



International Environmental  
Law Research Centre

# CLIMATE CHANGE, LAW AND INDIGENOUS PEOPLES IN KENYA

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Published in: in Abate Randall S. & Elizabeth Ann Kronk, eds., *Climate Change, Indigenous Peoples and the Search for Legal Remedies* (London: Edward Elgar, 2013).

*This paper can be downloaded in PDF format from IELRC's website at  
<http://www.ielrc.org/content/a1308.pdf>*

# Climate Change, Law, and Indigenous Peoples in Kenya: Ogiek and Maasai Narratives

Patricia Kameri-Mbote and Elvin Nyukuri

## INTRODUCTION

Indigenous peoples' strong connection to the land, together with the ongoing climate change debate, prompts analysis of their increased vulnerability and ability to respond to climate change. The ability of indigenous people to respond is widely recognized to be dependent on several factors, such as cultural identity, livelihood, sense of place, security, visions for the future, and aspects of governance, all of which have a long history. Indigenous peoples' lives are a chronicle of their struggles to sustain their livelihood in fast-changing ecological, economic, and political contexts<sup>1</sup> coupled with the quest of their nation states' to change their ways of life.

The literature analyzing vulnerability to climate change has focused largely on bio-physical and economic impacts and contextual factors. There have been very few studies on the adequacy of laws and policies to address indigenous peoples' vulnerability to climate change. Yet it is evident that climate variability and change does not occur in a vacuum but in the context of political, institutional, economic, and social structures in a society which is subject to laws and policies.

Using the experiences of Maasai pastoralists and Ogiek forest dwellers, this chapter analyzes the inadequacies of Kenyan law in dealing with indigeneity and associated vulnerability. Indigeneity draws from a combination of cultural distinctiveness and prior territorial occupancy relative to a more recently-arrived population with its own distinct and subsequently dominant culture.<sup>2</sup> Claims to indigeneity for Maasai and Ogiek<sup>3</sup> communities are not explicitly recognized

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<sup>1</sup> See generally Mangwangi, Seif (for PINGO's Forum), 'Study Report on Hadzabe Livelihood at Sungu in Meatu, Mang'ola in Karatu, YaedaChini Valley in Mbulu and Kipamba in Iramba' (June 20 -July 6, 2010), at 1-2.

<sup>2</sup> ILO Convention 169, *Indigenous and Tribal Peoples Convention* 1969

<sup>3</sup> See e.g. Francis Kemei & 91 Others vs. Attorney General & 3 Others (Nairobi HCCC No.238 of 1999 and Memoranda to the Constitution of Kenya Review Commission (CKRC), May 2001.

in Kenyan law and policy. In this chapter, the reference to indigenous people with respect to these communities relates more to their pastoralist and forest dwelling livelihoods and culture than to their entitlement to the status of indigeneity on the basis of recognized indicia.<sup>4</sup> The terms “indigenous,” “minority” and “marginalized” are used interchangeably in reference to the Ogiek and the Maasai<sup>5</sup> who fall among the plains and highlands Nilotic speaking groups respectively.<sup>6</sup> There are also inter- and intra-generational dynamics within these communities such as gender and age which have an influence on determining varying degrees of vulnerability to climate change.

The chapter is divided into three parts. Part I discusses the issues of vulnerability to climate change, paying particular attention to the vulnerability of the Maasai and the Ogiek. Part II outlines the role of law in addressing vulnerability and considers the Constitution, framework and sectoral environmental laws, and specific interventions on climate change. Part III comprises the conclusion.

## **I. VULNERABILITY TO CLIMATE CHANGE**

### **A. VULNERABILITY TO CLIMATE CHANGE ASSESSMENTS IN KENYA**

Vulnerability assessments in Kenya analyze both past and projected climate change impacts on different sectors: (1) natural, (2) economic social, and (3) physical infrastructure. These analyses indicate that climate change has and will severely impact the country. The country’s economic and livelihood systems are highly dependent on natural resources, which are very sensitive to

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<sup>4</sup> The Draft Declaration is contained in UN Doc. E/CN.4/Sub.2/1994/2/Add.1 It outlines these as historical continuity with pre-invasion and pre-colonial societies that developed on their territories, distinctness from other sectors of the societies now prevailing on those territories, forming non-dominant sectors of society and determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.

<sup>5</sup> Maurice Odhiambo Makoloo, *Kenya: Minorities, Indigenous Peoples and Ethnic Diversity*, Minority Rights Group (2005), <http://www.minorityrights.org/download.php?id=147>.

<sup>6</sup> See generally Constitution of Kenya Review Commission (2005).

any slight changes in the climatic conditions which in turn affect people's livelihood. Consequently, the country is exceptionally vulnerable to climate change.<sup>7</sup>

Assessments of the country's health, agriculture, energy, and tourism sectors' sensitivity to climate change indicate that there is need to act.<sup>8</sup> For example, there is evidence of climate-sensitive diseases such as malaria in higher altitude zones such as Kericho and Nairobi where the disease is not known to be endemic.<sup>9</sup> In the agriculture sector, impacts include the increasingly intense and frequent drought episodes, successive seasons of crop failure, diminishing pasturelands, increasing episodes of floods with detrimental impacts on infrastructure, displacements by landslides, mudslides, and submergence of homes.<sup>10</sup> In the energy sector, declining energy resources, drying of biomass, and low levels of electricity production during drought are evident.<sup>11</sup> A study by the Stockholm Environment Institute on the economics of climate change in Kenya revealed that the future economic costs of the impacts of climate change on market and non-market sectors might be close to 3% of GDP per year by 2030 and potentially much higher by 2050.<sup>12</sup> Moreover, climate change also presents challenges to the country that are beyond its control such as the issue of carbon footprints/food miles, which is likely to impact the country's horticultural sector. Primarily, fresh produce consumers in Europe where most of the produce of Kenya is exported have demanded products with lower carbon footprints. A principal determinant of the carbon footprint is the air-miles that products have to cover between the production point and the point of sale.<sup>13</sup> Already some retail chains such as Marks and Spencer have reportedly started to import products from North Africa because of the

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<sup>7</sup> Stockholm Environment Institute, *Economics of Climate Change in Kenya*, Project Report (2009) (Hereinafter "SEI Project Report").

<sup>8</sup> Government of Kenya, *National Climate Change Response Strategy* (April 2010).

<sup>9</sup> Yanda, P et.al. Adaptation to climate change /variability induced highland Malaria and Cholera in the Lake Victoria region. AIACC WORKING paper NO.43 (2006); *see also* Githeko, A. et.al. Topography and Malaria transmission heterogeneity in the western Kenya highlands; prospects for vector control. *American journal of Tropical Medicine and Hygiene* 10;5:107 (2006).

