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Survival is a worldwide organisation supporting tribal peoples. It stands for their right to decide their own future and helps them protect their lives, lands and human rights.

31 October 2007

Dear Mr Fearnhead,

Omo National Park, Ethiopia

I refer to our correspondence earlier this year, and in particular to my letter of 2 May 2007 to which I have received no response.

Since then the Development Conservation and Utilization of Wildlife Proclamation No 541/2007 has become law. The length of this letter, for which I should apologise in advance, reflects my concern that APF has not adequately addressed the implications of the Proclamation for its future role in the Omo National Park, or the legal difficulties in which it is likely to be placed by the Agreement of 4 November 2005 ("the Agreement").

My concerns are shared by the Centre for International Environmental Law and Native Solutions for Conservation Refugees, to whom I have shown a copy of this letter and whose work in this area I support. None of our organisations speak for the Mursi, who can and should speak for themselves, but we are able to identify some of the legal issues in a way that perhaps the Mursi are not.

Proclamation No 541/2007

The Proclamation raises fundamental questions about the role of APF in the Omo National Park to which I believe the Mursi and their many friends and supporters deserve specific answers.

On one view of the matter ("the first construction"):

- (1) The Proclamation creates different categories of "wildlife conservation area". One is "wildlife reserves" and another is "national parks". The former is defined as an area "designated to conserve wildlife where indigenous local communities are allowed to live together with and conserve wildlife". Remarkably, this is the only reference to indigenous communities in the entire Proclamation.

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- (2) A possible implication is that local communities are not to be allowed to "live together with and conserve wildlife" in any other kind of wildlife conservation area, and in particular in a national park.
- (3) The Proclamation goes on to provide that any person who carries out "unauthorized activities within a wildlife conservation area" shall be punished with a fine of not less than Birr 5000 or a term of imprisonment of between one and five years.
- (4) If the Mursi are not allowed to "live together with and conserve wildlife" in the Omo National Park, their occupation and use of land inside the Park for flood retreat or rain fed cultivation will presumably constitute an "unauthorized activity" unless someone "authorizes" it. In that event any Mursi who occupy the banks of the River Omo without that authority will face at least a year in prison, because they will be unable to pay a fine.
- (5) The "crime" for which the Mursi will have been arrested and imprisoned will be to have cultivated river banks as they have done for at least two centuries, growing the sorghum and other crops on which they and their families depend for their survival.
- (6) The responsibility for the enforcement of this law will rest with APF or its wholly owned subsidiary, Africa Parks (Ethiopia) PLC¹, because
 - (i) Under Clause 1.2 of the Agreement APF "took over management of law enforcement personnel and other staff of the Park," and was made responsible for "their training, discipline ... and performance as is necessary for them to continue to enforce the law and perform their functions"; and
 - (ii) Clause 2.10 confers upon APF employees the same "powers of law enforcement employed by Government employees."
- (7) According to your 2006 Report APF has already "taken over" 31 persons previously employed by the Government, and has hired another 37 staff "mainly to strengthen the law enforcement activities".
- (8) Some 68 people under APF control will not merely have the power under the Proclamation to detain "without any court order" any Mursi man or woman engaged in any "unauthorized activity" within the Park, but will be obliged to do so, because APF has assumed a contractual duty to "enforce the law."
- (9) The Proclamation would require APF to "hand over" detained persons to "the appropriate law enforcing body", but specifies no limit to the length of time for which APF could detain them. Nor would it require APF to provide legal representation or any other facilities to detainees.

As far as I am aware, this would be the first time that any conservation body anywhere in the world has placed itself in such an extraordinary position. It would be privatised sovereignty run riot.

An alternative and more compelling analysis of the Proclamation ("the second construction") is to the effect that:

¹ I make no distinction between the two entities because the subsidiary is entirely owned, controlled and funded by APF.

