report

Kenya: Minorities, Indigenous Peoples and Ethnic Diversity

By Maurice Odhiambo Makoloo, with a preface by Yash Ghai

The author
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Dedication
MRG and CEMIRIDE would like to dedicate this report to Professor Katama Mkangi, who was tragically killed in a road accident in Kenya while working on a first draft of material that would have formed this report. Prof. Mkangi was a tireless campaigner for human rights in Kenya and was formerly a prisoner of conscience. He will be much missed.

Minority Rights Group International
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MRG works with over 150 organizations in nearly 50 countries. Our governing Council, which meets twice a year, has members from 10 different countries. MRG has consultative status with the United Nations Economic and Social Council (ECOSOC), and observer status with the African Commission on Human and People's Rights (ACHPR). MRG is registered as a charity and a company limited by guarantee under English law. Registered charity no. 282305, limited company no. 1544957.

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CEMIRIDE is a research and advocacy national organization working with and across Kenyan indigenous and minority communities to enable respect and protection of their rights, so as to achieve sustainable development as well as peaceful coexistence. It is registered under the Non-Governmental Organisations Coordination Act of Kenya as number OP.218/051/2002/0149/2240.

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Summary

This report documents the plight of minorities and indigenous peoples in Kenya today. Minorities and indigenous peoples are poorer than other communities, their rights are not being respected, and they are not included in development or other participatory planning processes. Members of minority and indigenous communities feel excluded. They are aware of, and resent, being treated differently and having fewer opportunities.

The report shows how the poverty of marginalized communities is compounded by the lack of official (and unofficial) data disaggregated by ethnicity, which keeps the problem of minority and indigenous poverty hidden and unaddressed. The report examines some of the reasons why this data is not collected and published.

The report discusses the use and abuse of ethnicity in Kenyan politics, also raising the problem of the defensiveness of many in politics on ethnic issues. Claims by particular communities are often seen as threats to the unity of the Kenyan nation, instead of opportunities to make all groups feel included and to ensure that their needs are recognized.

The report examines Kenya's current Constitution and the new draft Constitution from a minority and indigenous peoples' perspective. The author is critical of Kenya's budget processes. For example, he analyses budget allocations (unfortunately there is no data for actual money spent) in the Turkana district. As 94 per cent of the population of the district are ethnically Turkana, this can be used to substitute for the unavailable disaggregated data. This analysis reveals huge disparities in budget allocation between the Turkana district and Kenya as a whole. He goes on to compare the allocation between the Turkana and Nyeri districts, th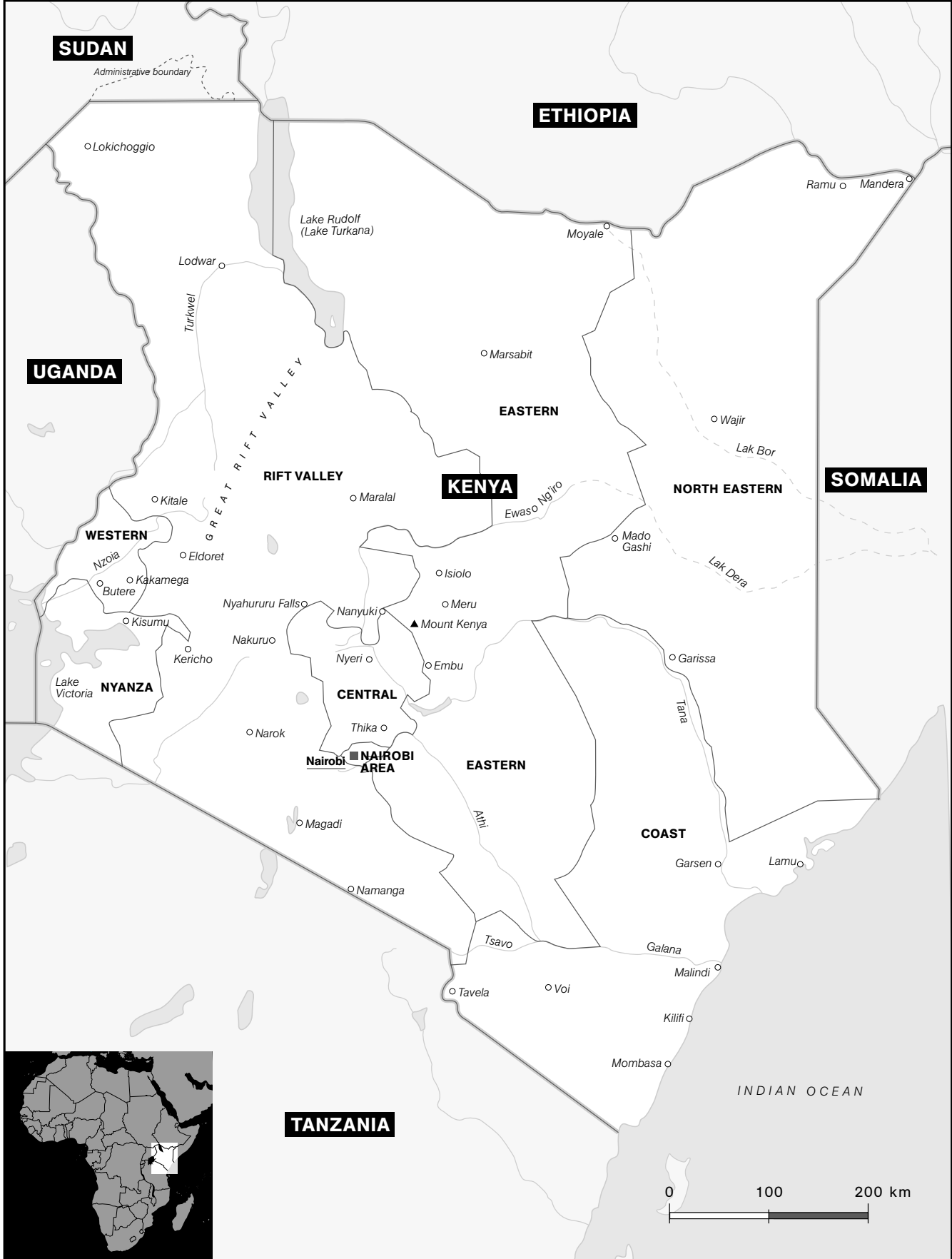e latter being the home district of the current President of Kenya, to analyse the extent to which ethnicity in politics can favour certain ethnic groups over others.

The report calls for immediate action to address inequality and the marginalization of communities as the best way to ensure Kenya remains free of major conflict. It calls for disaggregated data, a new Constitution to devolve power away from the centre, and measures to ensure minorities and indigenous peoples benefit equitably from existing and future development programmes.

Finally, the report argues that Kenya's diversity is a potential strength and opportunity. It need not be a threat to national unity. The report is sympathetic to those who deplore the abuse of ethnicity in politics; however, it argues that to react to this by hoping that ethnicity will disappear is both misguided and unrealistic. A new public debate about diversity in Kenya is needed. Suppressing and denying ethnic diversity, leaving minorities in poverty and politically marginalized, is the quickest route to both inter-ethnic conflict. Including and respecting minorities and indigenous peoples, and making sure that development reaches all of Kenya's peoples are, on the other hand, the only ways to lift the poorest out of poverty and to deliver sustainable conflict-free development.

Inter-ethnic conflict in Kenya is not imminent but it remains a real risk in the medium to long term. International experience has shown that the slide into conflict is very difficult to stop once momentum has built up. Preventative actions are too often begun only when conflict is looming. The measures taken are too little too late. Action must be taken early, at a time when conflict is still unlikely. Inequalities breed resentment and can ultimately lead to violence. In Kenya's case, action must be taken now.

Kenya

SUDAN

Administrative boundary

ETHIOPIA

○ *Lokichoggio*

Ramu ○ ○ *Mandera*

*Lake Rudolf
(Lake Turkana)*

○ *Moyale*

Lodwar ○

Turkwel

UGANDA

○ *Marsabit*

EASTERN

○ *Wajir*

Lak Bor

RIFT VALLEY

KENYA

○ *Maralal*

Ewaso Ng'iro

NORTH EASTERN

SOMALIA

G R E A T   R I F T   V A L L E Y

○ *Kitale*

*Mado
Gashi* ○

Lak Dera

WESTERN

Nzoia

○ *Eldoret*

○ *Isiolo*

○ *Kakamega*

Butere ○

Nyahururu Falls ○

Nanyuki ○

○ *Meru*

○ *Kisumu*

▲ *Mount Kenya*

Nakuru ○

○ *Garissa*

Kericho ○

Nyeri ○

○ *Embu*

Tana

*Lake
Victoria*

NYANZA

CENTRAL

○ *Narok*

Thika

Nairobi ■ **NAIROBI
AREA**

EASTERN

○ *Magadi*

COAST

Garsen ○   ○ *Lamu*

○ *Namanga*

Athi

Tsavo

Galana

Malindi ○

○ *Tavela*

○ *Voi*

Kilifi ○

Mombasa ○

INDIAN OCEAN

TANZANIA

0   100   200 km

Preface

Neither during colonialism or subsequently has Kenya been kind to minorities or indigenous peoples, or other disadvantaged groups, as Odhiambo Makoloo demonstrates so well. State power has been used to deprive communities of their resources. Exclusion and rampant discrimination have characterized Kenya's political and economic system. There are various reasons why, despite the absence of an ethnic majority, some groups feel that they are a minority. A group can be a minority in a province or a district where the same is dominated by another ethnic group. No one from the minority group may be able to win an election. Several ethnic and religious groups have asked for special representation in the National Assembly and local councils.

Minority concerns have also arisen because an ethnic group may acquire control of the apparatus of the state and use it to exercise dominance over other ethnic groups. This dominance is facilitated by the overwhelming powers given to the President, who is able to disburse favours to his or her community at the expense of other groups. A sense of being a minority can also arise from religious affiliation. It is evident that Muslims, for example, feel that they are a religious minority who have suffered discrimination and the denial of rights due to Christian hegemony.

Pastoral communities and hunter-gatherers have defined themselves as minorities or indigenous peoples on the basis of their lifestyles or mode of social and economic organization. They complain that the regime of land, legal structures and values, which are necessary for their existence as communities, are not permitted by the state, and demand the recognition of communal land tenures. Their sense of marginalization is aggravated by what they claim are historical injustices. They feel that their culture and values are misunderstood, and denigrated. They chose to present their claims to the Commission as indigenous peoples, claiming that they were covered by and should have the protection of international treaties on indigenous peoples. This sets them apart from the rest of Kenyans, living in enclaves of their own, with values and patterns of existence vastly different from other communities.

There are communities who share kinship with communities beyond Kenya's borders such as the Somalis, who feel that their loyalty to Kenya is questioned and that they are not accepted as Kenyans. At the same time they emphasize their own distinctiveness, and like many other groups, they want to preserve their own identity. Kenyan Asians also point to their distinctiveness, yet they want to be recognized as Kenyans. The need for recognition is universal and many groups resent being treated in the census as 'oth-ers'. In some communities this 'non-recognition' is aggravated by what they claim is their poverty and lack of development; indeed they sometime attribute the latter to the lack of recognition. Asians, on the whole a prosperous community, complain that their contribution to Kenya's political and economic development is not acknowledged.

Because these difficulties and problems are so widespread, they should be tackled on a national basis. For example, the sense of political marginalization that many suffer from can be dealt with through a constitutional and political system, which is more just and inclusive than that at present, and whose symbols do not exclude some communities. The alienation that arises from under-development can be overcome by economic policies that lead to growth and fair distribution, and ensure a community a share in the revenue derived from resources located in its area.

If we focus on problems instead of communities, we find that as a nation Kenyans have to ensure the full rights of citizenship (including the obtaining of ID, voting cards and passports) of all people (for even the poor of so-called 'dominant' communities have difficulties obtaining these), while recognizing the special difficulties Somalis, Nubians, and Asians etc. face. Another grievance, that of exclusion from public employment (strongly voiced by Asians), should be solved through fair and non-discriminatory employment. The difficulties of access to basic needs should be tackled through affirmative action based on the socio-economic needs of individuals and families. Complaints about lack of political representation can be met by fully implementing the principle of people's participation in public affairs, as well as via a more imaginative electoral system. Many minorities and indigenous peoples centre their complaints on land and other natural resources. We found that most communities experienced difficulties concerning land, which we consider need to be resolved through national policies with sensitivity to the special problems and needs of particular communities. The need for recognition can be met through greater respect for the traditions, values, beliefs, and traditional knowledge of communities, and greater sensitivity to the concerns, for example, of religious groups the manifestation of whose beliefs are generally misunderstood. The 'needs-based' approach is consistent with the goal of 'national unity and integration', while respecting 'regional and ethnic diversity'.

Yash Ghai – Chair of the Constitution of Kenya Review Commission (2000–4)

Historical background

The pre-colonial and colonial period

The concept of Kenya, as a nation state as we know it today, came into being in the colonial period. The various communities inhabiting what is now Kenya each had their distinct ways of life, obtaining their food through fishing, hunting and gathering, raising livestock etc. There were various modes of political organization. Due to differences in cultural and socio-economic activities, there were occasional violent conflicts between some of these communities, with cattle rustling[1] being a major contributing factor.

After the conquest and demarcation of the country, the colonial power, Britain, established infrastructures and institutions to serve its interests. These structures changed the socio-cultural and political economy of Kenya. From early on the British sought to acquire land as a major commodity. The alienation of the 'White Highlands' as well as other pieces of land stemmed from the knowledge that whoever controls the land is in a good position to influence the government; further, the colonial power needed to be able to grant parcels of land to attract settlers.[2] Therefore, with a sense of urgency, the colonial administration moved to secure large chunks of land using various means. These included treaties of forceful conquests, such as the Maasai Agreements of 1904 and 1911.[3] The British also passed several land laws to support these acquisitions, these included the Crown Lands Ordinance of 1902 and 1915. The outcome of these laws was to make all of Kenya's inhabitants tenants at the will of the Crown and therefore liable to be moved to any place at any time to further colonial interests.

By the time Kenya became an independent nation state in 1963, its population's composition and the pattern of settlement had defined geographical structures. Further, land had acquired a key position in the life of the new nation. The systematic application of the colonial political and socio-economic systems had left indelible marks on the young state.

The Kenyatta years

Kenya attained independence in 1963 with Mzee Jomo Kenyatta as the Prime Minister. In 1964, Kenya became a republic with Kenyatta as the first President. His reign lasted until his demise on 22 August 1978.

The main principles and strategies of Kenya's development after independence were laid down in the 1965 paper entitled *African Socialism and Its Application to Planning in Kenya*. In this document, the Kenya African National Union (KANU) government outlined its political and economic philosophies. With independence, Kenya intended to 'mobilize its resources to attain a rapid rate of economic growth for the benefit of its people'.[4] President Kenyatta also stressed that the economic approach of his government would be 'dominated' by the desire to ensure the Africanization of the economy and the public services.

Rather than socialism, Kenya's economic policies were heavily geared towards a mixed economy. In addition, the KANU government concentrated on growth rather than redistribution. The Kenyatta years continued previous politics and led to the social exclusion that exists today. While there was strong economic growth, the gulf between the rich and the poor widened. The process of Africanization saw increased tribalism in the manner in which jobs were acquired in the public services and in the manner in which other key positions were filled. This era also saw the Kikuyu, and its cousin communities, the Embu and Meru, amass large amounts of land, especially in the former White Highlands. This caused tension between the Kikuyu and other ethnic groups, especially within the Rift Valley province. Kenyatta did not move to recover land that had been acquired by white people to return it to the communities from which it had been taken. Thus, from early on in the life of independent Kenya, the minorities and indigenous peoples lost out. The Kenyatta administration is also known to have created minorities in Kenya, as well as beginning the systematic violation of the rights of the indigenous peoples – especially with regard to natural resource ownership and use (see later). Communities with close ties to political power began to dominate the rest of the communities.