<sup>10</sup> Mogaka, H. et.al, *Climate Variability and Water Resource Degradation in Kenya*, Improving water Resources Development and Management (2006); *see also* Takaoka, S. *Impact of the 1997-1998 El Nino Rains on Farm in the Mount Kenya Region*. *Mountain Research and Development*. 25 (4) at 326-331 (2005).

<sup>11</sup> Kiplagat, J & Wang, T. Renewable energy in Kenya: Resource Potential and status of exploitation, *Renewable and Sustainable energy reviews*, Vol 15, issue 6 (August 2011).

<sup>12</sup> SEI Project Report, *supra* note 2.

<sup>13</sup> Ministry of Environment, *Draft Climate Change Strategy* (2009) (on file with the authors).

close proximity to Europe. Tourism is another important sector of the country's economy that will be affected. Droughts are already affecting the wildlife.<sup>14</sup>

While these vulnerability assessments are a step in the right direction for the country to prepare policies and strategies to deal with climate change, it is imperative that the plight of indigenous people is addressed in national level assessments of climate change impacts. The existing vulnerability of these people drawing partly from the marginal environments they inhabit, and their dependence on these environments, makes them less resilient to climate variability. This in turn affects their ability to protect their families, livelihoods, and food supply. Climate change exacerbates their already precarious position.<sup>15</sup> That indigenous people have been treated as passive victims of hazards in Kenya is evident from the interventions identified in the National Climate Change Response Strategy (NCCRS), which states that climate change will disrupt food and fuel sources for indigenous people and that their capacity needs to be built to conserve forests.<sup>16</sup> The contribution that these communities can make to climate change responses is not given as much attention even though the strategy calls for an understanding of the vulnerable nature of communities and groups in designing an appropriate approach to coping with climate change impacts.<sup>17</sup>

This gap in vulnerability assessments at the national level needs to be filled to enable policy makers to develop a climate change policy and other related policies that encompass the needs of specific groups such as the indigenous communities.

## **B. VULNERABILITY OF THE MAASAI AND OGIEK PEOPLE TO CLIMATE CHANGE**

The Maasai and Ogiek live in different ecosystems, which include the arid and semi-arid, forest, and agricultural ecosystems. These communities have diverse cultures and livelihood strategies, and experience social, economic and political pressures from other communities, organizations, and the state. Their vulnerability to climate change stems from both the bio-physical impacts to

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<sup>14</sup> Government of Kenya, *National Climate Change Response Strategy* 35 (April 2010).

<sup>15</sup> Global Humanitarian Forum, *The Anatomy of a Silent Crisis, Human Impact Report*, Climate Change, at 2 (2009).

<sup>16</sup> See generally Government of Kenya, *National Climate Change Response Strategy* (April 2010).

<sup>17</sup> See generally Government of Kenya, *National Climate Change Response Strategy* (April 2010).

changes in the climate as well as from contextual factors. In the arid lands, it is projected that climate change will lead to a decrease in water availability and quality while extreme weather events such as droughts and floods will increase.<sup>18</sup> Agricultural productivity is expected to rise in some regions, with an overall decrease in drylands.<sup>19</sup> In the forest ecosystem, an increase in fires, droughts, and floods has been observed.<sup>20</sup> Climate change is projected to severely affect the health of especially vulnerable people through malnutrition, decrease in water quality, floods, fires, and droughts.<sup>21</sup>

### ***1. Change in Livelihood***

Previous research indicates that the Maasai and Ogiek communities experienced increasing competition for hunting, fishing, and pasture lands due to the presence of settlers.<sup>22</sup> The result was loss of land and water resources as a consequence of colonization. The Ogiek, for example, moved away from the forest to the farmland and had to adapt new forms of livelihood, including farming. The transition from hunting and gathering to farming has had both positive and negative implications for the Ogiek. On the positive side, the Ogiek have shown that they can adapt to changes when faced with extreme challenges.<sup>23</sup> However, the negative effects outweigh the positive outcomes. Since the Ogiek lack farming skills, have poor storage facilities, and lack information on market prices for their produce, they are unable to store harvested food and experience famine between harvests. This is paradoxical because the Ogiek had ways of storing honey (their main food) in the forest before they were forced out of the forest. Using their capacity to make the “Kisinguti,”<sup>24</sup> they could make food storage if facilitated.

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18 See generally Government of Kenya, *National Climate Change Response Strategy* (April 2010).

19 Intergovernmental Panel on Climate Change (IPCC) 2007. *Climate Change 2007. Synthesis Report, Summary for Policy Makers*. IPCC Fourth Assessment Report Geneva.

20 See generally Government of Kenya, *National Climate Change Response Strategy* (April 2010).

21 See generally Government of Kenya, *National Climate Change Response Strategy* (April 2010).

22 Sang, K. 2001. *The Ogiek in Mau Forest*, available at <http://www.forestpeoples.org/sites/fpp/files/publication/2010/10/kenyaeng.pdf> (last accessed April 25, 2012).

23 Interviews with Ogiek Community members, in East Mau, Kenya (June 2011).

24 “Kisinguti” is the Ogiek term for honey storage.

The new form of livelihood that the Ogiek adopted has also been affected by changes in the local climate.<sup>25</sup>The implications of long dry spells affect the farming activities that the Ogiek and other neighbouring communities engage in. The dry spells lead to droughts whereby lack of moisture has an immediate impact on the crop output and then later by floods. Already the unpredictability of Kenya's year to year productivity causes substantial problems for poor subsistence farmers as rain-fed crops are lost during the unusually dry or wet seasons. The successive seasons of crop failure have led to famine with famine cycles reducing from 20 years (1964-1984), to 12 years (1984-1996), to 2 years (2004-2006), to annually in 2007, 2008, and 2009.<sup>26</sup>

Livestock keeping does not generate income anymore owing partly to the outbreak of Rift Valley Fever disease that is known to occur during periods of high humidity that follow abnormally long rains, especially those associated with El Nino- Southern Oscillation (ENSO) events.<sup>27</sup> Another reason is that among the Ogiek, livestock was not a common mode of earning a livelihood and was introduced to them by the neighbouring Maasai who are their historical enemy.<sup>28</sup> It is therefore possible that the Ogiek resist this form of livelihood because of their cultural differences and lack of skills in animal husbandry, which explains both the low production and low incomes. Not surprisingly, the poorest of the Ogiek are those who settled among the Maasai and experienced slavery.<sup>29</sup>

While most literature identifies overgrazing as one of the drivers of deforestation and forest degradation,<sup>30</sup> the Maasai and Ogiek would only utilize trees as fodder or graze in the forested

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<sup>25</sup> Christy, J.R. *Surface Temperature Variation in East Africa and Possible Causes*. *Journal of climate*. 22: 3342-3356 (2009). Christy and co-authors examined air temperatures trends at 60 stations across Kenya. The study found a significant upward trend in minimum temperature in Kenyan highlands.

