

## **ANNEX 2 - Proposal to Solve the Crisis at Embobut**

### **Annex 2 to the Appeal to protect the rights of all the indigenous Sengwer / Cherangany people threatened with eviction from Embobut Forest, Kenya**

#### ***PART ONE: THE NATURE OF THE CRISIS AT EMOBUT***

##### **1.1. Summary:**

The Kenyan Government has been engaged in persistent attempts to evict the Sengwer indigenous people (also sometimes known as the Cherangany indigenous people) from their ancestral lands in Embobut forest and other people (including Marakwet families displaced by landslides and by insecurity along Kerio valley) from Embobut Forest in the Cherangany Hills.

These attempts to evict people have included burning Sengwer homes and possessions as recently as May 2013 despite an interim injunction secured in the High Court against any such action. (The interim injunction was served on those same authorities on 2<sup>nd</sup> April 2013 and it is still in force until 6<sup>th</sup> of February 2014 when the case will come for mention at Eldoret – Land and Environmental Court).

The most recent attempt to move people from Embobut Forest took place when the President, Deputy President and Senator Kipchumba Murkomen, visited Embobut on November 15<sup>th</sup> 2013 and the President promised 400,000 Kenyan shillings per family to what he called the 'Evictees' to move out of the forest<sup>1</sup>. On 12<sup>th</sup> December 2013, the Elgeyo Marakwet County Commissioner, Mr. Arthur Osiya, said that "The Evictees were given the cash and have no reason to continue staying in the forest. By January 3<sup>rd</sup> 2014, we expect all squatters out of that forest" – Saturday Nation, December 14, 2013 (page 22).

The 1.1 billion Kenyan shillings was promised by the President to 2,784 families to enable them to buy land to relocate themselves to places outside the forest. 400,000 Kenyan shillings would buy the equivalent of 4 cows or one acre of land in Trans Nzoia District. It is therefore both completely inadequate for enabling families to secure their livelihoods, but more importantly people were not consulted but simply told this was happening. There has been no attempt to secure peoples free prior and informed consent to such a process, and most crucially, financial compensation may be an appropriate way of helping landslide victims and victims of electoral violence (who would not be in Embobut Forest if it wasn't for those events) restart their lives, but it is completely wrong to seek to evict the indigenous Sengwer from their ancestral lands in the high forests of Embobut, an eviction which would remove them from the forest on which they depend for their cultural, social and physical existence.

The proposal outlined below has already been passed to Senator Kipchumba Murkomen in August 2013 to discuss with the Deputy President. We are now proposing it again through this public forum in the hope that it will be acted on. Through it we are not making 'impossible' demands to respect human rights while 'ignoring' the real dilemma of the need to protect the forests which are key water catchment areas for Kenya. Instead we are proposing practical measures through which all people living in Embobut Forest can be consulted and can arrive – through this process of free, prior and informed consent – at a solution which protects the forests, secures the livelihoods of all currently residing in Embobut Forest, and ensures that the indigenous Sengwer (and any other peoples committed to protecting the forest) can remain on their ancestral lands.

Representations made to communities by Government, in relation to this last attempt to move them, have been far from consistent. Statements from an authoritative government figure have advised the Sengwer that they can accept the President's money and still stay on the land where they are living. This implies that, for the Sengwer at least, the money being given was compensation for *past* sufferings (e.g. for being forcefully moved from the forest to the glades, for the repeated year on year burning of their homes by the Kenya Forest Service,

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<sup>1</sup>How Embobut Evictees agreed to leave the Forest' page 40, Sunday Nation, November 17 2013.

etc.) and is not compensation for their resettlement out of the Cherangany Hills altogether. Community members who are relying on this statement have a legitimate expectation that they can stay. Forced eviction in such circumstances is all the more unfair, oppressive and unlawful.