The Moi era

President Kenyatta was succeeded by President Daniel Arap Moi, who served until 2002. The Moi era had two important characteristics relevant to this report. Moi shrewdly ran a government that included virtually all of the tribes in Kenya (including minority and indigenous communities).

While he included many representatives of these communities in his government he only did this for political support, and their inclusion did not lead to any political, economical or social gains for these communities. Instead, their situation worsened as they slid deeper into poverty as well as social, cultural and political alienation. Further, the other communities viewed them with suspicion.

The Moi era would also see the cruellest and most intensive ethnic clashes since independence. At the centre of these clashes, were two explosive issues – the control of land and economic power. Moi had not addressed the inequalities of land redistribution, ownership and use that were a hangover from Kenyatta's presidency. There was an increasing realization by the minority and indigenous communities that their interests were not being taken care of by the government. They started a crusade in the early 1990s to reclaim their rights. However, this was hijacked by some of these communities' leaders to further their own political agendas.

The post-Moi era: the NARC dream

Moi's reign ended due to a constitutional limit of two terms of five years.[5] Thus, on 30 December 2002, President Mwai Kibaki was sworn in as Kenya's third President. He came in through the National Rainbow Coalition (NARC), an arrangement that had been achieved through a pre-election pact between the National Alliance Party (NAK) and the Liberal Democratic Party (LDP).

The 2002 elections and the subsequent government by NARC led to a government of the majority tribes, with the minority or indigenous tribes in the opposition. After just a short period in power, characterized with incessant squabbles over the two parties' failed implementation of their pre-election power-sharing agreement, the new government has come under heavy criticism for its perceived condoning of corruption, tribalism and nepotism. Beginning with the process that brought NARC to power, (essentially the coming together of Kenya's larger tribes), the NARC government, in terms of its political participation, is firmly in the hands of the majority groups. For many, the promise of a new government is turning sour.

Of most interest to minorities and indigenous peoples during the 2002 elections was the implementation of a new Constitution that would protect their rights. Indeed, this had been promised by the NARC candidates. However, it has been reneged on. Dominant communities, who are now enjoying immense state powers, do not want a devolution of power or any radical change in Kenya's governance systems that would see minorities and indigenous peoples achieve affirmative action. Recently, when the Maasai demanded a return of their land following the expiry of the 1904 Agreement, the Kibaki government declined to accede to this demand, showing the government's reluctance to solve the issue of what many believe to be illegally-acquired land.

On a positive level, however, the number of elected and nominated women Members of Parliament (MPs) doubled in between the 1997 and 2002 elections from nine to 18 women. Of a total of 210 MPs, 48 are from minority or indigenous communities, including three women, one of who is a cabinet minister. Further, women's participation in local authorities increased from 2.4 per cent in 1988 to 13.3 per cent in 2002.[6] Unfortunately, reports also show that violence against women (including young girls from all communities) is on the increase.[7]

Defining minorities and indigenous peoples

In 1966, the United Nations (UN) Special Rapporteur, Francesco Capotorti, proposed the following definition of minorities in the context of Article 27 of the International Convenant on Civil and Political Rights (ICCPR):

'A group numerically inferior to the rest of the population of a State, and in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religions and language.' [8]

A refinement of this definition was proposed in 1985 by Jules Deschênes:

'A group of citizens of a State, constituting a numerical minority and in a non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law.' [9]

While both definitions contribute to an understanding of the concept of minorities they are not without their difficulties. For example, a distinct ethnic group can constitute a numerical majority and be in a non-dominant position, and thus be entitled to the application of minority rights standards, to protect their rights to non-discrimination and to their identity. Similarly, the limiting criterion of citizenship can be used to exclude certain groups from their rights as minorities. However, the UN Human Rights Committee (HRC) has stated in a General Comment to Article 27 of the ICCPR that a state party may not restrict the rights under Article 27 to its citizens alone.[10] To this may be added the important point referred to by the HRC that:

'the existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by that State party but requires to be established by objective criteria'. [11]

This is closely linked to self-identification in determining minority status. In sum, any definitional criteria should aim at the furtherance of the rights of minorities to exist, to be treated without discrimination, to the preservation of their cultural identity and to their participation in public life.

For the purposes of this report, and to provide some guidance in line with international norms, the following elements are to be considered when defining who is a minority in Kenya.

A minority is:

- any ethnic, linguistic or religious group within a state, which is in a non-dominant position in that state. This raises the issue of public participation. In Kenya, the Northern Frontier district (NFD) has been under-developed and under-represented in public life when compared to the rest of the country. The NFD hosts several minority and indigenous groups (see later);
- a group consisting of individuals who possess a sense of belonging to that group, and who are determined to preserve and develop their distinct ethnic identity. As a response to its relations with other segments of society, a minority group will normally develop a strong sense of group loyalty and other related behaviour;
- likely to be discriminated against or marginalized on the grounds of its ethnicity, language or religion.

Capotorti's definition is capable of application to many indigenous peoples as well and has been so applied within the context of Article 27 of the ICCPR. For example, the stress on cultural difference, non-dominance and a desire to transmit culture to their successors, also rings true for indigenous peoples.

This report adopts the definition of indigenous peoples given by the International Labour Organization (ILO) Convention No. 169.[12] Article 1 provides that the Convention applies to:

'a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
b) peoples in independent countries who are regarded as indigenous on account of their decent from the populations which inhabited the country, or a geographical region to which the country belongs, at the

time of conquest for colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their social, economic, cultural and political institutions'.

By and large, whether indigenous or minority, these peoples suffer when it comes to political, social, economic and cultural discrimination, and exploitation. Thus, minority and/or indigenous communities are what the draft Constitution of Kenya 2004 refers to in Article 306 as a 'marginalized group or community'. The Article defines this to mean:

'a) a group who, as a result of laws and practices before or after the effective date, were or are disadvantaged by unfair discrimination on one or more prohibited grounds set out in Article 36; or
b) a community which by reason of its relatively small population or otherwise, has been unable to fully develop its internal structures or resources sufficient to participate in the integrated social and economic life of Kenya as a whole; or
c) a traditional community which, out of the need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole; or
d) a indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy; or
e) pastoral persons or communities, whether they are –
(i) nomadic; or
(ii) a settled community which, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of the Republic as a whole'.

Recognizing minorities and indigenous peoples

The recognition of minorities and indigenous peoples would contribute to the preservation of their identities and enable them to obtain equality with other groups in that state, including in relation to participation in political life as well as in development matters. Our concern in this report is with:

- religious minorities;
- ethnic minorities;
- linguistic minorities;
- indigenous peoples.

When the majority Africans came to power, Kenyans of non-African origin became politically marginalized. Asians, for example, becoming vulnerable. While Asians are central to the economy, they exercise relatively little influence in the public domain. Refugees present another category of minorities, having fled from their country of origin due to real or threatened persecution based on their ethnic or religious background. Upon arrival in Kenya, they have found themselves in a different cultural environment that inhibits their active participation in determining their own destinies.

Religious minorities

Having been colonized by a Christian nation, most Kenyans today profess to be Christians, although there is no state religion. This has made followers of non-Christian religions religious minorities. Thus, Muslims are a religious minority in Kenya, along with Buddhists, Hindus, and those Kenyans who practice traditional African religions.

Ethnic minorities

An ethnic group is a tribalistic grouping. It has a sense of common historic origins and frequently develops a sense of common destiny. Sharing a number of cultural traits and institutions, such as dress, food, language, and family patterns, nationalities generally precede the much later establishment of nation states, tracing their origins back to times before historical records were kept.

Kenya's population is a composite of ethnic communities. According to the population census, Kenya has three big homogenous communities – the Kamba, Kikuyu and Luo. Ethnic minorities here are distinguished by the small size of their populations. These include the Dorobo, Elmolo, Malakote, Ogiek, Sanye and Waata.

Linguistic minorities

Because ethnic groups invariably speak their own language, most ethnic minorities are similarly linguistic minorities. Take the Yaaku for example, their language has been classified by the United Nations Educational, Scientific and Cultural Organization (UNESCO) as being extinct. The Yaaku's existence has never been acknowledged in official documentation, including the national census, because they are grouped with their more populous neighbours, the Maasai. As 65-year-old Mzee Lobes Lokinyanyi says: 'Only a few old people can speak my language. Many died before their children could learn it. It is really sad.'[13]

The beginning of the end of the Yaaku community and language is attributed to colonialism. The colonial administration disrupted the Yaaku way of life by banning Africans' game hunting to stem competition with commercial sport hunters. The Yaaku, a hunter-gatherer community, was badly hit.

> 'The Yaaku used the hind leg of a giraffe as [a] crucial part of bride price…and outlawing giraffe hunting meant that young men could not marry.'[14]

Further, having the Maasai as neighbours only made matters worse for the Yaaku. One Yaaku old man says:

> 'The Maasai…were rich in livestock and used this to entice the daughters of Yaaku. The Yaaku had not livestock to pay [a] dowry, so the Maasai girls were also out of their reach. Many of our men died without a family.'[15]

Many of the Yaaku men became herders for the Maasai. Gradually many of the Yaaku intermarried with the Maasai, were assimilated into Maasai culture, abandoned their language and started speaking Maa (the Maasai language).

The Suba community was initially a Bantu-speaking group associated with the Maragoli Bantus of western Kenya. They settled in the area around Lake Victoria in Gwasi where they are surrounded by the Luo Nilotes. This community has almost lost its separate identity due to intermarriage with the Luo. Even their political and

social character is essentially Luo, as can be seen in their naming and voting patterns. There are very few remaining native speakers of the Suba dialect.

The Kenyan Constitution recognizes only two languages: English and Kiswahili. Kiswahili is the national language and English is the official language. Other languages are not officially recognized as national or official, save as 'mother tongues' (or 'first languages'). This makes all the African languages spoken in Kenya, apart from Kiswahili, carry the minority status. These minority languages are increasingly becoming endangered and yet more have become extinct, including the Malakote and Terik.[16]

Indigenous peoples

Post-colonial Constitutions, based on the Westminster model, have failed to recognize indigenous peoples as entities with their own cultures. Such Constitutions see land and resource ownership as individual or corporate, rather than collective. Governments are often reluctant to recognize indigenous peoples because of the implications in terms of land and resources.

In Kenya, traditional indigenous activities such as pastoralism and honey gathering are not recognized as economic activities. Further, indigenous peoples are not benefiting from tourism on their lands. They are too poor to access health care and are blocked from their traditional lands, which provided traditional cures. For example, the Ogiek have been excluded from the forests, which have been declared government property, yet these had been their homes and source of livelihood. Some of the Ogiek's traditional forests include Tinet Forest in Nakuru district, Narok Forest and Mt Elgon Forest within Narok and Mt Elgon districts respectively. The focus on the cash economy has prevented recognition of their cultural and spiritual identity. The Endorois and the Turkana are among Kenya's other indigenous communities.

Population census and breakdown of communities

The diverse ethnic groups in Kenya can be broken down into three main ethno-linguistic groupings, namely, Bantu-speaking, Cushitic-speaking and Nilotic-speaking peoples. They not only speak different languages but also occupy diverse ecological zones. This ecological diversity disposes the various peoples to different forms of liveli-

Table 1: Main ethno-linguistic minorities

Bantu-speaking peoples	Nilotic-speaking peoples	Cushitic-speaking peoples
Western Bantu 1. Abaluyia (Bakhayo, Banyala, Banyore, Bukusu, Idakho, Isukha, Kabras, Kisa, Marachi, Maragoli, Marama, Samia, Tachoni, Tiriki, Wanga) 2. Abagusii, 3. Abakuria	**Plains Nilotes** Elmolo, Dorobo, Ilchamus, Maasai, Sakweri, Samburu, Teso, Turkana	Boni, Borana, Burji, Dushnek, Gabbra, Munyoyaya, Oromo, Rendile, Sakuye, Somali, Waata
Central Bantu Aembu, Agikuyu, Akamba, Ambeere, Ameru (Achuka, Aigembe, Aimenti, Amuthambi, Amwimbi, Atharaka, Atigania)	**Highland Nilotes** Elgeyo, Elkony, Kipsigis, Lembus, Mandi, Marakwet, Nandi, Ogiek, Pokot, Sabaots, Sengwer, Terek, Turgen	
Coastal (Eastern) Bantu Adawida; Amalita; Ataita; Ataveta; Kenda (Chonyi, Digo, Duruma, Giriama, Jibana, Kambe, Kauma, Rabai, Ribe); Miji; Pokomo; Segeju; Waswahili (Amu, Bajun, Fundi, Mvita, Ozi, Pate, Shela, Siyu, Vumba);	**River-Lake Nilotes** Luo, Nubians	

SOURCE: CONSTITUTION OF KENYA REVIEW COMMISSION, *REPORT ON CULTURE*, AUGUST 2003

hoods. Most of these ethno-linguistic groupings can also be sub-categorized depending either on their settlement and/or migratory patterns. The Bantu-speaking peoples fall into three groups: Western, Central and Coastal (Eastern) Bantu. The Nilotic-speaking peoples are placed into three groups: Eastern (Plains) Nilotes, Highland Nilotes and River-Lake Nilotes. The Cushitic group is not sub-categorized.

There are also other non-African groups, such as Kenyans of American, Arabic, Asian and European origin, plus a number of Africans who have become citizens of Kenya.

The resettlement pattern of these communities is such that they occupy distinct or near distinct administrative units. Kenya is divided into administrative units called provinces – Central, Coast, Eastern, Nairobi, North Eastern, Nyanza, Rift Valley and Western. These provinces are further divided into districts, which are also divided into divisions.

The 1999 population census enumerated 28,686,607 people. The other post-independence censuses had been conducted in 1969 (10,956,501), 1979 (15,327,051) and 1989 (21,448,774). The 1999 figure was adjusted to 23 million but recent analyses have proven that the count was exaggerated for political reasons.[17] It is estimated that the country's population stands at 28.7 million, and is expected to rise to 33.4 million and 36.5 million in 2010 and 2020 respectively.

A historical analysis of population censuses reveals that while some nations and/or sub-nationalities were left out, others were created or emerged to form bigger nations according to existing political exigencies. For example, several sub-nationalities were put together to form the Kalenjin, Luhya and Miji Kenda groups in the 1969, 1979 and 1989 censuses. Thus, identity is a key question in Kenya.