<sup>26</sup> Government of Kenya. *Kenya National Climate Change Strategy*. Also in *Agricultural Development Strategy* (2010).

<sup>27</sup> Thornton, P.K, J. Van de Steeg, A. Notenbaert, M. Herrero. The impacts of climate change on livestock and livestock systems in developing countries: A review of what we know and what we need to know, Elsevier, *Agricultural Systems*, Volume 101, Issue 3 (July 2009) 113-127.

<sup>28</sup> Interviews with Ogiek Community members, in East Mau, Kenya (June 2011).

<sup>29</sup> *Supra* note 22.

<sup>30</sup> Kiage, L. *Recent Land Cover/Use Change Associated With Land Degradation in the Lake Baringo Catchment, Kenya, East Africa*. Evidence from Landsat TM & ETM+. *International Journal of Remote Sensing*, 28: 19 4285-4309 (2006).

areas as a last resort during extreme droughts when they had no other grazing options.<sup>31</sup> Even in rare instances when trees are utilized as fodder, the Ogiek value system which promotes environmental conservation and integrity would discourage the indiscriminate cutting of trees.<sup>32</sup>In addition, as noted by Hesses,<sup>33</sup> most of the humid tropical/montane forests do not provide the best grazing environments for the local indigenous livestock breeds in the country. Moreover, the policies in place encourage increasing agricultural productivity and reforestation, which are seen as the most promising options to sustain the growing population and to support rural development.<sup>34</sup>

The low production in livestock could also be attributed to droughts that reduce available pasture upon which livestock feed.<sup>35</sup> The market prices for the weak and emaciated cattle tend to be low. For example, an animal that was sold at Kshs 30,000 in a favourable season could only be sold for Kshs.1,000 in 2009.<sup>36</sup> The Maasai and Ogiek see no difference between selling the animal alive and leaving it to die. Most choose to keep cattle hoping against all hopes that the rains will fall sooner than later. While the price of cattle is diminishing, the prices of the most basic consumer goods is increasing with inflation estimated at 26.2 % in 2008, 20.5% in 2009,<sup>37</sup> and 15.61% in March 2012.<sup>38</sup>

## **2. Changes in health, diseases and immunity**

The Ogiek are known to have a wealth of indigenous knowledge regarding medicinal plants.<sup>39</sup> A total of 94 traditionally named medicinal plants and corresponding diseases have been

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31 Interviews with Ogiek Community members, in East Mau, Kenya (November 2010- March 2011).

32 Interviews with Ogiek Community members, in East Mau, Kenya(November 2010- March 2011).

33 Hesses et.al. *Pastoralism and Climate Change: Enabling Adaptive Capacity*. International Institute for Environment and Development (2009).

34 *Supra* note 33.

35 *Supra*note 27.

36 Huho, J. et al. *Living With Drought: The Case of Maasai Pastoralists Of Northern Kenya*. Educational Research Vol.2 (1) at779-789 (2011).

37 *See generally* CIA Fact Book. <https://www.cia.gov/library/publications/the-world-factbook/geos/ke.html> (last visited April 25, 2012).

38 Government of Kenya, Kenya National Bureau of Statistics , CPI and Inflation Rates For March 2012. <http://www.knbs.or.ke/cpi/cpi032012.pdf> last visited April 25, 2012).

39 Kiragu, J.M. .Trends, Local Perceptions and Cost of Waterborne Diseases in River NjoroWater Shade, Nakuru District. Ms Thesis, Egerton University (2006).

documented.<sup>40</sup> These medicinal plants have been used to treat a total of 38 diseases or disorders.<sup>41</sup> However, with the rapid disappearance of natural habitats in their homeland, the Ogiek are losing important medicinal plant resources, which has negatively impacted their knowledge of medicinal plants. Most medicinal plants are found growing in the wild with only a few species intentionally grown in gardens or agricultural fields. In addition, indigenous knowledge of ecosystems is learned and updated through observation, so the displacement of the Ogiek and Maasai from their ancestral land has and will continue to affect the inter-generational cycle of learning.<sup>42</sup> Since this knowledge is passed through observation over long periods of time, the movement of communities such as the Ogiek and the Maasai from their lands makes the passage of the knowledge difficult. This is confounded by the change in lifestyles forced on the communities by these movements and the absence of opportunity to pass on knowledge to younger generations.

There are increased incidences of malaria in areas that did not experience malaria before.<sup>43</sup> The strong winds sweep the dust from the open lands that have been left bare due to effects of deforestation and causing contamination of the air and water. While floods contaminate the water, the rising temperatures are seen to worsen the accumulated contamination causing respiratory and waterborne diseases to linger and develop into new diseases. Ritual practices and preventive measures meant to counter such adverse effects and dangers of each season have increasingly failed to have the desired effect.<sup>44</sup>

As early as 1876, a cholera outbreak wiped out sections of the Ogiek population.<sup>45</sup> This information indicates that as much as the *Ogiek* claim to be self-sufficient in containing the diseases they encounter using the traditional medicine,<sup>46</sup> there were situations where the community could not handle catastrophes of such magnitude. Therefore, they needed external

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<sup>40</sup> Ngari, E et.al .Ethno medicine of Ogiek of river Njoro water shade, Nakuru, Kenya. Ethno botany Research & Applications 8: 135-152 (2010).

<sup>41</sup> *Id.*

<sup>42</sup> Ohenjo, N,*Health of Indigenous People in Africa*,Lancet 367 (9526) at 1937-46 (2006).

<sup>43</sup> *Supra* note 9 Githeko et.al (2006).

<sup>44</sup> Sang, *supra* note 22.

<sup>45</sup> Blackburn, R. The “*Ogiek and their history*”, Azania vol 9: 146 and 150 (1974).

<sup>46</sup> Interviews with Ogiek Community members, in East Mau, Kenya(June 2011).

help either from the government or from well-wishers to contain the problem. Like climate change, the cholera outbreak was an external problem out of the Ogiek's control, which could not be resolved by the community resources.