The fact that the Sengwer, who have firm rights to their ancestral lands under the 2010 Constitution, are described as 'Evictees' or 'Squatters' (and so are lumped together with people who may well be living on Sengwer lands as a result of being evicted from elsewhere, and who may need very different solutions to their plight including through funding to restart their lives elsewhere) highlights the discrimination they experience. These are symptoms of Kenya's continued failure to respect and protect the Sengwer's rights to own, use and control their lands, territory and natural resources.

We call on the Kenyan authorities to recognise Sengwer rights to their ancestral lands in line with the 2010 Constitution, to desist from burning homes and evicting families from Embobut Forest, and to not pursue an approach which seeks to give the Sengwer no choice but to accept 400,000 Kenyan Shillings per family in order to leave their homes. Instead, we ask the Kenyan authorities to carry out widespread consultations with the Sengwer and other inhabitants of Embobut Forest. Through a process of Free, Prior and Informed Consent such as that outlined below, they can find the best way to recognise Sengwer rights to their land in line with the 2010 Constitution, and also in line with current conservation best practice which recognises ancestral communities as those best placed to secure their forest lands from encroachment and destruction, as long as they themselves have their long term rights to their lands recognised and secured.

## **1.2. History of the Sengwer Indigenous Peoples and other communities in Embobut:**

### **1.2.1: The Peoples inhabiting Embobut Forest:**

From research carried out by the Forest Peoples Programme in 2013, it would appear that none of the different people inhabiting Embobut Forest in the Cherangany Hills are actively seeking the displacement of others. However, the key distinction in terms of arriving at a solution to the current crisis – is that some would prefer to move if they are offered land and security elsewhere and others such as the Sengwer insist on their right to stay being recognised, even if that involves restrictions on their economic activities to protect the forest.

Some communities in Embobut Forest have arrived more recently (including those who were landslide victims, and victims of cattle rustling and or insecurity along Kerio Valley), and others are internal migrants from neighbouring groups (such as the Marakwet) who appear to have moved into the area mostly for economic reasons such as to clear land to grow potatoes to sell. The Sengwer, who have traditionally lived in the forest, were forced out of the forest to live in glades – natural clearings in the forest – by the Kenya Forest Service.

One cultural difference between the Sengwer and those other groups is that the Sengwer are a traditionally hunter-gatherer people who occupied and practiced those livelihoods both in the highlands, forests and lower slopes of the Cherangany Hills area. Gathering of forest honey is an important Sengwer livelihood activity. Their ancestors are buried in the forest, and they have sacred sites there - their traditional connection to the Cherangany forest appears to be profound and all-encompassing. A related point is that the Sengwer would like the Government of Kenya to appreciate that their traditional hunter-gatherer culture and livelihood is perfectly compatible with forest protection, which Sengwer would also like to see protected and preserved. This is one practical reason (as well as the legal ancestral land claim) why they say they should not be evicted, when the Government's declared reason for their eviction is forest protection.

Although these Sengwer former hunter-gatherer indigenous forest people are sometimes referred to as the Cherangany indigenous people, this should not be confused with the wider population of the Cherangany Hills which includes a range of different groups, including the locally dominant Marakwet and Pokot. The Marakwet and Pokot traditional livelihood and cultural patterns are more strongly agricultural or pastoralist, however those who reside in

Embobut forest can clearly claim the right to stay if they choose to do so, and if they have already, or choose to, establish livelihood and cultural patterns that protect the forest.

### 1.2.2: History of the Sengwer People

The Sengwer indigenous people are a traditionally hunter-gatherer forest people, whose ancestral lands are located in and around the forests of the Cherangany Hills, in the Rift Valley in western Kenya. Their current predicament arises from continued discrimination and marginalisation, in particular from the appropriation of their ancestral lands without regard for their customary ownership rights. The Sengwer were initially forcibly displaced from the lower reaches of their territories (considered as richer lands for agricultural purposes) by the British colonial administration, but were permitted to occupy the less agriculturally fertile highland forest and moorland areas of the Cherangany Hills. These forest highland areas – initially held by the County Council as Trust Lands – were subsequently gazetted by the Government of Kenya as a national forest reserve in 1964. Forest legislation in Kenya – consistent with the increasingly out-dated ‘fortress conservation’ approach that excludes communities from living in protected areas – effectively outlawed Sengwer occupation of their ancestral lands.<sup>2</sup>

