and present-day injustices and inequalities. It is in this sense that the term has been applied in the African context by the Working Group on Indigenous Populations/Communities of the African Commission on Human and Peoples' Rights (ACHPR).

10. Within this perspective, pastoralists and hunter-gatherers are normally regarded as indigenous peoples in the international context, and they increasingly come to identify themselves as such in many countries, including in Africa. In Kenya they include pastoralist communities such as the Endorois, Borana, Gabra, Maasai, Pokot, Samburu, Turkana, and Somali, and hunter-gatherer communities whose livelihoods remain connected to the forest, such as the Awer (Boni), Ogiek, Sengwer, or Yaaku. Other groups such as the Nubians consider themselves as a minority that has also been marginalized, but in an urban context. They and other minority groups share demands to end discrimination and exclusion with indigenous peoples in Kenya. The Kenya Government normally refers to indigenous and minority groups jointly as "minorities", "marginalized" or "vulnerable communities".

11. Government authorities and specialists recognize that historically the pastoralist and hunter-gatherer communities in the arid and semi-arid lands and forests were systematically marginalized on the basis of their economic, social and cultural characteristics, inextricably connected to the use of land and natural resources. One government report states that over the years policies directed at these communities were mainly top-down and discriminatory, and they often failed by marginalizing and impoverishing people in arid and semi-arid lands.

12. Indigenous peoples in Kenya have established numerous civil society organizations that are actively involved in promoting human rights, development issues and environmental concerns. Since the transition to a more democratic political regime in 2002, the visibility and public recognition of these organizations has grown, and a number of their leaders and members now cooperate closely with several government institutions.

III. LEGAL AND POLITICAL CONTEXT

13. Whilst Kenya has ratified most international human rights treaties and conventions, it has not ratified ILO Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries, and it has withheld its approval of the United Nations Declaration on the Rights of Indigenous Peoples at the current session of the General Assembly. The Government of Kenya has recently decided to update its reports to the various United Nations human rights committees, some of which are long overdue.

14. Kenya's independence from British rule in 1963 brought about the Africanization of the economy and the public services. The continuation of previous colonial policies, as well as the co-optation of the State apparatus by majority ethnic communities under a one-party system, led to increased tribalism in the distribution of political power, government jobs and wealth, and the widening gulf between rich and poor. This tendency increased during the Government of President Moi, during which numerous ethnic clashes occurred and human rights were severely curtailed.

15. The new Government, elected by a large majority in December 2002, enabled a democratic opening that allowed many pent-up grievances out into the open, including the long-standing demands by indigenous and other ethnic minorities for human rights and the emergence of a vibrant and articulate civil society. The new Government promoted legal reform and the consolidation of institutions of democratic governance, including a constitutional review process, and special inquiries into corruption, land mismanagement and historical injustices.

16. Most indigenous peoples in Kenya live in the arid and semi-arid lands (ASALs) which make up more than 80 per cent of the land mass and are home to more than 25 per cent of the national population, and include almost the majority of wildlife parks and reserves and protected forests. ASAL areas are predominantly pastoralist and agro-pastoralist, mainly suitable for livestock grazing due to low and erratic rainfall. These areas present the highest incidences of poverty and the lowest level of access to basic services in the country. Over 60 per cent of the population lives below the poverty line, which is above the average of 50 per cent nationwide.

17. Pastoralism was for a long time neglected and held in disrepute by the country's economic planners and political elites. Policies aimed at revitalizing ASALs since independence promoted sedentarization and crop farming, failing to take into account pastoralism as a sustainable form

of land use adapted to the environment. Deforestation and poor land use have further increased environmental degradation, making the land more vulnerable to cyclical droughts and floods.

18. The Constitution of Kenya incorporates the principle of non-discrimination and guarantees civil and political rights, but fails to recognize economic, social and cultural rights as such, as well as group rights. The rights of indigenous pastoralist and hunter-gatherer communities are not recognized as such in Kenya's constitutional and legal framework, and no policies or governmental institutions deal directly with indigenous issues. However, in recent years the specific situation and needs of these communities have started to be addressed, as reflected in current discussions on the ASAL and national land policies, and there seems to be growing consensus on the need for affirmative action towards these communities.

19. The specific needs and rights of pastoralists and hunter-gatherers were also taken into account in the constitutional review process that started in 2003. After countrywide consultations that included indigenous organizations, the first draft of a new constitution (the "Bomas draft") included the decentralization of power and group rights, a section on "Minorities and marginalized groups", and a system of affirmative action in employment, economic development, and political representation. It also called for the equal redistribution of lands and resources, and for the redress of historical injustices. A new revised draft prepared by Parliament (the "Wako draft") was overwhelmingly defeated in a referendum in 2005, partly because it failed to address outstanding land issues and the decentralization of power. Since then, the process of constitutional reform remains at a stalemate.

20. The Special Rapporteur is encouraged by the fact that KNCHR and the Ministry of Justice and Constitutional Affairs have begun to consider the promotion and protection of pastoralists and hunter-gatherers in Kenya as part of their activities. It is also encouraging that indigenous issues are being considered as cross-cutting issues in the process of formulation of a National Action Plan and Policy on Human Rights being spearheaded by these two institutions. Various official development initiatives, including the Poverty Reduction Strategy Paper (PRSP), the ASAL Resource Management Project and the draft National Policy for the Sustainable Development of the ASALs, take into account the special characteristics of pastoralism. Similarly, the new land policy currently under discussion refers explicitly to "the rights of minority communities", a concept that covers groups such as hunter-gatherers, forest peoples and pastoralists.

IV. MAJOR ISSUES AFFECTING THE RIGHTS OF INDIGENOUS PEOPLES IN KENYA

A. Legal recognition and political participation

21. The 1989 national census lists 42 tribes in Kenya, but omits many smaller pastoralist and hunter-gatherer communities, such as the Ogiek, El Molo, Watta, Munyayaya, Yakuu, and other small groups such as the Sabaot and Terik, who are not legally recognized as separate tribes. This situation is derived from the colonial policy of promoting assimilation of smaller communities into other dominant groups. Affected tribes claim that the lack of a separate code in official documents identifying them as distinct ethnic groups reduces their visibility in national policymaking. Many communities from the north, such as the Awer, Galjaeel, Somali,

and Oromo, are also prevented from enjoying full citizen rights as a result of the lack of proper identity cards.

22. The existing political system divides many communities such as the Endorois or Sengwer into different administrative and electoral units. This diminishes their effective representation in the Parliament and participation in local decision-making, as they may not have the numbers to vote for leaders from their communities through elective processes. Political parties, according to their numerical strength in Parliament, are vested with the constitutional power to appoint 12 “nominated members” of Parliament to represent “special interests”, which may include marginalized communities. There is also the legal possibility of changing the boundaries of existing constituencies, taking into account the “representation of ... sparsely populated rural areas”, and their “community of interest”. But these safeguards have not yet been fully implemented in favour of smaller indigenous communities.

23. Numerous indigenous communities complain that their needs are not being met and that their rights are not being adequately protected because, being numerically small, they do not have sufficient political representation at the national or provincial levels to make a difference. One such case was presented to the Special Rapporteur by the Ilchamus indigenous community of Baringo who represent 17 per cent of the local constituency and rely mainly on livestock for their subsistence. The community feels marginalized by the dominant groups in the district who do not represent their interests at the political level, and brought suit before the High Court alleging violation of their right to political participation. In a landmark judgement, issued shortly after the Special Rapporteur visited the country, the High Court directed the Electoral Commission of Kenya to supervise the appointment of nominated MPs to ensure compliance with the Constitution, and to take into account the Ilchamus community’s interests in the next boundary review.

24. The main effect of political marginalization is the unequal lack of access to development resources and government employment. This is particularly serious with relation to the Constituency Development Funds (CDF). Since 2003, 2.5 per cent of the government revenues are allocated every year to each constituency through this fund, but it is difficult for smaller communities who are not represented by an MP to have equal access to development resources and social services.

B. Land and resource rights: the pastoralists

25. Most of the human rights violations experienced by pastoralists and hunter-gatherers in Kenya are related to their access to and control over land and natural resources. The land question is one of the most pressing issues on the public agenda. Historical injustices derived from colonial times, linked to conflicting laws and lack of clear policies, mismanagement and land grabbing, have led to the present crisis of the country’s land tenure system.

26. The 2002 report of the Presidential Commission of Inquiry into the Land Law System of Kenya (“Njonjo report”), the 2004 report of the Presidential Commission into the Irregular-Illegal Allocation of Public Land (“Ndungu report”), and the draft National Land Policy include specific provisions concerning land reform, and so do the two constitutional drafts under discussion.

27. During the first half of the twentieth century, colonial authorities and European settlers seized the richest agricultural areas, while the original owners were displaced towards “native reserves” on far poorer land or remained as landless workers. After independence, the fertile agricultural lands of the “White Highlands” were bought back by the Government of Kenya, but they were not, contrary to early promises, returned to their original owners (among them the Maasai communities in the Rift Valley). The unequal distribution of land fostered a sense of relative injustice, and has created conflict over the years between farmers and pastoralists.

28. Most of the abuses after independence took place in Trust Lands, including former native reserves. The Constitution vests the administration of these lands in the County Councils, which acted “in total breach of trust as custodians of land on behalf of local residents” through the irregular adjudication of vast areas in favour of powerful individuals and settlers from other communities, and the establishment of protected areas (Ndungu report, p. 81). The prevailing theory of the sanctity of the title, whereby first registration of land title cannot be challenged in court regardless of fraud or mistake, further sanctioned these abuses. Displacement of original inhabitants has been widespread in the Rift Valley and Kajiado District, and most pastoralist grazing lands in the north and north-eastern regions face similar threats.

29. Since the end of the 1960s, and supported by the World Bank, the Government has promoted the transformation of Trust Lands into group ranches and then individual ownership, thus limiting the land available for traditional mobile grazing. Based on the idea that individual titles, through a “willing buyer-willing seller” approach, would improve the prospects for investment and economic growth, this policy in fact encouraged land grabbing and the massive sale of pastoralist land, particularly in areas neighbouring urban centres.

30. Loss of land through colonization, nationalization and privatization can be illustrated with the example of the Maasai, whose grazing areas were split by a colonial frontier installed between Kenya and Uganda at the end of the nineteenth century. It is estimated that the Maasai lost one third of their territory through coercive treaties in 1904 and 1911 imposed by the colonial regime, and were allowed to retain only small amounts of marginal land in the Kenyan districts of Narok and Kajiado. In Laikipia District, 75 per cent of the land still remains in hands of European owners. The Special Rapporteur personally observed traditional rangelands which were being fenced off, thus restricting the seasonal movements of the livestock herds of the nomadic pastoralist communities, as well as constricting the natural ecosystems of the wildlife, including important migratory routes.

31. After independence in 1963, the formerly closed Maasai districts were opened to immigration from other ethnic groups, based on the false assumption that large areas utilized by the Maasai for seasonal grazing were “idle land”. The Ndungu report documents the faulty adjudication of the Iloodo-Ariak in Kajiado District to hundreds of government officials and their relatives. Though they were not local residents, they were issued title deeds, while “many rightful inhabitants of the area were ... disinherited from their ancestral land” (ibid., p. 141). It is estimated that the Maasai lost another third of their lands in Narok and Kajiado Districts as a result of these processes. In Kajiado alone, 50 per cent of Maasai households did not have land in 1997, as compared to around 8 per cent in the 1980s.

32. On the Athi-Kapti plains, a traditional wildlife dispersal and pastoralist grazing area, the local Ilkaputiei Maasai, who fear the loss of their traditional livelihood, are opposed to the Jamii Bora Trust, an urban housing project for the resettlement of an estimated 30,000 slum dwellers from nearby Nairobi, that receives international financing. The Special Rapporteur, who visited the proposed site, was informed that the project has been challenged in the courts.

33. The Sabaot of the Mt. Elgon area were displaced by the British and are still waiting for compensation and resettlement under the post-independence agreements between the Governments of the United Kingdom and Kenya. They provided the Special Rapporteur with copies of the plea for reparations, restitution and compensation which they presented to these Governments, but they have yet to receive satisfaction.

34. Also in Trans-Nzoia and West-Pokot, the semi-nomadic Pokot people are claiming compensation for similar violations of their right to land. Many of the claims briefly outlined in this report were presented, fully documented, to the Constitution Review Commission of Kenya in 2002 but have yet to be acted upon. One specialist notes: "For decades, the communities quarrelled over the resources and longed for a day when they would gain access once more to their historical land ... But whereas some ethnic communities benefited from some settlement arrangement, there was no effort made to include Pokot, Sabaot or Sengwer ..."

35. A century of dispossession has left a balance of increased landlessness, insecurity, ecological degradation and resentment among indigenous communities. Virtually all the communities interviewed by the Special Rapporteur shared a similar demand for restitution and reparation. The Ndungu Commission on land grabbing suggested the establishment of a Land Titles Tribunal responsible for revocation and rectification of irregular titles. It considers that "land crimes" are as much a part of Kenya's past wrongdoings as economic crimes and human rights crimes, which constitute the country's transitional justice agenda. The draft National Land Policy promotes the creation of a National Land Commission with powers to investigate land disputes and alleged injustices. However, no functioning mechanism is currently in place and, in the absence of legal safeguards, indigenous peoples continue to be at risk of further violations of their land and resource rights.

