



Swedish Society for Nature Conservation



Mr. Stefano Dejak, EU Ambassador to Kenya
Mr. Erik Habers, EU Head of Development (Kenya)
Mr. Daniel Plas, EU Head of Social Affairs and Environment (Kenya)
European Union Delegation to Kenya
Union House, P.O. Box 45 119
Nairobi 00100, Kenya,

CC: Neven Mimica, Commissioner for International Cooperation & Development; and,
Hans Christian Stausboll, Head of Unit DEVCO D2 – Development Coordination East Africa and Regional Cooperation in Eastern and Southern Africa

2 December 2016

Your Excellency:

Dear Mr. Ambassador Stefano Dejak; Dear Messrs' Erick Habers and Daniel Plas,

URGENT – Re: European Union, Water Tower Protection and Climate Change Mitigation and Adaptation Project (WaTER) in Kenya

We the undersigned organisations are writing to request your urgent assistance in respect of the tender for bids for 'Technical assistance to the Water Tower Protection and Climate Change Mitigation and Adaptation (WaTER) Programme' (publication ref EuropeAid/137671/IH/SER/E) whose bid deadline closed yesterday. The urgency of this matter is illustrated by the fact that – certainly from the perspective of the Mt. Elgon Ogiek and Sengwer peoples living in the WaTER project area – the instigation of the WaTER project has coincided with recent forced evictions of members of the Mt. Elgon Ogiek near Chepkitala, and a threat of mass eviction made yesterday (with only 7 days notice) in Kapyego (Elgeyo Marakwet County) by the Kenya Forest Service (KFS) directed at the Sengwer of the Cherangany Hills.

In particular, we are seeking the EU's undertaking to postpone the selection of any bid pending a review of the Terms of Reference (attached for ease of reference), which in their current form in our view, are at risk of placing the EU, Kenya and any successful bidder in a position of non-compliance with legal duties and/or responsibilities enshrined in multiple instruments of EU policy and law, international human rights law, and indeed Kenyan domestic law (notably its 2010 Constitution). Indeed, it is our fear that the WaTER project as a whole is at risk of so doing, but due to the imminence of bid selection, our emphasis in this letter is on the bidding process.¹

In light of the urgency of the context in which this letter is being written, we ask for an acknowledgement of receipt of this letter by return, and that the requested undertaking be communicated to the signatories to this letter as soon as possible, and no later than **Thursday 8th December 2016**. In the absence of such an undertaking we will have no choice but to consider legal

¹ We would like to have raised these matters with the relevant members of the EU delegation in Kenya directly in the first instance, and preferably in person, before involving others, but we hope you will understand that purely due to the urgency of the situation we are putting this in writing and copying the offices of Commissioner Neven Mimica and Head of Unit DEVCO D2, Mr. Hans Christian Stausboll.

avenues, however we would much prefer the opportunity to avoid unnecessary cost on both sides and the space and opportunity for a constructive dialogue. For this reason, we would also be grateful for a meeting at the delegation's earliest convenience to discuss matters in person.

We would like to make clear at the outset that we do not want to position ourselves in opposition to the EU's WaTER project *in toto* or be perceived as such, but rather as critical friends keen to ensure that the factual basis, aims, assumptions, risks and general methodology of the project really can deliver the public policy objectives which the signatories would broadly support – including the restoration and protection of the forests of Mt. Elgon and Cherangany Hills.

Our major concern as regards the Terms of Reference for the Technical Assistance tender for bids is that two related and fundamental issues are not addressed, namely:

- (1) the fact that the ownership of these forests is highly contested and currently under consideration in Kenya's domestic courts, with the Ogiek and Sengwer seeking to enforce their right to effective control, ownership and protection of their ancestral forests on Mt. Elgon and Cherangany respectively in two separate High Court challenges. No conservation project can succeed without this forest tenure matter being addressed first.
- (2) that the degradation of the forests at Mt. Elgon and Cherangany has arisen under Kenya Forest Service governance and will continue to occur under its aegis, unless and until the ownership of these forests is resolved in favour of its ancestral owners and stewards, and the role of state conservation bodies is re-orientated to supporting the community owners to conserve their forests with technical support from those agencies.