Since the 1970s and throughout the past decade, the Kenya Forest Service (KFS) has repeatedly attempted to forcibly evict the Sengwer, including by regularly burning their houses, food and other possessions (e.g. in 2007, 2008, 2009, 2010, 2011, 2013). The Forests Act 2005 prohibits from state forests (without licence) the activities of occupying forest reserves, or erecting buildings or enclosures, cultivating, grazing, collecting honey or keeping bees, cutting and taking wood and other forest produce, and hunting in forest reserves.<sup>3</sup> In recent years the Government of Kenya, variously through Inter-Ministerial Taskforces, the Ministry of State for Special Programmes (MSSP), KFS, and in cooperation with World Bank representatives overseeing implementation of a Natural Resources Management (NRM) Project in the Cherangany Hills, have been seeking the resettlement of Embobut Sengwer on alternative lands including in Rongai, Kipkapus and Moiben.<sup>4</sup>

This cycle of harassment and eviction and the constant threat to leave their lands and resources or be forcibly resettled, continues at present – as does the associated harm caused to health (including psychological trauma), children’s education, livelihoods and culture. Sengwer homes in Embobut Forest were burnt by KFS as recently as May 2013.<sup>5</sup> This took place despite a court injunction dated 26 March 2013 prohibiting such actions in Embobut Forest, a court injunction served on the relevant authorities on April 2<sup>nd</sup> 2013.<sup>6</sup> This blatant disregard for decisions of its own court that have been made in defence of the rights

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<sup>2</sup> The ‘new conservation paradigm’ frequently cited as replacing the traditional ‘fortress conservation’ approach can be illustrated by Decision VII/28 on Protected Areas, adopted by the 7<sup>th</sup> Conference of Parties to the CBD in 2004, which provides that “the establishment, management and monitoring of protected areas should take place with the full and effective participation of, and full respect for the rights of, indigenous and local communities consistent with national law and applicable international obligations.” (at para 22).

<sup>3</sup> Forests Act 2005, see Sections 32(3) and 52 and Sections 50 and 51

<sup>4</sup> NB. The World Bank’s NRM Project has been the subject of a challenge by the Sengwer, via the Bank’s Inspection Panel, including in relation to the forced evictions in Embobut. In June 2013, the Bank’s Board of Executive Directors approved the recommendation of the Inspection Panel for a full investigation of the complaint, which was conducted in May and September 2013, and is expected to report in January 2014. For further information, see the following link:  
<http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,contentMDK:23350855~pagePK:64129751~piPK:64128378~theSitePK:380794,00.html>

<sup>5</sup> Clearly such actions by Kenya violate a number of rights protected by the International Convention on the Elimination of all forms of Racial Discrimination (“ICERD”), including non-discrimination in the right to own property alone as well as in association with others - Article 5(d)(v), and non-discrimination in relation to economic, social and cultural rights, such as the right to housing, culture health – Article 5(e).

<sup>6</sup> Eldoret High Court Petition No. 6 of 2013, *David Kiptum Yator & Others (on behalf of the Sengwer community) v Kenya Forest Service and Others* (conservatory orders issued on 26<sup>th</sup> March 2013 per Justice Fred Ochieng).

protected under its own constitution, demonstrates the government's disregard for the rights of victims of discrimination to remedy and equal protection from the law.<sup>7</sup> Some Sengwer have been displaced from their forest lands altogether and make do on what land they can use or acquire nearby, but many Sengwer communities including those in the Embobut forest area of the Cherangany Hills' forest reserves (Embobut Forest) have continued their occupation and maintain a close connection to their ancestral lands and forests.

The situation of the Sengwer indigenous people, and the situation for many other current inhabitants of Embobut Forest, is urgent.