C. Hunter-gatherers and forest peoples

36. Settlement schemes, logging and charcoal production have put a severe strain on Kenya's rich and varied forests, and have resulted in the loss of the traditional habitat of Kenya's forest peoples, the indigenous hunter-gatherers such as the Awer (Boni), Ogiek, Sengwer, Watta, and Yaaku. While existing laws are oriented to the protection of wildlife and forest resources, many of these communities can no longer live by their traditional livelihoods, and their cultures and language are rapidly vanishing as a result; illegal logging has played a major role in this as well.

37. The way of life of the Ogiek is well adapted to the Mau Forest environment where they have lived for centuries. Numbering about 20,000 countrywide, they have been dispersed and assimilated in recent decades, and dispossessed of their traditional source of livelihood. When the Mau Forest was gazetted as a National Forest in 1974, the Ogiek were evicted from their traditional habitat without prior consultation or compensation, in violation of their basic human rights. They were henceforth prevented from hunting or collecting bee honey for survival in the forest, and were reduced to a miserable subsistence on the margins of this area rich in plants and

wildlife. On the other hand, illegal logging, the introduction of exotic plantations and the excision of parts of the forest for private development by outside settlers have endangered the Mau Forest as a water catchment area, as well as the country's environmental security. The Special Rapporteur on adequate housing, Miloon Kothari, signalled in his report on his mission to Kenya that the destruction of the forest has affected the rights of the Ogiek to housing, health, food and a safe environment, threatening to further destroy their cultural identity and the community as a whole (see E/CN.4/2005/48/Add.2, para. 61).

38. Despite a court injunction in their favour in 1997, the Government has proceeded to alienate Ogiek forest land, and a recent court decision does not recognize the Ogiek's ancestral title to the forest. Still, the Government has distributed title deeds to land to several thousand Ogiek, and some non-Ogiek outsiders have tried to enrol as Ogieks in the hope that they may eventually also be given title deeds. The unresolved conflict between the Ogiek and their neighbours continues to this day. Being considered as squatters on their own land and legally banned from using the forest resources for their livelihood, their attempt to survive according to their traditional lifestyle and culture has often been criminalized and their repeated recourse to the courts has not been successful. Ogiek attribute this vulnerability to the fact that they are not recognized as a distinct tribe and therefore lack political representation. The Special Rapporteur met with members of several Ogiek villages, listened to their grievances and heard their demands for the recognition of their right to land and to maintain their traditional lifestyle in the forest.

39. A similar problem besets the Sengwer of the Cherangany Hills and Kapolet Forest in Trans Nzoia, Marakwet and West Pokot Districts, numbering around 30,000, who have not only been denied access to their traditional hunting and gathering grounds, now converted into a game park, but also their tribal identity. During colonial times the Sengwer were forced to assimilate into larger tribes; they were dispersed from their ancestral territory and expected to take up cattle raising and crop planting. The dispossession of their land continued in the post-colonial period, and like numerous other communities they have over time become victims of cattle rustling. The Special Rapporteur met with the Sengwer community and was informed that their situation may become more complicated by the project to construct a dam on the Kapolet River about which they claim they were not consulted and which may result in further evictions. Nowadays, they not only demand a solution to the land issue, but also claim formal recognition as a separate tribe and adequate political representation in their own district so that their requirements may be attended to by the government authorities, including compensation and consideration in relation to the construction of the dam system.

40. The Watta, a hunter-gatherer population who live dispersed among other groups near Marsabit, Isiolo, the Tana River and Voi, in the precincts of the Tsavo National Park, face similar threats to their livelihood. Not having received licences to hunt for their subsistence, they were considered illegal poachers, committing an offence punishable by law and treated as criminals when they attempted to survive. The El Molo, who practise a subsistence economy of fishing and herding on the eastern shore of Lake Turkana, are threatened by the continuous influx of settlers. They have appealed to the Government to allocate a title deed for the stretch of land between Sarama and Moite (a sacred mountain) to ensure their livelihood and the sustainability of their community. They also demand to be granted an annual licence for the hippo hunt, which is a rite of passage in the lives of young males and a big cultural event for the whole community.

41. These and other hunter-gatherer communities constitute the most marginalized communities in Kenya, and require urgent government attention to guarantee their enjoyment of basic human rights. The Government is currently developing an Indigenous Planning Framework for the Western Kenya Community-Driven Development and Flood Mitigation Project and the Natural Resource Management Project “to improve social welfare, enhance living standards and promote the sustainable use of water, land, forests and other natural resources through support of small-scale initiatives among the Ogiek and Sengwer. The purpose of the Framework is to ensure that the development process fully respects the dignity, human rights, economies, and culture of indigenous peoples” (Office of the President, draft, December 2006).

D. Environmental rights

42. Indigenous peoples’ reliance on natural resources and their disproportionate poverty make them more vulnerable to the effects of environmental threats such as cyclical droughts and floods, deforestation, soil erosion and pollution, which turn into major human rights concerns. One of the most pressing issues faced by nomadic pastoralists is access to water in ASALs, which is exacerbated by recurrent drought and inadequate government responses as well as the privatization of water points.

43. The El Molo and Turkana, who depend on Lake Turkana for their subsistence, have witnessed the rapid drying out of the lake as a result of prolonged drought and the damming of the tributary rivers, leading to the depletion of fish and increasing intercommunal conflicts. Similarly, the West Borana, dependent on the Wuaso Ngiro River, suffer the effects of the diminishing volume and pollution of the river due to over-abstractions for agriculture upstream.

44. The Munyayaya are affected by the construction of seven hydroelectric dams along the Tana River. Their farms, houses and animals are washed away as a result of the electrical company’s release of water from the dams, caused by heavy rains that rapidly increase the volumes of the water in the dams, forcing them to relocate during some periods. Similar mega-development projects threaten the livelihood of pastoralist communities, such as the Turkwel Hydroelectric project in Turkana District and the proposed Tana Delta sugar project.

45. Gem mining in the Endorois’ traditional lands around Lake Turkana has polluted the river Sandai, on which they depend for their subsistence. Similarly, the Maasai of Laikipia denounce the environmental degradation caused by the extracting of soda from the Magadi deposits, and demand participation and an equal share of the benefits. Flower farms across the Maasai landscape severely limit access to necessities like water, grass and saltlicks, especially those erected around the shores of Lake Naivasha. Dumping of toxic waste has also been denounced in Wajir and Marsabit, owing to the adverse effects this has on pastoralist grazing areas.

46. According to the information received by the Special Rapporteur in the early 1980s in a joint initiative by the Government and FAO to reduce desertification the prosopis plant (*Prosopis juliflora*) was introduced in the Marigat area, homeland of the Il Chamus. A thorny vegetation, the invasive plant rapidly colonized the area and destroyed native flora, causing harm to humans, as well as emaciation and death of livestock. The community, which was visited by the Special Rapporteur, claims to have found no support in addressing the devastating consequences of the wrong policy and filed a lawsuit in 2006 demanding reparation.

47. Pastoralists' lives have also been affected by the consequences of the establishment in the past and at present of military bases and training camps in pastoralist areas like Isiolo, Garissa, Laikipia, Samburu, Turkana and Wajir. Unexploded ordnance left behind after military exercises in pastoralist areas have produced numerous victims among local communities, who complain that they have not received any compensation for their losses and that nobody has assumed responsibility for cleaning up the contaminated lands.

E. Conservation versus livelihood

48. Kenya is widely admired in the world for its national parks and game reserves, which have become a major tourist attraction and therefore important for the national economy. It is estimated that direct and indirect revenues from wildlife conservationist policies amount to 10 per cent of GDP. Protected areas cover over 3.5 million hectares, or 6 per cent of Kenya's total land area. The conservation of wildlife and the preservation of natural parks are considered high priority for the country, and this has involved separating indigenous people from the wildlife and the forests. Many families were evicted by the creation of protected areas, most of which were originally inhabited by pastoralists and hunter-gatherers.

49. The Endorois community has lived for centuries in their traditional territory around Lake Bogoria, which was declared a wildlife sanctuary in 1973. Since then, the community has been pushed to live in the higher lands, a rocky terrain providing insufficient pasture for their animals. The community brought suit against the Government, seeking return to their lands and participation in the benefits derived from the reserve. Failing to obtain redress at the national level, they brought the case before ACHPR in 2003.

50. On the mistaken assumption, held since colonial times, that subsistence hunting by indigenous communities was decimating wildlife, the Wildlife Conservation Act interdicts game hunting inside and outside the protected areas. Those who persist are often arrested and prosecuted as poachers, and in some areas "eco-guards" were armed and actually killed poachers to prevent illegal hunting. Despite centuries of coexistence with wildlife, nomadic pastoralists are not allowed to herd their cattle in the reserves even in game reserves which are managed by the local authorities on behalf of the local communities. In the context of rising human population and escalating poverty, the restrictions imposed on the utilization of national parks and game reserves by pastoralists have severely affected their livelihoods and their chances for survival.

51. Wildlife conservation also has had direct negative impacts on neighbouring communities. The Maasai living close to Amboseli and Maasai Mara denounce the killing and injury of many of their members and herds as a result of attacks by wild animals, as well as the destruction of their crops. Victims of these episodes claim that they have been insufficiently compensated, if at all.

52. The growth of the tourist industry in connection with the establishment of protected natural areas has created additional problems for these communities. In Maasai Mara the construction of a private tourist resort reportedly associated with top government officials has involved fencing off an area traditionally belonging to the Sekenani village, leading to the loss of access to one of the only three sources of water for everyday human and cattle consumption. Local communities of Endorois similarly claim that the privately owned Laikipia Natural Conservancy Trust

severely curtailed their livestock grazing, and access to water sources in the area is only allowed once a week.

53. Local indigenous communities do not participate in the management of the parks and reserves and do not benefit from the revenue, which either accrues to the Kenya Wildlife Service in the case of national parks, or to the local district in the case of national reserves. An exception in this regard is the Maasai Mara, where 19 per cent of the revenue is said to be invested in favour of the local Maasai communities. However, local villagers claim that they do not see the benefit, and 60 per cent of the district remains in poverty.

54. The revision of the Kenyan Wildlife Policy in 2003, adoption of which is still pending, was halted under pressure from indigenous communities. A better practice, from the human rights and ecological perspectives, would be to involve the pastoralist and forest communities in the management and benefits of a conservationist strategy. Thus, wildlife and parks would be preserved, tourist dollars would be obtained, and the livelihood of the local populations would be protected and strengthened. Throughout Kenya's recent history, it would appear that wild animals are protected, while people are not.

F. Access to justice and impunity

55. Historical injustices and marginalization, increased pressure on lands and resources, political manipulation and cross-border dynamics have given rise to a deteriorating security situation and recurrent inter-ethnic conflicts. Episodes of violence in the north, the Rift Valley and coastal areas reached a peak during the 1990s and in 2004-2005, resulting in widespread human rights violations. Communities claim that the Government's response to these situations has been inadequate, and that in many instances it has led to human rights abuses by security forces. 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.

56. The North Eastern Province is one the most marginalized areas of Kenya. It has a long history of conflict dating from the European "scramble for Africa", and still suffers the tragic consequences of the short-lived "Shifita war" between the Government and the Somali secessionists after independence. The region became practically a police State during the following decades, and the application of emergency laws led to gross violations of human rights. While much of this legislation has since been repealed, the consequences of discrimination (such as the issuing of "screening" cards) against Somali Kenyans still lingers.

57. Cattle rustling, banditry and cross-border insurgency have led to hundreds of deaths, thousands of internally displaced persons and a flourishing trade in small arms. Near the Ethiopian border, the Gabra have suffered cross-border attacks by cattle rustlers linked to armed groups that have caused many victims, and they feel themselves to be neglected by government authorities. The neighbouring Burji, as well as the Munyayaya and the Orma in Garissa, presented the Special Rapporteur with similar complaints. One report states that in northern Kenya insecurity has risen, to rank alongside drought as the principal cause of human misery.

58. A comparative analysis of conflicts in Turkana, Marsabit, Garissa and Tana River highlights the high economic, social and cultural costs of these conflicts and the need to invest resources in conflict resolution at the local level. In Wajir, among other instances, a local peace initiative is said to have produced promising results. The long-term solution to these complex conflicts does not consist so much in applying straightforward “law and order” mechanisms, as some officials in the capital seem to believe, but in local peace initiatives with community participation. The final costs will be much lower and the results more long-lasting.

59. Over the years, a number of massacres of unarmed civilians have occurred in the context of enduring ethnic conflicts, like those at Malka-Mari (1981), Garissa (1982), or Turbi (2005). The 1984 Wagalla massacre in Wajir stands as the worst episode of human rights violations in Kenyan history. In the course of three days, security forces detained, tortured and brutally killed many hundreds of Degodia Somali. While the Government recently acknowledged the loss of 360 lives, other sources interviewed by the Special Rapporteur estimate that there were 2,000-3,000 victims. Many of the survivors still suffer physical and psychological consequences, and the widows and orphans have found no support. The true facts have never been established, and none of the alleged perpetrators has been prosecuted.

60. Besides cases of mass killings, there have been countless reports of arbitrary detention, police harassment, and incidents of torture and rape suffered by local residents as a result of the punitive application of security measures. The Special Rapporteur on the question of torture found in 2000 that those acts were widespread in the northern regions as a “form of communal punishment” (E/CN.4/2000/9/Add.4, para. 16). Many police abuses have been reported in relation to social protests associated with land rights claims, and vocal community members have been ill-treated and arrested. In Laikipia, in 2004, Maasai protesters marking the expiration of leases under the 1904 treaty with the British were severely repressed, resulting in the killing of an elder and serious injury to four people. Rape of women and looting in local villages were reported as a result of the security operation that ensued.