Modern conservation science and best practice (supported by international environmental law and human rights law) demonstrates that:²

- (a) community involvement as 'helpers to the Government' (out-dated 'participatory' forestry) is an insufficient condition for sustainable conservation (let alone badly needed rehabilitation); and that recognition of community ownership on conservation conditions, is the necessary tipping point to enable effective protection of indigenous forests;
- (b) old strategies that assume that resources of national and local importance must be owned by governments are unproductive, especially in modern agrarian states where

² For a comprehensive survey of sources, see: Seymour, La Vina, Hite, (2014) *Evidence linking community-level tenure and forest condition: An annotated bibliography*, Climate and Land Use Alliance (CLUA) (http://www.climateandlandusealliance.org/wp-content/uploads/2015/08/Community_level_tenure_and_forest_condition_bibliography.pdf). See for example: CIFOR whose survey comparing 40 protected areas and 33 community-managed forests in 16 countries found that community-managed forests were over 6 times better at avoiding deforestation than protected areas (Porter-Bolland et al (2011) *Community managed forests and forest protected areas: An assessment of their conservation effectiveness across the tropics*, Forest Ecology and Management, <http://www.cifor.org/online-library/browse/view-publication/publication/3461.html>) Research for the World Bank's Independent Evaluation Group (IEG) found that: "In Latin America, where indigenous areas can be identified, they are found to have extremely large impacts on reducing deforestation" (Nelson A, Chomitz KM (2011) Effectiveness of Strict vs. Multiple Use Protected Areas in Reducing Tropical Forest Fires: A Global Analysis Using Matching Methods. PLoS ONE 6(8) (<http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0022722>).

This approach is supported by *international human rights law*, notably by reference to the treaties and jurisprudence of the UN and the African Charter on Human & Peoples' Rights (ACHPR), and *international environmental law* including Articles 8(j) and 10(c) of the UN Convention on Biological Diversity (1992) as illustrated by Decision VII/28 on Protected Areas, adopted by the 7th Conference of Parties to the Convention on Biological Diversity in 2004 (e.g. at para 22). Further, the IUCN's World Conservation (WCC) Congress in Hawaii in September 2016 made clear resolutions calling for the recognition of the rights of indigenous peoples and local communities where protected areas have been created on their territories and lands, see <http://www.forestpeoples.org/topics/iucn/news/2016/10/key-outcomes-iucn-s-world-conservation-congress-indigenous-peoples> in relation WCC Motions 80 and 29.

devolutionary democracy is the constitutional mode of governance; many communities all around the world serve wisely as owner-conservators of nationally important assets under state oversight; and,

- (c) that Kenya, and these forests in particular, are gifted with the presence of traditional forest dwellers (the Sengwer and the Mt. Elgon Ogiek) who are at this point probably the only parties who will be able to rehabilitate and sustain conservation over the long term, because these forests are the last of their ancestral lands and they cannot survive culturally, socio-economically and organisationally as peoples without their forests being intact.

This is not an uncommon story, but one with particular pertinence today in Kenya as, in the context of the Sengwer and Mt. Elgon Ogiek:

- their ownership is now recognised in the Constitution, according to Article 63 (2)(d) of the Constitution of Kenya (2010);
- they are highly mobilised in protecting their rights, including taking their cases to court, partly in response to the gross human rights violations they have been experiencing for many decades;³
- their sister community, the Mau Ogiek, exhausted local remedies and has its case in the African Court, the first land case against an African Government which the Court has taken up (ruling in March 2017); and
- they have made a clear proposal for a constructive solution⁴ to the problems facing them and their forests, namely that in return for acknowledgement that these forests are their ancestral lands (and designated as community lands, and formal registration of which is provided by the Community Land Act) the concerned communities are fully prepared to have this ownership/entitlement subject to denial of: the right to ever sell these forested lands, clear intact forest, extend habitation beyond current glades, and so on. They are also very keen to work with competent forest authorities and experts to organise rehabilitation and restoration.