Since 1962, the African population in Kenya has been classified to be a composition of no less than 42 nations. However, in the latest population and housing census of 1999, the government stopped providing information on the ethnic breakdown of the peoples of Kenya. Instead it opted to provide information disaggregated by age, districts and gender. Since it is not possible to find a district that is purely occupied by one specific ethnic group, it is not possible to know the exact numbers of the ethnic communities since that time. This action of the government, according to a Senior Demographic Officer with the Ministry of Planning and National Development, was due to the experience of the 1989 census. He stated that:

'it was discovered that the ethnic figures were hijacked, abused and used for the wrong purposes

Table 2: Kenya population census by ethnicity, 1948–89

	1948	1962	1969	1979	1989
Asian	97,687	176,613	139,037	78,600	89,185
European	29,660	55,759	40,593	39,901	34,560
Arab	24,174	34,048	27,886	39,146	41,595
Other	3,325	3,901	1,987	67,874	25,435
Total non-African	154,846	270,321	209,503	225,521	190,775
Total African	5,251,120	8,355,942	10,742,705	15,101,540	21,252,861

SOURCE: INSTITUTE FOR ECONOMIC AFFAIRS

Table 3: Distribution of population by province

Province	1999
Nairobi	2,143,254
Central	3,724,159
Coast	2,487,264
Eastern	4,631,779
North Eastern	962,143
Nyanza	4,392,196
Rift Valley	6,987,036
Western	3,358,776

SOURCE: *THE 1999 (KENYA) POPULATION HOUSING CENSUS*, VOL. 1, JANUARY 2001

Table 4: Kenya: Tribes by sex and district

Tribe	Male	Female	Total	% of total
Ajuran	13,461	13,455	26,916	0.13
Bajun	27,556	27,631	55,187	0.26
Basuba	55,380	52,439	107,819	0.50
Boni-Sanye	5,513	5,378	10,891	0.05
Boran	41,714	38,446	80,160	0.37
Bulji	3,051	2,924	5,975	0.03
Dashnachi–Shangil	281	137	418	0.00
Degodia	52,101	48,299	100,400	0.47
Dorobo	12,396	11,967	24,363	0.11
Elmolo	1,800	1,800	3,600	0.02
Embu	128,235	128,388	256,623	1.20
Gabra	18,194	17,532	35,726	0.17
Gosha	1,037	1,044	2,081	0.01
Gurreh	41,501	38,503	80,004	0.37
Hawiyah	14,091	13,153	27,244	0.13
Kalenjin	1,223,037	1,235,086	2,458,123	11.46
Kamba	1,212,635	1,235,667	2,448,302	11.42
Kikuyu	2,205,640	2,250,225	4,455,865	20.78
Kisii	653,150	665,259	1,318,409	6.15
Kuria	55,904	56,332	112,236	0.52
Luhya	1,518,851	1,564,422	3,083,273	14.38
Luo	1,306,323	1,347,609	2,653,932	12.38
Maasai	188,950	188,139	377,089	1.76
Mbere	48,365	52,643	101,008	0.47
Meru	540,160	547,618	1,087,778	5.07
Mijikenda	492,971	514,400	1,007,371	4.70
Njemps	7,826	8,046	15,872	0.07
Ogaden	71,797	67,800	139,597	0.65
Orma	23,060	22,502	45,562	0.21
Pokomo	29,276	29,369	58,645	0.27
Rendile	12,804	13,732	26,536	0.12
Sakuye	5,307	5,371	10,678	0.05
Samburu	53,182	53,715	106,897	0.50
Swahili–Shirazi	7,050	6,870	13,920	0.60
Somali	24,232	20,866	45,098	0.21
Taita	99,546	103,843	203,389	0.95
Taveta	7,090	7,268	14,358	0.07
Teso	88,861	89,594	178,455	0.83
Tharaka	48,558	50,970	92,528	0.46
Turkana	140,071	143,679	283,750	1.52
Indian	14,925	14,166	29,091	0.14
Pakistani	997	865	1,862	0.01
Other Asian	3,044	2,220	5,264	0.02
Kenyan Asian	28,113	24,855	52,968	0.25
Kenyan European	1,720	1,464	3,184	0.01
Kenyan Arab	16,838	16,876	33,714	0.16
British	7,076	8,532	15,608	0.07
Other Arab	4,153	3,728	7,881	0.04
Other European	8,350	7,418	15,768	0.07
Other Kenyan	14,560	14,162	28,722	0.13
Tanzanian	10,797	8,529	19,326	0.09
Ugandan	12,965	14,302	27,267	0.13
Other African	8,357	6,114	14,471	0.07
Rest	3,291	3,017	6,308	0.03
Tribe unknown	1,459	952	2,411	0.01
Not recorded	10,769	5,947	16,716	0.08

SOURCE: 1989 KENYA POPULATION CENSUS: *TABLE 2 POPULATION BY SEX AND SINGLE YEARS OF AGE.*

mainly political propaganda. This is why you found that in some cases senior politicians claimed that the figures of their communities had been doctored. This raised unnecessary tensions. The result of this, which is the other reason for the new decision, is that the debate having been taken over by politicians the main issues for which a census is done [sic] were not addressed in the national debate'.[18]

According to this officer, the figures on ethnicity were collected but not processed for the reasons stated.

For minority and indigenous groups, the net effect of this is that they do not have data on which to base their advocacy. Further, the government is not in possession of crucial data with which to plan the country's socio-cultural and economic development. While it is essential to have data disaggregated by gender or age etc, it is crucial that this information is also disaggregated by ethnicity.

Issues for Kenya's minorities and indigenous peoples

In this section we discuss four minority or indigenous communities in Kenya – the Turkana, Nubians, Endorois and Muslims. While there are some specific issues that are pertinent to these communities, many of the issues are relevant to other minority or indigenous communities in Kenya.

The common denominator among Kenya's excluded communities is poor access to resources and opportunities, insecurity of tenure and alienation from the state administration. Their weak voice in governance restricts their ability to address most of these issues and increases their vulnerability in the face of environmental, economic and political problems. As noted previously, the social exclusion in Kenya today is a byproduct of the socio-economic order imposed by British colonialism, which embraced Western economic, social, organizational, linguistic, religious and cultural traits. These distinguish, to varying degrees, Kenya's dominant population from the marginalized population. The latter suffer from low levels of income; and poor health and nutrition, literacy and educational performance, and physical infrastructure. The developmental gaps tend to increase between the highlands and the lowlands; the latter occupied largely by minority or indigenous communities. Social exclusion is also a function of people's distance from Nairobi.[19] As a rule, these marginalized societies tend to live in remote areas of the country.

The Turkana

Background

The Turkana belong to the Karamoja ethnic language cluster whose 14 sub-nations form one nation known as the Ateger. Different sub-nations are found in Kenya, Sudan and Uganda. They are a nomadic pastoralist community with about 65 per cent of the population, male and female, engaged in economic activities that concern livestock. Nomadism entails the mass movement of people and animals for pasture. People move to the mountains during the dry season and to the lowlands during the rainy season.

The Turkana have common cultural practices with regard to dance, initiation ceremonies, marriage, and pastoralism as an economic activity.

The Turkana community mainly lives in Kenya's Turkana district, with far smaller numbers elsewhere. Turkana district is the largest district in Kenya. Despite this, it has only three MPs, all of whom are from the community. Presently, only one of the MPs is in government, as an Assistant Minister (the situation was no better in the past), and there are no other senior government officials from the community. It is said that this is partly due to the majority of the population being uneducated. It remains to be seen whether the policy of free and compulsory primary education will improve the situation. According to the *Turkana District Development Plan 1999–2001*, the district has 175 pre-primary schools, 136 primary schools, eight secondary schools and two polytechnics. There are no farmers' training centres or commercial colleges. The primary schools are sponsored by the government and churches. Some primary schools are not fully used due to numerous raids by cattle rustlers, which have made families move away to safer areas. The teacher/pupil ratio at the pre-primary level is 1:104, compared with the national average of 1:28.

Most of the district consists of low lying plains with isolated mountain and hill ranges. It has several rivers, the major ones being Kerio and Turkwel, yet these are seasonal. Further, a hydroelectricity plant dam has been built at the Turkwel Gorge, which means that the Kerio is now dry for the Turkana. The district has an annual rainfall of 120 mm, which is erratic and unreliable, it is designated as one of Kenya's Arid and Semi-Arid Areas (ASALs).

For several reasons, the Turkana do not feel that they are part of Kenya. Upon leaving The Turkana district, many remark that they have 'now entered Kenya'.

In 1989, Turkana district had a population of 184,058 with an annual population growth rate of 2.5 per cent. The population was projected to be 247,540 in 2001. The male/female ratio was 92:100 as per the 1989 census,[20] so the district has a higher female population. The distribution and settlement pattern cannot be easily determined because of their semi-nomadic way of life. However, the district has a very poor infrastructural development.

Land in the district is not demarcated except for South Turkana Game Reserve (1,901 sq. km) and Central Island National Park (5 sq. km).[21] The district is under what is called 'trust land'. This means that all the land is held by the relevant local authority, ostensibly in trust for the local inhabitants. This system does not allow for individual land ownership. Consequently, individual Turkana have no title to their land. In other parts of Kenya, individual titles have been issued, and the holders of those titles have

been able to access credit facilities to further their socio-economic development.

The district suffers from one of the highest levels of insecurity in the country. This is partly due to the wars in neighbouring countries (and has increased the availability of small arms in the area), and the attendant influx of refugees, some of whom carry arms. This situation is exacerbated by the culturally-driven cattle rustling economic activity among the Ateger sub-nationals. During these raids the district suffers from loss of life and property; rape; the displacement of families; the destruction of infrastructure such as schools, health and water facilities; and the disruption of education and farming.

Due to the war in southern Sudan, Turkana has become home to the largest group of refugees in the region. The Turkana fear that due to intermarriage with the Dinka and Toposas that their identity and cultural practices could be endangered.[22] Even the UN, which has a huge base in Lokichoggio in Turkana district, has not done much for this community. A visit to the town reveals a stark contrast between the conspicuous consumption within the UN compound and the desolation outside of it. Instead of building a water point for the community for example, the people have to ask for water within the camp, and sometimes they are chased away.

Yet in resource-based terms, the district is not poor. There is gold mining, and there are mineral water sources at Elly Springs. It is rich in precious stones such as gypsum in Napusmor and green garnet in Horiu. Lake Turkana's fishing grounds have yet to be exploited. A Norwegian fishing venture was abandoned in the 1980s due to political disagreements between Kenya and Norway.[23]

Government policies in Turkana place an emphasis on pastoralism as the only economic activity that the Turkana can be involved in. There is no serious commitment towards economic diversification, although the district boasts other resources in addition to livestock.

Most of the funds brought to the district appear to pay the salaries of government employees, most of whom are non-Turkana (see later). As previously mentioned, the poor level of education for the Turkana means that they are not able to take up the professional jobs within the district.

At a recent community consultation,[24] the Turkana identified several threats and challenges to their continued existence as a nation:

- Drought and insecurity, e.g. raids – people leave their traditional grazing areas and move to secure areas due to frequent raids. During the drought of the 1970s and 1980s many people settled near the Turkwel irrigation scheme and in Katilu for farming and livestock rearing.
- Government policies in Turkana ensure that pastoralism is the only development activity. There is no

diversification, yet Turkana has other resources in addition to animals.
- Modernization – interaction with others and with religion has eroded the cultural practices of the Turkana people. Further, educated Turkana tend to lose touch with their culture. Migration outside the district is also threatening the community.
- The influx of refugees has led to the erosion of cultural practices, with intermarriage. There are times when there are more refugees than Turkana in the district.
- Being the largest district in the country and sparsely populated, the Turkana are the least represented both at the local and national levels. All decisions are taken from the centre, so there is a need for decentralization.
- The Turkana believe that the census under-represents the size of their population.
- They do not feel part of Kenya and are excluded from the mainstream. They also feel inferior and regard the Kenyans as *Ngimoe* – the other who is hostile and repressive. They also feel that other communities know little about them.[25]
- The Turkana feel that with trust land, they have no control over their existence. They feel that this automatically disempowers them.

Some welfare indicators

As at 1989, only 12 per cent of the total labour in Turkana district had had five years of education.[26] Aside from small-scale business and work in the informal sector, pastoralism is the dominant activity for the Turkana. Other activities include gold mining and the collection of gemstones, which employs a substantial number of children under the age of 15.

Most of the health facilities in the district have been constructed by non-governmental organizations (NGOs). The government manages about 40 per cent of these facilities, with the rest handled by NGOs. The poor roads mean that these facilities are not well used, and that the mobile clinics do not reach most parts. In the whole of the Turkana district there is only one medical doctor.[27] There is insufficient equipment to enable the doctor and the paramedics to carry out their functions. There are no private health facilities. Whatever the reason, having only one doctor in such a vast district, with all its transport difficulties, is a great injustice to the population of the area.

In terms of energy, apart from Lodwar town where electricity is generated by diesel generator, no other town or market is provided with power. Similarly, most areas are short of water and it may be necessary to travel 10 or more km in search of water. The collection of water is primarily a task left to women and children. The district has a total of 122 boreholes and 172 shallow wells. Most of

these were drilled by NGOs but are maintained by the government.[28] Turkana district relies heavily on relief food distributed by international NGOs.

The nutritional status of children is generally poor. Factors associated with malnutrition include lack of a proper diet, natural calamities such as drought and lack of knowledge on diet. The infant mortality rate is 159 deaths per 1,000 live births. The national average is less than 100 deaths per 1,000 live births. The drafters of the *Turkana District Development Plan 1999–2001* sum up the problems of the district in the following words:

> *'The district which is at its economic infancy cannot cope with the structural and economic reforms [i.e. structural adjustment policy reforms]; hence many pastoralists have been pushed below the poverty line. The introduction of cost-sharing in services, e.g. medical provision and education has stalled social growth and created psychological imbalance at family levels.'* [29]

Whereas the reforms have hurt the whole country, Turkana district has suffered deeply, and the most vulnerable groups are women and children. In a pastoral society, a girl, from her formative years, is moulded by her family and society to assume a certain role. She is socialized to take up household responsibilities from a pre-school age. While the boys' roles are seasonal, girls' duties occur throughout her life and also include those given to boys. Girls are important sources of family wealth. Through marriage, girls earn wealth (animals) for their families' survival.

The Turkana case is a good illustration of the correlation between exclusion and marginalized communities in Kenya. Kenya inherited an administration geared to pre-established criteria of progress, and interrelated cultural, religious and linguistic factors. After independence, this system has acted to exclude many minority or indigenous groups, to the degree that even their wealthy and educated elites can find their access to credit, formal and state sector employment, and services blocked. Because of the nature of Kenya's economic policies, areas such as Turkana are insignificant, and do not attract investments and other budgetary allocations.

Kenyan Nubians

The Nubians of Kenya find themselves in a unique but distressing situation. Most Nubians live as *de facto* stateless persons without adequate protection from national and international law. This is irrespective of the fact that they can be considered as Kenyan citizens under ch. VI of the Kenyan Constitution. To understand their present predicament, in particular the systematic denial of their right to Kenyan citizenship as well as their right to own land, it is important to discuss their background in the region and to situate their plight within this context.

Settlement and land ownership problems

In Kenya, the Nubians are scattered in several places, which they first occupied after their demobilization from the British armed forces following the end of the Second World War. Currently they live in Bondo, Eldama Ravine, Isiolo, Kapsabet, Kibera (Nairobi), Kibos, Kisii, Kisumu, and Mazeras (Mombasa), Meru, Migori, Mumias, Sondu and Tange–Kibigori.

In some areas, the Nubians were accorded temporary occupational licences in the form of *shamba* passes. According to Mr Patrick Obura Okoth[30] the legal position the British took was that the Nubians would own the houses they built but the land would remain state land; however, the Nubians understood, then as now, that this was land legally assigned to them. This is given credence by the 1933 Report of the Kenya Land Commission,[31] chaired by Sir Morris Carter, which observed:

> *'The legal position of the occupants of Kibira [sic] appears to be that they are tenants of the crown and the tenancy is liable to termination by the commissioner of lands at any time.'* [32]

The 1933 Carter report noted that the Nubians had a right to equity:

> *'We consider that the government had a clear duty to these ex-Askaris either to repatriate them or to find accommodation for them. They were told that they might make their homes in Kibira [sic] and in our judgment they ought not to be moved without receiving a suitable land elsewhere and compensation for disturbance, and we believe that similar obligations exist in respect of their widows, or sons who are already householders at Kibira.'* [33]

The Commission was reluctant to move the Nubians out of the Kibera settlement, yet it agreed this, subject to certain conditions: compensation in full for their houses; compensation in the form of equal facilities for cultivation and grazing, up to 24 acres per household; compensation for any crops damaged or destroyed; and compensation for the disturbance.

