

Mandates of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; the Special Rapporteur on the situation of human rights defenders and the Special Rapporteur on the rights of indigenous peoples

REFERENCE:
UA OTH 1/2018

12 January 2018

Dear Mr. Mimica,

We have the honour to address you in our capacity as Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; Special Rapporteur on the situation of human rights defenders and Special Rapporteur on the rights of indigenous peoples, pursuant to Human Rights Council resolutions 28/11, 34/5 and 33/12.

In this connection, we would like to bring to your attention information we have received concerning **alleged attacks against the indigenous Sengwer peoples living in the Embobut forest where the EU funded Water Towers Protection and Climate Change Mitigation and Adaptation (WaTER) project is being implemented. The attacks allegedly started on 25 December by around 100 armed Kenya Forest Service guards who have burnt at least 15 Sengwer homes with the aim of forcibly evicting the community. They have also threatened and fired shots against community members and leaders, destroyed property and shot dead a number of animals belonging to the community.**

According to the information received:

The Sengwer peoples are an indigenous group living in the Embobut Forest, along the slopes of the Cherangany Hills in western Kenya. The Sengwer are a community dependent on the forest for its socio-cultural and economic sustenance. Despite their strong ties with their ancestral lands, Kenyan authorities have made numerous efforts over the past decades to forcibly evict the Sengwer from the Embobut forest.

On 25 December some 100 armed Kenya Forest Service (KFS) guards entered the ancestral lands of the Sengwer peoples in the Kapkok, Koropkwen and Kaptirpai glades the Embobut Forest. The KFS guards burnt at least 15 homes with the aim of forcibly evicting the community, threatened and fired shots against community members and leaders, destroyed property and shot dead a number of animals belonging to the community. Allegedly, on 29 December, KFS guards took a 6 year old child from his family, later releasing him alone in the forest far from home.

Members of the community have been threatened and leaders who defend the rights of the Sengwer have been targeted by KFS guards in retaliation for their activism seeking to protect their traditional lands. On 9 January 2018, around

12:30pm Mr. Kiptuka, one of the Sengwer leaders, was shot at by KFS guards. Mr. Kiptuka managed to escape unhurt, but his house was burnt down and his property destroyed by the KFS guards.

The timing of the forced evictions, during the Christmas and the New Year holiday period, meant that the Sengwer community struggled to mobilise support to contest the action through the media, civil society and the judiciary.

The Ministry of the Environment and Natural Resources and the KFS allegedly claim that they are evicting squatters, while at the same time, according to the information received, they block visits by the Kenya National Human Rights Commission (KNCHR) and civil society organisations.

We are concerned that forced evictions, intimidation and violations of the indigenous rights of the Sengwer peoples are escalating. We are particularly disturbed by the KFS agents' targeting of community leaders, defenders of the rights of the Sengwer peoples and the violent institutional force used to evict the Sengwer from their ancestral land

In 2013, the Sengwer secured an injunction by the Eldoret High Court against being evicted, yet numerous violent evictions have continued to take place.

Special procedures mandate-holders appointed by the Human Rights Council have sent several communications to the Kenyan Government expressing concerns over evictions which took place in 2014, 2016, 2017 and 2018 (KEN 1/2014; KEN 1/2017; KEN 7/2017; KEN 1/2018). Despite our repeated efforts to bring these violations to the attention of the Government of Kenya, the evictions have not been halted but rather appear to be intensifying. These communications are publicly available (except the most recent which is not yet public, however covers the same substantive allegations as contained in this communication) in the joint communications report submitted to the Human Rights Council, searchable at: <https://spcommreports.ohchr.org>

Earlier forced evictions of the Sengwer were exacerbated by conservation projects, which resulted in restrictions or loss of access to their traditional forest lands. The World Bank's Inspection Panel recognised that this was the case during the activities of the Natural Resource Management Project (NRMP), which was run by the World Bank from 2007 to 2013. In an investigation report issued on May 2014, the Inspection Panel concluded that the NRMP violated numerous World Bank safeguard policies. Particularly, the Inspection Panel raised concerns that the project was developed without prior consultations with the Sengwer, failed to disclose information in a timely manner and neglected the customary rights of the Sengwer. Furthermore, the NRMP's implementation agent, the Kenya Forest Service, whose activities were then funded by the World Bank, applied a policy based on undertaking evictions, which was not adequately identified, addressed or mitigated by the NRMP.