61. A number of organizations active in promoting land reform and denouncing abuses against indigenous communities, including the Kenya Land Alliance, Osiligi in Laikipia and MPIDO, have allegedly been the object of systematic harassment and intimidation by the authorities, and donors to those organizations have reportedly been pressured to discontinue funding. In 2005, the director and two other staff members of MS Kenya, a branch of the Danish Association for International Cooperation that supports the promotion of land rights, were accused of “subversive activities”.

62. Exercising the liberties promised by the new Government, people now seek redress for past injustices. In many of the land rights cases involving human rights violations, the communities concerned still await responses to their numerous complaints to authorities at all levels. This typical lack of response, linked to high levels of public corruption, has led to widespread distrust of government authorities.

63. The issue of redress for past human rights violations led to the creation of a presidential Task Force on the Establishment of a Truth, Justice and Reconciliation Commission (the “Mutua Commission”), which concluded that “[t]he post-colonial state has engaged in the most abominable human rights violations ... known to humanity” (p. 9), and recommended the establishment of a truth commission to inquire into those episodes and to seek redress for the

victims. These views have been fully endorsed by KNCHR, which reports that “[p]olitically instigated ethnic clashes have, in the 1990’s, resulted in massive human rights violations such as the death of thousands of people and injury to many more, the destruction of property worth billions of shillings, and the traumatizing of the immediate victims and their relatives” (KNCHR, Strategic Plan 2004-2009). The Government has so far failed to establish a transitional justice mechanism, which has been seen as a major failure in its democratization efforts.

64. With the exception of Kadhis (Islamic) courts, there is only a limited recognition of traditional or customary justice systems in Kenya. National courts may apply customary law only in civil matters in which one of the parties is subject to customary law and “as long as it is not repugnant to natural justice”. There is an increasing demand for the right of communities to be represented in court that is not yet addressed.

G. Poverty, inequality and access to social services

65. The *Kenya UNDP Human Development Report 2001* indicates that the Human Development Index declined from 0.531 in 1990 to 0.514 in 1999, as reflected in the fall in life expectancy, per capita income and school enrolment and the rise in infant mortality and disease incidence. A major concern is the recent increase in poverty in the country, from 26 per cent in 1997 to 35 per cent in 2001. Another source estimates this rate at 57 per cent in 2005. Inequality is on the rise in Kenya, and the top 10 per cent of households control 42 per cent of the total income while the bottom 10 per cent of households control less than 1 per cent. The overall development situation is also characterized by regional, rural-urban, gender and social class inequalities. Due to their historical marginalization and social exclusion, pastoralist, hunter-gatherer and other minority communities consistently show higher poverty rates and lower levels of social and human development than the rest of the population.

66. The *Human Development Report* does not provide disaggregated data about indigenous people, but regional differences provide significant indicators. A large gap exists between the north and the rest of the country. In Garissa District alone, the poverty incidence is 64 per cent and in Marsabit the majority of the population relies on humanitarian relief. Together with the North Eastern Province, the poorest districts in the country are found in Coast, Eastern and Rift Valley Provinces, all ASAL areas that are home to the majority of pastoralists and hunter-gatherers. The Economic Recovery Strategy for 2003-2007 (ERS) defines the situation in the ASALs as one of “rampant poverty” (p. 45).

67. Community representatives interviewed by the Special Rapporteur outlined as causes of indigenous peoples’ poverty the unequal distribution of land and the lack of access to productive resources; the lack of access to and distribution of social services; ineffective development programmes; and the lack of basic infrastructure and marketing opportunities. The reactivation of the Kenyan Meat Commission has been welcomed by pastoralist communities, who also underlined that it should be made functional in all pastoralist areas.

68. Both the Economic Recovery Strategy and the Poverty Reduction Strategy include specific lines of action to improve equality and reduce poverty in ASAL areas that have a direct bearing on indigenous communities. Government development efforts in these areas are now focused on the ASAL Management Project, financed by the World Bank, which includes a community-based drought early warning system and support for development initiatives at the local level.

The project has played a major role in the formulation of the Government's draft ASAL policy, which sets out a comprehensive plan to support pastoralism in these areas through water provision, grazing, rangeland management, animal health and marketing. The policy is, however, still subject to adoption by the Parliament.

69. To implement the Millennium Development Goals, to which it has subscribed, Kenya has launched the Free Universal Primary Education programme. The authorities recognize, however, that the programme has not yet reached all school-age children, especially in the geographically isolated arid and semi-arid lands, given their specific educational needs. Due to disproportionate poverty, families struggle to provide their children with school uniforms, transportation and school supplies. In some areas, children have to walk many kilometres every day to reach a school. Access to education in pastoralist areas is a serious human rights issue, as reflected in low literacy rates. An estimated 1.7 million children remain out of school, the majority of them living in marginalized pastoralist communities. The literacy level for Maasai in Kajiado and Somali in Mandera is only 3 per cent compared with a national average of 79.3 per cent. According to the *Human Development Report*, enrolment rates in North Eastern Province were especially low: only 9.8 per cent for primary school and 4.8 per cent for secondary school.

70. To face the difficulties of providing primary school education to semi-nomadic pastoralist families, some attempts have been made to establish boarding schools and mobile schools that accompany the nomadic families. Both initiatives have their problems. When children attend boarding schools, they cannot help their families with herding the livestock and other chores. Thus families are reluctant to send their children to boarding schools. Girls are especially disadvantaged when cultural constraints such as early marriages prevent them from being able to attend school. Mobile schools require not only committed teachers willing to endure hardship but also support mechanisms that are not easily provided.

71. Whilst universal primary school education may be attainable within a reasonable time frame, access to secondary schooling is more complicated and costly. Many of the communities that the Special Rapporteur visited complained that secondary schooling was out of their reach. Only a select few from pastoralist and hunter-gatherer communities can make it through secondary school, and even fewer manage to achieve a university-level education.

72. There are a number of reasons for this decline of educational achievement over the last years. There has been a reduction of government spending on educational infrastructure and materials; additionally, remote pastoralist areas lack schools and qualified teachers. Moreover, the school curricula are mostly irrelevant for the needs of pastoralists and hunter-gatherers.

73. The Government's 2005 Policy Framework for Education, Training and Research advocates affirmative action strategies, calling for the priority construction of schools in areas where nomadic populations live. Pastoralists are now targeted as marginalized groups on the same footing as slum dwellers and children with special needs, but with no regard to their specific cultural contexts.

74. The official languages of teaching are Kiswahili and English. Local vernacular languages are not officially used in the school system, though some communities manage to provide schooling in their own language as well. The Special Rapporteur received a number of reports complaining about the loss of the vernacular language, for example from the Yaaku and the Watta people, with pleas for action to preserve their languages, which they consider as cultural treasures.

75. Most indigenous peoples still lack easy access to primary health care, due to distance, lack of transport and essential supplies, and high costs. Moreover, health facilities are understaffed and distributed unevenly across districts in ASALs. Maternal health care is lacking, infant mortality is high, and the Orma estimate that 30 per cent of their women die during pregnancy and labour. In the absence of public health, people rely on traditional medicine and the Kenyan Medical Research Institute has recommended its legalization.

76. Indigenous communities, as the rest of Kenya's population, have been strongly affected by HIV/AIDS, though statistical data are lacking. The disease mostly affects poor women, especially in the pastoralist areas where they are excluded from development policies and where certain cultural practices such as initiation rites are conducive to its propagation.

77. Child labour is on the increase among indigenous communities, because domestic herding requires their participation. Orphans and children from poorer households are often hired out, sometimes to commercial herders but also to tea plantations and mining quarries, or as domestic workers. Child labour among indigenous populations has not received the government attention it requires, but ILO and some private organizations have programmes addressing these issues.

H. The rights of indigenous women

78. Gender inequalities and discrimination against women constitute persistent human rights violations, and indigenous women stressed that they also face systematic injustices and abuse within their own communities.

79. Female genital mutilation (FGM), though outlawed since 2001, is still practised widely among numerous indigenous communities such as the Maasai, Samburu, Somali and Pokot, as part of the culturally sanctioned rites of passage. Whereas at the national level 34 per cent of women undergo FGM, the percentage in North Eastern Province rises to an alarming 99 per cent. FGM poses serious problems for the physical and mental health of girls and, being a form of gender violence, it is also a major human rights violation. Some organizations have experimented with various means of abandoning the practice in socially acceptable ways. For instance, UNFPA supports the Tasau Ntomok Girls Rescue Centre in Narok, which promotes an alternative rite of passage for pubescent girls, respecting the value of the tradition but rejecting the violence associated with it.

80. During violent ethnic conflict, rape has become a weapon of aggression and a systematic form of abuse by security forces. Indigenous women complain that rape allegations are not treated seriously in police stations. In cases of rape within their own communities, the redress provided by existing customary laws fails to compensate the victim.

81. Many indigenous women are denied access to property rights as a result of discriminatory statutory and customary law. ILO reports that women suffer marginalization with regard to land ownership due to patrilineal systems of land inheritance, and become virtually destitute in case of widowhood or divorce. Women are further excluded from decision-making in land transactions and the administration of communal ownership and group ranches. A report published by Human Rights Watch in 2002 concludes that discriminatory property laws generate gross violations of women's human rights, relegating them to dependence on men, abhorrent living conditions and increased vulnerability to HIV/AIDS.

V. CONCLUSIONS

82. The pastoralist and hunter-gatherer way of life of Kenya's indigenous peoples has come under heavy strains in recent decades. This is mainly the result of the historical legacy of colonialism, but also of inappropriate land policies and developmental strategies in ASALs and forest areas since independence, which are currently being revised. These policies entailed the systematic land-loss of rangelands and of forest reserves that underpinned the pastoralist and hunter-gatherer livelihoods and their cultural sustainability, leading to serious violations of economic, social and cultural rights and some persistent abuses of civil and political rights.

83. Nomadic and semi-nomadic pastoralism and agro-pastoralism were erroneously considered an obstacle to Kenya's economic development. The assault on the pastoralists' grazing areas involved forced displacements and the drastic reduction of available rangeland for livestock herding. The privatization of land, water and other resources, and the individualization of homesteads led to the fragmentation of traditional communally owned lands, increasing competition and conflict over diminishing resources, the progressive disintegration of community life and the growth of social and economic inequality among indigenous communities. To this must be added the long-term effects of persistent droughts and the environmental deterioration of pastoralist areas and forests, including diminishing water resources.

84. Historical injustices and contemporary dispossession of lands and resources have been a major setback for the full enjoyment of the human rights of these groups. While a number of government initiatives have underlined the importance of such issues, the current land legislation and policies do not adequately address the challenges faced by pastoralist and hunter-gatherer communities. It is still a pending issue to be resolved, but the longer it takes the more difficult it will become for indigenous communities to be guaranteed their right to land, territory and resources.

85. The exclusion of hunter-gatherers and pastoralists from national parks and game reserves as a result of misguided conservationist policies also contributed to their progressive impoverishment and did not offer any alternatives for economic and social development for indigenous communities. This rigid conservationist strategy has come increasingly under critical scrutiny and alternative proposals for community-driven participatory asset management and development schemes have been put forward in the Government. They point to the importance of including the right to a healthy and secure environment in ongoing discussions concerning the rights of indigenous peoples in Kenya. Destruction of traditional habitats as a result of insensitive development projects, flawed policies and private enterprise are also human rights issues that demand compensation and reparation.

86. Historical injustices and increased pressure on land and natural resources have produced uncertainties that nourish ongoing inter-ethnic conflict which in turn fuels expressions of negative ethnicity that are often manipulated by political elites in a widely perceived environment of corruption and impunity. The legacy of grievous human rights violations that occurred in the past, such as the Wagalla massacre of 1984 and others, still weighs heavily on the country, and unless true transitional justice is achieved the human rights picture at the national level will be clouded. Effective means for conflict resolution and peacebuilding at the local level must also be strengthened.

87. Since the 2002 elections a new atmosphere of civil liberties has enabled human rights and indigenous peoples' organizations to have a voice in the national debate and to participate actively in discussions on alternative policies. Still, a number of indigenous communities complain about their "invisibility" and lack of recognition, and they ask for greater participation at the political level.

88. The human and social development indicators of indigenous people lag behind the national average. The draft ASAL policy, the PRSP, the Economic Recovery Strategy for Wealth and Employment Creation and the programme of free universal primary education, among others, are steps in the right direction, and they must be supported with material resources, technical skills, human capital and, above all, political will. These programmes must focus on the special needs and requirements of pastoralist and forest communities if they are to make an impact on the human rights situation of indigenous peoples in the country.

89. Indigenous women are victims of serious human rights violations derived from discriminatory status and customary law, lack of access to social services and decision-making, and harmful traditional practices such as FGM. Difficulties in achieving gender equality among indigenous communities will require special measures within an overall approach of affirmative action and culturally appropriate policies towards these communities.