### **1.3. Why the Sengwer should be permitted to remain on their ancestral lands:**

*While the solution proposed in Part 2 seeks to address the needs of all current inhabitants of Embobut Forest, and the need to protect the forest itself, this section highlights the predicament of the Sengwer indigenous people for whom the forest is their ancestral home.*

At no stage have the Sengwer of Embobut been meaningfully consulted in relation to resettlement, and nor has their free, prior and informed consent been sought and obtained. There has been no reasonable benefit offered, nor has there been a remotely adequate offer of alternative land and compensation if they were to consent to resettlement. To the contrary, the Sengwer of Embobut wish to remain on their land, obtain *de jure* title to that land and reparation for the harm experienced to date from forced eviction and harassment. The Sengwer also want to come to an enduring and amicable settlement with the Government of Kenya on ways that this can be achieved while also conserving the forest environment and ensuring environmental services (notably for water) for the benefit of all Kenyans.

Recognising that hunter gatherer and pastoralist livelihoods have been practiced perfectly sustainably, and the increasing evidence that communities with secure rights over their land and resources are the better guardians of local ecosystems, the time is ripe for Kenya to shift to a new conservation paradigm based on recognising land and resource rights of indigenous peoples. This is increasingly being recognised via international conservation policy initiatives,<sup>8</sup> and by conservation organisations themselves such as the International Union for Nature Conservation (IUCN), for example under the auspices of the IUCN's 'Whakatane Mechanism'.<sup>9</sup> The Whakatane mechanism was successfully piloted with the Ogiek of Mt. Elgon in 2011, but the valuable lessons learned from that process have not been translated into the draft Wildlife Bill and Policy.<sup>10</sup>

In summary, urgent action is needed to ensure that Kenya's conservation law and policy meets its legitimate conservation objectives without discriminating against indigenous peoples. In order to meet its objective of properly implementing the 2010 Constitution (which, crucially, incorporates international human rights law into Kenyan domestic law under Article

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<sup>7</sup> See Article 6 ICERD. See also the 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005).

<sup>8</sup> For example see: Durban Action Plan and Recommendations as developed at the 5<sup>th</sup> IUCN World Parks Conference (2003), and the 2004 Programme of Work on Protected Areas (POWPA) of the United Nations Convention on Biological Diversity (CBD).

<sup>9</sup> For more information on the Whakatane Mechanism, see <http://whakatane-mechanism.org/>. The stated aim of the Mechanism is 'to assess the situation in different protected areas around the world and, where people are negatively affected, to propose solutions and implement them. It also celebrates and supports successful partnerships between peoples and protected areas'.

<sup>10</sup> One of two Whakatane Mechanism pilots took place with the Ogiek of Mt. Elgon in 2011. Early indications are extremely positive that given the right framework, stakeholders (KFS, KWS and other authorities) are able to appreciate that indigenous peoples' land and resource rights are not incompatible with conservation. On the contrary, the Ogiek's community structures and presence ensures that their byelaws help protect the forest, moorland and fauna. Other signs are also positive: forced evictions have so far ceased at Mt Elgon, access by road has improved, and there has been the re-establishment of primary schools in Chepkitale where formerly community-run schools and clinics had been burnt down by the police and KFS. The current draft Wildlife Bill and Policy fail to capitalise on lessons learned from such work, and stand to reverse the gains made to date.

3) and the National Lands Policy, the new Wildlife Act and Policy, the Community Land Bill, the Evictions and Resettlement Bill, and the new Forests Bill to replace the Forests Act 2005 must respect the community land and resource rights of indigenous peoples, and so be compatible with 2010 Constitution.

