

Brussels,
(2018) Ares

Dear Mrs Tauli-Corpuz, dear Mr Forst, dear Mr Knox,

In response to your appeal dated 12 January 2018, I would like first of all to express our deep sadness with reference to the recent loss of life of Mr Robert Kiroich and the shooting of Mr David Kipkosgei Kiptilkesi, members of the Sengwer community. The European Union Ambassador to Kenya immediately reacted in condemning publicly these tragic events.

In view of the reported use of lethal violence and the news on the recent breach of the most fundamental human rights, the European Commission has responded immediately and decided to suspend on the 17 January 2018 the European Union's support to the Water Towers' Programme.

We, the EU staff members and I, are deeply concerned about the situation the Sengwer people and their leaders face. Since several months, we have systematically insisted on full respect of indigenous peoples' rights in this programme's implementation. The conservation work on the Water Towers was never expected to involve any eviction or use of violence. As we all know, grievances on ancestral lands by indigenous communities are unfortunately not a new issue, as they have been going on for the last decades in Kenya. This is why we closely followed the procedures before the African Court on Human and Peoples' Rights in the Ogiek case and immediately entered into a dialogue with the Kenyan authorities on the implications of the May 2017 judgment for the Water Towers Programme.

Mrs Victoria Lucia TAULI-CORPUZ
UN Special Rapporteur on the rights of Indigenous peoples

Mr. John H. KNOX
UN Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment

Mr. Michel FORST
UN Special Rapporteur on the situation of human rights defenders

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My services have taken very seriously the concerns expressed by the civil society organisations since late 2016 and have been engaging with them on multiple occasions both in the field and at headquarters. In addition, the EU Delegation to Kenya has been liaising with UN agencies on the implementation of indigenous peoples' rights. Last but not least, we have been following up with the Kenyan authorities on reports which began more than a year ago concerning abuses of indigenous peoples' rights in the conservation area and undertaken a number of measures to address them, one of them being the activation of its human rights defenders scheme in favour of indigenous peoples' rights defenders living in the conservation area in order to react to the emergency.

The suspension of this support will not solve the difficult issues confronting the indigenous communities, and the Sengwer people in particular, in Kenya. For this reason, we continue to push for an independent investigation of recent alleged attacks in the Embobut Forest with Water Towers and will continue to monitor the situation closely.

You will find in annex to this letter replies to the specific questions you have raised.

I wish to thank you for bringing to our attention your concerns regarding the alleged attacks against the indigenous Sengwer people.

My services are fully committed to suspend the Water Towers Programme until convincing progress is made, based on inclusive dialogue, to chart a way forward for the peaceful management of the Embobut forest in full respect of human rights.

Please accept, Mrs Tauli-Corpuz, Mr. Forst and Mr. Knox, the assurances of my highest consideration.

Yours sincerely,

Enclosure: Annex convening our reply on the 5 points raised by the Special Procedures

Annex convening our reply on the 5 points raised by the Special Procedures

1. *Please provide any additional information and any comment you may have on the above-mentioned allegations.*

The Water Towers Programme (EUR 31 million) which covers the Mount Elgon and Cherangany ecosystems was signed by the Government of the Republic of Kenya in 2014 and activities started recently¹. The financial assistance that the European Commission planned to provide until the recent suspension of the two grants to governmental agencies (Kenya Forest Service and Kenya Forestry Research Institute) on 17 January 2018 comprises four components. In addition to a technical assistance to the Ministry of Environment and Natural Resources (EUR 4 million), two grants were being implemented: the first one with the Kenya Forestry Research Institute (EUR 5 million) aiming at characterising the degradation of Water Towers of Mt. Elgon and Cherangani ecosystems by applying science-based approaches; and the second one with the Kenya Forest Service (EUR 4 million) aiming at formulating and implementing integrated management plans to address climate change mitigation and boost adaptation. A third grant was foreseen and was in the process of formulation. This third grant would aim at supporting the Environmental Action Plans of 11 counties (including the ones where Mt. Elgon and Cherangani are located). A fourth component was planned (EUR 2 million) for communications and audit purposes.

The Water Towers Programme was designed in late 2012 and is implemented in a very complex and dynamic legal environment which, with ongoing activities to adapt the legal framework to the provisions of the 2010 Constitution of the Republic of Kenya, in our view, constitutes a solid ground for action.

Notably, the 2010 Constitution provides for community land to be vested in and held by communities identified on the basis of ethnicity, culture or similar community of interest. The term community land, as per the 2010 Constitution, encompasses ancestral lands and lands traditionally occupied by hunter-gatherer communities. The 2010 Constitution also foresees that Parliament shall enact legislation to give effect to these provisions (Article 63). The 2010 Constitution furthermore guarantees environmental rights and assigns obligations in respect of the environment, including that the State shall encourage public participation in the management, protection and conservation of the environment (Articles 42 and 69). The 2010 Constitution clarifies that the term “marginalised community” comprises an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy.

The report of Kenya’s Truth, Justice and Reconciliation Commission (2013) found that throughout its mandate period, the state failed to recognize the existence, unique culture and contributions of many minority and indigenous communities in Kenya.