Changes in health are attributed to change of food from fresh meat, wild fruit and honey to consuming starch such as potatoes and maize and eating highly processed food. The high consumption of alcohol by both the old and young is a learned behavior.<sup>47</sup> Though the Ogiek used to brew alcohol made from honey, they report that the alcohol that they consume now is contaminated with chemicals and not good for their health.<sup>48</sup> Elders use a large number of plant species for healing and ritual practices but the ability to carry out these practices is compromised when they cannot successfully grow the plants they need.<sup>49</sup> The elders are now forced to walk for long distances to look for medication unlike in the forest where the herbs were abundant. The Ogiek report that the health they were born with does not rhyme with the modern medicine.<sup>50</sup> The lack of trust in this modern medicine translates to them not believing that they would be healed by it. Like many tribes, Ogiek and Maasai find it hard to embrace a culture other than their own. In addition, new and numerous diseases compound their healing and prevention abilities.<sup>51</sup>

### ***3. Changes in water volumes***

Increasingly the Maasai and *Ogiek* have witnessed the water volume in the rivers diminishing. For example, during the 1984 drought, the Ngabol and Ildupa springs in the Laikipia District dried up and never rejuvenated while the waters of the Ilpudk spring reduced during the 1999-2000 prolonged drought.<sup>52</sup> The decrease in water volume in the Mau Complex is a consequence of the effects of deforestation as well as a result of residents' of the Mau failure to abide by the government laws.<sup>53</sup> The government's policy was that every citizen had to leave a space of 50

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47 Interviews with Ogiek Community members, in East Mau, Kenya (January 2011).

48 Interviews with Ogiek Community members, in Nessuit-East Mau, Kenya (November 2010-March 2011).

49 *Id.*

50 *Id.*

51 *Id.*

52 *Supra* note 36.

53 Interviews with Ogiek Community members, in Nessuit-East Mau, Kenya, (November 2010-March 2011).

feet between farming and a river.<sup>54</sup> However, overtime these laws were not followed due to high demand for land for farming because of population increase in the area.

#### **4. Changes in the tree species**

The harvesting of exotic trees by timber companies and the settlers has affected the composition of the Mau forest, a home to the Ogiek community.<sup>55</sup> When indigenous forests are replaced by exotic plantations, the ecosystem is disturbed and many changes occur, especially an increase in sunshine, forest fires, and diseases, and the quality of honey is also affected.<sup>56</sup> Some of the indigenous tree species include *Olea Africana*, *prunus Africana*, *Dombeagoetzenii*, *Juniperus Procera*, *Oleacapensis*, *Bamboo spp.*<sup>57</sup> The Ogiek believe that traditional trees brought rain resulting in less frequent drought and forest fires. The importance of indigenous trees is acknowledged by Lambrechts<sup>58</sup> who affirms that indigenous forests store more carbon, regulate weather conditions better, and contain more varied biodiversity than tree plantations and reforested areas. But reforestation and commercial forestry are also important for creating a renewable source of wood products and a buffer between humanity and the ancient trees.

#### **5. Strong winds and change in housing**

The Ogiek formerly constructed their houses with grass, which they believed was stronger than the corrugated iron roofed houses in which they currently reside.<sup>59</sup> The grass-thatched houses were stronger and could not be blown away by the wind. However, since land has been left bare, they are now experiencing strong winds which blow away these houses. The youth appreciate the iron roofed houses they currently live in but the elderly would prefer the old house.<sup>60</sup> The modern houses are too hot for them to live in, especially during dry spells.

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<sup>54</sup> Agriculture Act, Chapter 318 of the Laws of Kenya. (could not pull up this citation to format correctly)

<sup>55</sup> Interviews with Ogiek Community members, in Nessuit-East Mau, Kenya, (November 2010-March 2011).

<sup>56</sup> *Id.*

<sup>57</sup> Government of Kenya. *Report of the Prime Ministers Task Force on the Conservation of the Mau Forest Complex* (2009).

<sup>58</sup> Lambrechts, C. *Destruction of Aberdare Range Forests*. Division of Early warning. UNEP. at 36 (2003).

<sup>59</sup> Interviews with Ogiek Community members, in Nessuit-East Mau, Kenya, (November 2010-March 2011).

<sup>60</sup> *Id.*

## **6. Culture**

Social and cultural activities such as traditional rites of passage (*e.g.* naming, initiation, marriage, graduation to adulthood, age set formation ceremonies) that ideally should be held collectively as a community are constantly affected by not only the evictions but by persistent droughts. The prolonged droughts affect certain plant and tree species utilized in such ceremonies. The out-migration of the youth in the urban areas in search for employment opportunities weakens the importance of these rites of passage. The ripple effect of these delayed rites of passage strains the capacity of sharing and perpetuation of indigenous knowledge systems among the Maasai and Ogiek. These changes affect their ability to adapt quickly to changes to their environment, which leaves them more vulnerable.

Acknowledging the links between cultural identity and climate change is particularly relevant for the Maasai and Ogiek given the richness of their traditional knowledge, cultural heritage, innovative responses to changes and challenges posed by climate change. Like other indigenous peoples, the Maasai and Ogiek have been calling on the integration of both scientific knowledge and research together with values, principles, and practices of indigenous relationships with the natural world, which can provide a sustainable future. In addition, they interpret and react to climate change impacts in creative ways, which may help society at large to cope with the impending changes because indigenous peoples' concepts about the environment are rooted in their language and cultural practices. This understanding stands in contrast to the notion of development, which classifies the poor as deprived because they lack education, knowledge, and experience to make rational choices.

Communities living in the dry lands such as the Maasai are acknowledged to be among the most vulnerable communities due to a combination of political, economic, and social factors as well as erratic rainfall,<sup>61</sup> yet still it is these people who have extensive knowledge about adaptation to climate variability and who have successfully sustained their communities from dry land ecosystem services for centuries. Dry lands are characterized not so much by a shortage of water, but by erratic availability and a variable climate. Consequently, some argue that pastoralists will

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<sup>61</sup> Neely, C. Bunning, S & Wilkes, A. Review of evidence on drylands pastoral systems and climate change. Land and Water discussion paper.No.8. FAO 2009.accessed at [http://www.fao.org/uploads/media/LWdisc\\_paper8\\_temp.pdf](http://www.fao.org/uploads/media/LWdisc_paper8_temp.pdf) .

be best equipped to adapt to climate change<sup>62</sup> given their traditional knowledge and management systems. However, because of their political and economic marginalization, their adaptive capacities have been severely undermined and they have become in many cases more vulnerable than other communities because of the scale and intensity of recent climate change.

### **7. Intergenerational Effects**

The effects of climate change will affect the future generations, creating an inter-generational dimension to the current climate change strategies and policies. Values change over time and between generations. The Maasai and Ogiek view themselves as indigenous people because of their cultural cohesion and because they depend on natural resources for their livelihood. To maintain their livelihood, they depend heavily on cultural, human, and social assets including traditional knowledge systems and institutions that are now under increased stress.<sup>63</sup> However, climate change is defining development pathways that will affect and alter indigenous groups' cultural means of livelihood and survival.