In light of the preceding, we request that the Government of Kenya:

- a. Recognises Sengwer rights to their ancestral lands in line with the 2010 Constitution and regional and international law, and guarantees that the Sengwer people and other inhabitants of Embobut Forest will not be resettled unless they have provided their free, prior and informed consent (FPIC) to any such process. This means, for example, that the Government will not use the promise of inducements or the threat of burning homes, to evict families from Embobut, but will enter into dialogue to establish a fair and just way forward based on FPIC, (such as outlined in Part 2);
- b. Ensures an urgent and fully participatory demarcation, restitution and legal recognition of Sengwer lands, territories and natural resources in and around the Cherangany Hills, and provides compensation and other suitable redress for past violations, in conjunction with culturally appropriate development assistance in the form of health-care, education and other services.
- c. Ensures a coherent reform of laws and policies, notably in the current reform of the 2005 Forests Act, the development of a Community Land Bill and an Evictions and Resettlement Bill, as well as the reform of Wildlife Conservation and Management law and policy, in a way that will guarantee respect and protection for the rights of indigenous peoples to own, use and control their lands, territories and resources and appropriately addresses the discrimination and marginalisation currently being experienced by them.

## ***PART TWO: PROPOSED SOLUTION AT EMOBUT***

### **2.1. Basing a solution at Embobut on the new constitution and scientific conservation:**

Key to solving the problem is to recognise two critical shifts that have happened:

- (1) At the national level** - the new Constitution recognises the rights of former hunter-gatherers such as the Sengwer to their community lands<sup>11</sup>.
- (2) At the international level** - the 'New Conservation Paradigm' recognises that conservation of forests and wildlife can only succeed<sup>12</sup> if those who have sustainably used those resources for centuries are supported to continue that protection.

Given the realities on the ground in places such as Embobut, it is crucial to act in accordance with these shifts in the constitution and in conservation, even before the review of the Forest Act and the new Community Land Bill hopefully ensure that legislation reflects these realities.

Current legislation that criminalises the presence of such people as the Sengwer in their forest lands should not take precedence over the constitution, and nor should the old exclusionary 'Fortress Conservation' approach take precedence over the proven success of community forest conservation (NB this is not the same as the Community Forest Association

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<sup>11</sup>Both explicitly in Article 63 of the 2010 Constitution (Constitution of Kenya 2010, Section 63(2)(d)(i) and (ii). and implicitly through incorporating international treaties in Article 2

<sup>12</sup>The 'New Conservation Paradigm' can be illustrated by Decision VII/28 on Protected Areas, adopted by the 7<sup>th</sup> Conference of Parties to the CBD in 2004, which provides that "the establishment, management and monitoring of protected areas should take place with the full and effective participation of, and full respect for the rights of, indigenous and local communities consistent with national law and applicable international obligations." (at para 22).

system<sup>13</sup>, it is not a system based on being compensated through alternative livelihood schemes for being excluded from the forest, but is instead a system based on making sustainable and respectful use of the forest – including, where culturally appropriate, continuing to inhabit the forest – based on establishing and adhering to community bylaws<sup>14</sup>.

*In practical terms what does this mean for solving the problem at Embobut?*

## 2.2. What is the problem?

There are three key problems. Solving any one of them without solving the others will only lead to far greater problems over the next few years:

- (a) **The forests** need to be protected - both to protect water supply to communities downstream, and to maintain indigenous forest for biodiversity and climate reasons
- (b) People such as **landslide victims and victims of electoral violence** who have nowhere else to go need to be given land elsewhere to reduce the pressure on the forest and to ensure their human rights to a secure home and a future for their children
- (c) The **Sengwer** need their right to remain on their ancestral lands to be recognised in accordance with the new constitution and modern conservation, and need the authorities to stop burning their homes<sup>15</sup>, they also need to act responsibly in relation to the forest.

Solving any one of these problems in isolation will simply cause a far deeper problem that will explode within a few years. For example:

- (a) Simply maintaining the **exclusion of the Sengwer** from their forest resources and burning their homes means international attention will focus on this refusal to comply with the human rights requirements of the new constitution and modern conservation
- (b) Simply **degazetting the forest** for everyone's use will destroy this crucial resource, likewise simply **resettling everyone against their will**, will trigger huge conflicts and human rights legislation
- (c) Simply allowing the **Sengwer to remain without enforceable restrictions** on their activities could likewise see the forest and glades destroyed, and allowing *only* the Sengwer to remain could be interpreted as discriminatory against others.