The series of annexations that have seen the land in question reduced from what was initially a spacious and environmentally-balanced Kibera, to a squalid, congested and overpopulated area, started in 1915. Because of the role their forebears were forced to play for the benefit of the British government during its conquest of East Africa

(see later), the Nubian community is viewed with suspicion by other Kenyans, a situation that led to stereotyping, mistrust and violent conflicts, the last major one having occurred in November 2001.[34]

With 90 per cent of the Nubians landless, they live in poverty, which impacts on their education, health and food security. Unemployment among the youth, both male and female, is at an all time high. This has contributed to urban crime and the Nubians' further socio-economic marginalization and underdevelopment.[35]

Citizenship

The Nubians are originally from the Nuba Mountains in central Sudan. According to several Nubians interviewed, Nubians were conscripted into the British army when Sudan was under Anglo–Egyptian rule. Later they formed part of the British colonial army's King's African Rifles (KAR) during the British expeditions of colonizing East Africa. By 1905, they were the hub of the British expeditionary colonial conquering forces. They also contributed tremendously to the British military efforts during the First and Second World Wars.

Yet, they were demobilized without any meaningful compensation, pension or the after-service benefits, which are usually accorded to the predominantly white soldiers in the British army. Unlike the Indians who had also been relocated into the region by the British to render similar services or to build the railways, the Nubians were not accorded the privilege of British citizenship.

At the dawn of Kenya's independence, the British left their former colony without any plan for the resettlement or entitlement of the Nubians in Kenya or for their repatriation to Sudan. Successive Kenyan governments have failed to take concrete measures to change the Nubians' situation.

In 1939, the Nubians sought to be repatriated to Sudan. The British government refused their request on the grounds that such a proposal would not be acceptable to the Sudanese government.[36] Yet at the time, Sudan was a British colony. The British government stated that the Nubians had to remain in Kenya, thereby condemning the community into a miserable status in which they are stateless.

Left in an alien land without sound legal protection, impoverished and literally uneducated, the Nubians and their descendants have continued to be neglected and vilified; further, whatever land had been assigned to them has been alienated with impunity by successive Kenyan governments.

Members of this community have applied in vain for Kenyan citizenship. They brought an unprecedented case (High Court civil case no. 256 of 2003, Nairobi) primarily seeking citizenship and to be issued with the appropriate documents. Yet the government is seeking to have the case terminated; it says that the case has been brought too late in the day and that it should have been brought against Britain, not Kenya. The Kenyan government denies that the Nubians are citizens of Kenya. They are not included in the 1989 census. There are, however categories such as 'Other Kenyan', 'Other Africans', and 'Other Arabs'. It is not clear if this is where they have been placed. However, they have been categorized, they are clearly a minority community.

The denial of citizenship rights is a great injustice. Citizenship brings consequential rights and benefits; therefore, the community is prevented from enjoying these rights. For example, the Nubians are not entitled to vote nor contest any political office in the country. This means that they are excluded from the decision-making processes as they cannot choose their leaders or have a say on issues that affect them. Further, it has opened them up to oppression. Proof of citizenship is by a national identification card or passport. The police may arrest those unable to provide documentation. Similarly, access to employment and to voting is dependent on citizenship.

The Endorois

Cultural identity and territoriality

The Endorois community is said to be part of five Tugen clans. The Tugen clans are: the Aror, Endorois, Lembus, Pokor and Samor. The Endorois have over 20 sub-clans, including: the Gabon, Gumoi, Kobilo, Mogei, Samak, Sogom, Talai, Tarkok, Terik, Tungae, etc.

The Endorois community lives in the Lake Bogoria area of Baringo and Koibatek districts, as well as in Laikipia and Nakuru districts in the Rift Valley province. While the Endorois are demographically dispersed, the landmass around Lake Bogoria, including Langa'ata Ngaria', Muchongoi and Saracho Hills, contains their sacred places.

Bogoria is said to be sacred and used for prayers and rituals. One such ritual is the *ndasim*-blessing ritual performed by men and *karertapaik* or *karebei* performed by women. These rituals are performed at specific points as follows:

- where the two inlets of rivers Emsos and Owaseges enter Lake Bogoria. The eastern side of this Lake is regarded as a point of healing and the western side is said to be a place of blessing;
- at the viewpoint south and adjacent to the Lake;
- at the mountain top north of the Lake;
- at the fig tree opposite the hot spring, which is considered to be a blessing place; and

- at the hot spring, which is another blessing and cleansing point.[37]

Economic status, opportunities and constraints

The Endorois are an agro-pastoralist community. However, the Endorois' few remaining animals have lost both grazing sites at the Kesubo Kirborgot swamps, which could accommodate up to 12,000 animals, to the Baringo County Council.

In 1973, Lake Bogoria, which is in Baringo, was declared a game park. This necessitated the removal of the Endorios from this area. This loss of their land was confirmed by the re-gazettement of the Lake Bogoria Reserve in 1978.

The Endorois community was not consulted over this. It was the Kenya Wildlife Service (KWS) working through the County Council that implemented these changes. The creation of the park meant that the people had to pay entrance fees to enter or pass through the land. They were stopped from grazing their livestock and were no longer allowed to access their sacred sites around Lake Bogoria. Further, they had no access to fresh water, pasture areas or salt licks. The government had promised to build dams and dips, but it has yet to do so. They also lost their herds when diseases from the wildlife infected their cattle, and the land that was left to them for grazing could not support their animals. With the displacement and the attendant problems, they have received no compensation.

They have not benefited from tourism to the area. The Endorois say that only 10 per cent of the total employees in the park are Endorois. They had been promised 80 per cent employment. Similarly, it had been agreed that 20 per cent of the total income from tourism would be given to the community. This agreement has yet to be fulfilled by the government.[38] Rubies have recently been discovered in the mountains on their land. Needless to say, they fear that they will not benefit from this resource.

To address the collective cultural, social, political and economic situation, the Endorois have formed the Endorois Welfare Council (EWC). The EWC recently filed a case, High Court Misc. Civil Application No. 183 of 2000 at Nakuru against the local County Council and another body. However, they lost the case on technical grounds. This prompted the community to take further action through a Kenyan NGO, the Centre for Minority Rights and Development (CEMIRIDE), to enable them to take their struggle to the African Commission on Human and Peoples' Rights (ACHPR). The case is raising their national visibility; however, it is still awaiting an admissibility hearing before the ACHPR.

Through these actions, the Endorois community has been able to win some concessions from the government. For example, the Endorois no longer have to pay entrance fees into the park. They have a limited access to pasture in the park and are allowed to access their religious sites. Recently, they were allowed to stage their cultural festivities. Previously, in 1997, 17 people were arrested and jailed for 18 months for having organized such activities.[39]

Their sense of marginality is entrenched by Kenya's legal, economic and political set-up. In addition to the issues previously mentioned, there is little public transport, despite good roads; and while electricity is available it is not accessible by the community.

The Endorois would like to be recognized regarding their identity, and over their rights to natural resources.[40] Those Endorois who had important positions under President Moi were not able to significantly influence policy or the deployment of resources into their areas, so they have remained poor. However, the new government (until recently in opposition) registered their negative view of the Endorois' support for the then ruling party, KANU, which they believed had benefited the Endorois. It is therefore feared that the new government will not give the Endorois the support they need.

Kenyan Muslims

As previously mentioned, Kenya has a largely Christian population. The Muslim population is therefore a minority, which mainly lives in the Coast and North Eastern provinces. A number of Kenya's small ethnic minority and indigenous groups are also to be found within these areas, including: the Borana, Burji, Garba, Orma, Sakuye and Waata. These provinces are some of the country's poorest areas. At the time of publishing this report, Kenya is facing a famine.[41] These two areas are among the worst affected. Problems are exacerbated by the poor infrastructure, which hampers relief assistance efforts. Additional problems include insecurity, which is partly attributed to the instability in the neighbouring countries. This has also worsened the poverty of the respective communities.

The prevalent image of Muslims in Kenya is of religious fundamentalists who will cause problems and even kill, if need be, on account of their religion. This view has gained popularity among non-Muslims, particularly after the terrorist attacks in Kenya in August 1998.[42] After this, many Muslims were feared and labelled as 'terrorists'. The government banned several Muslim NGOs who were accused (without proof) of having links with terrorists or otherwise supporting their operations.

Muslims have had problems obtaining passports, especially for those wanting to make the pilgrimage to

Mecca. Again, this situation worsened after the August 1998 attacks.

The Kenyan government published the Terrorism Bill in 2003. It was noted by many, including lawyers, that the Bill as drafted was contrary to the fundamental rights and freedoms under the Kenyan Constitution. The Muslim clergy protested against provisions of the Bill that appeared to target Muslims specifically or Islam. If enacted as it was drafted, certain simple actions of Islamic faith would have qualified as 'criminal'. The government has bowed to the protests and has promised to redraft the Bill.

In its draft Constitution of Kenya, the Constitution of Kenya Review Commission provided for the creation of Kadhis Courts. (The current Constitution provides for them in section 66. These courts' jurisdiction covers Muslim law relating to personal status, marriage, divorce or inheritance.) This proved to be a dividing factor during the debates at the National Constitutional Conference, with some delegates calling for its removal from the draft Constitution. This division is led by key Christian clergy who have previously worked closely with their Muslim counterparts. Although the National Constitutional Conference agreed to maintain the provisions, these have been classified as 'contentious issues' that need to be ironed out (read deleted from the text).

Another example of the anti-Muslim sentiment was illustrated in 1998 after the 1997 general elections. The mention of Dr Bonaya Godana MP, as a candidate for the post of Vice President prompted a delegation of church leaders to warn the President against appointing a Muslim. They were informed that their fears were unfounded because Dr Godana is a Roman Catholic.[43]

Minorities, indigenous peoples and the legal process

Minorities and indigenous peoples within the current constitutional framework

Minorities and indigenous peoples lack participation in the decision-making processes, especially on issues that affect them either directly or indirectly. There are also the issues of a lack of recognition (both actual and constructive),[44] and discrimination by institutions of government, which appear to be allowed by law – either actively or by default.

Most laws in Kenya are fashioned to allow individual claims, while obstructing group identity rights or claims. Yet, communal solidarity is essential to minority and indigenous peoples' identity. However, the Constitution, in ch. V that deals with human rights, is boldly titled: 'Protection of fundamental rights and freedoms of the **individual**' (emphasis added). Relying on this broad title and anchoring its position on section 84 of the Constitution (which deals with enforcement of the protective provisions), a judge recently said:

> *'The scheme of the protection of fundamental rights envisaged by our constitution is one where the individual as opposed to community or group rights are the ones enforced by the courts…the emphasis is clear. Except for a detained person for whom someone else may take up the cudgels, every other complainant of alleged contravention of fundamental rights must relate the contravention to himself [sic] as a person…there is no room for representative actions or public interest litigation in matters subsumed by section 70–83 of the Constitution.'* [45]

Thus most cases brought by and on behalf of minorities or indigenous peoples (as a group) would fail on technical legal grounds. This position has some of its roots in the development of the country's legal system. The dominant ideology in Western jurisprudence is that rights exist only as properties of individuals. However, it is now widely accepted that communities, whether organized or not, and associations, corporate entities, or groups defined simply by social and cultural ties, do have and enjoy rights by reason of their collective characters.[46]

Despite such progressive provisions, several practical difficulties remain, including bringing cases to court.

With limited education, it is not easy for minorities and indigenous peoples to know when their rights have been violated, by whom, what action to take, and where. Further, hiring a lawyer is beyond their means. In the name of public interest, some NGOs may help them to take the case up; yet these instances are few and far in between. Kenya has no legal aid scheme.[47] Although there are mechanisms for defending the rights of minorities and indigenous peoples internationally, they depend on the exhaustion of domestic remedies, which means that they have to suffer an inordinately long time before receiving some respite.

The Constitution of a country is the highest law of that land. Thus, a discussion of the legal process relating to minorities must be anchored upon the constitutional process. Besides the ongoing constitutional review process, the last systematic national effort at Constitution-making took place as part of the process of attaining independence. The resulting Constitution at independence had several provisions for minority or indigenous protection, within a parliamentary system of government. As a consequence, the two major principles of the independence Constitution were parliamentary democracy and the devolution of power as an instrument of minority or indigenous protection. Thus, the structure of government resulting from the Constitution was composed of: the national government, eight semi-autonomous regions and local government. However, the devolved government structure of the independence Constitution was eroded via several constitutional amendments resulting in the present highly centralized government.

The current Constitution does not define the terms 'minority', 'indigenous', 'minority interests' or 'indigenous interests'. It does, however, have some provisions of interest to minorities and indigenous peoples. Section 33(1) of the Constitution states: 'there shall be twelve nominated members of the National Assembly appointed by the President following a general election **to represent special interests**' (emphasis added).

The genesis of this provision can be traced to the 1958 Macleod Constitution.[48] These special interests are understood to be those that the normal electioneering process has failed to capture and represent. Section 33(3) of the Constitution further provides that:

> *'The persons to be appointed shall be nominated by the parliamentary parties according to the proportion of*

*every parliamentary party in the National Assembly,
taking into account the principle of gender equality.'*

Similar words on gender equality are used in section 33(5) of the Constitution. However, the members have not always represented special interests.[49]

Another Constitutional provision, which deals with minorities and indigenous peoples, is section 42. This relates to electoral constituencies. Thus, the recognition of minority and indigenous communities in a census is crucial.

Ch. V of the Constitution deals with fundamental rights and freedoms. The most relevant sections for minorities and indigenous peoples are 70, 78 and 82. Section 70 provides that every person in Kenya is entitled to various rights and freedoms. Section 78 deals with freedom of conscience which includes:

'freedom of thought and of religion, freedom to change his [sic] religion or belief, and freedom, either alone or in community with others, both in public and in private, to manifest his religion or belief in worship, teaching, practice and observance'.

Section 82 deals with protection from discrimination, which is defined as:

'affording different treatment to different persons attributed wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex…'.

Thus discrimination against minorities or indigenous peoples is prohibited. However, it is instructive to note that parliament has not enacted statutes to enforce this provision. The only mechanism left for the enforcement of this right is the court system, which is slow, complicated and expensive.

Ch. IX of the Constitution relates to trust land. These provisions are best understood within the history of Kenya's struggle for independence. At independence, white farmers wanted a scheme for the purchase of their farms at favourable prices, through a central land board, to be financed by international financial institutions. The smaller tribes, fearful that the larger tribes would start to acquire land in their traditional areas, wanted land to be the responsibility of regional governments. In the end, regions were given what used to be Crown land in the region, and central government obtained public and trust land within the Nairobi area.

The trust land, the most sensitive of all, was vested in the County Council, within whose jurisdiction the land

lay, rather than in the regional authorities. The County Council held the land in trust for the benefit of those ordinarily resident on that land, and had to give effect to such rights, interests, or other benefits vested in any tribe, group, family or individual under customary law. In a nutshell, the historical basis of these provisions was the intended protection of the rights of smaller tribes (read minorities and indigenous peoples) to land.