We wish to call to your attention that according to information received, the ongoing attacks and evictions are occurring in the context of the EU funded Water Towers Protection and Climate Change Mitigation and Adaptation (WaTER) project of

€31 million, launched by the EU and the Kenyan government in June 2016. The WaTER project contains funding for the KFS as an implementing agent. Concerns have been raised that this funding may constitute a motivation for the KFS to evict the Sengwer, in order to prevent them from interfering with the project.

According to information received, the WaTER project has been elaborated without the participation of the Sengwer and Ogiek peoples despite that it is carried out on their traditional lands and affects them directly. Consultations have not been carried out with indigenous communities to seek their free, prior consent nor has adequate information about the project been made available. Furthermore, a human rights impact assessment has not been carried out. This raises concerns that the WaTER project, analogous to the NRMP, will reinforce violations of indigenous peoples' rights and the denial of their access to, and ownership of, the lands, territories and resources which they have traditionally owned, occupied or otherwise used.

While we do not wish to prejudge the accuracy of these allegations, the information received generates concerns over the compliance with the international standards that protect the rights of indigenous peoples. It also raises concerns over the discharging of the European Union's due diligence responsibilities and the consistency with official policies of the European Union which affirm a human rights-based approach to development that involves stakeholders such as indigenous peoples, notably set out in the policy 'New European Consensus on Development - Our world, our dignity, our future' (2017).

We also wish to bring to your attention that the Special Rapporteur on the rights of indigenous peoples raised specific concerns over the WaTER project in her 2017 report to the Human Rights Council on climate change and climate change funds (A/HRC/36/46, paras. 110-111). We also wish to underline that there is now plenty of evidence indicating that securing indigenous peoples' rights is one of the best ways to achieve conservation and climate change adaptation and mitigation objectives, making it especially unnecessary and disproportionate to evict indigenous peoples such as the Sengwer on conservation grounds. The Special Rapporteur on the rights of indigenous peoples has dedicated two of her most recent reports, to the General Assembly and the Human Rights Council, to analysis and recommendations on how conservation and climate change adaptation and mitigation measures can be carried out in accordance with human rights standards on indigenous peoples' rights.

In this regard, we would like to call your attention to the the United Nations Declaration on the Rights of Indigenous Peoples adopted by the General Assembly in 2007 with the support of European Union countries. Article 32 states that 'indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources' and that 'States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, *water* (emphasis added) or other resources'.

Article 32 furthermore affirms that ‘States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact’. In addition, Article 10 of the Declaration states that indigenous peoples ‘shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.’

The full texts of the human rights instruments and standards recalled above are available on www.ohchr.org or can be provided upon request.

In view of the urgency of the matter, we would appreciate a response on the steps the European Union has taken to safeguard the rights of the abovementioned indigenous communities in compliance with international human rights instruments.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and any comment you may have on the above-mentioned allegations.
2. Please explain in detail the measures that the European Union has taken to ensure that consultations take place and that 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 Adaptation (WaTER) project.
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.
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.
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.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of those responsible of the alleged violations. We urge you to undertake an independent review of the implementation of this project and, pending an assessment of its compatibility with human rights standards, consider suspending it.

We reserve the right to publicly express our concerns. In our view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. We also believe that the wider public should be alerted to the potential implications of the above-mentioned allegations.

The response from the European Union will be made available in the joint communication report to be presented to the Human Rights Council for its consideration.

Please accept, Mr. Mimica, the assurances of our highest consideration.

John H. Knox

Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment

Michel Forst

Special Rapporteur on the situation of human rights defenders

Victoria Lucia Tauli-Corpuz

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