VI. RECOMMENDATIONS

90. **In view of the above, the Special Rapporteur makes the following recommendations:**

A. Recommendations to the Government

Legal recognition and political participation

91. **The rights of indigenous pastoralist and hunter-gatherer communities to their lands and resources, effective political participation and distinct cultural identity should be constitutionally recognized. Specific legislation should be correspondingly enacted, including affirmative action where necessary.**

92. **The Government should take all the necessary steps, in consultation with indigenous peoples in the country, to ensure prompt ratification of ILO Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries. It should also promote the adoption of the United Nations Declaration on the Rights of Indigenous Peoples by the General Assembly and, through Parliament, ensure the incorporation into domestic law of these instruments.**

93. **The national census should identify pastoralists and hunter-gatherers as distinct indigenous communities and provide disaggregated data in order to understand their specific needs and facilitate the elaboration of appropriate public policies.**
94. **The Government, through the Electoral Commission of Kenya, should regulate the nomination of Members of Parliament by political parties, in particular to ensure adherence to the constitutional provisions on the need to take into account special interest groups in those nominations.**
95. **Existing districts and constituencies should be redefined in order to provide for a more effective representation of the interests of smaller indigenous communities, particularly in cases where they are divided into several administrative units, in line with section 42 of the Kenya Constitution.**
96. **The current procedures for granting national identity cards should be reviewed to remove obstacles affecting indigenous communities, and such identity documents should be provided to members of nomadic pastoralist and forest communities who still lack them.**

Land and resource rights

97. **The Government should fully implement the recommendations of the Ndungu report, giving particular attention to the rights of indigenous and other marginalized communities to their lands and natural resources. The draft National Land Policy should be adopted, retaining the sections on the land rights of pastoralists and hunter-gatherers, and fully implemented.**
98. **Indigenous communities should be consulted prior to the exploration for and exploitation of natural resources on their traditional lands, and should receive an equitable share of benefits obtained from such activities through participatory resource management. They should be fully compensated for any adverse environmental impact on their land, resources and traditional livelihoods resulting from development projects and other economic activities.**
99. **Efficient mechanisms should be established to address historical injustices and settle current land and natural resource disputes resulting from dispossession of lands traditionally owned by pastoralists and hunter-gatherers. These mechanisms should include the possibility of revocation and rectification of irregular titles, as well as the restitution of lands and/or effective compensation to the affected communities.**
100. **Stronger guarantees against the dispossession of indigenous communal lands should be incorporated in the land legislation, allowing for room to challenge fraudulent first registrations in the courts. The Government should also ensure that no adjudication or setting apart of trust lands or unalienated government lands should be allowed without the free, prior and informed consent of local communities.**

101. The policy of privatization of communal ranches should be carefully revised with the participation of the communities concerned, in order to provide permanent protection and support to communal lands and group ranches and counteract the negative consequences of the “willing seller-willing buyer” practice, particularly in Narok and Kajiado Districts.

Forest areas

102. The rights of indigenous hunter-gatherer communities (particularly the Ogiek in Mau Forest) to occupy and use the resources in gazetted forest areas should be legally recognized and respected. Further excisions of gazetted forest areas and evictions of hunter-gatherers should be stopped. Titles derived from illegal excision or allocation of forest lands should be revoked, and new titles should only be granted to original inhabitants. Illegal commercial logging should be stopped.

Environmental rights

103. The Government’s ASAL policy should include measures to restore the environment and prevent further degradation in pastoralist areas. In particular, it should cooperate with other actors in the elimination of the prosopis weed in the Il Chamus community.

104. The authorities of the Tana River dams should ensure that no water release takes place without previously informing and consulting with the Munyayaya and other communities living along the river. Any damage on indigenous communities’ lands resulting from the operations of the dams should be fully compensated.

105. The State should promote the complete removal of landmines and other military ordnance in pastoralist areas, and victims should be fully compensated.

106. Existing legislation should be amended to ensure the rights of local indigenous communities to access the natural resources in protected areas in their traditional territories. Conservation and the rights of indigenous peoples should be balanced in accordance with the recommendations of the fifth World Parks Conference held in Durban, South Africa in 2003.

107. Pastoralist and hunter-gatherer communities should be involved in decisions concerning the management of and benefits derived from protected areas, game reserves and national parks. They should also be compensated for any loss derived from the creation of such areas, including any human and material losses derived from wildlife activities in the vicinities of these areas.

108. The Government should aim at a friendly settlement in the case of the Endorois before ACHPR, leading to the establishment of a system of co-management between the authorities and the local communities in the Lake Bogoria Game Reserve.

Access to justice

109. **The Government should fully implement the recommendations of the “Mutua Task Force” and KNCHR, and establish a Truth, Justice and Reconciliation Commission with the power to investigate and provide redress and compensation to the victims of gross human rights violations. Special attention should be paid to the investigation of the Wagalla and other massacres, the compensation of the victims and the punishment of the perpetrators.**

110. **The Government should ensure that all allegations of torture, rape and other human rights violations are promptly, independently and thoroughly investigated by a body capable of prosecuting perpetrators. The rights of human rights defenders and indigenous activists should be specifically protected.**

111. **The national conflict resolution mechanism should include leaders from indigenous peoples’ communities and be linked to local conflict resolution mechanisms.**

112. **Indigenous communities should have the legal right to represent their interests in cases affecting their collective rights.**

Social services

113. **The Government should adopt the current draft ASAL policy and fully implement it with the participation of pastoralist communities.**

114. **Indigenous communities should participate actively in the design, implementation and evaluation of the poverty reduction strategy and the realization of the Millennium Development Goals.**

115. **Affirmative action should be applied to promote education for indigenous children at all levels, particularly for indigenous girls. Free boarding and mobile schools should be an integral part of the free universal primary education programme. More appropriate educational curricula should be devised, taking into account indigenous peoples’ distinct ways of life.**

116. **Efforts should be made to protect the languages of the smaller indigenous communities from extinction, by appropriate educational, linguistic and cultural policies.**

117. **Indigenous peoples, particularly indigenous women and girls, should be ensured access to adequate health services. The system of mobile clinics in pastoralist areas should be reinforced, and the use of traditional medicine and health-related knowledge should be encouraged and legally recognized.**

Women’s rights

118. **The Government should reinforce its efforts to achieve the effective eradication of FGM in all communities, by helping promote culturally appropriate solutions such as alternative rites of passage and supporting women’s organizations in these tasks.**

119. **The Government should review existing discriminatory laws and regulations affecting the property rights of indigenous women, particularly those of widows and divorced women.**

B. Recommendations to the Kenya National Commission on Human Rights

120. **KNCHR should establish a specialized programme dealing with the rights of pastoralists and hunter-gatherers and other minority communities, promote wider knowledge of their human rights situation and strengthen cooperation with their organizations.**

121. **KNCHR should play a key role in the monitoring of the implementation by all relevant actors of the recommendations made by the Special Rapporteur in this report.**

C. Recommendations to indigenous communities and organizations

122. **Existing customary laws and practices should be revised to eliminate discrimination against women, especially with regard to their property rights and harmful traditional practices, and ensure their full participation in decision-making at the community and national levels.**

123. **Indigenous communities and organizations should renew efforts to find constructive solutions to existing conflicts with other communities, taking into account customary practices, the principles of transitional justice and the respect for human rights.**

124. **Indigenous peoples' organizations are encouraged to develop concrete strategies for data collection, research and documentation to support their advocacy work both at the national and international levels.**

D. Recommendations to civil society and political parties

125. **Political parties should take a stand in favour of the recognition of indigenous peoples' communities and their rights in the constitutional review, legislative reform and policymaking.**

126. **Members of the Pastoralist Parliamentary Group are encouraged to revitalize their activities in order to build a common agenda and strategy in favour of pastoralist and other indigenous communities.**

127. **NGOs and donors should strengthen their relations with indigenous communities, support their development initiatives and promote a better understanding of their demands and aspirations within Kenyan society.**

E. Recommendations to the international community

128. **The international agencies and programmes in Kenya should take into account the needs and rights of indigenous peoples and establish specific programmes for them. They are encouraged to engage with UNIPACK and other pastoralist and hunter-gatherer networks and organizations in the formulation and implementation of these policies.**

129. **International agencies and financial institutions should ensure that all projects in indigenous areas respect the principle of free, prior and informed consent of the local communities. Any negative impact caused to these communities as a result of these projects should be duly accounted for and compensated.**

130. **ILO should further its efforts to promote the rights of indigenous communities in Kenya under the provisions of Convention No. 169 and other fundamental international labour standards.**

F. Recommendations to the academic community and the media

131. **The country's universities and research centres should establish focal points for research on and teaching about the needs and rights of indigenous peoples in Kenya.**

132. **The written press and the audio-visual media should avoid any discriminatory or biased reporting on indigenous peoples in Kenya and provide space for their concerns and information that promotes their ways of life and cultural identities.**



ГЕНЕРАЛЬНАЯ АССАМБЛЕЯ

Distr.
GENERAL

A/HRC/4/32/Add.3
26 February 2007

RUSSIAN
Original: ENGLISH

СОВЕТ ПО ПРАВАМ ЧЕЛОВЕКА
Четвертая сессия
Пункт 2 предварительной повестки дня

**ОСУЩЕСТВЛЕНИЕ РЕЗОЛЮЦИИ 60/251 ГЕНЕРАЛЬНОЙ АССАМБЛЕИ
ОТ 15 МАРТА 2006 ГОДА, ОЗАГЛАВЛЕННОЙ
"СОВЕТ ПО ПРАВАМ ЧЕЛОВЕКА"**

**Доклад Специального докладчика по вопросу о положении в области прав человека
и основных свобод коренных народов г-на Родольфо Ставенхагена**

Добавление

МИССИЯ В КЕНИЮ*

* Резюме настоящего доклада распространяется на всех официальных языках. Сам доклад, содержащийся в приложении к резюме, распространяется только на том языке, на котором он был представлен.

Резюме

Настоящий доклад описывает официальное посещение Кении Специальным докладчиком по вопросу о положении в области прав человека и основных свобод коренных народов в период с 4 по 14 декабря 2006 года по приглашению правительства. В Кении Специальный докладчик провел консультации с представителями общенациональных и региональных органов власти, учреждений Организации Объединенных Наций, неправительственных организаций и членами общин и организаций коренных народов в различных частях страны.

Общинами коренных народов Кении являются меньшинства охотников-собирателей и скотоводов, которые проживают главным образом в засушливых и полузасушливых землях, такие, как эльмоло, якуу, сенгвер, масаи и огиек. Их образ жизни и культура традиционно подвергались дискриминации, а отсутствие правового признания и наделения полномочиями отражает их социальную, политическую и экономическую маргинализацию.

Основные проблемы в области прав человека, с которыми они сталкиваются, касаются утраты и экологической деградации их земель, традиционных лесов и природных ресурсов в результате выселения в колониальный период и в период после обретения независимости. В последние десятилетия непродуманные программы развития и охраны окружающей среды привели к еще большему нарушению их экономических, социальных и культурных прав.

Отсутствие социальных и медицинских услуг в общинах коренных народов особенно тяжело сказывается на женщинах и детях, которые страдают от гендерного неравенства и дискриминации, особенно с точки зрения прав собственности и вредной традиционной практики, которая также ведет ко все большему распространению ВИЧ/СПИДа среди этих общин.

Нынешнее правительство разработало альтернативные программы освоения засушливых и полузасушливых земель с учетом интересов проживающих на них общин, программы позитивных действий в рамках стратегии сокращения масштабов нищеты и программы бесплатного всеобщего начального образования. В случае своего успеха эти программы должны исправить историческую несправедливость и содействовать улучшению общего положения общин коренных народов.

Насилие, связанное с социальными и этническими конфликтами различного рода, и отсутствие механизмов правосудия и восстановление справедливости в переходный период также оказывают влияние на соблюдение прав человека общин коренных народов.

Специальный докладчик приводит в конце своего доклада ряд рекомендаций, призванных содействовать улучшению положения в области соблюдения прав человека коренных народов страны.