Furthermore, this willingness and organisation has been demonstrated in practice under the auspices of the IUCN's ('Whakatane Mechanism') conflict resolution process. This has resulted in a community scouts scheme, whereby Ogiek scouts were trained by KWS and equipped to monitor, identify and apprehend illegal charcoal burners and poachers from non-Ogiek communities based outside of the forest, and escort those individuals to KFS and KWS for arrest.

There is nothing radical about this strategy. Some of the most globally important national forests are owner-conserved by forest peoples, with the Xingu National Park in Brazil being a good example. There, forest dwellers are very effectively and efficiently protecting millions of hectares of forest and guaranteeing the healthy continuation of the environmental services thus provided.

Kenyan law also supports the rights of the Ogiek and the Sengwer, so one way or another any conservation project needs to work within this reality, and would be in danger of failing or causing harm (including human rights violations) were it not to do so. It is imperative that the WaTER

³ See by way of background, *inter alia*, the report by Milka Chepkorir Kuto, herself a Sengwer woman, on the impacts of evictions on women and their struggle to protect their rights (see <http://www.forestpeoples.org/topics/rights-based-conservation/publication/2016/sengwer-women-s-experiences-evictions>). See also the interventions addressing the evictions and discrimination faced by the Mt. Elgon Ogiek and Sengwer of the Cherangany per representations made by the UN Committee on the Elimination of Racial Discrimination (CERD) to the Government of Kenya in 2013 (http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/KEN/INT_CERD_ALE_KEN_7099_E.pdf) and 2014 (<http://www.ohchr.org/Documents/HRBodies/CERD/EarlyWarning/Kenya7April2014.pdf>), and the representations of the UN Special Rapporteur on Indigenous Peoples (J. Anaya) in 2014 (<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14163&>).

⁴ This solution was communicated publicly in the following article in 'The Star' newspaper: http://www.the-star.co.ke/news/2016/07/12/does-burning-homes-save-the-water-towers-quite-the-opposite_c1384027

project as a whole, and the Technical Assistance Terms of Reference in particular, be reconsidered and refined in order to properly address this reality. This may of course require dialogue between the Ministry of Environment and Natural Resources and Kenya Forest Service, in order to adjust the policy context to one that accepts the 'owner-conservator' arrangement as the best route to fulsome and long-lasting conservation.

Beyond national law, we are also concerned that actions undertaken as a result of the current Terms of Reference for the Technical Assistance tender may not be compatible with EU policy and law. Areas of potential conflict include, *inter alia*, the EU's external policy on indigenous peoples; the EU Consensus for Development and proposed new European Consensus for Development; the EU Human Rights Action Plan, and human rights obligations binding on the institutions of the EU by virtue of the Charter of Fundamental Rights of the European Union (CFR) and relevant jurisprudence of the European Court of Justice.⁵

It is also imperative to avoid the mistake of perceiving the 'Community Forest Association' (CFA) model as a proxy for successful, human rights compliant forest management. In Kenya the CFAs are not forest communities, but represent forest-adjacent interests, whether logging, forest farming or other (often elite) interest groups. Forest-adjacent communities do and should have rights, and where properly formed and genuinely comprising forest adjacent populations with traditional access rights to fuel-wood and similar assets of forests, traditional forest dwellers welcome engaging with them. However, by legal definition, the CFA discriminate against the Ogiek and Sengwer as they live *in* their ancestral forests, and CFAs concern only communities living *adjacent* to forests. The CFA thus presents a model that can be racially discriminatory and prone to offending other basic human rights, as well as failing to take advantage of the capacity of the Mt. Elgon Ogiek and Sengwer to provide cost-free, sustainable and committed rehabilitation and conservation as owner-conservators.