Minorities, indigenous peoples and the proposed constitutional framework

If the provisions in the draft Constitution of Kenya 2004 were implemented, minorities and indigenous peoples would have their rights protected, including the right to full participation in public affairs. Article 43, for example, provides that marginalized groups and communities are entitled to enjoy all the rights and freedoms set out in the Bill of Rights,[50] on a basis of equality, taking into account their special circumstances and needs. Article 43(3) then lists some of the measures that must be taken to ensure compliance with this provision. The term 'marginalized group or community' is defined in Article 306 of the draft Constitution. This is the first time that the Constitution of Kenya would be clearly recognizing group rights, as a concept and in relation to minorities and indigenous peoples.

Another key development with respect to minorities and indigenous peoples is the reintroduction of devolved governments. Under the draft Constitution, there is a greater opportunity for most citizens to meaningfully participate in public affairs, and includes a system to ensure the representation of most, if not all, ethnic groups.

It is worth noting that the first draft of this Constitution had proposed removing the 12 nominated MPs and replacing them with 90 MPs selected through a system of Mixed Member Proportion (MMP). Sadly, this has been dropped. It would have offered another avenue for the participation of minorities and indigenous peoples in parliamentary life and hence public decision-making.

Nevertheless, the draft Constitution has provided additional protection measures for minorities and indigenous peoples. For example: 'Elections shall ensure fair representation of women and men, persons with disabilities, older members of the society, youth and other marginalized groups and communities.[51] Further, the draft Constitution provides that:

*'In the interest of affirmative action –
(a) five per cent of the seats in the National Assembly or the legislature of a devolved government shall be*

reserved for persons with disabilities, the youth, workers and marginalized groups and communities
(b) eight and one-half per cent of the seats in the Senate shall be reserved for persons with disabilities, the youth, workers and marginalized groups and communities.

At least one third of the seats referred to in clause (3) shall be reserved for women.' [52]

In the delimitation of boundaries, the draft Constitution provides that the Electoral and Boundaries Commission 'shall consult all interested parties'.[53] This will offer an unprecedented opportunity for minorities and indigenous peoples to have their say in how their constituencies' boundaries are set.

Unfortunately, the ongoing review of the Constitution is proving to be a protracted struggle.

Minority and indigenous protection within other legal frameworks

In addition to the Constitution, there are other laws, which deal with minorities and indigenous peoples.

However, they target people as individuals and not as a collective. And while there are various laws regarding women and children, there are none regarding older people, orphans, people living with HIV/AIDS,[54] or refugees.[55]

Kenya is signatory to several international and regional legal instruments. Among these is the African Charter on Human and Peoples' Rights. Through this Charter, the African Commission on Human and Peoples' Rights has been created. There are also efforts to create an African Court on Human Rights. Regionally, Kenya is a party to the Treaty Establishing the East African Community. Out of this treaty, the East African Court of Justice has been created. Although relatively new, these offer additional avenues through which minorities and indigenous peoples can raise their issues. For example, as previously mentioned, the Endorois have taken their case to the African Commission on Human and Peoples' Rights through a local NGO, CEMIRIDE.

In sum, the minority or indigenous question has not been dealt with very seriously within the existing legal frameworks. In the few instances where the law does make provisions, the realization of those rights as enshrined has been a major challenge.

Minorities, indigenous peoples, ethnic diversity and politics

Politicization of ethnicity in Kenyan politics

A year after Kenya became independent in 1963, its leaders established a republic, with an executive President. However, the manner in which Kenya has set out to create a new political order has, to a considerable degree, been dictated by circumstances and institutions inherited from the past. The most important of these legacies are the nationalist movement, and the governmental structure and machinery. These have provided a political tradition and an institutional framework from which Kenya's leaders have found it difficult to depart.

The nationalist movement that swept Kenya into independence had overwhelming popular support. The pre-independence elections of 1961 and 1963 testified to this. But it was a fragmented rather than a unified movement. This is partly because the different peoples of Kenya had an uneven political development, becoming politically active at different times. The difficulties of communication, the limited leadership and official discouragement also played a role.

Colonial government's policy since it first stabilized the tribal units[56] within the administrative boundaries had tended to emphasize the district as a separate unit, and to isolate tribal groups from each other. Local government elective bodies were established within these units. The emphasis of local issues within the units tended to heighten a people's awareness of their identity as a tribal group.[57] Ethnicity is a factor that has stayed long after independence.

But what is ethnicity? Ethnicity is often used to refer to the expression of the belief of 'difference', often suggestive of the superiority of one's own ethnic group over another. Thus implying the concept of 'us as the norm' and 'others as the variant'. Ethnicity is therefore sometimes used as the deliberate and calculated assumption of an identity to take advantage of certain opportunities and resources.[58]

In such circumstances, ethnicity becomes the ideology creating and sustaining power structures. It is in this sense that ethnicity is discussed in this report. In Kenya, it has taken the form of the 'ethnification of political and economic processes', which means that people are made to treat ethnicity as increasingly relevant to their personal and collective choices in terms of choice of candidate dur-

ing elections, investment, residence, and even social interactions such as marriages.

Thus, political leaders and the people they lead are stimulated to consolidate, form or stabilize an ethnic identity; and the political opportunity afforded by ethnic networks is easily exploited for political support. Most ethnic groups in Kenya associate the relative economic prosperity of the Kalenjin and Kikuyu elite to the real/imagined favours derived from the political advantages that accrued to them during the Moi and Kenyatta presidencies respectively. The same is now being said of the Kibaki presidency. Thus, there is common talk of those who have 'eaten'. In terms of political mobilization therefore, political leaders call upon their ethnic communities to group together and fight for political office either as a way of ensuring their continued stay in power,[59] so as to continue 'eating', or to gain political power as a way of finding an 'eating place'.

Political power in Kenya has been used to acquire economic power, thereby placing an additional premium on the necessity of acquiring political power. This has been taken to absurd levels, where particular leaders have used their political positions to illegally acquire wealth and upon being called to account, have said that their ethnic groups are being persecuted politically. However, even when a particular community is in power the 'eating', is only done by that community's elite. It does not always translate into a tangible benefit for the ordinary people in that community.

Other politicians have demonized ethnicity as a division that could easily lead to the break-up of the country or inter-communal violence. On the return to multi-party politics in 1991, President Moi predicted that there would be tribal warfare. Clashes did erupt later that year and continued sporadically until the 1997 elections. Therefore, leaders have been quick to dissociate themselves from appearing to condone ethnicity lest they acquire the tags of 'tribal leaders'. The word 'tribe' has acquired an ugly face. Thus, any attempt to discuss ethnicity within the context of Kenyan politics especially from the perspective of harnessing unity within diversity is characterized as retrogressive. However, the Kenyan people are conscious of their ethnicity and for various reasons at times resort to it.

Therefore, the two social forces at the core of Kenyan politics are ethnic groups and political parties. In the absence of strong ideologies, however, ethnicity provides

the focus for 'party' loyalty. It can be seen that parties and ethnic groups overlap.

Ethnicity has shaped Kenya's political economy and defined its social, economic and political institutions. Thus, for example, support for political parties is first sought among the ethnic kin; the Democratic Party among the Kikuyu; Ford Kenya among the Luhyia, especially the Bukusu sub-tribe; Ford People among the Kisii; the Liberal Democratic Party among the Luo; the National Alliance Party of Kenya among the Kamba; and Shirikisho Party among the Digo and a section of the Coastal tribes.

This scenario is of immense disadvantage to minorities and indigenous peoples. It means that they cannot marshal sufficient numbers to bargain with other groups for political power. For all intents and purposes they are irrelevant to political mathematics. Given the link between politics and economics, it also means that they lose out on prime appointments and on the distribution of resources. Yet, minorities and indigenous peoples are among the poorest.

Women and other communities within minorities and indigenous groups, such as children, older people and people with disabilities, suffer further, in the sense that they are left to fight for their issues within the dynamics of their ethnic groups. More often than not, they lose out as their communities rationalize that because they are literally 'at war' with other ethnic groups, the community must only send out the mighty and strong, which will frequently exclude them and their issues.[60]

Further, since ethnicity is close to the core of individual identity, perceived slights or threats from 'outsiders' tend to generate powerful collective reactions. Such reactions are easily mobilized and politicized by the group's elite, motivated partly by genuine concern for their people and partly to nurture their political ambitions.

However, ethnicity does have its positive side. It performs positive functions in civil society, as a means for checking the political and other excesses, or frailty, of government and national social and political leaders. The claims and counterclaims of members of ethnic groups over real and imagined discrimination over access to scarce resources can have a balancing effect on the national politico–economic system. The challenge is how to harness these positive attributes. Popular participation in local and national politics is essential in positive ethnicity. The mobilization of ethnic groups and associations must be perceived as a necessity for this mass political participation. Positive ethnicity has a vital role to play, functioning as a democratic organ by being associated with peoples' mobilization and political participation.

Seyoum Hameso has observed that, properly guided, politicized ethnicity can serve various objectives, such as mobilizing resources to do away with oppressive rule and assisting in economic development. He warns that states which tend to ignore or fail to accommodate ethnic claims are almost certainly doomed to political instability and perhaps collapse.[61]

It is in this respect that bureaucrats who frown at the mention of the word 'ethnicity' in governmental should work. Those who fear that publishing disaggregated data will lead to 'unnecessary tension' need to understand that a certain amount of constructive tension within society is inevitable and prevents latent tensions building up which can explode into violence. If a government has no data about the position of different communities, it is extremely vulnerable to accusation, exaggeration and rumour, which it may find difficult to refute. Indeed, without accurate information political extremists can provide their own biased ethnic data to stir up trouble. The existence of authoritative data allows the government not only to refute exaggerated claims and ensure that political extremists manipulating ethnicity do not gain ground, but also to plan programmes so as to reach the poorest. Having transparency in the system allows this not only to be done but be seen to be done. Such a strategy can avoid the development of unmanageable tensions in the long term.[62]

Ethnicity and conflicts in Kenya

It is clear that conflicts in Africa have been a major hindrance to the improvement of the wellbeing of Africans.[63] What is also clear about post-independence conflicts is that they have generally been between different ethnic groups within a country.[64] Even conflicts that are apparently free of ethnic considerations involve factions and alliances built around ethnic lines.[65] For example, conflicts in Burundi, Democratic Republic of Congo, Eritrea, Ethiopia, Mozambique, Rwanda and Sudan have all been caused or exacerbated by ethnic dynamics.

Yet, it is not the mere existence of ethnic diversity that causes conflicts. The failure of political institutions to accommodate diverse interests (ethnic, religious, linguistic, etc.) has generated conflicts that adversely affect political and economic outcomes.

Post-colonial leaders sought to retain (and strengthen) the unitary governments bequeathed by the colonialists. This resulted in highly centralized political systems. Therefore, the leader of the ethnic group that heads the state controls an enormous amount of resources. These have been distributed in a skewed manner, favouring particular groups. Instead of unifying the ethnic groups, the opposite has been achieved. The favoured group sees the reaction of the other group as a threat to its continued stranglehold over the resources. Thus, the discriminatory allocation of resources in Kenya has been a primary source of conflicts. The conflicts are a result of the non-fulfilment of basic human needs – needs of autonomy,

group (ethnic) identity, participation, recognition, security and, of course, poverty.

Apart from their easy access to land, the economic success of the Kikuyu region in the first 10 years of Kenya's independence was envied by other ethnic groups. The Kikuyu also enjoyed abundant school and education facilities, electricity, expanded health services, good modern roads, piped water, etc.[66] Moreover, the Gikuyu [Kikuyu] Embu Meru Association (GEMA)[67] helped its members to acquire land and businesses. They visibly outdistanced other ethnic groups at a pace that posed immediate political risks to their newly acquired positions in the government structures.

In sharp contrast, Nyanza province (i.e. the home of among others, the Luo ethnic group) suffered severe repression and neglect, for trying to challenge and question the enrichment of one region out of the 'national cake'. This followed the fall-out between Kenyatta and Oginga Odinga. In 1966, Oginga Odinga, the Luo leader at the time, who had hitherto been the Vice President of the nation, and of KANU (the ruling party), lost both posts. Odinga responded by forming a political party – the Kenya Peoples Union (KPU). The arguments between Odinga and Kenyatta over the KPU heightened Luo–Kikuyu ethnic animosities, which sometimes degenerated into open confrontations.

The assassination of Joseph Tom Mboya (a Luo) on 9 July 1969, a few months after the mysterious death of Argwings Kodhek, another prominent Luo politician, intensified the ethnic animosity between the Luo and the Kikuyu. The banning of the KPU in October 1969 and the detention of Odinga and other leaders without trial led to outpourings of Luo anger during Kenyatta's visit to Kisumu (the political headquarters of the Luo). During this visit, a large crowd of Luo reportedly threatened Kenyatta's security and was fired on by the security guards in what later came to be known as the 'Kisumu massacre'. Forty three were killed.[68] In an explanatory statement, the government accused the KPU of being subversive, intentionally stirring up inter-ethnic strife, and of accepting foreign money to promote anti-national activities. The proscription in effect returned Kenya to the status of a single party state.[69] Following these incidents, Nyanza province, like other non-Kikuyu areas, was virtually written off from 'national' development plans.

Other tribes suffered in similar ways. The unequal distribution of land, infrastructure and other national resources happened under Moi, where the Kalenjin ethnic group has been perceived to have benefited more that others. However, just like for the Kikuyu, not all Kalenjins benefited. It was only the elite who flourished.[70]

The mysterious death of Robert Ouko (another Luo, MP and Kenya's Minister for Foreign Affairs) in 1990 fur-

ther strained the relationship between the Luo and the Kalenjin ruling elites. This was a cause of the conflicts between the Luo and the Kalenjin before the 1992 general multi-party elections and after.

Another long-term cause of ethnic prejudice and subsequent conflict is attributed to the Africanization of the civil service. Just as there was an immediate need to 'Africanize' the land, the government moved equally fast to give jobs in the civil service and other parts of the public sector to Africans. Independence had after all been fought for using the slogan *Uhuru na kazi* (independence will bring jobs). During the colonial period, the African population had worked essentially as plantation labourers or domestic servants for white people. It was therefore natural that independence should give them mobility into the higher echelons of the labour market as a realization of self-governance. The government's policy was first described as 'Africanization', then 'Kenyanization', and unofficially, 'Kikuyunization' (under Kenyatta) and later, under Moi, as 'Kalenjinization'.[71] This terminological mutation succinctly explains how an otherwise well-conceived policy deteriorated into the ethnicization of employment in the civil service.

Land is another source of ethnic conflict in Kenya. As discussed, under colonialism, large tracts of fertile land (i.e. the White Highlands) were alienated and many Kenyans were pushed into 'native reserves' that were not conducive for arable farming. The displaced populations lived as casual workers, farm labourers, tenants and squatters. The process of land alienation was also extended to the pastoral ethnic groups including the Maasai, Nandi, Pokot, Samburu, and other Kalenjin-speaking communities.[72]

Like their agricultural counterparts, the pastoralists were pushed to the less conducive reserves. The expectation during the struggle for independence was that the land would be freely distributed to the people since it had in the first place, been forcefully taken from them. However, this was not to be the case; under the independence agreement with Britain, the Kenyan government was to buy it from the settlers. This meant that there was no free land for distribution and the price tag made land very scarce. This is the critical point at which land tenure became a factor of ethnicity and led to the intensification of ethnic animosity.