Annex

**REPORT OF THE SPECIAL RAPPORTEUR ON THE SITUATION
OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS OF
INDIGENOUS PEOPLE, RODOLFO STAIVENHAGEN, ON HIS
MISSION TO KENYA (4-14 DECEMBER 2006)**

CONTENTS

	<i>Paragraphs</i>	<i>Page</i>
I. INTRODUCTION	1 - 7	5
II. INDIGENOUS PEOPLES IN KENYA	8 - 12	6
III. LEGAL AND POLITICAL CONTEXT	13 - 20	7
IV. MAJOR ISSUES AFFECTING THE RIGHTS OF INDIGENOUS PEOPLES IN KENYA	21 - 81	9
A. Legal recognition and political participation	21 - 24	9
B. Land and resource rights: the pastoralists	25 - 35	10
C. Hunter-gatherers and forest peoples	36 - 41	13
D. Environmental rights	42 - 47	15
E. Conservation versus livelihood	48 - 54	16
F. Access to justice and impunity	55 - 64	17
G. Poverty, inequality and access to social services	65 - 77	20
H. The rights of indigenous women	78 - 81	22
V. CONCLUSIONS	82 - 89	23
VI. RECOMMENDATIONS	90 - 132	25
A. Recommendations to the Government	91 - 119	25
B. Recommendations to the Kenya National Commission on Human Rights	120 - 121	29

CONTENTS (*continued*)

	<i>Paragraphs</i>	<i>Page</i>
C. Recommendations to indigenous communities and organizations	122 - 124	29
D. Recommendations to civil society and political parties	125 - 127	30
E. Recommendations to the international community	128 - 130	30
F. Recommendations to the academic community and the media	131 - 132	31

I. INTRODUCTION

1. Pursuant to Commission on Human Rights resolution 2001/57 of 24 April 2001, which established his mandate, and at the invitation of the Government, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people visited Kenya from 4 to 14 December 2006.
2. The purpose of this visit was to better understand the situation of indigenous peoples in Kenya, to learn about policies and practices designed to promote and protect their rights, and to dialogue with government officials at the national and local levels, representatives of indigenous peoples' communities and organizations, development partners and other actors on ways to strengthen the responses to the demands and needs of indigenous peoples.
3. The Special Rapporteur travelled to Nairobi, Kitengela, Narok, Nakuru, Baringo, Mount Elgon, Laikipia, Wajir, Garissa, Marsabit and several rural areas around the country. In Nairobi, he met with the Permanent Secretary in the Ministry of Justice and Constitutional Affairs, the Permanent Secretary in the Ministry of Lands, the Permanent Secretary in the Ministry of Education, the Director of the Kenya Wildlife Service, as well as with high officials in the Ministry of Health and the President's Office of Special Programmes. He also met with the Kenya National Commission on Human Rights (KNCHR) and with Members of Parliament of the Pastoralist Parliamentary Group. In the various provinces he met with the Deputy Provincial Commissioner of the Rift Valley Province, the District Commissioners of Laikipia, Marsabit, Narok, and the Mayor of Garissa.
4. The Special Rapporteur met with the United Nations Resident Coordinator and country team representatives, and held conversations with international agencies including the International Labour Organization (ILO), the Food and Agriculture Organization of the United Nations (FAO), the United Nations Development Programme (UNDP), the United Nations Environment Programme (UNEP), the United Nations Children's Fund (UNICEF), the United Nations Office on Drugs and Crime (UNODC), the United Nations Human Settlements Programme (UN-Habitat), the United Nations Population Fund (UNFPA) and the World Health Organization (WHO), as well as with donor organizations and non-governmental organizations (NGOs).
5. The Special Rapporteur conducted on-site visits to numerous indigenous pastoralist and hunter-gatherer communities in Narok, Laikipia, Mau Forest, Mount Elgon, Lake Baringo, Cherangany Hills and Wajir. He also held meetings with indigenous representatives of the Awer, Boni, Borana, Burgi, Elmolo, Endorois, Ilchamus, Gaaljecel, Gabra, Maasai, Malakote, Munyayaya, Ogiek, Orma, Pokot, Rendille, Sabaot, Sakuye, Samburu, Sengwer, Somali, Talai,

Turkana, Watta, Munyayaya and Yakuu. He met with members of other minority communities, such as the Nubians, and with groups of refugees. He also visited the Maasai Mara National Park and the Lake Baringo Game Reserve, where he assessed the impact of protected areas on local indigenous peoples.

6. During his visit, the Special Rapporteur participated in the National Seminar on Indigenous Issues, organized by the Office of the High Commissioner for Human Rights (OHCHR) and UNDP in Nairobi, on 5 and 6 December 2006.

7. The Special Rapporteur would like to acknowledge the hospitality of the Government of Kenya, and especially thank the Ministry of Justice and Constitutional Affairs for its invitation and cooperation, and KNCHR, UNIPACK (United Nations Indigenous Peoples' Advisory Committee - Kenya) and the indigenous peoples' steering committee for the preparation of the visit. He also wishes to thank the many indigenous communities and organizations that gave their time and provided useful information for this report, including Arid Lands Institute, Center for Minority Rights Development (CEMIRIDE), Enderois Development Council, International Movement for Peace Advancement and Conflict Transformation (IMPACT), Maa Civil Society Forum, Ogiek Welfare Development Council, Pastoralist Integrated Development Organization (MPIDO), Sengwer Culture and Information Centre, Truth to be Told Network, and Womankind. UNDP-Kenya deserves a special mention for its invaluable support of the mission at all stages.

II. INDIGENOUS PEOPLES IN KENYA

8. In Kenya all Africans are indigenous to the country, as many Kenyans are inclined to point out to the Special Rapporteur. This is of course true, given that most Africans living in contemporary Kenya are descendants of the original inhabitants, and because in colonial times all Africans, of whatever tribe or ethnic affiliation, were considered as "natives" by the authorities, sharing the same history of colonial subjugation and racial discrimination. At independence all natives became free and equal citizens of the new State. Moreover, due to geographic conditions and historical circumstances, social and cultural distinctions became defining characteristics that differentiated among the many tribes that populate the country. The majority ethnic groups which became integrated into the farming economy occupied the more fertile areas and after independence they regained much of the land which they had lost to the colonial regime.

9. As in some other African countries (see the Special Rapporteur's report on his mission to South Africa, E/CN.4/2006/78/Add.2, paras. 20-32), the contested use of the term "indigenous" in Kenya has implications for policy decisions and therefore for the human rights of the

concerned populations. From a human rights perspective, the question is not “who came first” but the shared experiences of dispossession and marginalization. The term “indigenous” is not intended to create a special class of citizens, but rather to address historical and present-day injustices and inequalities. It is in this sense that the term has been applied in the African context by the Working Group on Indigenous Populations/Communities of the African Commission on Human and Peoples’ Rights (ACHPR).

10. Within this perspective, pastoralists and hunter-gatherers are normally regarded as indigenous peoples in the international context, and they increasingly come to identify themselves as such in many countries, including in Africa. In Kenya they include pastoralist communities such as the Endorois, Borana, Gabra, Maasai, Pokot, Samburu, Turkana, and Somali, and hunter-gatherer communities whose livelihoods remain connected to the forest, such as the Awer (Boni), Ogiek, Sengwer, or Yaaku. Other groups such as the Nubians consider themselves as a minority that has also been marginalized, but in an urban context. They and other minority groups share demands to end discrimination and exclusion with indigenous peoples in Kenya. The Kenya Government normally refers to indigenous and minority groups jointly as “minorities”, “marginalized” or “vulnerable communities”.

11. Government authorities and specialists recognize that historically the pastoralist and hunter-gatherer communities in the arid and semi-arid lands and forests were systematically marginalized on the basis of their economic, social and cultural characteristics, inextricably connected to the use of land and natural resources. One government report states that over the years policies directed at these communities were mainly top-down and discriminatory, and they often failed by marginalizing and impoverishing people in arid and semi-arid lands.

12. Indigenous peoples in Kenya have established numerous civil society organizations that are actively involved in promoting human rights, development issues and environmental concerns. Since the transition to a more democratic political regime in 2002, the visibility and public recognition of these organizations has grown, and a number of their leaders and members now cooperate closely with several government institutions.

III. LEGAL AND POLITICAL CONTEXT

13. Whilst Kenya has ratified most international human rights treaties and conventions, it has not ratified ILO Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries, and it has withheld its approval of the United Nations Declaration on the Rights of Indigenous Peoples at the current session of the General Assembly. The Government of Kenya has recently decided to update its reports to the various United Nations human rights committees, some of which are long overdue.

14. Kenya's independence from British rule in 1963 brought about the Africanization of the economy and the public services. The continuation of previous colonial policies, as well as the co-optation of the State apparatus by majority ethnic communities under a one-party system, led to increased tribalism in the distribution of political power, government jobs and wealth, and the widening gulf between rich and poor. This tendency increased during the Government of President Moi, during which numerous ethnic clashes occurred and human rights were severely curtailed.

15. The new Government, elected by a large majority in December 2002, enabled a democratic opening that allowed many pent-up grievances out into the open, including the long-standing demands by indigenous and other ethnic minorities for human rights and the emergence of a vibrant and articulate civil society. The new Government promoted legal reform and the consolidation of institutions of democratic governance, including a constitutional review process, and special inquiries into corruption, land mismanagement and historical injustices.

16. Most indigenous peoples in Kenya live in the arid and semi-arid lands (ASALs) which make up more than 80 per cent of the land mass and are home to more than 25 per cent of the national population, and include almost the majority of wildlife parks and reserves and protected forests. ASAL areas are predominantly pastoralist and agro-pastoralist, mainly suitable for livestock grazing due to low and erratic rainfall. These areas present the highest incidences of poverty and the lowest level of access to basic services in the country. Over 60 per cent of the population lives below the poverty line, which is above the average of 50 per cent nationwide.

17. Pastoralism was for a long time neglected and held in disrepute by the country's economic planners and political elites. Policies aimed at revitalizing ASALs since independence promoted sedentarization and crop farming, failing to take into account pastoralism as a sustainable form of land use adapted to the environment. Deforestation and poor land use have further increased environmental degradation, making the land more vulnerable to cyclical droughts and floods.

18. The Constitution of Kenya incorporates the principle of non-discrimination and guarantees civil and political rights, but fails to recognize economic, social and cultural rights as such, as well as group rights. The rights of indigenous pastoralist and hunter-gatherer communities are not recognized as such in Kenya's constitutional and legal framework, and no policies or governmental institutions deal directly with indigenous issues. However, in recent years the specific situation and needs of these communities have started to be addressed, as reflected in current discussions on the ASAL and national land policies, and there seems to be growing consensus on the need for affirmative action towards these communities.

19. The specific needs and rights of pastoralists and hunter-gatherers were also taken into account in the constitutional review process that started in 2003. After countrywide consultations that included indigenous organizations, the first draft of a new constitution (the “Bomas draft”) included the decentralization of power and group rights, a section on “Minorities and marginalized groups”, and a system of affirmative action in employment, economic development, and political representation. It also called for the equal redistribution of lands and resources, and for the redress of historical injustices. A new revised draft prepared by Parliament (the “Wako draft”) was overwhelmingly defeated in a referendum in 2005, partly because it failed to address outstanding land issues and the decentralization of power. Since then, the process of constitutional reform remains at a stalemate.

20. The Special Rapporteur is encouraged by the fact that KNCHR and the Ministry of Justice and Constitutional Affairs have begun to consider the promotion and protection of pastoralists and hunter-gatherers in Kenya as part of their activities. It is also encouraging that indigenous issues are being considered as cross-cutting issues in the process of formulation of a National Action Plan and Policy on Human Rights being spearheaded by these two institutions. Various official development initiatives, including the Poverty Reduction Strategy Paper (PRSP), the ASAL Resource Management Project and the draft National Policy for the Sustainable Development of the ASALs, take into account the special characteristics of pastoralism. Similarly, the new land policy currently under discussion refers explicitly to “the rights of minority communities”, a concept that covers groups such as hunter-gatherers, forest peoples and pastoralists.

IV. MAJOR ISSUES AFFECTING THE RIGHTS OF INDIGENOUS PEOPLES IN KENYA

A. Legal recognition and political participation

21. The 1989 national census lists 42 tribes in Kenya, but omits many smaller pastoralist and hunter-gatherer communities, such as the Ogiek, El Molo, Watta, Munyayaya, Yakuu, and other small groups such as the Sabaot and Terik, who are not legally recognized as separate tribes. This situation is derived from the colonial policy of promoting assimilation of smaller communities into other dominant groups. Affected tribes claim that the lack of a separate code in official documents identifying them as distinct ethnic groups reduces their visibility in national policymaking. Many communities from the north, such as the Awer, Galjheel, Somali, and Oromo, are also prevented from enjoying full citizen rights as a result of the lack of proper identity cards.

22. The existing political system divides many communities such as the Endorois or Sengwer into different administrative and electoral units. This diminishes their effective representation in the Parliament and participation in local decision-making, as they may not have the numbers to vote for leaders from their communities through elective processes. Political parties, according to their numerical strength in Parliament, are vested with the constitutional power to appoint 12 “nominated members” of Parliament to represent “special interests”, which may include marginalized communities. There is also the legal possibility of changing the boundaries of existing constituencies, taking into account the “representation of ... sparsely populated rural areas”, and their “community of interest”. But these safeguards have not yet been fully implemented in favour of smaller indigenous communities.

23. Numerous indigenous communities complain that their needs are not being met and that their rights are not being adequately protected because, being numerically small, they do not have sufficient political representation at the national or provincial levels to make a difference. One such case was presented to the Special Rapporteur by the Ilchamus indigenous community of Baringo who represent 17 per cent of the local constituency and rely mainly on livestock for their subsistence. The community feels marginalized by the dominant groups in the district who do not represent their interests at the political level, and brought suit before the High Court alleging violation of their right to political participation. In a landmark judgement, issued shortly after the Special Rapporteur visited the country, the High Court directed the Electoral Commission of Kenya to supervise the appointment of nominated MPs to ensure compliance with the Constitution, and to take into account the Ilchamus community’s interests in the next boundary review.

24. The main effect of political marginalization is the unequal lack of access to development resources and government employment. This is particularly serious with relation to the Constituency Development Funds (CDF). Since 2003, 2.5 per cent of the government revenues are allocated every year to each constituency through this fund, but it is difficult for smaller communities who are not represented by an MP to have equal access to development resources and social services.

B. Land and resource rights: the pastoralists

25. Most of the human rights violations experienced by pastoralists and hunter-gatherers in Kenya are related to their access to and control over land and natural resources. The land question is one of the most pressing issues on the public agenda. Historical injustices derived from colonial times, linked to conflicting laws and lack of clear policies, mismanagement and land grabbing, have led to the present crisis of the country’s land tenure system.

26. The 2002 report of the Presidential Commission of Inquiry into the Land Law System of Kenya (“Njonjo report”), the 2004 report of the Presidential Commission into the Irregular-Illegal Allocation of Public Land (“Ndungu report”), and the draft National Land Policy include specific provisions concerning land reform, and so do the two constitutional drafts under discussion.