The Terms of Reference and wider WaTER project needs urgently reviewing so as to:

- a. lay out clearly a strategy of exploring and piloting the most innovative strategies possible to bring these forests back from the brink, which does not settle for present failing strategies. This means venturing more thoroughly into the fundamental issues, including the question of community land tenure;
- b. show awareness that the ownership of these forests is contested and that this issue must be addressed by the project and in full compliance with the EU and Kenya's legal human rights obligations. The Constitution is crystal clear on both the rights of, and the support that must be given to, precisely these kind of very poor marginalised communities;
- c. assure the Government of Kenya that resolving these issues will require working with the full range of parties, including the Mt. Elgon Ogiek and Sengwer themselves (and other non-State parties) as well as all relevant bodies of the State, including especially county governments, because owner-conservator approaches have been shown to be a logical path, workable, cheap, and definitely worthy of being piloted in these areas. It would also be worthy of the EU to make clear to bidders that the new Forest Conservation and Rehabilitation Act, 2016 makes provision for public lands (the present status of these forests) to be transferred to community lands on a case by case basis; this provides a useful opening to trial these cutting-edge approaches.

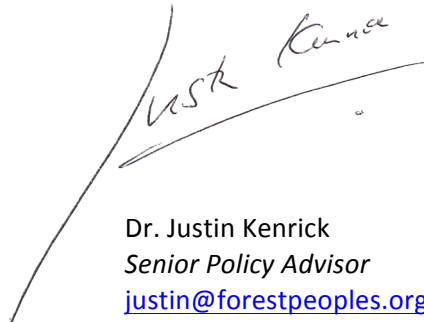
⁵ Joint Staff Working Document *Implementing EU External Policy on Indigenous Peoples*, (2016) on the EU's respect for the United Nations Declaration on the Rights of Indigenous Peoples, particularly with regard to free, prior informed consent (p.9) and the EU's rights-based approach to development cooperation when dealing with indigenous peoples (p.13); European Consensus on Development (2006), primarily paragraphs 7, 13, 18, 86, 92, 97, 101; EU Action Plan on Human Rights and Democracy (2015), primarily priorities 10, 17c; See Charter of Fundamental Rights of the European Union, binding on the EU by virtue of Article 6(1) of the Lisbon Treaty.

If a cautionary tale is needed, the World Bank's Natural Resource Management Project (NRMP) related to the same geographical area, had substantially the same public policy objectives as WaTER, and yet resulted in what was a highly damning Inspection Panel report. The Panel found non-compliance with World Bank operational policies, including its Indigenous Peoples Policy (OP 4.10) and Involuntary Resettlement (OP 4.12) in various regards because its project sustained the conditions for further evictions by failing to adequately identify, address or mitigate the fact that the institution it was funding (KFS) was and remains committed to eviction "before, during and after the conclusion of the NRMP".⁶ In the view of the Mt Elgon Ogiek and Cherangany Sengwer forest communities, the World Bank project wasted millions and squandered a valuable opportunity to achieve a win-win in the protection of Kenya's forests and peoples, and their input to the design and execution of the WaTER project would be invaluable in ensuring its success.

Yours sincerely,



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Dr. Justin Kenrick
Senior Policy Advisor
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FPP is a UK-registered Charity (No. 1082158) and registered as a non-profit Stichting in the Netherlands. FPP was founded in 1990, and works to support the rights of indigenous and other peoples who live in forests and depend on them for their livelihoods. We work to create political space for forest peoples to secure their rights, control their lands and decide their own futures. FPP has Special Consultative Status to the United Nations Economic and Social Council (ECOSOC), and Observer Status with the African Commission on Human & Peoples Rights (ACHPR).



Richard Wainwright
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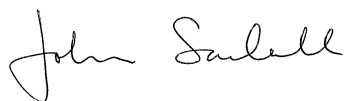
FERN

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FERN is a non-governmental organisation (NGO) and a Dutch Stichting created in 1995 to keep track of the European Union's involvement in forests and coordinate NGO activities at the European level. Our work centres on forests and forest peoples' rights and the issues that affect them such as trade and investment and climate change. All of our work is done in close collaboration with social and environmental organisations and movements across the world.