Intergenerational equity is relevant in this context because actions taken or not taken today will affect future generations. Global warming will affect the full enjoyment of accepted human rights including the right to life, the right to culture, and the right to property. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)<sup>64</sup> acknowledges the right to self-determination of indigenous populations. It states; "Indigenous peoples have the right of self determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."<sup>65</sup>UNDRIP further affirms that "Indigenous peoples have the right to participate fully, if they choose at all levels of decision making which may affect their rights."<sup>66</sup> "Freely determine their political status" raises issues of participation and consent in the procedures leading to change of the political order under which people live. For instance, "Freely pursue their economic, social and cultural development" requires a

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<sup>62</sup> Ogendi, G, Morara, R AND Olekaikai,N. The influence of westernization, water resources use and conservation among Maasai people of Kenya. In *Water, Cultural diversity & Global Environmental Change: Emerging trends, Sustainable futures* . Johnston BR et al (eds) UNESCO 2012.

<sup>63</sup> Salick, J., Byg, A (eds.) *Indigenous Peoples and Climate Change*. Tyndall Centre, Oxford UK (2007).

<sup>64</sup> United Nations Declaration on the Rights of Indigenous Peoples, art.3, Sep. 13, 2007.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at art. 19.

governing institutional order under which individuals and groups are able to make substantial choices concerning all spheres of life on a continuous basis.<sup>67</sup>

## **II. PROTECTING THE RIGHTS OF THE MAASAI AND OGIEK IN THE CONTEXT OF CLIMATE CHANGE: THE ROLE OF LAW**

### **A. LEGAL FRAMEWORK**

Kenya has a plural legal system in which the Constitution is the supreme law but it also allows for the operation of other laws, namely, customary law and religious law, as long as they are consistent with the constitutional tenets.<sup>68</sup> Interestingly, the Constitution provides that the general rules of international law shall form part of the law of Kenya as well as any treaty or convention ratified by Kenya.<sup>69</sup> The Ogiek and Maasai, who view themselves as indigenous peoples in Kenya, were not recognized in the previous Constitution and therefore made representations to the Constitution of Kenya Review Commission (CKRC). One of the objectives of Review was to secure “provisions ...respecting ethnic and regional diversity and communal rights including the right of communities to organize and participate in cultural activities and the expression of their identities’.<sup>70</sup> This is the crux of the contention of the two communities –the need to be recognized as a distinct group entitled to an identity and participation in the political, cultural, social and economic life of this country.<sup>71</sup> Kenya has signed and ratified the International Covenants on Civil and Political Rights (ICCPR)<sup>72</sup> and Economic, Social and Cultural Rights (ICESCR),<sup>73</sup> both of which recognize the right of people to self-determination and the principles of equal rights and non-discrimination. The Ogiek and Maasai can use these protections as the spring

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<sup>67</sup> Anaya, J. *Indigenous Peoples in International Law*. Oxford University Press. 1996

<sup>68</sup> *The Constitution of Kenya* [Kenya], August 27, 2010, art. 2.

<sup>69</sup> *The Constitution of Kenya* [Kenya], August 27, 2010, art.2, (5), and (6).

<sup>70</sup> Section 4 (e) The Constitution of Kenya Review Act, [Kenya], No. 9, 2008.

<sup>71</sup> Workshop Report “*Strengthening the Participation of Pastoralists and Hunter-Gatherer Communities in The Kenya Constitution Review Process*”, 28 to 30 November 2001 Nairobi Hosted by: Centre for Minority Rights Development (CEMIRIDE), Supported by: International Labour Organization Project to Promote ILO Policy on Indigenous and Tribal Peoples.

<sup>72</sup> United Nations. *International Covenant on Civil and Political Rights*, New York (1966), available at <http://treaties.un.org>. (last visited April 25, 2012).

<sup>73</sup> United Nations, *International Covenant on Economic, Social and Cultural Rights*, available at <http://treaties.un.org> (last visited April 25, 2012)

board for recognition of their right to a way of life as pastoralists and forest dwellers. Kenya has not yet adopted UNDRIP.<sup>74</sup> Indeed Kenyan policy and law refers to these communities as marginalized and minority communities rather than indigenous peoples.

The Issues and Recommendations Report prepared for the National Land Policy stated that the “link between culture and environment is clear among indigenous people.”<sup>75</sup> This link, it continued, is spiritual, cultural, social and economic and the physical and cultural survival of indigenous people is dependent upon the protection of their land and related resources.<sup>76</sup> It also incorporated an intergenerational dimension when it stated that traditional laws, customs, and practices reflect both an attachment to land and responsibility for preserving traditional lands for use by future generations.<sup>77</sup>

The plight of the Maasai and Ogiek in the environmental management realm, which includes climate change, conveys a scenario of environmental injustice -- the members of a disadvantaged, ethnic, minority suffering disproportionately at the local and national levels from environmental risks or hazards; suffering disproportionately from violations of fundamental human rights as a result of environmental factors; and denied access to environmental investments, benefits, natural resources, information and a right to participate in decision-making in environment-related matters.<sup>78</sup> Indeed, the context for the protection of the rights of indigenous peoples in the environmental realm at the national level is embedded within respect for civil, political, economic, and social rights provided for in national constitutions, framework environmental laws, and sectoral statutes.

The new Constitution provides the broad legal framework within which the rights of indigenous people are protected. The Preamble to the Constitution, provides that Kenyans are proud of their “ethnic, cultural and religious diversity, and determined to live in peace and unity as one

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<sup>74</sup> United Nations, Declaration on the Rights of Indigenous Peoples (2008), available at [www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf)

<sup>75</sup> Ministry of Lands and Housing, *National Land Policy Formulation Process*, Issues and Recommendations Report, 15 (August 2005).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Kameri-Mbote, P, Towards Greater Access to Justice in Environmental disputes in Kenya, Opportunities for intervention. Kenya Law Society Digest 2005.

indivisible sovereign nation” as well as “respectful of the environment, which is our heritage, and determined to sustain it for the benefit of future generations”.<sup>79</sup> Article 27 comprises a robust non-discrimination clause, which proscribes direct or indirect discrimination on the grounds of “race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.”<sup>80</sup> Indigenous communities can challenge discrimination on the basis of this provision especially where such discrimination arises because of their way of life.

Natural disasters such as floods and droughts strain the capacity of the existing structures and processes and in a context of marginalization may exacerbate the plight of individuals and communities. It is within this context that climate change impacts on indigenous peoples must be taken into account along with the values and perceptions of different stakeholders including law and policy makers and development agencies. The difference in values can derail the process of designing effective climate change policies. Turner et al. argue that losses that are indirect and cumulative are more likely to be invisible in environmental decision making and that such losses typically include cultural and lifestyle losses, loss of identity, self-determination and influence, and changes which for those experiencing it represent “loss of order in the world.”<sup>81</sup> Taking the forest ecosystem as an example, those promoting conservation efforts to minimize environmental degradation may face value conflicts with those promoting access to timber, carbon credits and those who value the forest as a human habitat.