27. During the first half of the twentieth century, colonial authorities and European settlers seized the richest agricultural areas, while the original owners were displaced towards “native reserves” on far poorer land or remained as landless workers. After independence, the fertile agricultural lands of the “White Highlands” were bought back by the Government of Kenya, but they were not, contrary to early promises, returned to their original owners (among them the Maasai communities in the Rift Valley). The unequal distribution of land fostered a sense of relative injustice, and has created conflict over the years between farmers and pastoralists.

28. Most of the abuses after independence took place in Trust Lands, including former native reserves. The Constitution vests the administration of these lands in the County Councils, which acted “in total breach of trust as custodians of land on behalf of local residents” through the irregular adjudication of vast areas in favour of powerful individuals and settlers from other communities, and the establishment of protected areas (Ndungu report, p. 81). The prevailing theory of the sanctity of the title, whereby first registration of land title cannot be challenged in court regardless of fraud or mistake, further sanctioned these abuses. Displacement of original inhabitants has been widespread in the Rift Valley and Kajiado District, and most pastoralist grazing lands in the north and north-eastern regions face similar threats.

29. Since the end of the 1960s, and supported by the World Bank, the Government has promoted the transformation of Trust Lands into group ranches and then individual ownership, thus limiting the land available for traditional mobile grazing. Based on the idea that individual titles, through a “willing buyer-willing seller” approach, would improve the prospects for investment and economic growth, this policy in fact encouraged land grabbing and the massive sale of pastoralist land, particularly in areas neighbouring urban centres.

30. Loss of land through colonization, nationalization and privatization can be illustrated with the example of the Maasai, whose grazing areas were split by a colonial frontier installed between Kenya and Uganda at the end of the nineteenth century. It is estimated that the Maasai lost one third of their territory through coercive treaties in 1904 and 1911 imposed by the colonial regime, and were allowed to retain only small amounts of marginal land in the Kenyan districts of Narok and Kajiado. In Laikipia District, 75 per cent of the land still remains in hands of European owners. The Special Rapporteur personally observed traditional rangelands which were being fenced off, thus restricting the seasonal movements of the livestock herds of the

nomadic pastoralist communities, as well as constricting the natural ecosystems of the wildlife, including important migratory routes.

31. After independence in 1963, the formerly closed Maasai districts were opened to immigration from other ethnic groups, based on the false assumption that large areas utilized by the Maasai for seasonal grazing were “idle land”. The Ndungu report documents the faulty adjudication of the Iloodo-Ariak in Kajiado District to hundreds of government officials and their relatives. Though they were not local residents, they were issued title deeds, while “many rightful inhabitants of the area were ... disinherited from their ancestral land” (ibid., p. 141). It is estimated that the Maasai lost another third of their lands in Narok and Kajiado Districts as a result of these processes. In Kajiado alone, 50 per cent of Maasai households did not have land in 1997, as compared to around 8 per cent in the 1980s.

32. On the Athi-Kapti plains, a traditional wildlife dispersal and pastoralist grazing area, the local Ilkaputiei Maasai, who fear the loss of their traditional livelihood, are opposed to the Jamii Bora Trust, an urban housing project for the resettlement of an estimated 30,000 slum dwellers from nearby Nairobi, that receives international financing. The Special Rapporteur, who visited the proposed site, was informed that the project has been challenged in the courts.

33. The Sabaot of the Mt. Elgon area were displaced by the British and are still waiting for compensation and resettlement under the post-independence agreements between the Governments of the United Kingdom and Kenya. They provided the Special Rapporteur with copies of the plea for reparations, restitution and compensation which they presented to these Governments, but they have yet to receive satisfaction.

34. Also in Trans-Nzoia and West-Pokot, the semi-nomadic Pokot people are claiming compensation for similar violations of their right to land. Many of the claims briefly outlined in this report were presented, fully documented, to the Constitution Review Commission of Kenya in 2002 but have yet to be acted upon. One specialist notes: “For decades, the communities quarrelled over the resources and longed for a day when they would gain access once more to their historical land ... But whereas some ethnic communities benefited from some settlement arrangement, there was no effort made to include Pokot, Sabaot or Sengwer ...”

35. A century of dispossession has left a balance of increased landlessness, insecurity, ecological degradation and resentment among indigenous communities. Virtually all the communities interviewed by the Special Rapporteur shared a similar demand for restitution and reparation. The Ndungu Commission on land grabbing suggested the establishment of a Land Titles Tribunal responsible for revocation and rectification of irregular titles. It considers that “land crimes” are as much a part of Kenya’s past wrongdoings as economic crimes and human

rights crimes, which constitute the country's transitional justice agenda. The draft National Land Policy promotes the creation of a National Land Commission with powers to investigate land disputes and alleged injustices. However, no functioning mechanism is currently in place and, in the absence of legal safeguards, indigenous peoples continue to be at risk of further violations of their land and resource rights.

C. Hunter-gatherers and forest peoples

36. Settlement schemes, logging and charcoal production have put a severe strain on Kenya's rich and varied forests, and have resulted in the loss of the traditional habitat of Kenya's forest peoples, the indigenous hunter-gatherers such as the Awer (Boni), Ogiek, Sengwer, Watta, and Yaaku. While existing laws are oriented to the protection of wildlife and forest resources, many of these communities can no longer live by their traditional livelihoods, and their cultures and language are rapidly vanishing as a result; illegal logging has played a major role in this as well.

37. The way of life of the Ogiek is well adapted to the Mau Forest environment where they have lived for centuries. Numbering about 20,000 countrywide, they have been dispersed and assimilated in recent decades, and dispossessed of their traditional source of livelihood. When the Mau Forest was gazetted as a National Forest in 1974, the Ogiek were evicted from their traditional habitat without prior consultation or compensation, in violation of their basic human rights. They were henceforth prevented from hunting or collecting bee honey for survival in the forest, and were reduced to a miserable subsistence on the margins of this area rich in plants and wildlife. On the other hand, illegal logging, the introduction of exotic plantations and the excision of parts of the forest for private development by outside settlers have endangered the Mau Forest as a water catchment area, as well as the country's environmental security. The Special Rapporteur on adequate housing, Miloon Kothari, signalled in his report on his mission to Kenya that the destruction of the forest has affected the rights of the Ogiek to housing, health, food and a safe environment, threatening to further destroy their cultural identity and the community as a whole (see E/CN.4/2005/48/Add.2, para. 61).

38. Despite a court injunction in their favour in 1997, the Government has proceeded to alienate Ogiek forest land, and a recent court decision does not recognize the Ogiek's ancestral title to the forest. Still, the Government has distributed title deeds to land to several thousand Ogiek, and some non-Ogiek outsiders have tried to enrol as Ogieks in the hope that they may eventually also be given title deeds. The unresolved conflict between the Ogiek and their neighbours continues to this day. Being considered as squatters on their own land and legally banned from using the forest resources for their livelihood, their attempt to survive according to their traditional lifestyle and culture has often been criminalized and their repeated recourse to the courts has not been successful. Ogiek attribute this vulnerability to the fact that they are not

recognized as a distinct tribe and therefore lack political representation. The Special Rapporteur met with members of several Ogiek villages, listened to their grievances and heard their demands for the recognition of their right to land and to maintain their traditional lifestyle in the forest.

39. A similar problem besets the Sengwer of the Cherangany Hills and Kapolet Forest in Trans Nzoia, Marakwet and West Pokot Districts, numbering around 30,000, who have not only been denied access to their traditional hunting and gathering grounds, now converted into a game park, but also their tribal identity. During colonial times the Sengwer were forced to assimilate into larger tribes; they were dispersed from their ancestral territory and expected to take up cattle raising and crop planting. The dispossession of their land continued in the post-colonial period, and like numerous other communities they have over time become victims of cattle rustling. The Special Rapporteur met with the Sengwer community and was informed that their situation may become more complicated by the project to construct a dam on the Kapolet River about which they claim they were not consulted and which may result in further evictions. Nowadays, they not only demand a solution to the land issue, but also claim formal recognition as a separate tribe and adequate political representation in their own district so that their requirements may be attended to by the government authorities, including compensation and consideration in relation to the construction of the dam system.

40. The Watta, a hunter-gatherer population who live dispersed among other groups near Marsabit, Isiolo, the Tana River and Voi, in the precincts of the Tsavo National Park, face similar threats to their livelihood. Not having received licences to hunt for their subsistence, they were considered illegal poachers, committing an offence punishable by law and treated as criminals when they attempted to survive. The El Molo, who practise a subsistence economy of fishing and herding on the eastern shore of Lake Turkana, are threatened by the continuous influx of settlers. They have appealed to the Government to allocate a title deed for the stretch of land between Sarama and Moite (a sacred mountain) to ensure their livelihood and the sustainability of their community. They also demand to be granted an annual licence for the hippo hunt, which is a rite of passage in the lives of young males and a big cultural event for the whole community.

41. These and other hunter-gatherer communities constitute the most marginalized communities in Kenya, and require urgent government attention to guarantee their enjoyment of basic human rights. The Government is currently developing an Indigenous Planning Framework for the Western Kenya Community-Driven Development and Flood Mitigation Project and the Natural Resource Management Project “to improve social welfare, enhance living standards and promote the sustainable use of water, land, forests and other natural resources through support of small-scale initiatives among the Ogiek and Sengwer. The purpose of the Framework is to ensure that the development process fully respects the dignity,

human rights, economies, and culture of indigenous peoples” (Office of the President, draft, December 2006).

D. Environmental rights

42. Indigenous peoples’ reliance on natural resources and their disproportionate poverty make them more vulnerable to the effects of environmental threats such as cyclical droughts and floods, deforestation, soil erosion and pollution, which turn into major human rights concerns. One of the most pressing issues faced by nomadic pastoralists is access to water in ASALs, which is exacerbated by recurrent drought and inadequate government responses as well as the privatization of water points.

43. The El Molo and Turkana, who depend on Lake Turkana for their subsistence, have witnessed the rapid drying out of the lake as a result of prolonged drought and the damming of the tributary rivers, leading to the depletion of fish and increasing intercommunal conflicts. Similarly, the West Borana, dependent on the Wuaso Ngiro River, suffer the effects of the diminishing volume and pollution of the river due to over-abstractions for agriculture upstream.

44. The Munyayaya are affected by the construction of seven hydroelectric dams along the Tana River. Their farms, houses and animals are washed away as a result of the electrical company’s release of water from the dams, caused by heavy rains that rapidly increase the volumes of the water in the dams, forcing them to relocate during some periods. Similar mega-development projects threaten the livelihood of pastoralist communities, such as the Turkwel Hydroelectric project in Turkana District and the proposed Tana Delta sugar project.

45. Gem mining in the Endorois’ traditional lands around Lake Turkana has polluted the river Sandai, on which they depend for their subsistence. Similarly, the Maasai of Laikipia denounce the environmental degradation caused by the extracting of soda from the Magadi deposits, and demand participation and an equal share of the benefits. Flower farms across the Maasai landscape severely limit access to necessities like water, grass and saltlicks, especially those erected around the shores of Lake Naivasha. Dumping of toxic waste has also been denounced in Wajir and Marsabit, owing to the adverse effects this has on pastoralist grazing areas.

46. According to the information received by the Special Rapporteur in the early 1980s in a joint initiative by the Government and FAO to reduce desertification the prosopis plant (*Prosopis juliflora*) was introduced in the Marigat area, homeland of the Il Chamus. A thorny vegetation, the invasive plant rapidly colonized the area and destroyed native flora, causing harm to humans, as well as emaciation and death of livestock. The community, which was visited by

the Special Rapporteur, claims to have found no support in addressing the devastating consequences of the wrong policy and filed a lawsuit in 2006 demanding reparation.

47. Pastoralists' lives have also been affected by the consequences of the establishment in the past and at present of military bases and training camps in pastoralist areas like Isiolo, Garissa, Laikipia, Samburu, Turkana and Wajir. Unexploded ordnance left behind after military exercises in pastoralist areas have produced numerous victims among local communities, who complain that they have not received any compensation for their losses and that nobody has assumed responsibility for cleaning up the contaminated lands.

E. Conservation versus livelihood

48. Kenya is widely admired in the world for its national parks and game reserves, which have become a major tourist attraction and therefore important for the national economy. It is estimated that direct and indirect revenues from wildlife conservationist policies amount to 10 per cent of GDP. Protected areas cover over 3.5 million hectares, or 6 per cent of Kenya's total land area. The conservation of wildlife and the preservation of natural parks are considered high priority for the country, and this has involved separating indigenous people from the wildlife and the forests. Many families were evicted by the creation of protected areas, most of which were originally inhabited by pastoralists and hunter-gatherers.

49. The Endorois community has lived for centuries in their traditional territory around Lake Bogoria, which was declared a wildlife sanctuary in 1973. Since then, the community has been pushed to live in the higher lands, a rocky terrain providing insufficient pasture for their animals. The community brought suit against the Government, seeking return to their lands and participation in the benefits derived from the reserve. Failing to obtain redress at the national level, they brought the case before ACHPR in 2003.