Land redistribution was skewed in favour of the Kikuyu.[73] They were the main beneficiaries of the government's settlement plan for the landless. They expanded their land ownership and settlement beyond their traditional home – Central province – into the Rift Valley and Coast provinces, apart from their widespread networks in Kenya's cities. The distribution of land formerly occupied by the white settlers mainly to Kikuyu, was perceived by other ethnic groups as unfair and there were parliamen-

tary debates that called for equal distribution. Unfortunately, these debates did not address the issue of ethnic imbalance,[74] and led to ethnic conflicts between the Kalenjins and the Kikuyu in the Rift Valley.

At the time of writing this report, the Maasai are seeking compensation from Britain over the injustices they suffered from the colonialists. They maintain that the Agreements signed in 1904 and 1911, under which their land was given to the settlers, have expired and should not be renewed. They have vowed to invade and take over this land. The disputed land is currently the site of large ranches under the control of white settlers and a few extremely wealthy black Africans. The government's stance is aggressive. During a recent peaceful demonstration at which Maasai representatives intended to submit a memorandum to the British High Commission in Nairobi, the police violently broke up the demonstration. Several Maasai demonstrators have subsequently been charged in court with various offences such as participating in an unlawful assembly. A large number have also been charged in other courts allegedly for trespassing onto those ranches to which they lay claim.[75] Their livestock has also been confiscated. There have also been reports of human rights abuses (such as rape and torture) committed by the security forces seeking to stop the Maasai from enforcing their demands.[76] This has caused a rift in the government with a Maasai Cabinet Minister siding with his community and criticizing the government.[77]

The land question needs to be addressed adequately and urgently, if further ethnic conflicts are to be avoided. The Moi government sought to address some of these problems by establishing the Commission of Inquiry into the Land Law System of Kenya, headed by the former Attorney General, Mr Charles Njonjo. The Commission's report was released to the public on 6 May 2003 after much agitation by civil society organizations. Among its recommendations was the development of a national land policy. At the time of writing this report, that process is underway. Recently, President Kibaki appointed another Commission to inquire into illegally acquired public property. The report was made public in December 2004.

Recent ethnic conflicts in Kenya (1991–2 and 1997) appear to have been fuelled by various members of the elite, including: the leadership of the government of the time (i.e. top officials of the KANU government), senior members of the ruling and opposition parties, some church leaders etc.[78]

Second, the confusion over pluralism and *majimboism* (see below) is another source of ethnic conflict in Kenya. The advocates of *majimboism* in the build-up to the 1992 elections and after, often called for the expulsion of all other ethnic groups from land occupied before colonialism by the Kalenjins and other pastoral ethnic groups.[79] The

debate on *majimboism* was deliberately started, predominantly in the Rift Valley and Coastal provinces, to counter the calls for the reintroduction of pluralism in Kenya.

In Mombasa, pro-*majimbo* leaflets were circulated in 1994, calling on minority ethnic groups to fight for their rights. An extract reads:

> '*Majimbo or federal government is the only salvation of the minority communities and should not be treated just as an abstract concept...Majimbo was the best solution to the suffering of the coastal people*'.[80]

In the run-up to the 1997 general elections, new threats of violence emerged. Hitherto peaceful Mombasa erupted into violence on the night of 13 August 1997 with the invasion of Likoni Police Station by armed raiders. What at first appeared to be a daring ordinary criminal incident soon took on an ethnic and political aspect. Soon, residents of upcountry origin, (i.e. those who have migrated to the coast from other regions, including Kamba, Kikuyu and Luo), who constituted the bulk of the opposition, became targets for attacks as the *majimbo* ghost reemerged.[81]

Similarly, there have been and still are clashes over access to, and control of, scarce resources such as farm land, grazing land and water. Of growing significance is the conflict over access to water resources in arid regions, where there is not enough water available to satisfy all needs.

Women, children and conflict

Women and children are subject to horrific attacks in any conflict today. Yet, they have tended to be ignored in peace efforts, despite the UN Security Council's Resolution 1325 on Women, Peace and Security.[82] Conflicts adversely impact on the lives of women in a variety of ways. They face physical violence, starvation and malnutrition, and poor sanitary conditions, as well as rape and other forms of sexual violence. Women face the adverse consequences of conflicts long after hostilities have ended. The most distinctive feature about pastoralists' conflicts today, as opposed to previous such conflicts, is that the major casualties are women and children.[83]

Women's role in peace-building is usually not acknowledged. When women and youths have been acknowledged as important actors, the thrust usually has been to strengthen their numbers in decision-making bodies or to provide sustainable and gender-sensitive development programmes. Seldom have people engaged in resolving conflict asked women and youths how they see or do the work of building peace. This aspect is clearly manifested in the pastoral set-up, where women are generally acknowledged to be the backbone of the pastoral economy.

Women, however, in most nomadic communities have also been known to contribute to violence. In almost all of these communities women have developed ways of recognizing and rewarding their kin who perpetrate conflicts, e.g. cattle rustling. For example, in Turkana, before a warrior goes to raid his neighbours either for livestock or as a form of retribution, the mother would be the first person to bless him. Girls also sing songs praising young men who have led successful cattle raids against the 'enemy' or *emoit*. Unmarried or sometimes married women openly admire such men and praise them as heroes. Through dance, poetry and song, the girls ridicule those who have never gone to raid. Among the Borana, warriors normally severe the enemy's testicles and tie them around a male camel's neck, dangling like a cowbell, as evidence of their valour to women back at home. Normally, when women see this, they sing and dance to welcome the warrior. In times of drought and famine, Turkana women sing songs that castigate their men for letting the children die when they could raid livestock from their neighbours. This is to incite the men to go on a raid. In the same way, women can also dissuade their men from hostilities through seductive songs.

A role which women play indirectly in bringing about conflict, is that of marriage. Most of these communities give many animals as a dowry. Most girls want to 'earn' as many animals as possible. On the other hand, prospective grooms want to pay the highest dowry to beat their contemporaries. However, in most cases, they lack sufficient animals, so prospective grooms mount raids against their neighbours to meet this requirement.

Conflict resolution activities and institutions

Various attempts at resolving the conflicts were made. It should be noted that we use the word attempts because, although the large-scale overt conflicts were addressed, several conflicts are continuing. Therefore, we only give examples of how the large-scale conflicts of the 1990s were addressed.

Government resolution activities

During the clashes, the government was accused of many sins both of commission and omission. Nevertheless, there are a number of actions that it took that led or are leading to the resolution of conflicts. These include:

- use of the media to call for harmony, peace and tolerance among the affected communities;
- the provision of security officers to curb the violence; (however, the government was accused of doing so in a half-hearted manner);

- the arrest and prosecution of some perpetrators of the violence; (however, this was reportedly selectively done and mostly involved the 'small fish');
- he confiscation of the means of warfare such as bows and arrows, *pangas*, spears, etc;
- the declaration of a curfew to promote security operations and to prevent the movements of people who could cause trouble; (this was also seen in some quarters as the government's way of preventing observers from witnessing and reporting on the events in the affected areas);
- the establishment of a Parliamentary Select Committee to Investigate Ethnic Clashes in Western and Other Parts of Kenya; and
- the establishment of Judicial Commission of Inquiry into Ethnic Clashes in Kenya.

Religious resolution activities

In various ways the religious groups also played a role in resolving the conflicts. Their methods include:

- preaching peace and using religious doctrines to call for respect and tolerance;
- applying pressure on the government to stop the clashes; and
- investigating the causes of the conflicts and recommending action.[84]

Civil society and international community resolution activities

Both the civil society and the international community put pressure on the government to act to halt the clashes and to carry out preventive as well as corrective measures. The action by the international community of threatening and/or withholding financial aid pushed the government into taking action.

Reports in both the domestic and the international media also embarrassed the government into taking much-needed action to resolve the conflicts.

Ethnically-based organizations' resolution activities

There were attempts to resolve these conflicts by ethnically-based organizations. For example, the government organized joint meetings between elders from the Kalenjin, Kikuyu, Maasai, Turkana and Samburu communities (known as the Gema–Kamatusa talks). Although not entirely successful they did lower the scale of the conflicts.

Women's organizations' resolution activities

In virtually all the pastoralists' communities, women perform household, social and economic roles. They feature

in virtually every aspect of pastoralist life. This makes their role in conflict resolution and management even more significant. A number of women peace-building and conflict resolution lobby groups have emerged in many parts of the world. In Wajir, Kenya, for example, women have formed Women for Peace Group through the assistance of Oxfam. They have persuaded their husbands and sons to hand in their weapons, and to seek peaceful methods of resolving conflicts.

Their husbands have since made pacts with neighbouring clans and tribes, and have their own rapid response unit – elders who head out into villages at the first signs of trouble and calm the situation. The women now travel from village to village encouraging other tribes to follow their example. There is a real need for the inclusion of gender perspectives in conflict resolution and peace-building initiatives.

It is sad that while there is undeniable evidence of the significant impact that conflict has on women, they have held a negligible role when it has come to devising strategies or initiatives aimed at managing this problem. Women's participation is usually limited to the role of counselling other women affected by conflict, or engaging in other humanitarian-oriented activities. Although these are important, the patriarchal division of labour should not be replicated in conflict management interventions by assigning women to the periphery of the political debate. Given the effect of conflict on women, it makes sense that the meaningful management of conflicts should include a significant role for women. This rhetorical commitment needs to be translated into firm action within the area of capacity-building. Women should be part of conflict management initiatives, and should also be properly empowered.

Managing ethnic diversity: decentralization

The typical response to perceived difficulties associated with ethnicity within political systems has been the development of highly centralized political power structures whose intent is to use coercive force to 'cement' the country together. The problem of the centralization of power needs to be addressed. The assumption of all authority by the central government and its consequent responsibility for everything leads to excessive demands being made on it. The central government thus becomes the target of varied complaints, pleas and conflicting expectations and, eventually, the focus of common hatred. In essence, the centralized government promises all, satisfies few and antagonizes most. This is a recipe for

conflict; without the means to satisfy exaggerated demands, the government resorts to coercion to suppress demands. The devolution of administrative responsibilities and authority can reduce this source of tension and conflict.

Critics of decentralization argue that it would lead to independent statehood for every 'tribe'. This is an alarmist view. The principles of power devolution may best be viewed as entitling people to negotiate the terms of political allegiance, to influence the political order under which they live, to preserve their identity and to safeguard their security. With the goodwill of the parties concerned, and the encouragement and assistance of the international community, these objectives are obtainable, without resorting to agitation for secession.

Decentralization can increase the efficiency and responsiveness of the government in two ways. First, local leaders have superior information on the local people's needs, compared to central government officials in far-off offices. Devolving resource allocation decisions to locally-elected leaders therefore helps improve the match between the preferences of local people and the government's output. Second, local leaders are more accessible to local people and can be held more accountable. This results in the improved management of resources through improved performance. In any event, the establishment of devolved governments does not preclude collaboration across ethnic groups.

As part of the process of reviewing the Constitution, the Constitution of Kenya Review Commission held a series of meetings with experts and stakeholders on the devolution of power. Among the points that were raised, and which later influenced the Commission in adopting a system of devolved governments in the draft Constitution, were:

- the democratic criterion that devolution increased the quality of government by bringing government closer to the people;
- the need to enhance participatory governance and opportunities for participation; and
- the need to resolve and manage conflict, and accommodate diversity – including cultural, ethnic and linguistic diversity – in addition to the needs of children, the marginalized, minorities and indigenous peoples, people with disabilities and women.[85]

That the Commission dealt with the draft Constitution using a framework of devolution is a pointer to the argument that this is probably the fairest way to deal with ethnic diversity in Kenya.

Minorities, indigenous peoples and socio-economic development

Overview of the socio-economic situation

Kenya's economic performance during the last two decades has been far below its imputed potential. After making initial gains in the post-independence era, the economy started a downward trend during the early 1980s. From 1990 to 2001, Kenya was in a virtual recession. The situation is expected to improve and the economy grew from 1.1 per cent in 2002 to 1.8 per cent in 2003. The growth rate is projected to reach 3.7 per cent in 2004, 6.5 per cent by 2006 and to average 4.7 per cent over 2003–7.[86]

Kenya's poor economic performance, coupled with the insurgency of HIV/AIDS and poverty, led to a deterioration in its people's health. According to the recent estimates of the Human Development Index (HDI),[87] which measures the socio-economic progress of a country, Kenya fell from 0.531 in 1990 to 0.489 in 2001. Average life expectancy, which explains the fall in the HDI, declined from 62 years in 1991 to 46 years in 2002, while average adult literacy stood at 83.3 per cent. Income per head, in constant 1982 prices, dropped from Ksh. 3,813 in 1990 to Ksh. 3,360 in 2002. The number of people officially unemployed in 2002 stood at over 2 million or 14.6 per cent of the labour force, with the youth accounting for 45 per cent of this figure.[88]

Poverty in Kenya

Kenya wants to reduce poverty and achieve sustained economic growth for development.[89] The government said it intended to address this challenge in consultation with the private sector, civil society organizations and other development partners. It is in this regard that the government went about the process of developing its Poverty Reduction Strategy Paper (PRSP). The principles of the PRSP were said to be: giving a voice to the poor; participation and ownership; transparency, openness and accountability; and equitable distribution of national resources and development initiatives.[90]

While poverty can be defined using a monetary or non-monetary perspective, poverty mapping research in Kenya has adopted an absolute poverty line derived from the 1997 Welfare Monitoring Survey, as a minimum standard required by an individual to fulfil his/her basic food and non-food needs. The absolute poverty per month line

has been set at Ksh. 2,648 per adult in urban areas and at Ksh. 1,238 per adult in rural areas.[91]

An estimated 60 per cent of the Kenyan population is poor, and this has been rising, albeit with fluctuations.[92] Regionally, North Eastern province was the poorest, with 73.6 per cent of its population living below the poverty line;[93] and at 35.32 per cent, Central province's poverty rate was the lowest. Central province is home to Kenya's largest ethnic group – the Kikuyu, and has produced two Presidents – Kenyatta and Kibaki.

Women are generally the hardest hit by poverty, and female-run households have the highest poverty rates in both rural and urban areas.[94]

In terms of poverty rankings by constituency, Turkana Central is the poorest. Turkana South, Turkana North and Turkana Central constituencies are ranked 98, 129 and 156 respectively out of a total 210 constituencies.[95]

The latest in a series of reports on inequality in Kenya, entitled, *Pulling Apart: Facts and Figures on Inequality in Kenya* produced by the Society for International Development (SID), states that there are wide disparities in Kenya. Some of the key findings include: wide differences between men and women in terms of employment, education and HIV/AIDS infection; and regional differences in poverty.[96]

Budgeting process and specific allocations to communities

The Kenyan government began preparing its PRSP in 2000, along with the process of preparing an Economic Recovery Strategy for Wealth and Employment Creation (ERS). The ERS is a plan for economic recovery for the next five years and takes into account existing policy documents, particularly the PRSP and national development plans.

According to a senior official in the Central Bureau of Statistics:[97]

• The allocation of funds does not necessarily mean that the funds will be disbursed to implement the intended project. The official said that sometimes resources that are on paper allocated to a particular area are diverted to other areas, depending on the political importance of that area at that time or the political influence of a leader from that area. During the by-elections in 1995, campaigning and 'development projects' such as road rehabilitation and rural electrification went hand-in-

hand. Because these may not have been budgeted for, such resources are usually diverted from other areas. This, he said, partly explains why the government does not issue expenditure breakdowns by district, because it would be a way to discover such anomalies.

- The disbursement of funds does not guarantee that the project will be implemented. Funds may be disbursed but may not reach the project. This can be due to the reasons described above, or because the allocated funds are not spent and therefore have to be returned by the end of the financial year. Interestingly, this has been a recurring phenomenon.
- Even if the funds are allocated and disbursed to the project, there is no guarantee that the resources will be used efficiently to bring maximum results.