*So how are these 3 problems to be solved simultaneously?*

## 2.3. What is the solution?

The solution proposed here is very simple, and is based on solid research and dialogue with the communities concerned and with similarly placed communities in the same region<sup>16</sup>. The

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<sup>13</sup>CFAs define communities as people living outside but adjacent to the forest, and thereby lock out members of the Sengwer, Ogiek and other forest communities who live inside the forest by requiring them to give up their ancestral claim to their forests in order for them to be eligible under the CFA system.

<sup>14</sup>See for example research by: Chhatre, A. and Agrawal, A. (2009), *Trade-offs and synergies between carbon storage and livelihood benefits from forest commons*, PNAS vol. 106 no. 42, pp.17667-17670; 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): e22722. doi: 10.1371/journal.pone.0022722; and 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, Forest Ecol. Manage., doi:10.1016/j.foreco.2011.05.034..

<sup>15</sup>Despite an interim injunction obtained at the High Court against the KFS and other authorities, KFS continued to burn more homes in Embobut.

key is to: (i) recognise the right to remain of those willing to continue living in a way which protects the forests and glades<sup>17</sup>, and (ii) resettle those who do not want to live in this way.

In practice this would mean that:

- (i) **Those willing to abide by the Sengwer sustainability bylaws** (bylaws which the Sengwer community are in the process of finalising) would have the right to remain; whilst
- (ii) **Those who refuse to abide by these bylaws** would be supported to be resettled elsewhere.

The bylaws recently established by the Ogiek of Mt Elgon are completely consistent with the new constitution, are being presented to the County Government for approval, impose strict conditions on the Ogiek and any other users of the forest, and have already led to the Ogiek enabling the Kenya Forest Service to arrest illegal charcoal burners and to review whether the Shamba system at Mt Elgon is encouraging the regeneration of the forest or is accelerating its destruction. Similarly the Sengwer bylaws can ensure that commercial cultivation of the glades, the cutting of indigenous trees, encroachment into the thick forest, charcoal burning and other unsustainable practices are halted with the full backing of, and enforcement by, the Sengwer themselves and by any other peoples currently living in Embobut who agree to abide by such community sustainability bylaws.

What the research has uncovered is that:

- (i) **Almost all Sengwer would willingly abide by these rules** if it meant their right to remain was recognised. These rules would nevertheless need to be enforced by the communities governing council (in the same way they are being enforced at Mt Elgon by the governing council and community scouts of the Ogiek (backed up by the conservation and local authorities).
- (ii) **Almost all non-Sengwer would prefer to be resettled elsewhere** rather than abide by these rules that restrict activities to ensure the sustainability of the forest. This appears to be the case not only for landslide victims and victims of electoral violence, but also (or especially) for those from more dominant neighbouring populations whose commercial agriculture is accelerating forest destruction.

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<sup>16</sup>Both KFS and KWS are members of the world's pre-eminent governmental and non-governmental conservation body, IUCN. IUCN's first Whakatane Mechanism in the world took place at Mt. Elgon in 2011 at the invitation of the Ogiek, and with the participation of KFS, KWS, the County Council and other key actors. Early indications are extremely positive. See <http://whakatane-mechanism.org/>

<sup>17</sup>Note that a key problem is that the boundary agreed upon between Sengwer communities and Rashid (the former DC of Marakwet) in the mid-nineties (which defined the boundary beyond which the Sengwer would not build their homes) was redrawn without any community consultation by the World Bank funded NRM project in 2010/11. This placed people's homes on the wrong side of the boundary, and KFS appear to have burnt even the houses of those in the glades. The Project has been challenged by the Sengwer, via the Bank's Inspection Panel, including in relation to the forced evictions in Embobut. In June 2013, the Bank's Board of Executive Directors approved the recommendation of the Inspection Panel for a full investigation which carried out its assessment in May and September 2013 and is expected to report in January 2014. For further information, see: <http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,contentMDK:23350855~pagePK:64129751~piPK:64128378~theSitePK:380794,00.html>