50. On the mistaken assumption, held since colonial times, that subsistence hunting by indigenous communities was decimating wildlife, the Wildlife Conservation Act interdicts game hunting inside and outside the protected areas. Those who persist are often arrested and prosecuted as poachers, and in some areas "eco-guards" were armed and actually killed poachers to prevent illegal hunting. Despite centuries of coexistence with wildlife, nomadic pastoralists are not allowed to herd their cattle in the reserves even in game reserves which are managed by the local authorities on behalf of the local communities. In the context of rising human population and escalating poverty, the restrictions imposed on the utilization of national parks and game reserves by pastoralists have severely affected their livelihoods and their chances for survival.

51. Wildlife conservation also has had direct negative impacts on neighbouring communities. The Maasai living close to Amboseli and Maasai Mara denounce the killing and injury of many of their members and herds as a result of attacks by wild animals, as well as the destruction of their crops. Victims of these episodes claim that they have been insufficiently compensated, if at all.

52. The growth of the tourist industry in connection with the establishment of protected natural areas has created additional problems for these communities. In Maasai Mara the construction of a private tourist resort reportedly associated with top government officials has involved fencing off an area traditionally belonging to the Sekenani village, leading to the loss of access to one of the only three sources of water for everyday human and cattle consumption. Local communities of Endorois similarly claim that the privately owned Laikipia Natural Conservancy Trust severely curtailed their livestock grazing, and access to water sources in the area is only allowed once a week.

53. Local indigenous communities do not participate in the management of the parks and reserves and do not benefit from the revenue, which either accrues to the Kenya Wildlife Service in the case of national parks, or to the local district in the case of national reserves. An exception in this regard is the Maasai Mara, where 19 per cent of the revenue is said to be invested in favour of the local Maasai communities. However, local villagers claim that they do not see the benefit, and 60 per cent of the district remains in poverty.

54. The revision of the Kenyan Wildlife Policy in 2003, adoption of which is still pending, was halted under pressure from indigenous communities. A better practice, from the human rights and ecological perspectives, would be to involve the pastoralist and forest communities in the management and benefits of a conservationist strategy. Thus, wildlife and parks would be preserved, tourist dollars would be obtained, and the livelihood of the local populations would be protected and strengthened. Throughout Kenya's recent history, it would appear that wild animals are protected, while people are not.

F. Access to justice and impunity

55. Historical injustices and marginalization, increased pressure on lands and resources, political manipulation and cross-border dynamics have given rise to a deteriorating security situation and recurrent inter-ethnic conflicts. Episodes of violence in the north, the Rift Valley and coastal areas reached a peak during the 1990s and in 2004-2005, resulting in widespread human rights violations. Communities claim that the Government's response to these situations has been inadequate, and that in many instances it has led to human rights abuses by security

forces. 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.

56. The North Eastern Province is one of the most marginalized areas of Kenya. It has a long history of conflict dating from the European “scramble for Africa”, and still suffers the tragic consequences of the short-lived “Shifita war” between the Government and the Somali secessionists after independence. The region became practically a police State during the following decades, and the application of emergency laws led to gross violations of human rights. While much of this legislation has since been repealed, the consequences of discrimination (such as the issuing of “screening” cards) against Somali Kenyans still lingers.

57. Cattle rustling, banditry and cross-border insurgency have led to hundreds of deaths, thousands of internally displaced persons and a flourishing trade in small arms. Near the Ethiopian border, the Gabra have suffered cross-border attacks by cattle rustlers linked to armed groups that have caused many victims, and they feel themselves to be neglected by government authorities. The neighbouring Burji, as well as the Munyayaya and the Orma in Garissa, presented the Special Rapporteur with similar complaints. One report states that in northern Kenya insecurity has risen, to rank alongside drought as the principal cause of human misery.

58. A comparative analysis of conflicts in Turkana, Marsabit, Garissa and Tana River highlights the high economic, social and cultural costs of these conflicts and the need to invest resources in conflict resolution at the local level. In Wajir, among other instances, a local peace initiative is said to have produced promising results. The long-term solution to these complex conflicts does not consist so much in applying straightforward “law and order” mechanisms, as some officials in the capital seem to believe, but in local peace initiatives with community participation. The final costs will be much lower and the results more long-lasting.

59. Over the years, a number of massacres of unarmed civilians have occurred in the context of enduring ethnic conflicts, like those at Malka-Mari (1981), Garissa (1982), or Turbi (2005). The 1984 Wagalla massacre in Wajir stands as the worst episode of human rights violations in Kenyan history. In the course of three days, security forces detained, tortured and brutally killed many hundreds of Degodia Somali. While the Government recently acknowledged the loss of 360 lives, other sources interviewed by the Special Rapporteur estimate that there were 2,000-3,000 victims. Many of the survivors still suffer physical and psychological consequences, and the widows and orphans have found no support. The true facts have never been established, and none of the alleged perpetrators has been prosecuted.

60. Besides cases of mass killings, there have been countless reports of arbitrary detention, police harassment, and incidents of torture and rape suffered by local residents as a result of the

punitive application of security measures. The Special Rapporteur on the question of torture found in 2000 that those acts were widespread in the northern regions as a “form of communal punishment” (E/CN.4/2000/9/Add.4, para. 16). Many police abuses have been reported in relation to social protests associated with land rights claims, and vocal community members have been ill-treated and arrested. In Laikipia, in 2004, Maasai protesters marking the expiration of leases under the 1904 treaty with the British were severely repressed, resulting in the killing of an elder and serious injury to four people. Rape of women and looting in local villages were reported as a result of the security operation that ensued.

61. A number of organizations active in promoting land reform and denouncing abuses against indigenous communities, including the Kenya Land Alliance, Osiligi in Laikipia and MPIDO, have allegedly been the object of systematic harassment and intimidation by the authorities, and donors to those organizations have reportedly been pressured to discontinue funding. In 2005, the director and two other staff members of MS Kenya, a branch of the Danish Association for International Cooperation that supports the promotion of land rights, were accused of “subversive activities”.

62. Exercising the liberties promised by the new Government, people now seek redress for past injustices. In many of the land rights cases involving human rights violations, the communities concerned still await responses to their numerous complaints to authorities at all levels. This typical lack of response, linked to high levels of public corruption, has led to widespread distrust of government authorities.

63. The issue of redress for past human rights violations led to the creation of a presidential Task Force on the Establishment of a Truth, Justice and Reconciliation Commission (the “Mutua Commission”), which concluded that “[t]he post-colonial state has engaged in the most abominable human rights violations ... known to humanity” (p. 9), and recommended the establishment of a truth commission to inquire into those episodes and to seek redress for the victims. These views have been fully endorsed by KNCHR, which reports that “[p]olitically instigated ethnic clashes have, in the 1990’s, resulted in massive human rights violations such as the death of thousands of people and injury to many more, the destruction of property worth billions of shillings, and the traumatizing of the immediate victims and their relatives” (KNCHR, Strategic Plan 2004-2009). The Government has so far failed to establish a transitional justice mechanism, which has been seen as a major failure in its democratization efforts.

64. With the exception of Kadhis (Islamic) courts, there is only a limited recognition of traditional or customary justice systems in Kenya. National courts may apply customary law only in civil matters in which one of the parties is subject to customary law and “as long as it is

not repugnant to natural justice”. There is an increasing demand for the right of communities to be represented in court that is not yet addressed.

G. Poverty, inequality and access to social services

65. The *Kenya UNDP Human Development Report 2001* indicates that the Human Development Index declined from 0.531 in 1990 to 0.514 in 1999, as reflected in the fall in life expectancy, per capita income and school enrolment and the rise in infant mortality and disease incidence. A major concern is the recent increase in poverty in the country, from 26 per cent in 1997 to 35 per cent in 2001. Another source estimates this rate at 57 per cent in 2005. Inequality is on the rise in Kenya, and the top 10 per cent of households control 42 per cent of the total income while the bottom 10 per cent of households control less than 1 per cent. The overall development situation is also characterized by regional, rural-urban, gender and social class inequalities. Due to their historical marginalization and social exclusion, pastoralist, hunter-gatherer and other minority communities consistently show higher poverty rates and lower levels of social and human development than the rest of the population.

66. The *Human Development Report* does not provide disaggregated data about indigenous people, but regional differences provide significant indicators. A large gap exists between the north and the rest of the country. In Garissa District alone, the poverty incidence is 64 per cent and in Marsabit the majority of the population relies on humanitarian relief. Together with the North Eastern Province, the poorest districts in the country are found in Coast, Eastern and Rift Valley Provinces, all ASAL areas that are home to the majority of pastoralists and hunter-gatherers. The Economic Recovery Strategy for 2003-2007 (ERS) defines the situation in the ASALs as one of “rampant poverty” (p. 45).

67. Community representatives interviewed by the Special Rapporteur outlined as causes of indigenous peoples’ poverty the unequal distribution of land and the lack of access to productive resources; the lack of access to and distribution of social services; ineffective development programmes; and the lack of basic infrastructure and marketing opportunities. The reactivation of the Kenyan Meat Commission has been welcomed by pastoralist communities, who also underlined that it should be made functional in all pastoralist areas.

68. Both the Economic Recovery Strategy and the Poverty Reduction Strategy include specific lines of action to improve equality and reduce poverty in ASAL areas that have a direct bearing on indigenous communities. Government development efforts in these areas are now focused on the ASAL Management Project, financed by the World Bank, which includes a community-based drought early warning system and support for development initiatives at the local level. The project has played a major role in the formulation of the Government’s draft ASAL policy,

which sets out a comprehensive plan to support pastoralism in these areas through water provision, grazing, rangeland management, animal health and marketing. The policy is, however, still subject to adoption by the Parliament.

69. To implement the Millennium Development Goals, to which it has subscribed, Kenya has launched the Free Universal Primary Education programme. The authorities recognize, however, that the programme has not yet reached all school-age children, especially in the geographically isolated arid and semi-arid lands, given their specific educational needs. Due to disproportionate poverty, families struggle to provide their children with school uniforms, transportation and school supplies. In some areas, children have to walk many kilometres every day to reach a school. Access to education in pastoralist areas is a serious human rights issue, as reflected in low literacy rates. An estimated 1.7 million children remain out of school, the majority of them living in marginalized pastoralist communities. The literacy level for Maasai in Kajiado and Somali in Mandera is only 3 per cent compared with a national average of 79.3 per cent. According to the *Human Development Report*, enrolment rates in North Eastern Province were especially low: only 9.8 per cent for primary school and 4.8 per cent for secondary school.

70. To face the difficulties of providing primary school education to semi-nomadic pastoralist families, some attempts have been made to establish boarding schools and mobile schools that accompany the nomadic families. Both initiatives have their problems. When children attend boarding schools, they cannot help their families with herding the livestock and other chores. Thus families are reluctant to send their children to boarding schools. Girls are especially disadvantaged when cultural constraints such as early marriages prevent them from being able to attend school. Mobile schools require not only committed teachers willing to endure hardship but also support mechanisms that are not easily provided.

71. Whilst universal primary school education may be attainable within a reasonable time frame, access to secondary schooling is more complicated and costly. Many of the communities that the Special Rapporteur visited complained that secondary schooling was out of their reach. Only a select few from pastoralist and hunter-gatherer communities can make it through secondary school, and even fewer manage to achieve a university-level education.

72. There are a number of reasons for this decline of educational achievement over the last years. There has been a reduction of government spending on educational infrastructure and materials; additionally, remote pastoralist areas lack schools and qualified teachers. Moreover, the school curricula are mostly irrelevant for the needs of pastoralists and hunter-gatherers.

73. The Government's 2005 Policy Framework for Education, Training and Research advocates affirmative action strategies, calling for the priority construction of schools in areas where nomadic populations live. Pastoralists are now targeted as marginalized groups on the same footing as slum dwellers and children with special needs, but with no regard to their specific cultural contexts.

74. The official languages of teaching are Kiswahili and English. Local vernacular languages are not officially used in the school system, though some communities manage to provide schooling in their own language as well. The Special Rapporteur received a number of reports complaining about the loss of the vernacular language, for example from the Yaaku and the Watta people, with pleas for action to preserve their languages, which they consider as cultural treasures.

75. Most indigenous peoples still lack easy access to primary health care, due to distance, lack of transport and essential supplies, and high costs. Moreover, health facilities are understaffed and distributed unevenly across districts in ASALs. Maternal health care is lacking, infant mortality is high, and the Orma estimate that 30 per cent of their women die during pregnancy and labour. In the absence of public health, people rely on traditional medicine and the Kenyan Medical Research Institute has recommended its legalization.

76. Indigenous communities, as the rest of Kenya's population, have been strongly affected by HIV/AIDS, though statistical data are lacking. The disease mostly affects poor women, especially in the pastoralist areas where they are excluded from development policies and where certain cultural practices such as initiation rites are conducive to its propagation.

77. Child labour is on the increase among indigenous communities, because domestic herding requires their participation. Orphans and children from poorer households are often hired out, sometimes to commercial herders but also to tea plantations and mining quarries, or as domestic workers. Child labour among indigenous populations has not received the government attention it requires, but ILO and some private organizations have programmes addressing these issues.

H. The rights of indigenous women

78. Gender inequalities and discrimination against women constitute persistent human rights violations, and indigenous women stressed that they also face systematic injustices and abuse within their own communities.