The budget-making process in Kenya suffers from a number of weaknesses that are relevant to this report. Some of these are:

- A disaggregated district version of the budget is not available or accessible to the public.
- The budget process is still 'top-down' with no scope for 'bottom-up' inputs. Therefore, minorities and indigenous peoples cannot declare beforehand what they perceive their priorities to be. This is exacerbated because parliament does not get to input into the budget before it is presented to it. Hence, MPs may not have the chance to factor in the concerns of their constituents. Further, they cannot amend the budget in any way to reflect the wishes of their constituents.
- The budget deals initially with national figures, which are then disaggregated to a ministerial level. Since ministries cover the whole country, it is not easy to see which areas or communities have benefited.
- The budget does not show data by programme or objective.
- Published printed estimates are very difficult to read by the layperson.
- Frequent reallocations between the budgets make it difficult to analyse the government's priorities.

It is therefore not possible to obtain figures of specific budgetary allocations to communities. This is because the budgetary process does not take ethnic communities into account. According to an Assistant Programme Officer in charge of the Budget Information Programme with the Institute for Economic Affairs,[98] allocations to specific communities can only be inferred and estimated. This can be done at two levels. First, would be to look at the recurrent expenditure in the district. This normally consists of wages and the provision of essential services to the district. One would then have to look at the ethnic

composition of the staff within the district in the government's government. Such data is never kept, because the government would not want to be seen to be promoting ethnicity. However, most of the employees (especially in senior positions) in these areas are from other parts of the country and from other ethnic communities. It follows therefore that the resources are generally spent on government staff rather than the specific ethnic community.

Second, would be to look at the development expenditure. The allocations target the districts and not the communities within the districts. However, given that communities within Kenya are settled in such a way that they can be identified by some districts, it can be inferred that the development projects are for their benefit. Unfortunately, this can only be true of some districts.

According to governmental and non-governmental reports, the poorest parts of the country include: the North Eastern, some parts of the Coast, some parts of Eastern and parts of the Rift Valley provinces.[99] These areas happen to be the homes of the marginalized communities of the Turkana in North Eastern province, the Miji Kenda and Sanye in Coast province, the Burji in Eastern province, the Maasai and Ogiek in Rift Valley province, and Muslims in the North Eastern and Coast provinces, although Muslims are generally better off than other minorities. According to a senior official in the Central Bureau of Statistics,[100] the blame can be traced back to the Sessional Paper no. 10 of 1965, *African Socialism and its Application to Planning in Kenya*. In his view, the Sessional Paper:

> *'set the basis for the present day inequality…First, it sought to achieve rapid development ostensibly for the benefit of the inhabitants of Kenya. The practical implementation of this was the massive investment in areas that were perceived to hold the key for the country's development. The areas occupied by minority ethnic groups were left out of the picture. Second, because the country generally lacked trained and experienced manpower [sic] at independence, those who had a basic level of education and beyond moved to occupy the emerging positions in the civil service. Most members of the minority ethnic groups were mostly uneducated. Consequently, they were left again out of the picture. Subsequent policies based on or following this Sessional Paper have not helped to change things drastically.'* [101]

A case study of Turkana district

According to the 1989 population census, about 94.5 per cent of the inhabitants of Turkana district are of the Turkana ethnic group. We propose to use this district to represent the

Turkana community and to track how resources have been allocated. This will enable us to evaluate how effectively the budgetary allocations impact on a minority or indigenous peoples' position. A caveat must however be made, that a shared and disaggregated district version of the budget is not available or accessible to the public.

This analysis has taken into account numerous development expenditure resource allocations to various Kenyan districts in the last financial year 2003–4 and the current one 2004–5 with specific reference to the Turkana district. However, for comparative purposes, close attention has also been paid to Nyeri district. This district has been chosen to check whether there is a link between political power and resource allocation. The current President is from Nyeri district.

Our analysis is on development expenditure alone. This is partly because it is not easy to obtain the expenditure allocations disaggregated by district, and because we are assuming that the development projects represent the actual developments in the respective areas. Nevertheless, we appreciate that recurrent expenditures would be an indication of the level of governmental activity within a district. In addition, it is to be noted that even the development expenditures may contain some component of recurrent expenditures.

In this analysis we also look at whether there is a link between the major problems affecting the Turkana district, as identified by its residents during the consultation process for the PRSP, and resource allocation by the government to the district. During the Turkana district PRSP consultations the following issues were ranked in order of priority:[102]

1. Natural calamities;
2. Security;
3. Low literacy levels;
4. Poor/inadequate infrastructure (roads and communication);
5. Lack of adequate water;
6. Rampant livestock diseases;
7. Inadequate health facilities and drugs (human diseases);
8. Inadequate marketing infrastructure;
9. Inadequate extension services;
10. Rural industries;
11. Detrimental cultural practices;
12. Poor governance/poor planning;
13. Lack of technology to exploit natural resources; and
14. Cost-sharing – land tenure and dependence syndrome.

One would therefore expect to see the resource allocations by government respecting this prioritization. However, our principal objective in this section is to discern how committed the government is and has been to areas occupied by minority and indigenous communities. There is no specific data enumerating these facts; we have therefore sought to glean this information from the government printed financial estimates.

We have restricted the analysis to the first two budgets prepared by the NARC government since it came to power. First, we captured all resource allocations on development expenditure for all districts in Kenya. It was observed that some expenditure is not spread throughout the districts and only the target areas are seen to have allocations. Resource allocations are supposed to be demand-driven: thus, for example, tsetse fly control expenditures are only in tsetse fly-infested areas or where they pose a great threat. The mode of financing also varies from fully government-funded projects to those projects/programmes that are fully development partner-funded, where the financier makes direct payments and yet other projects may be a funding mix between the government and the external financier. The problem with the latter is that a government's inability to meet its part of the payments could lead to a delay in the project. Another problem of the over reliance on donor funding is that development partners may be pushing for their own agenda, which may not be that of the community.

Second, we listed the ranking of the resource allocation to the districts. This took the total approved expenditure in 2003–4 and those allocations earmarked for spending in the district during the current fiscal year 2004–5. The districts are therefore ranked according to cumulative resources allocated in the first two NARC government budgets. First, an area such as the Turkana district is known to be among the poorest in the country. This shows that previous governments have done little for this area since independence. Second, since the NARC government was elected on a platform of change, it would be expected to behave differently and positively to such areas as the Turkana district. For illustrative purposes we juxtaposed the Turkana district allocations against those of Nyeri district.

It is interesting to note from table 5 that whereas Nyeri district is not classified as an Arid and Semi-Arid Land (ASAL) it has a budgetary allocation for what is referred to as the Arid Lands Resource Management Project. Similarly, Nyeri district was allocated Ksh. 4.26 million in 2003–4, which was increased to Ksh. 23 million in the current financial year for ASAL development projects. Yet Turkana receives no allocation. This is surprising, given that the Turkana district PRSP process identified natural calamities (which can be addressed through such allocations) as the major problem. Another area showing glaring disparities is in the provision of water services. Considering that Turkana district is a water-scarce area, the indicated allocations pale in comparison to Nyeri district.

	Turkana Ksh. millions		Nyeri Ksh. millions	
	2003–4	2004–5	2003–4	2004–5
Arid Lands Resource Management Project	35.24	60.45	14.60	13.64
Central Kenya Dry Areas	–	–	3.03	–
Soil and Water Conservation (NALEP)	–	–	2.34	4.10
Culture and Social Services	–	–	1.46	–
District Cultural Services	–	–	1.20	1.20
ASAL Development Projects/532 Fisheries	–	–	4.26	23.00
Veterinary Investment Laboratory Services	–	–	1.46	1.50
Construction of Sewerages	–	–	4.00	5.00
Construction of Rural/Urban Water Supply	–	–	30.40	15.00
District Cooperative Extension Services	–	–	–	1.50
Wood Fuel Resources Development	–	–	0.25	0.50
Curative Health	–	1.00	–	2.00
Rural Health Services	–	3.00	5.64	3.00
Construction of Water Supplies	5.00	5.00	19.93	5.00
Construction of Urban Water Supplies	5.00	5.00	215.60	595.00
Water Resources	7.90	–	–	–
Water Conservation and Dam Construction	6.00	6.00	5.10	4.10
Turkana Rehabilitation Project	4.40	5.00	–	–
Rural Electrification	9.15	9.15	11.15	11.15
Totals	**72.69**	**94.60**	**320.42**	**685.69**

SOURCE: *GOVERNMENT OF KENYA, PRINTED DEVELOPMENT EXPENDITURE ESTIMATES, 2003–04* AND *2004–05*, NAIROBI, GOVERNMENT PRINTER

From our workings we also found that despite the poor state of the roads in Turkana district, which has no tarmac roads, not a cent was allocated by the Ministry of Roads and Public Works to the rehabilitation of the roads in the whole district. It is equally instructive to note that the Minister for Finance had the following to say during the budget speech presentation this year:

'in the immediate and medium term, our priorities will continue to be (a) improvement of the physical infrastructure particularly roads, railway and ports; (b) provision of basic social services, i.e. health and education; and (c) improvement in safe water, energy and security'.

The Minister then proceeded in the same speech to list the roads that were going to be dealt with during the financial year. Not a single road is mentioned in Turkana district except perhaps to state that: 'several other roads spread throughout the country have been earmarked for upgrading to **gravel standards**' (emphasis added). Two things are clear here. First, the best that the Turkana district would have received is the upgrading of some of its roads to gravel

level. Yet, there was no allocation for this as already indicated. Perhaps, given the theme of this year's budget, 'Enhancing Efficiency for Accelerated Economic Growth', emphasis could not be placed on this district? There is, however, some Ksh. 4.5 billion earmarked for the Constituency Development Fund (CDF) during the financial year. This Fund is meant to be equally distributed among Kenya's 210 constituencies. Each constituency, with the MP ultimately responsible, is supposed to choose how it will spend the money. Thus, the Turkana constituencies could use their allocations (amounting to approximately Ksh. 20 million each) for roads if they wish.

The allocations are a good indicator of how power relations and economic resources are correlated. Areas with political heavyweights (i.e. NARC strongholds) seem to have the lion's share of the national cake when compared to areas that are perceived to sympathize with the opposition. For example, 10 districts take a total of 44 per cent of the national resources allocated to development expenditure, while the remaining 60 districts share 56 per cent of the resources. This is a clear indication of how national resource allocation promotes ethno-regional economic inequality. For example, out of a total Ksh. 2,980

million for the construction of urban water supplies in the financial years 2003–4 to 2004–5 Ksh. 810 million or 27.2 per cent will go to Nyeri district, with no allocation to the Wajir district for the same purpose. As the above table illustrates, Nyeri district received a total of Kshs 320.42 million for development projects in the last financial year 2003–4 and during the current financial year 2004–5, Ksh. 685.69 million has been set aside for Nyeri, compared to a paltry 72.96 million and 94.6 million for Turkana district in the respective years.

A critical assessment of resource allocation in the previous administrations would indicate a similar trend in all spheres both in socio-economic development and access to other national resources. The genesis of this pattern of ethno-regional inequality is partly traceable to the colonial administration that defined the economic potential of the country strictly through agro-ecological zones. Unfortunately, this policy bias was largely retained and perpetuated after independence as shown in Kenya's successive political leaderships. This policy prescription, which retained the colonial fixation with highland agriculture and its central economic logic, defined Central and Rift highlands as high potential, the Lake Basin and Ukambani lowlands (Eastern province), as medium potential and the rangelands, which comprise 70 per cent of the country, as of the lowest potential.

As noted previously, the fact that some sums are allocated to an area does not guarantee that the area receives them. Given that the whole of the Turkana district remains largely unlit by electricity, it may not be too far-fetched to conclude that even the small allocations for rural electrification in the previous two budgets (if not in the past as well) may not have been disbursed or otherwise spent there within the respective financial years.

Therefore, the future of minorities and indigenous peoples may be addressed in at least two ways. The first is for them to acquire political power. As this is extremely unlikely, the second option may yield more results: transparency and the devolution of governance systems and structures, to allow for decisions about resource allocations to be made at lower levels of governance, where the communities are able to make maximum impact. This is where the ongoing constitutional review comes in.

Civil society involvement in the budgetary process

Due to the meagre resources available in the country, it is imperative that the resources available from the Kenyan taxpayers should be equitably allocated, taking into consideration the existing regional disparities. This calls for close monitoring and evaluation of the planning and budgeting process, of the allocation and disbursement of the resources, of the implementation and impact assessment of the budgeted activities, and of the projects and programmes. Civil society generally has recently therefore stepped into the budgetary process. This is partly because sections of civil society participate actively in the development process, for example, by providing schools, hospitals, etc., but also because it is a recognized way of holding the government accountable.

However, there are as yet only a few civil society institutions working on this. These include: Action Aid Kenya, Elimu Yetu Campaign, the Institute for Economic Affairs (IEA), etc. The IEA, for example, is a civic forum that endeavours to promote the pluralism of ideas through research and informed debate on public policy issues. Since 1999 it has been conducting public pre-budget hearings. Their purpose is to encourage public participation in the preparation of the budget. The IEA summarizes the submissions and proposals, and sends this to the Treasury for consideration during the preparation of the budget. In the past this has been well received by the Treasury and a significant percentage of proposals make their way into the final budget. To encourage a wider participation in the pre-budget hearings, these have been extended to include other regions outside Nairobi.[103]

In 2002, the Kenya Budget Network was formed. This is a group of grassroots organizations working to put submissions forward on the budget, and includes: Abantu for Development, Action Aid Kenya, the African Women's Development Communication Network (FEM-NET), Care Kenya, the Collaborative Centre for Gender and Development (CCGD), IEA and the Kenya Alliance for the Advancement of Children's Rights. The Kenya Budget Network's mission is to:

> 'ensure that Kenya's national budget is focused on people's needs, but more specifically, that it gives every Kenyan the ability and opportunity to make choices about their well-being'.

It is essential that NGOs representing minorities and indigenous peoples – both women's and men's interests – are active in these proposals to ensure that public finances are directed towards alleviating their poverty.

Conclusions

This report concludes that minorities and indigenous peoples are in dire need of positive action to improve their lot. Their situation has resulted from historical, legal and political factors. For minorities and the socially excluded, political choices remain limited by the same structures that constrain their voice in other situations. Over time, however, this tends to give way to violence, as witnessed in the recent past. The endemic insecurity prevailing in northern Kenya and the violent eruption of discontent in other parts of country, especially in the 1990s, can be traced to this lack of power, to poverty and to the ethnic loyalty equation. In all cases, such violent actions have not activated system-correcting measures; conversely, they have worsened the economic lot of their respective communities.

There is a need for the urgent redress of historical wrongs. Ethnic elites beginning with Kenyatta, developed a stake in commercial agriculture that ensured a smooth transition from the colonial to the independent era. Minorities and indigenous peoples' political elites, in contrast, have not been able to significantly promote policies that favour their constituents' economic interests. Minority political inclusion has not translated into economic inclusion. This is why Kenya's commitment to constitutional reform currently represents the most promising path.

Regarding social exclusion, there are two pertinent conclusions. The role of NGOs and civil society is now accepted, even by the government. There is therefore the issue of promoting a more inclusive approach to economic policy-making and governance reform. However, this also reinforces yet another pertinent conclusion of this report: the need to improve the capacity of new and traditional organizational structures among the marginalized communities as a prerequisite for their active participation.