⁶ World Bank Inspection Panel Report (2014), at paragraph 27 (see <http://documents.worldbank.org/curated/en/191221468050686466/pdf/880650REVISED0001400INSPOR201400001.pdf>). See also article in The Guardian (2014) by Environment Editor, John Vidal, 'World Bank accuses itself of failing to protect Kenya forest dwellers' <https://www.theguardian.com/global-development/2014/sep/29/world-bank-kenya-forest-dwellers>).

The following organisations, though not signatories to this letter when originally sent on 2nd December 2016, have agreed to add their organisations' logos to the letterhead and their signature below as an expression of their support for the contents of this letter and the requests made. These signatures and the above-listed signature of Dr. Justin Kenrick were added to the 2nd December 2016 letter and sent to the EU by way of a 9th December 2016 update:



Johanna Sandahl

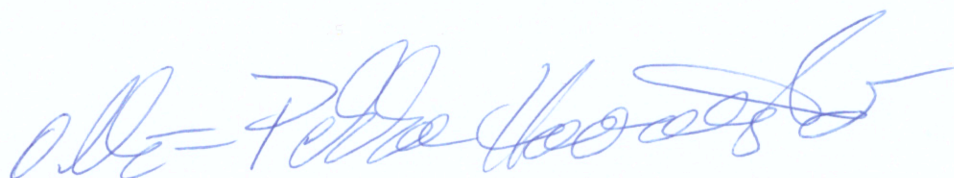
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Swedish Society for Nature Conservation (SSNC)

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The SSNC is a leading Swedish charitable organisation concerned with nature protection. The SSNC works to spread knowledge, chart environmental threats, propose solutions and influence politicians and authorities, both nationally and internationally. Under democratic forms, we work regionally in 24 county branches and locally in 270 community branches.



Mr. Olli-Pekka Haavisto

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FoEF is one of over 30 national organisations which along with thousands of local groups make up FoE-Europe. FoE-Europe is the single largest grassroots environmental network in Europe. FoE campaigns on today's most urgent environmental and social issues, challenging the current model of economic and corporate globalization, and promoting solutions that will help to create environmentally sustainable and socially just societies. FoE seeks to increase public participation and democratic decision-making, with greater democracy being both an end in itself and vital to the protection of the environment and the sound management of natural resources.



Hanna Matinpuro

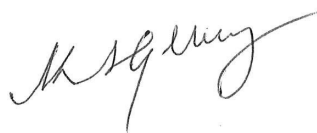
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The Siemenpuu Foundation was founded in 1998 by fifteen Finnish environmental and development policy CSOs. It supports environmental work and global cooperation of civil society organisations in developing countries. In addition to environmental issues, focus is also on human rights, social justice and cultural diversity. Siemenpuu's support is channeled to projects planned and implemented locally by CSOs. Since 2002 Siemenpuu has funded more than 600 environmental projects in over 50 developing countries.



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BIC partners with civil society in developing and transition countries to influence the World Bank and other international financial institutions (IFIs) to promote social and economic justice and ecological sustainability. BIC is an independent, non-profit, non-governmental organization that advocates for the protection of rights, participation, transparency, and public accountability in the governance and operations of the World Bank Group and regional development banks. This mission rests on the core premise that socially and environmentally sustainable development is not possible without the informed and active participation of local communities.




Dr. Laura Miller

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Synchronicity Earth

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Synchronicity Earth is a UK registered charity that provides a framework for enlightened environmental giving, globally. We fill an important niche: only four per cent of UK (and six per cent of US) philanthropy goes to environmental charities. Our aim is to grow the amount of support available to high-priority conservation action globally. This is vital: the health of the planet is a threshold issue. Without a healthy biosphere, we lose the possibility of peace, security, health and prosperity for all. Our rigorous research identifies effective people and organisations tackling the most urgent environmental problems.



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RFUK is committed to both human rights and environmental protection. Indigenous peoples' participation as well as their knowledge of the local ecology are now recognised as the most effective way of protecting the environment. We have been helping indigenous and local communities to protect millions of hectares of rainforest over the last 26 years and we will continue empowering forest people to secure lands and sustain lives for future generations.