79. Female genital mutilation (FGM), though outlawed since 2001, is still practised widely among numerous indigenous communities such as the Maasai, Samburu, Somali and Pokot, as

part of the culturally sanctioned rites of passage. Whereas at the national level 34 per cent of women undergo FGM, the percentage in North Eastern Province rises to an alarming 99 per cent. FGM poses serious problems for the physical and mental health of girls and, being a form of gender violence, it is also a major human rights violation. Some organizations have experimented with various means of abandoning the practice in socially acceptable ways. For instance, UNFPA supports the Tasau Ntomok Girls Rescue Centre in Narok, which promotes an alternative rite of passage for pubescent girls, respecting the value of the tradition but rejecting the violence associated with it.

80. During violent ethnic conflict, rape has become a weapon of aggression and a systematic form of abuse by security forces. Indigenous women complain that rape allegations are not treated seriously in police stations. In cases of rape within their own communities, the redress provided by existing customary laws fails to compensate the victim.

81. Many indigenous women are denied access to property rights as a result of discriminatory statutory and customary law. ILO reports that women suffer marginalization with regard to land ownership due to patrilineal systems of land inheritance, and become virtually destitute in case of widowhood or divorce. Women are further excluded from decision-making in land transactions and the administration of communal ownership and group ranches. A report published by Human Rights Watch in 2002 concludes that discriminatory property laws generate gross violations of women's human rights, relegating them to dependence on men, abhorrent living conditions and increased vulnerability to HIV/AIDS.

V. CONCLUSIONS

82. The pastoralist and hunter-gatherer way of life of Kenya's indigenous peoples has come under heavy strains in recent decades. This is mainly the result of the historical legacy of colonialism, but also of inappropriate land policies and developmental strategies in ASALs and forest areas since independence, which are currently being revised. These policies entailed the systematic land-loss of rangelands and of forest reserves that underpinned the pastoralist and hunter-gatherer livelihoods and their cultural sustainability, leading to serious violations of economic, social and cultural rights and some persistent abuses of civil and political rights.

83. Nomadic and semi-nomadic pastoralism and agro-pastoralism were erroneously considered an obstacle to Kenya's economic development. The assault on the pastoralists' grazing areas involved forced displacements and the drastic reduction of available rangeland for livestock herding. The privatization of land, water and other resources, and the individualization of homesteads led to the fragmentation of traditional communally owned lands, increasing competition and conflict over diminishing resources, the progressive disintegration of

community life and the growth of social and economic inequality among indigenous communities. To this must be added the long-term effects of persistent droughts and the environmental deterioration of pastoralist areas and forests, including diminishing water resources.

84. Historical injustices and contemporary dispossession of lands and resources have been a major setback for the full enjoyment of the human rights of these groups. While a number of government initiatives have underlined the importance of such issues, the current land legislation and policies do not adequately address the challenges faced by pastoralist and hunter-gatherer communities. It is still a pending issue to be resolved, but the longer it takes the more difficult it will become for indigenous communities to be guaranteed their right to land, territory and resources.

85. The exclusion of hunter-gatherers and pastoralists from national parks and game reserves as a result of misguided conservationist policies also contributed to their progressive impoverishment and did not offer any alternatives for economic and social development for indigenous communities. This rigid conservationist strategy has come increasingly under critical scrutiny and alternative proposals for community-driven participatory asset management and development schemes have been put forward in the Government. They point to the importance of including the right to a healthy and secure environment in ongoing discussions concerning the rights of indigenous peoples in Kenya. Destruction of traditional habitats as a result of insensitive development projects, flawed policies and private enterprise are also human rights issues that demand compensation and reparation.

86. Historical injustices and increased pressure on land and natural resources have produced uncertainties that nourish ongoing inter-ethnic conflict which in turn fuels expressions of negative ethnicity that are often manipulated by political elites in a widely perceived environment of corruption and impunity. The legacy of grievous human rights violations that occurred in the past, such as the Wagalla massacre of 1984 and others, still weighs heavily on the country, and unless true transitional justice is achieved the human rights picture at the national level will be clouded. Effective means for conflict resolution and peacebuilding at the local level must also be strengthened.

87. Since the 2002 elections a new atmosphere of civil liberties has enabled human rights and indigenous peoples' organizations to have a voice in the national debate and to participate actively in discussions on alternative policies. Still, a number of indigenous communities complain about their "invisibility" and lack of recognition, and they ask for greater participation at the political level.

88. The human and social development indicators of indigenous people lag behind the national average. The draft ASAL policy, the PRSP, the Economic Recovery Strategy for Wealth and Employment Creation and the programme of free universal primary education, among others, are steps in the right direction, and they must be supported with material resources, technical skills, human capital and, above all, political will. These programmes must focus on the special needs and requirements of pastoralist and forest communities if they are to make an impact on the human rights situation of indigenous peoples in the country.

89. Indigenous women are victims of serious human rights violations derived from discriminatory status and customary law, lack of access to social services and decision-making, and harmful traditional practices such as FGM. Difficulties in achieving gender equality among indigenous communities will require special measures within an overall approach of affirmative action and culturally appropriate policies towards these communities.

VI. RECOMMENDATIONS

90. **In view of the above, the Special Rapporteur makes the following recommendations:**

A. Recommendations to the Government

Legal recognition and political participation

91. **The rights of indigenous pastoralist and hunter-gatherer communities to their lands and resources, effective political participation and distinct cultural identity should be constitutionally recognized. Specific legislation should be correspondingly enacted, including affirmative action where necessary.**

92. **The Government should take all the necessary steps, in consultation with indigenous peoples in the country, to ensure prompt ratification of ILO Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries. It should also promote the adoption of the United Nations Declaration on the Rights of Indigenous Peoples by the General Assembly and, through Parliament, ensure the incorporation into domestic law of these instruments.**

93. **The national census should identify pastoralists and hunter-gatherers as distinct indigenous communities and provide disaggregated data in order to understand their specific needs and facilitate the elaboration of appropriate public policies.**

94. **The Government, through the Electoral Commission of Kenya, should regulate the nomination of Members of Parliament by political parties, in particular to ensure adherence to the constitutional provisions on the need to take into account special interest groups in those nominations.**

95. **Existing districts and constituencies should be redefined in order to provide for a more effective representation of the interests of smaller indigenous communities, particularly in cases where they are divided into several administrative units, in line with section 42 of the Kenya Constitution.**

96. **The current procedures for granting national identity cards should be reviewed to remove obstacles affecting indigenous communities, and such identity documents should be provided to members of nomadic pastoralist and forest communities who still lack them.**

Land and resource rights

97. **The Government should fully implement the recommendations of the Ndungu report, giving particular attention to the rights of indigenous and other marginalized communities to their lands and natural resources. The draft National Land Policy should be adopted, retaining the sections on the land rights of pastoralists and hunter-gatherers, and fully implemented.**

98. **Indigenous communities should be consulted prior to the exploration for and exploitation of natural resources on their traditional lands, and should receive an equitable share of benefits obtained from such activities through participatory resource management. They should be fully compensated for any adverse environmental impact on their land, resources and traditional livelihoods resulting from development projects and other economic activities.**

99. **Efficient mechanisms should be established to address historical injustices and settle current land and natural resource disputes resulting from dispossession of lands traditionally owned by pastoralists and hunter-gatherers. These mechanisms should include the possibility of revocation and rectification of irregular titles, as well as the restitution of lands and/or effective compensation to the affected communities.**

100. **Stronger guarantees against the dispossession of indigenous communal lands should be incorporated in the land legislation, allowing for room to challenge fraudulent first registrations in the courts. The Government should also ensure that no adjudication or**

setting apart of trust lands or unalienated government lands should be allowed without the free, prior and informed consent of local communities.

101. The policy of privatization of communal ranches should be carefully revised with the participation of the communities concerned, in order to provide permanent protection and support to communal lands and group ranches and counteract the negative consequences of the “willing seller-willing buyer” practice, particularly in Narok and Kajiado Districts.

Forest areas

102. The rights of indigenous hunter-gatherer communities (particularly the Ogiek in Mau Forest) to occupy and use the resources in gazetted forest areas should be legally recognized and respected. Further excisions of gazetted forest areas and evictions of hunter-gatherers should be stopped. Titles derived from illegal excision or allocation of forest lands should be revoked, and new titles should only be granted to original inhabitants. Illegal commercial logging should be stopped.

Environmental rights

103. The Government’s ASAL policy should include measures to restore the environment and prevent further degradation in pastoralist areas. In particular, it should cooperate with other actors in the elimination of the prosopis weed in the Il Chamus community.

104. The authorities of the Tana River dams should ensure that no water release takes place without previously informing and consulting with the Munyayaya and other communities living along the river. Any damage on indigenous communities’ lands resulting from the operations of the dams should be fully compensated.

105. The State should promote the complete removal of landmines and other military ordnance in pastoralist areas, and victims should be fully compensated.

106. Existing legislation should be amended to ensure the rights of local indigenous communities to access the natural resources in protected areas in their traditional territories. Conservation and the rights of indigenous peoples should be balanced in accordance with the recommendations of the fifth World Parks Conference held in Durban, South Africa in 2003.

107. Pastoralist and hunter-gatherer communities should be involved in decisions concerning the management of and benefits derived from protected areas, game reserves

and national parks. They should also be compensated for any loss derived from the creation of such areas, including any human and material losses derived from wildlife activities in the vicinities of these areas.

108. The Government should aim at a friendly settlement in the case of the Endorois before ACHPR, leading to the establishment of a system of co-management between the authorities and the local communities in the Lake Bogoria Game Reserve.

Access to justice

109. The Government should fully implement the recommendations of the “Mutua Task Force” and KNCHR, and establish a Truth, Justice and Reconciliation Commission with the power to investigate and provide redress and compensation to the victims of gross human rights violations. Special attention should be paid to the investigation of the Wagalla and other massacres, the compensation of the victims and the punishment of the perpetrators.

110. The Government should ensure that all allegations of torture, rape and other human rights violations are promptly, independently and thoroughly investigated by a body capable of prosecuting perpetrators. The rights of human rights defenders and indigenous activists should be specifically protected.

111. The national conflict resolution mechanism should include leaders from indigenous peoples’ communities and be linked to local conflict resolution mechanisms.

112. Indigenous communities should have the legal right to represent their interests in cases affecting their collective rights.

Social services

113. The Government should adopt the current draft ASAL policy and fully implement it with the participation of pastoralist communities.

114. Indigenous communities should participate actively in the design, implementation and evaluation of the poverty reduction strategy and the realization of the Millennium Development Goals.

115. Affirmative action should be applied to promote education for indigenous children at all levels, particularly for indigenous girls. Free boarding and mobile schools should be an

integral part of the free universal primary education programme. More appropriate educational curricula should be devised, taking into account indigenous peoples' distinct ways of life.

116. Efforts should be made to protect the languages of the smaller indigenous communities from extinction, by appropriate educational, linguistic and cultural policies.

117. Indigenous peoples, particularly indigenous women and girls, should be ensured access to adequate health services. The system of mobile clinics in pastoralist areas should be reinforced, and the use of traditional medicine and health-related knowledge should be encouraged and legally recognized.

Women's rights

118. The Government should reinforce its efforts to achieve the effective eradication of FGM in all communities, by helping promote culturally appropriate solutions such as alternative rites of passage and supporting women's organizations in these tasks.

119. The Government should review existing discriminatory laws and regulations affecting the property rights of indigenous women, particularly those of widows and divorced women.

B. Recommendations to the Kenya National Commission on Human Rights

120. KNCHR should establish a specialized programme dealing with the rights of pastoralists and hunter-gatherers and other minority communities, promote wider knowledge of their human rights situation and strengthen cooperation with their organizations.

121. KNCHR should play a key role in the monitoring of the implementation by all relevant actors of the recommendations made by the Special Rapporteur in this report.

C. Recommendations to indigenous communities and organizations

122. Existing customary laws and practices should be revised to eliminate discrimination against women, especially with regard to their property rights and harmful traditional practices, and ensure their full participation in decision-making at the community and national levels.

123. Indigenous communities and organizations should renew efforts to find constructive solutions to existing conflicts with other communities, taking into account customary practices, the principles of transitional justice and the respect for human rights.

124. Indigenous peoples' organizations are encouraged to develop concrete strategies for data collection, research and documentation to support their advocacy work both at the national and international levels.

D. Recommendations to civil society and political parties

125. Political parties should take a stand in favour of the recognition of indigenous peoples' communities and their rights in the constitutional review, legislative reform and policymaking.

126. Members of the Pastoralist Parliamentary Group are encouraged to revitalize their activities in order to build a common agenda and strategy in favour of pastoralist and other indigenous communities.

127. NGOs and donors should strengthen their relations with indigenous communities, support their development initiatives and promote a better understanding of their demands and aspirations within Kenyan society.

E. Recommendations to the international community

128. The international agencies and programmes in Kenya should take into account the needs and rights of indigenous peoples and establish specific programmes for them. They are encouraged to engage with UNIPACK and other pastoralist and hunter-gatherer networks and organizations in the formulation and implementation of these policies.

129. International agencies and financial institutions should ensure that all projects in indigenous areas respect the principle of free, prior and informed consent of the local communities. Any negative impact caused to these communities as a result of these projects should be duly accounted for and compensated.

130. ILO should further its efforts to promote the rights of indigenous communities in Kenya under the provisions of Convention No. 169 and other fundamental international labour standards.

F. Recommendations to the academic community and the media

131. The country's universities and research centres should establish focal points for research on and teaching about the needs and rights of indigenous peoples in Kenya.

132. The written press and the audio-visual media should avoid any discriminatory or biased reporting on indigenous peoples in Kenya and provide space for their concerns and information that promotes their ways of life and cultural identities.