Given the heavy involvement of the international community in Kenya, this report also concludes that there is a need for international institutions to transform the way they currently work. Communities excluded on the state level may be even more excluded within the international order. The meaningful participation of Kenya's marginalized and excluded communities – i.e. women and men from minority and indigenous communities – is essential. Participation must be used to promote their views at the state and international level. Achieving this entails the reorganization of the governance system as well as general legal and institutional reforms. The moment is now.

Recommendations

To the Kenyan government:

1. The draft Constitution should be promulgated as quickly as possible, in particular to ensure that:
   a. All groups existing in Kenya are recognized.
   b. The principle of individual choice as to which group, if any, a person wishes to belong to (and should suffer no detriment from doing so) should be acknowledged.
   c. The political system should ensure that all groups and persons belonging to them are able to participate in the decisions that affect them.
   d. The principle of recognition of traditional land rights should be enshrined in the Constitution, including compensation and restitution for past seizure of land.

2. The government of Kenya should gather and publish the data on budget allocation and spend by district and sector, with the support of the United Nations Development Programme (UNDP) and donor agencies.

3. The data on ethnicity in the 1999 census should be processed and published by the Kenyan government (supported by the UNDP and donor agencies if necessary).

4. A poverty/welfare monitoring survey should be carried out nationally, disaggregated by age, disability, district, ethnicity, HIV status and sex.

5. The government of Kenya should review all major current and new development initiatives to ensure that they are reaching minority and indigenous communities equitably. In particular, primary education should be assessed to see if:
   a. it reaches all communities
   b. it is appropriate for protecting the right to development of the minority and indigenous communities (e.g. is in their first language as well as Swahili, and is culturally appropriate).

A plan should be quickly drawn up and implemented to address any major failings found by this review.

To the major donors and governments concerned about Kenya, in particular the European Union (EU), UK and UNDP:

6. Donor agencies should financially support the recommendations in 2, 3, 4 and 5 above.

7. All parties with influence on the Kenyan government should prioritize pressing for:
   a. The new Constitution.
   b. Full participation of all communities in all levels of government.
   c. Recognition and protection of traditional land rights.
   d. A review of primary education and minorities and indigenous peoples.

Relevant international instruments

United Nations International Covenant on Civil and Political Rights (1966)
Article 27
In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

International Convention on the Elimination of All Forms of Racial Discrimination (1965)
Article 1
1. In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

ILO 111 Discrimination (Employment and Occupation) Convention (1958)
Article 2
Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

ILO 169 Indigenous and Tribal Peoples Convention (1989)
Article 3
1. Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. The provisions of the Convention shall be applied without discrimination to male and female members of these peoples.

Article 7
1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

Article 14
1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

African Charter on Human and Peoples' Rights (1981)
Article 12
1. Every individual shall have the right to freedom of movement and residence within the borders of a State provided he *[sic]* abides by the law.
[…]
Article 13
1. Every citizen shall have the right to participate freely in the government of his *[sic]* country, either directly or through freely chosen representatives in accordance with the provisions of the law
[…]
Article 19
All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.
Article 20
1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
[…]
Article 21
1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
2. In case of spoilation, the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.
[…]
Article 22
1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind *[sic]*.
2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (11 July 2003)
Article 19
Right to Sustainable Development
Women shall have the right to fully enjoy their right to sustainable development. In this connection, the States Parties shall take all appropriate measures to:
[…]
b) ensure participation of women at all levels in the conceptualisation, decision-making, implementation and evaluation of development policies and programmes;
c) promote women's access to and control over productive resources such as land and guarantee their right to property;
d) promote women's access to credit, training, skills development and extension services at rural and urban levels in order to provide women with a higher quality of life and reduce the level of poverty among women.

Notes

1 Due to a number of reasons including historical and mythical beliefs, some communities raid their neighbours and drive away with their livestock, which they then keep as their own. This activity invariably involves the use of force.

2 Ghai, Y.P. and McAuslan, J.P.W.B., *Public Law and Political Change in Kenya*, Oxford University Press, London, 1970, p. 25.

3 Recently, the Maasai have been making several demands, including that the Kenyan government should find that the Agreements were not binding on the Maasai and that they should be compensated for their losses over time. These demands were repeated during a demonstration on 13 August 2004, during which the Maasai exhorted the government not to renew the agreement, the same having expired. They presented memoranda to both the Kenyan government and the British High Commission in Nairobi. The Maasai lands in Laikipia and Naivasha are still held by descendants of the white settlers, who use the property for ranching. On 24 August 2004, a section of the Maasai community sought to present a copy of their petition to the British High Commission claiming restoration of their lands, seeing as the Agreements had expired. They were violently dispersed by the police, a number of them beaten and others were charged in court with criminal offences. See *Daily Nation*, 25 August 2004.

4 Republic Of Kenya, Sessional Paper No. 10, *African Socialism and its Application to Planning in Kenya*, Nairobi, 1965.

5 Section 9 of the Constitution of Kenya.

6 Electoral Commission of Kenya, *Economic Survey*, 2004, p. 43.

7 Government of Kenya, *Kenya Demographic and Health Survey*, Nairobi, Government Printer, 2003.

8 Capotorti, F., *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, New York, United Nations, 1991, para. 568.

9 Proposal Concerning a Definition of the term 'Minority', UN Doc. E/CN.4/Sub.2/1985/31.

10 Para. 5.1. HRC General Comment No. 23, 50th session, 1994.

11 See para. 5.2 HRC General Comment No. 23, 50th session, 1994. As of 9 December 2002, 149 states are party to the ICCPR. Almost all African states are party (except Comoros, Mauritania and Swaziland).

12 The Convention was adopted by the International Labour Conference at its 76th session, Geneva, 27 June 1989 and entered into force on 5 September 1991.

13 See *Sunday Nation*, 17 October 2004.

14 *Ibid.*

15 *Ibid.*

16 For further discussion, see the UNESCO *Red Book on Extinct and Endangered Languages*.

17 Republic of Kenya, *Economic Survey 2003*, Central Bureau of Statistics, Ministry of Planning and National Development, Nairobi, Government Printer, p. 205.

18 This officer requested to remain anonymous.

19 Goldsmith, P., 'Kenya country study: participation and the dynamics of social exclusion and poverty', Concept Document for the *World Development Report 2000*, p. 3.

20 Government of Kenya, *Turkana District Development Plan, 1999–2001*, Nairobi, Government Printer, 1999, p. 11.

21 *Ibid.*

22 Members of the Turkana community during a community consultation in Lodwar on 27 October 2003.

23 *Ibid.*

24 *Ibid.*

25 Ibid.

26 *Turkana District Development Report, 1999–2001, op. cit.*, p. 35.

27 *Ibid.*, p. 34.

28 *Ibid.*

29 *Ibid.*, p. 40.

30 Article in the *Weekly Review*, 27 October 1995.

31 The Carter Land Commission was set up in 1932 by the Secretary of State for the Colonies, to consider the land requirements of the African population.

32 *The Carter Land Commission Report*, 1933, p. 171.

33 *Ibid.*

34 See CEMIRIDE's unpublished report, 'Covert racism: manipulation of citizenship and 100 years of Nubian landlessness'. There were serious clashes between the Nubians and other ethnic groups residing within the larger Kibera slums. Many lives and lots of property were lost on both sides.

35 *Ibid.*

36 A petition letter no 1/1/C/41 written by the Union of Sudanese, Headquarters Office, Kibera. The petition was addressed to the Acting Chief Secretary and the response was dated 22 August 1939.

37 Consultations with the Endorois community at Bogoria on 24 October 2003.

38 *Ibid.*

39 Members of the community who attended the Bogoria consultation refused to disclose these people's names for fear of further problems.

40 The community consultations.

41 See, for example, *The Standard*, Kenya, 14 October 2004.

42 Terrorist bombs blew up the American Embassy in Nairobi. Over 250 people, mostly Kenyans, were killed. Al-Queda later claimed responsibility.

43 Goldsmith, P., *op. cit.*, p. 5.

44 By actual lack of recognition we mean that there are people in the country who are not aware of these people as citizens, who fall within the brackets of minorities or indigenous peoples, they have never heard of them nor seen anyone from these communities. By constructive lack of recognition we mean a process by which important decisions are made and crucial activities take place that ignore the citizenship of the minorities or indigenous peoples.

45 As per Ringera, J. in H.C. Misc. Civil Application No. 82 of 2004 (OS) Rev. Dr Timothy Njoya & Others vs The Attorney General & Others, delivered on 25 March 2004. The sections mentioned constitute the whole gamut of the rights and freedoms under the Constitution of Kenya.

46 Emerging legislation does appear to confirm that Kenya is embracing this trend. Thus, when the Environmental Management and Co-ordination Act, Act no. 8 of 1999 talks of 'every person' (section 3) it has been taken to mean much more than just individuals.

47 It is only in cases where a person is charged with murder and treason, offences that carry the death penalty, that the state may offer such an advocate, free of charge, on condition that he or she cannot get one themselves.

48 The resulting political impasse at the time occasioned the Lennox–Boyd Constitution of 1958, which significantly increased the African membership of the Legislative Council to 14, the same number as the elected Europeans. It also

made a token departure from the principle of voting on the basis of communal rolls. It provided that members of the Council constituted an electoral college, which elected 12 additional members, to be known as 'Specially Elected Members'. The guiding principle was that this category would speak on behalf of the people as a whole, without favouring any particular racial group.

49 The practice has appeared to show that the parties have used this provision to nominate a number of their own party loyalists who failed to get elected. However, there are some positive aspects. In the 8th parliament (between 1997 and 2002), Josephine Odira Sinyo, who is blind, was nominated by KANU to represent the interests of people with disabilities.

50 The Bill of Rights includes: the right to life; equality and freedom from discrimination; the right to health, education, housing, food, water, sanitation and environment; the right to language, culture, freedom of association, assembly, expression, religion etc.

51 Article 101(3).

52 Article 102(3) and (4).

53 Article 109(2)(b).

54 A Bill to deal with HIV/AIDS has been drafted but is yet to be presented to parliament.

55 Refugees are largely dealt with under the United Nations High Commissioner for Refugees (UNHCR).

56 Tribal units were basically the existing administrative units, which were based on the different tribes' traditional governance systems.

57 Gertzel, C.J., *et al*, (eds), *Government and Politics in Kenya: A Nation Building Text*, Nairobi, East African Publishing House, 1969, p. 4.

58 International Commission of Jurists (Kenya Section), *The Political Economy of Ethnic Clashes in Kenya*, Nairobi, Scan Communications, 2000, p. 13.

59 For example, with the reintroduction of multi-party politics in 1991, several KANU leading lights exhorted their communities to stay together and fight the 'bigger tribes', which wanted to take power away from them.

60 For further discussion on these issues from a gender perspective, see Banda, F. and Chinkin, C., *Gender, Minorities and Indigenous Peoples*, London, MRG, 2004.

61 Hameso, S.Y., 'Ethnicity in Africa: towards a positive approach', *African Studies Quarterly*, 2001.

62 See also UNDP, *Human Development Report 2004*, which focuses on cultural diversity and makes the point in even stronger terms.

63 World Bank, *Can Africa Claim the 21st Century?*, Oxford, Oxford University Press, 2000.

64 Kimenyi, M.S., *Ethnicity, Institutions of Governance and Conflict Avoidance*, Kenya Institute for Public Policy Research and Analysis, KIPPRA Discussion Paper no. 23, November 2002, p. 2.

65 Deng, F.M., 'Ethnicity – An African predicament', *Brookings Review*, Washington DC, The Brookings Institution, vol. 15, no. 3, 1997.

66 Hazlewood, A., *The Economy of Kenya: The Kenyatta Era*, Oxford, Oxford University Press, 1979, p. 46.

67 GEMA (now defunct) was one of the tribal organizations used by the government in the immediate post-independent period for political purposes.

68 Ogot, B. A. and Ockiengi, W.R. (eds), *Decolonization and Independence in Kenya: 1940–93*, Nairobi, East Africa Publishing House, 1995.

69 These incidents have been widely discussed. See, for example, Nyukuri, B.K., *The Impact of Past and Potential Ethnic Conflicts on Kenya's Stability and Development*, Nairobi, University of Nairobi, 1997.

70 Nyukuri, B.K., 'Of ethnicity and leadership in Kenya', *Daily Nation*, 3 April 1993.

71 The manner in which the plum state appointments have been made by the current NARC government under President Kibaki has caused much displeasure and rekindled memories of the Kenyatta years.

72 See, for example, Abuor O.C., *White Highlands No More: A Modern Political History of Kenya*, vol. 1, Nairobi, Pan African Researchers, 1970.

73 Goldsmith, *op. cit.,* p. 9.

74 Eshiwani A., 'Tribalism and its impact on development', unpublished, 1991.

75 *Daily Nation* and *The Standard*, 27 August, 2004.

76 News bulletin carried by the Kenya Television Network, a popular and credible newsroom, on 26 August 2004.

77 *Ibid.*

78 See 'Task force report of NCCK 1992' *Daily Nation*, 11, 29, 31 March 1992. Task Force Report of the National Council of Churches of Kenya, *The Cursed Arrow*, April 1992; *Report of the Parliamentary Select Committee On Tribal Clashes*, headed by Hon. Kennedy Kiliku, 1992; Human Rights Watch, *Divide and Rule: State-sponsored Ethnic Violence in Kenya*, November, 1993.

79 See, for example, *Weekly Review*, 29 June 1993; *Kenya Times*, 20, 21 May 1993; *Daily Nation*, 30 June 1993.

80 Anonymous writer.

81 The author, who lost an uncle during these clashes, participated as an advocate during a public inquiry into the clashes ordered by the then President Moi. Evidence was tendered at the inquiry that the government was long aware of the plans to start the violence but chose to do nothing. Its response to the clashes was equally suspect.

82 The Resolution recognizes the disproportionate and unique impact of armed conflict on women and also calls for women's full participation in peace-building and conflict resolution.

83 Information from the community consultations.

84 See such reports as *The Cursed Arrow, op. cit.*

85 See *Special Working Document for the National Constitutional Conference: Report on Devolution of Power'*, Constitution of Kenya Review Commission, 19 August 2003.

86 Central Business of Statistics, *Economic Survey*, 2004.

87 UNDP, *Kenya Human Development Report 2001*, Nairobi, 2002.

88 *Ibid.*

89 Republic of Kenya, *Poverty Reduction Strategy Paper For the Period 2001–2004*, Nairobi, Government Printer, 2001, p. 1.

90 *Ibid.*

91 *Poverty Reduction Strategy Paper for the Period 2001–4*, *op. cit.*, p. 13.

92 *Ibid.*

93 Mwabu, G., *et al, Predicting Household Poverty: A Methodological Note with a Kenyan Example*, Nairobi, Kenya Institute for Policy Research and Analysis (KIPPRA), Discussion Paper Series no. 12, 2002, p. 8.

94 *Ibid.*

95 Government of Kenya, *Economic Survey*, 2004, p. 6.

96 For more information see the full report, also available on their website www.sidint.org.

97 Interview on 18 August 2004. The officer requested to remain anonymous.

98 Interview with Mr Fredrick Muthengi on 20 August 2004.

99 See, for example, the Poverty Maps, produced by the Central Bureau of Statistics in conjunction with the Ministry of Planning and National Development.

100 This officer requested to remain anonymous.

101 *Ibid.*

102 Republic of Kenya, *Turkana District PRSP Consultation Report for the Period 2001–2004*, p. 13.

103 Interview with IEA staff. Some organizations such as CEMIRIDE, which represents minority and indigenous peoples, have participated in these.

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