Implementing a climate change policy that does not factor in value conflicts will give rise to a new set of impacts and consequences. These consequences in turn will affect people, communities, businesses, and other actors differently. In some situations, such as when genuine politically driven development programs or land reform or national security purposes are involved, the government may have no interest in halting the process of orderly deforestation, regardless of what it tells the press or the public. However, this could have consequences on the implementation of proposed climate initiatives such as Reducing Emissions from Deforestation

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<sup>79</sup> *The Constitution of Kenya* [Kenya], August 27, 2010 Preamble.

<sup>80</sup> *The Constitution of Kenya* [Kenya], August 27, 2010, art.27 (4).

<sup>81</sup> Turner B L & Robbins P., Land change science and political ecology: similarities, differences and implications for sustainability science, *ANNUAL REVIEW RESOURCES* 295-316(2008).

and Forest Degradation (REDD). Equally challenging is when the government is willing to relocate a group of people for the purpose of promoting REDD programs. The challenge on the part of the government will include resettling those who have been relocated from their land, finding alternative sources of livelihood, and providing compensation to the losers under this arrangement. The Constitution provides the right to a healthy environment, which by implication can be read to mean that indigenous peoples have a right to the protection of their environment.<sup>82</sup>

In article 69 of the Constitution, it states;

(1) The State shall—

- (a) ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits;
- (b) work to achieve and maintain a tree cover of at least ten percent of the land area of Kenya;
- (c) protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities; and
- (d) encourage public participation in the management, protection and conservation of the environment.

These provisions are relevant for indigenous people whose livelihoods are dependent on the environment. For the Ogiek, forest conservation is especially critical and the decimation thereof has forced them to drastically change their way of life to farming and livestock keeping, which they are not well equipped to do.<sup>83</sup>

Timber operations and use of wood fuel as energy have particularly impacted forests in Kenya and tracts of forests have been cleared leaving a paltry 3% forest cover. This explains the constitutional provision on raising forest cover to at least 10%. Logging and deforestation accounts for about 20% of the world's greenhouse gas emissions worldwide.<sup>84</sup> Given that the demand for energy in Kenya leads to deforestation, and 74% of all energy consumed in Kenya is wood fuel,<sup>85</sup> it is likely that land use change and deforestation account for a significant portion of greenhouse gas emissions in Kenya.

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<sup>82</sup> *The Constitution of Kenya* [Kenya], August 27, 2010, art. 42.

<sup>83</sup> Interviews with Ogiek Community members, in Nessuit-East Mau, Kenya, (November 2010-March 2011).

<sup>84</sup> IPCC, *The Physical Science Basis, Contribution of working group 1 to the fourth assessment report of IPCC* 499-587 (eds. Solomon, S. et al. Cambridge University Press 2007)

<sup>85</sup> IEA *Energy Balances of non-OECD Countries*, Paris: International Energy Agency (2007).

Dealing effectively with climate change impacts on indigenous people will require holistic evaluation of adaptation options assessing the technological, economic, political, social and psycho-social impacts of legal and policy arrangements across a wide range of sectors. The Ogiek, for example, no longer control their ancestral lands, places of worship, or the kind of livelihood they desire to have. Currently, they have no land tenure recognition under the law and thus would not be in a position to participate in carbon offset schemes that require one to have legal rights to the forest land involved. They have been denied the freedom to operate in an environment --the forest—that they so desire and are thus forced to change their lifestyle.

The legal regime for the protection of the environment in Kenya consists of the Constitution and the Environment Management and Coordination Act, which is the framework environmental law and sectoral laws on forests, water, and wildlife among others. In addition to these, Kenya has the National Climate Change Response Strategy and a draft Climate Change Bill. In addition to the right to a healthy environment, the Constitution provides for economic and social rights,<sup>86</sup> including rights to (1) health care services; (2) accessible and adequate housing; (3) reasonable standards of sanitation; (4) be free from hunger and have adequate food of acceptable quality; (5) clean and safe water in adequate quantities; (6) social security; and (7) education. These rights are very important for marginalized communities like the Ogiek and Maasai. In addition to these, the Constitution also provides the right of all persons to use the language and participate in the cultural life, of the person's choice -- issues that are close to the hearts of the members of these two communities.<sup>87</sup>

While these rights are not directly linked to climate change, climate change as a threat multiplier will lead to further marginalization of the members of these communities and the tools they have at their disposal to mitigate or adapt to climate change will be weaker in the absence of a strong legal protections to ensure their access to basic amenities and the ability to use their culture and language.

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<sup>86</sup> *The Constitution of Kenya* [Kenya], August 27, 2010, art. 43.

<sup>87</sup> *The Constitution of Kenya* [Kenya], August 27, 2010, art. 44.

## **B. THE FRAMEWORK ENVIRONMENTAL LAW AND SECTORAL LAWS**

The Environment Management and Coordination Act <sup>88</sup>provides for the establishment of an appropriate legal and institutional framework for the management of the environment recognizing that the environment constitutes the foundation of national economic, social, cultural and spiritual advancement. It does not deal with the vulnerabilities of specific actors in society and is therefore silent on the plight of indigenous peoples. The Act, however, requires any person executing a project, program, or policy that may have an impact on the environment to undertake an Environmental Impact Assessment (EIA) study and prepare a report for the National Environmental Management Authority (NEMA). The Environmental Impact Assessment and Audit regulations of 2003 clarify what an EIA study should include. First, it must take into account environmental social, cultural, economic, and legal considerations. Second, the study must, among other things, identify anticipated environmental impacts, examine alternatives to the project, and put in place mitigation measures once the project is implemented. Third, the person executing the project is required to consult the persons who may be affected by the project. REDD projects which aim at rewarding or compensating tropical developing countries for keeping their forests intact or for reducing the scale of deforestation may require an EIA. The Mau forest, a home to the Ogiek and partly the Maasai, serves as a good example where conservation programmes are being implemented and the REDD+ scheme is one of them. The Mau forest is one of the largest forest systems that has been encroached upon and destroyed on a significant scale during the past years as a result of logging, creation of tea plantations, and land allocations. All these activities were carried out without completion of EIAs prior to the degradation of the ecosystem and negative impacts to the water table, agricultural productivity, and wildlife. The Mau Task Force noted that most if not all land allocations were illegal. Efforts to conserve the Mau ecosystem have led to evictions affecting the Ogiek, a forest people who have lived in harmony with the Mau forest and preserved the forest since time immemorial.