Kenya abstained from voting for the United Nations Declaration on the Rights of Indigenous Peoples in 2007. However during its latest Universal Periodic Review in the United Nations Human Rights Council (2015), Kenya accepted recommendations to strengthen the protection of the rights of indigenous peoples, including to their ancestors’ lands, as well as to implement recommendations made by the Truth, Justice and Reconciliation Commission, and to actively engage to obtain the support of international and regional partners in this regard.

¹ As included in the Financing Agreement between the EU and Kenya (KE/FED/024-208).

Kenya is party to the African Charter on Human and Peoples' Rights. The African Commission on Human and Peoples' Rights, in its Endorois decision, found that Kenya had violated several provisions of the African Charter and held that the removal of the Endorois from their ancestral lands was not a lawful action in pursuit of ecological protection. Most recently the African Court on Human and Peoples' Rights delivered judgment in Ogiek case, when it found Kenya in violation of several provisions of the African Charter on Human and Peoples' Rights and ordered the country to remedy the violations and to inform it of measures taken after 6 months. Reparations will be decided upon in a separate judgment.

Kenya is furthermore party to the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Rights of the Child. The monitoring bodies of all aforementioned human rights instruments have expressed criticism with regard to evictions and displacement of indigenous peoples from their ancestral lands.

The inception phase of the overall design of the Water Towers Programme, undertaken in early 2010's and before the signatures of any Financing Agreements, looked into the social, environmental, economic and human rights impact of the programme, which were all included in, what we call, a feasibility study. This study has been elaborated without the direct participation of the Sengwer peoples. However the third grant, not signed yet and at early stage of formulation only, which aims at supporting activities in the 11 counties (including the ones where Mt. Elgon and Cherangani are located) will require Free, Prior, Informed Consent of affected communities.

2. Please explain in detail the measures that the European Union has taken to ensure that consultations take place and the the free, prior and informed consent is obtained from the indigenous peoples affected by the European Union funded Water Towers Protection and Climate Change Mitigation and Adaption (WaTER) project.

The EU advocated with the Government of the Republic of Kenya to have free, prior and informed consent used within the programme and the Government of the Republic of Kenya committed in writing to have the FPIC used in the programme.

The EU Delegation to Kenya has been liaising with the UNDP and UNEP to adapt and use for Water Towers Programme the FPIC guidelines that had been developed in the framework of the UN-REDD+ Programme.

In addition, the EU ensured at all time a systematic follow up with Kenyan authorities on reports concerning abuses of indigenous peoples' rights in the conservation area and on the different Court rulings, decisions and judgements and took a number of actions to address them.

The last one, as an immediate reaction to December 2017 events, was the organisation of a stakeholder consultation on the 10 January 2018 with all parties (e.g. the Government of the Republic of Kenya, the EU Delegation, civil society organisation such as Amnesty International, indigenous community representatives – including the Sengwer community). Intensive dialogues between the EU and the Government of the Republic of Kenya are ongoing, and the Ministry of Environment agreed to an independent investigation to clarify the recent violent episodes in the Embobut Forest which have been taken place since the end of the year. This investigation will be led by the Kenya National Human Rights Commission, the Kenya office of Amnesty International, and joined by the EU.

The European Commission seeks to find the best way to address the violations and to open the space for indigenous peoples before going on with the activities: (i) First Steering Committee of the Water Towers Programme in August 2017 was broadened to the Council of Governors and the Kenya Commission of Human Rights; (ii) the possibility to contract the allocation foreseen under the programme was granted in view of the commitment made by the Government of Kenya; (iii) in 2017 the EU staff in the EU delegation was trained on the Rights Based Approach; (iv) the third grant that would support activities in 11 counties (including the ones where Mt. Elgon and Cherangani are located) - if concluded – foresees participation of indigenous representatives and free, prior and informed consent from the indigenous peoples concerned.

The European Commission, in order to react to the emergency, also activated its human rights defenders scheme in favour of indigenous peoples' rights defenders in the area.

3. Please indicate whether an independent human rights impact assessment of the project has been carried out and if so kindly provide details of the results indicating what potential human rights risks have been identified, and on the basis of those risks, what measures have been contemplated to prevent or mitigate these.

The EU is committed to a rights-based approach, encompassing all human rights, in its development cooperation, founded on the Tool-box on the Rights-Based Approach of April 2014 and the Council Conclusions on a rights-based approach to development cooperation, encompassing all human rights, adopted in May 2014. A 2016 Joint Staff Working Document on “Implementing EU External Policy in Indigenous Peoples” underlines the need for full and effective participation of indigenous peoples at all stages of the project cycle and safeguarding the rights of indigenous peoples by ensuring their free, prior and informed consent. The systematic application of the principles of the UNDRIP is foreseen, and the rights-based approach is described as the main vehicle to integrate the rights and issues of indigenous peoples into the EU’s implementation of the 2030 Agenda as stipulated in the recent Council Conclusions on Indigenous Peoples of 15 May 2017.