This scenario illustrates how the responsiveness and accountability of formal rules and the agencies responsible for their design and implementation will influence the timeliness and effectiveness of climate change adaptation strategies. The inadequate relationship between laws

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<sup>88</sup> Government of Kenya, Ministry of Environment and Natural Resources, The Environmental Management Act, Act No. 8 of 1999.

established during colonization and traditional rules that deal with forests in Kenya is one of the barriers to effective implementation of adaptation strategies. In Kenya, while it is claimed that the Forest Act 2005<sup>89</sup> recognizes the rights of local communities, the Act has many shortcomings and the recognition of local communities' rights is limited. First, it does not recognize those forest dwelling communities that have always lived and resided in the forests such as the Maasai, Ogiek, and others. While there is booming demand for forest products, little benefit from the harvesting of such products accrues to forest communities. Joint forest management in its current form is an extremely weak arrangement where most powers are vested with the forest department. The Forest Act avoids mentioning the "historical injustice" against sustainable forest life. The World Conservation Union has outlined what needs to be done to protect natural heritage is to address historical injustices caused through the establishment of protected areas. It proposes that, countries should "establish participatory mechanisms for the restitution of indigenous people's lands territories and resources that have been taken over by protected areas without their consent."<sup>90</sup>

Kenya unveiled a draft policy on internally displaced persons (IDPs) in March 2010 in Nairobi. This draft policy seeks to enhance the protection and assistance of IDPs, prevent future displacement, and provide appropriate durable solutions. The policy covers situations of internal displacement due to factors including political and resource-based conflict, natural disasters, and development projects and is based on the Kampala Convention<sup>91</sup> to a great extent. This policy also insists on the adoption of laws that deal with historical injustices related to land. Land issues have often played a substantial role in causing conflict and displacement in Kenya. If implemented, this policy might bring about positive changes to the plight of environmentally displaced persons such as the Maasai and Ogiek in Kenya.

The Kenyan draft policy on IDPs covers persons who are forced from their homes as a result of the execution of development projects without proper relocation. Development-induced

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<sup>89</sup> See generally Government of Kenya, *Forest Act* Government printers 2005.s

<sup>90</sup> See article 16 of IUCN charter.

<sup>91</sup> African Union, African Union Convention for the Protection and Assistance of internally displaced Persons in Africa (Kampala Convention), available at [www.unhcr.org/refworld/docid/4ae572d82.html](http://www.unhcr.org/refworld/docid/4ae572d82.html) (last access April 25, 2012).

displacement also receives considerable attention in both the Protocol on IDPs and the Kampala Convention. In addition to explicitly including persons displaced by large scale development projects, the Protocol on IDPs in its definition of IDPs provides that

States as much as possible shall prevent displacement caused by projects carried out by public or private actors

State parties shall ensure that the stakeholders concerned will explore feasible alternatives, with full information & consultation of persons likely to be displaced by projects

State parties shall carry out a socio-economic & environmental impact assessment of a proposed development project prior to undertaking such a project

The Kampala Convention also contains several provisions specifically dealing with displacements as a result of natural disasters. It calls on states to devise early warning systems in areas of potential displacement and establish and implement disaster risk reduction strategies, emergency and disaster preparedness and management measures and, where necessary, provide immediate protection and assistance to internally displaced persons.<sup>92</sup>

Kenya seeks to gain from the Kampala Convention if it signs and ratifies this convention. The Kampala Convention will strengthen the existing standards for IDP protection and assistance because Kenya does not have a comprehensive disaster preparedness policy today. As a result, the country's response to natural disasters such as droughts and floods is rather slow or poorly coordinated. Nevertheless, the Kenyan government is aware of the need for a legal policy and an institutional framework for effective management of disasters. A case study on the 1999-2001 drought crisis in Kenya reveals that the cost of emergency aid associated with the drought resulted in 60% of the livestock and crop failures in several parts of the country, which was twice the amount that would have been required if there had been an effective disaster management system in place at that time.<sup>93</sup>

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92 *Id.*

93 Akililu, Y and Wekesa, M. Drought Livestock & Livelihoods; Lessons from the 1999-2001 emergency response in the Pastoral sector in Kenya. Overseas Development Institute. London. 2002

## C. RELEVANT POLICIES

### 1. The National Land Policy

The National Land Policy<sup>94</sup> contains provisions on disaster management.<sup>95</sup> It acknowledges that the country experiences disasters such as floods, earthquakes, and landslides that lead to the loss of both human and animal life. It also notes the negative impacts on agriculture and to the natural environment, as well as the destruction of property. The policy recognizes that there are no legal, policy, and institutional frameworks for the prevention and management of land-related disasters.<sup>96</sup> It proposes that the Government establish legal, policy, and institutional frameworks for the prevention and management of land-related disasters and a suitable legal and administrative framework for resettlement in the event of natural disasters.<sup>97</sup>

The National Land Policy also recognizes the need to address the plight of marginalized communities, which it deals with in the section on land issues requiring special intervention. It defines vulnerability as a manifestation of poverty and deprivation including “lack of adequate shelter, illiteracy, exposure to ill treatment, lack of power to influence decisions affecting one’s life, and disabilities.”<sup>98</sup> It identifies pastoralists and hunters as among the most vulnerable who lack voice, power, and representation in society, which in turn limits their opportunities with respect to land. The Policy proposes a number of interventions which include development of mechanisms to identify, monitor, and assess the vulnerable groups; facilitation of participation in decision-making over land and land-based resources; and protection of their land rights from unjust and illegal expropriation.<sup>99</sup>

The Policy also defines minority communities as those that are culturally dependant on specific geographical habitats and who, over the years, have lost access to land and land-based resources critical for their livelihoods. It recognizes that these communities have not been adequately

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<sup>94</sup> Government of Kenya, National Land Policy, Sessional Paper No. 3 of 2009.

<sup>95</sup> *Id.* at Part 3.6.7.

<sup>96</sup> *Id.* at Para. 200.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at Para. 194.

<sup>99</sup> *Id.* at Para. 197.

represented in governmental decision-making because of their numerical inferiority.<sup>100</sup>To address these problems, the government proposes to undertake an inventory of the existing minority communities to obtain a clear assessment of their status and land rights, and develop a legislative framework to secure their rights to individually or collectively access and use land and land based resources.<sup>101</sup>

## **2. National Climate Change Response Strategy<sup>102</sup>**

The NCCRS was developed by the Ministry of Environment and Mineral Resources in response to the increasing effects of climate change in the country, the resulting opportunities and the need to put in place measures necessary to address the challenges posed by climate change in the country. The Strategy was developed through a consultative process factoring in contributions from various workshops that were conducted countrywide. The NCCRS is the first document that seeks to integrate climate information into Government policies cutting across all the relevant sectors of the economy. It is the country's key government climate change agenda guide through which other nation-wide climate change program development activities will be implemented. As such, the Strategy is meant to guide the process of formulation of relevant government policies such as the National Climate Change Policy.

The Strategy also seeks to align efforts to combat climate change with the country's development plans and rectify the non-recognition of climate change "as a problem that could hamper the country's ambitious development goals" articulated in its economic blueprint, Vision 2030. It proposes "climate smart" development and "climate change proof" solutions necessary for the attainment of Vision 2030 goals.<sup>103</sup> It also proposes the need to re-examine Vision 2030 with a view to amending it to reflect the climate change problem<sup>104</sup> as a way of mainstreaming climate change into sectoral and development priorities.<sup>105</sup>

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<sup>100</sup> *Id.* atPara. 198.

<sup>101</sup> *Id.* atPara. 199.

<sup>102</sup> *See generally* Government of Kenya, *National Climate Change Response Strategy* (April 2010).

<sup>103</sup> *See generally* Government of Kenya, *National Climate Change Response Strategy* 17(April 2001).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

The NCCRS seeks to respond to the challenges and opportunities arising from climate change by<sup>106</sup>

- Putting in place robust adaptation and mitigation measures needed in order to minimize risks associated with climate change while maximizing opportunities;
- Enhancing understanding of climate change and its impact nationally and in local regions;
- Providing conducive and enabling policy framework and a concerted programme of action to combat impacts of climate change;
- Enhancing Kenya's participation in the global climate change negotiations;
- Enhancing understanding of international agreements, policies, and processes and the positions Kenya needs to take in order to maximize beneficial effects; and
- Providing a coordinated approach and overall guidance to the implementation of programmes.

The Strategy seeks to have the following action taken as its objectives:

- Recommendations for short-term, medium-term, and long-term priorities for implementing adaptation and mitigation strategies;
- Education and awareness programmes implemented;
- Specific sectoral and cross-sectoral adaptation measures put in place for vulnerable groups and communities;
- Assessment of climate change threats and risks at national and local levels;
- Recommended capacity building framework in strategic climate change areas implemented;
- Specific research and development needs necessary to address climate change, and opportunities for technology development and transfer identified;
- Governance of climate change, that is, policy, legislation and institutional frameworks strengthened; and
- A framework for monitoring and evaluating impacts of climate change developed and applied.<sup>107</sup>

These objectives will be implemented through various strategic programmes and projects. They include:

- Adaptation and mitigation;
- Education and awareness programmes;
- Assessing vulnerability and climate change threats;

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<sup>106</sup> *Id.* at 5.

<sup>107</sup> *Id.* at 6.

- Capacity building framework in strategic climate change areas; and
- Research and development needs, and technology development and transfer.

The Strategy also proposes the establishment of a secretariat dedicated to climate change which will oversee the implementation of the Action Plan supported by a climate change expert group. It proposes that the Government should create a multi-stakeholder National Adaptation Facility (NAF) for mobilizing resources for adaptation activities.<sup>108</sup>The Strategy will operate within an integrated framework anchored on UNFCCC and in complement with the United Nations Convention to Combat Desertification (UNCCD) and the Convention on Biological Diversity.<sup>109</sup> The reference to vulnerability assessment brings the Strategy close to the Maasai and the Ogiek. However, it remains to be seen whether and how the specific action plans under the Strategy will address the concerns of these communities. These are currently being worked out. The action plans under the Strategy should recognize the close links between the Maasai and the Ogiek and their environment and specifically address their vulnerability to climate change while putting in place specially tailored mitigation and adaption plans for them.

### **3. Draft Climate Change Bill 2012**

An interesting development is the introduction of a Climate Change Bill as a Private Member's Bill. Developed by the Kenya Climate Change Working Group, a coalition of non-governmental organizations, which includes groups representing indigenous peoples, the bill seeks to establish the Climate Change Authority, provide a framework for mitigating and adapting to the effects of climate change on various sectors of the economy, and provide for the development of response strategies to the effects of climate change.<sup>110</sup>Section 3 outlines the objectives of the Bill as providing a framework for mitigating and adapting to the effects of climate change on all sectors of the economy; appropriate response strategies in relation to climate change; and mechanisms for the financing, coordination and governance of matters of climate change. Among its guiding principles are ensuring public participation and consultation with stakeholders and promoting sustainable development under the changing climatic conditions.<sup>111</sup>

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 17.

<sup>110</sup> Draft Climate Change Bill (March 2012).

<sup>111</sup> Section 4, Draft Climate Change Bill (March 2012).

Under Section 19, the Climate Change Authority, established as the lead climate change agency is required to formulate, implement, publish, and regularly update national climate change programmes in strategic climate change sectors. Such programmes are to be informed by factors including the socio-economic well-being of any segment or part of the population; social circumstances, in particular, the likely impact of the programmes on marginalized and disadvantaged communities; environmental considerations, in particular, the likely impact of the programmes on biodiversity and the ecosystem; and indigenous knowledge related to climate change adaptation and mitigation.<sup>112</sup> These considerations provide an opportunity for the interests and needs of the Ogiek and the Maasai to be considered in framing climate change programmes. The Bill is yet to be brought before Parliament and it is difficult to anticipate what will happen to it given the heavy workload emanating from bills seeking to implement the 2010 Constitution and the fact that this is the last year of Parliament before the next general election slated for 2012 or early in 2013.

### **III. CONCLUSION**

Indigenous peoples' close links with their environments make them very vulnerable to the impacts of climate change as the experiences of the Ogiek and the Maasai demonstrate. Kenyan laws on rights and the environment fall short of recognizing indigenous communities. These laws do, however, recognize that there are marginalized and vulnerable communities living in marginal environments. While the framework environmental and sectoral laws on the environment have not dealt with issues of indigenous peoples, the 2010 Constitution provides a robust context for integrating the rights of indigenous peoples by bringing international law provisions to influence and be part of national law. The Constitution is, however, in the early stages of implementation and it remains to be seen whether the promises it holds will be realized by all Kenyans, including the Ogiek and the Maasai. The draft Climate Change Bill and the work plans under the National Climate Change Strategy provide pathways for bringing the needs and interests of indigenous peoples to the table in the area of climate change. One way of doing this would be by preparing climate change programmes that accommodate the concerns and vulnerabilities of indigenous people in a transparent and participatory process. Additionally, a

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<sup>112</sup> *Id.* at Section 19 (4).

well-functioning legal system can provide mechanisms for absorbing shocks and ensuring stability in time of rapid change and uncertainty. This can only happen when laws are designed taking into account the specific contexts within which indigenous people live and the factors that nuance their implementation and effectiveness.