At the inception phase of the Water Towers Programme, in the early 2010's, an independent feasibility study was undertaken that encompassed, as previously mentioned, looking into the social, environmental, economic and human rights impact of the programme. In retrospect it has become clear that this independent feasibility study did not match the human rights assessment standards that we apply today. As underlined above, in the development of the implementation of the Water Towers Programme, the European Commission has taken care of strengthening the respect for the rights of indigenous peoples and tried to prevent and mitigate risks.

The Financing Agreement determines that the Commission can suspend the agreement on the basis of violations of human rights, democratic principles and the rule of law and serious cases of corruption. Before suspension takes place, the Commission can take any appropriate precautionary measure. The Financing Agreement ultimately also provides for the termination of the agreement. The annexes to the grant contracts concluded with KFS and KEFRI - which form integral parts of the contracts - require the beneficiary to respect human rights. Article 11 of that annexes provide for the possibility to suspend the implementation of the contract if exceptional circumstances of force majeure make the implementation excessively difficult or dangerous, while the contract can also be suspended if the contracting authority has evidence that, or if, for objective and well justified reasons, the contracting authority deems necessary to verify whether presumably the beneficiary(ies) have breached any substantial obligation under the contract. If the

award procedure or the implementation of the grant proves to have been subject to substantial errors, irregularities, fraud, or breach of obligations, then the contracting authority may terminate the contract.

4. Please indicate how the affected indigenous peoples can participate in the implementation of the project and what livelihood benefits they stand to benefit from.

Regarding the affected indigenous peoples, the European Commission – as mentioned above and if the third allocation of the programme will be granted – foresees participation of indigenous representatives in County Steering Committees and that a free, prior and informed consent mechanism is in place.

Having taken very seriously the concerns expressed by the civil society organisations since late 2016, the European Commission engaged directly with representatives of the Sengwer community, after having received their prior consent to do so.

5. Please also indicate what grievance mechanisms are available to file complaints about failure to ensure compliance with human rights standards in European Union funded projects.

The EU is founded on a strong commitment to promote and protect human rights, democracy and rule of law worldwide. This commitment underpins all internal and external policies of the European Union. Article 21 of the Treaty on the European Union stipulates that the Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity and respect for the principles of the United Nations Charter and international law.

The EU actively promotes and defends human rights both within its borders and when engaging in relations with partner countries.

The institutions, bodies, offices and agencies of the Union and the Member States when they are implementing Union law are required to respect the provisions of the Charter of Fundamental Rights of the EU (Art. 51(1) Charter of Fundamental Rights of the EU). Under certain conditions, any natural or legal person can institute proceedings against an act of the Union (Article 264 TFEU)

The EU does not have a specific human rights complaint mechanism but disposes of a network of human rights focal persons in its Delegations worldwide whose contact details are publicly available and who serve as important contact persons for human rights defenders and civil society. However, in line with the EU Charter, the Commission/EU can intervene within the EU in cases of alleged breaches of European Union law, such as in the case of the lack of transposition or the inadequate transposition of EU legislation or a systematic practice which is not in compliance with existing EU legislation.

The EU has developed various instruments to engage with third countries, such as political dialogues, human rights dialogues, sectorial dialogues, human rights clauses and suspension of cooperation. Over the years, indigenous issues have become more prominent in human rights dialogues (Staff Working Document 'Implementing EU External Policy on Indigenous Peoples'). Furthermore the EU committed to the Rights Based Approach as a further step to put into practice these commitments (see above).

The Cotonou Agreement is the overarching framework for EU relations with African, Caribbean and Pacific (ACP) countries. The EU and the ACP countries acknowledge that human rights, democratic principles, and the rule of law are essential elements of their partnership and key pillars for long-term development (Article 9 ACP-EU Partnership Agreement). They commit to protecting and promoting these values and principles, in particular through political dialogue. Article 8 of the Cotonou Partnership Agreement outlines the specific modalities for a regular, comprehensive, balanced and deep political dialogue and covers a broad range of topics, most notably the respect for human rights, democratic principles, the rule of law and good governance. Article 8 further stipulates that representatives of civil society organisations shall be associated to this political dialogue between both parties. Article 96 Cotonou Agreement provides for a consultation procedure in case of failure to fulfil human rights obligations, which can result in taking measures in accordance with international law and proportionality, with a suspension of the agreement as a last resort. This is, however, at the level of the EU-ACP partner country relationship. It is, nevertheless, possible to take measures at programme level as well. The 11th EDF Implementing Regulation determines that cooperation contributes to respect for human rights, while implementing a rights-based approach encompassing all human rights (Article 1 11th EDF Implementing Regulation). Relations between the Union and its Member States and partner countries are based on and will promote shared values of human rights. Cooperation with third countries is based, inter alia, on the promotion of a rights-based approach encompassing all human rights in order to integrate human rights principles in the implementation of cooperation, to assist partner countries in implementing their international human rights obligations and to support the right holders, with a focus on poor and vulnerable groups, in claiming their rights (Article 2 11th EDF Implementing Regulation).

Conscious that the respect for human rights and democracy cannot be taken for granted, the EU strongly believes in empowering individuals and organisations to promote freedom, democracy and human rights throughout the world by financially supporting this type of activities. It has also put in place a human rights defenders mechanisms for emergency support.