- (1) If it had really been intended to outlaw human settlements in national parks, the Proclamation would have expressly said so. It does not. On the contrary
- (2) A "national park" is defined as "an area designated to conserve wildlife and associated natural resources [and] to preserve the scenic and scientific value of the area." This definition is not inconsistent with human settlements in a park which do not threaten the "conservation" (as opposed to the preservation) of wildlife and associated natural resources²
- (3) "Unauthorised activities" are not defined, but presumably refer simply to those activities which require but have not received the authority of the responsible body
- (4) The responsible body can only be the person or persons charged with the management of the wildlife conservation area: In the present case this is APF, to which clause 1 of the Agreement delegates "all Park management including community involvement." Any decision to authorize or refuse access to the Park will inevitably pertain to its "management."
- (5) There is therefore nothing to prevent APF from "authorising" the Mursi to continue to occupy and use lands within the boundaries of the Park in the same manner and to the same extent that they have traditionally occupied and used them, in accordance with what may best be described as "their traditional rights".
- (6) Only this second construction of the Proclamation is consistent with the rights of the Mursi to equality before the law under Article 25 of the Constitution; to choose their own residence under Article 32, and not to be displaced from their own lands under Article 40.

As I understand it, the Omo has still not been formally gazetted as a national park. A third possibility is therefore to invite the Government to designate the area as a "wildlife reserve" rather than a park.

Given the extraordinary role that it has voluntarily assumed under the Agreement, APF cannot leave it to somebody else to decide how the Proclamation should apply to the Mursi. It must decide for itself whether the first, second or some other construction of the Proclamation is the correct one, or whether it should seek to reclassify the Omo as a reserve.

Unless and until it has made these decisions APF cannot direct its law enforcement officers whether to arrest and detain Mursi who enter the "Park" in pursuit of their traditional rights. Nor can it make sensible business decisions about its future investments in the Park.

It is of the greatest possible interest to the Mursi and their supporters, and perhaps also to the funders and potential funders of APF, to know what conclusion you have reached on this issue. I look forward to being told what it is very shortly.

Undertakings

If APF agrees with my alternative analysis of the Proclamation, or that the "park" should become a wildlife reserve, it should give practical effect to that view by giving formal assurances to the Mursi.

² Nor, of course, is human occupation precluded by the Park's classification as an IUCN category II protected area.

The Mursi themselves may want to add to the list, but it seems to me that the very least that APF should do is to agree that

- (1) the Mursi are entitled to continue to occupy and use lands within the boundaries of the Park in the same manner as they have traditionally occupied and used them
- (2) it will immediately provide the Mursi in writing with any authorisation that it thinks they may require for this purpose
- (3) it will not cause or permit law enforcement officers under the control of its subsidiary to interfere with Mursi occupation and use of their traditional lands within the Park, unless and to the extent that the Mursi have previously agreed to give up that occupation and use
- (4) it will not seek to rely upon any such agreement, past or future, until it is first established that the agreement enjoys the free and informed consent of the Mursi as a whole.
- (5) it will terminate the Agreement of 4 November 2005 if in the meantime the Government attempts in any way to prevent or interfere with the exercise by the Mursi of their traditional rights.

There is no reason for APF to decline to give these undertakings if it is confident that the Mursi are not at risk, and there are a number of compelling reasons why it should give them:

First, they will go a long way to allay current Mursi suspicions about APF's motives and intentions. This in turn will hugely improve the prospects that APF can reach a sensible accommodation with the Mursi about hunting, tree-felling and other issues of mutual concern. These issues can only be resolved in an atmosphere of trust.

Second, unless it gives the undertakings I have listed APF may endanger the "further funding from public and private sources" to which it refers on its website. One of your public sources appears to be the Dutch Embassy in Ethiopia, to which I note from your May 2007 report you have recently applied for "a large grant". I attach a copy of my letter to the Embassy about this application.

I have drawn ILO Convention 169 to the particular attention of the Embassy, but potential lenders or donors will expect you to respect the traditional rights of the Mursi generally. JPMorgan Chase, for example, now finances projects only if land claims of the indigenous community have been appropriately addressed and the community has expressed its support for the project after free, prior and informed consultation. ABN AMRO, Bank of America, Citigroup and HSBC have adopted similar principles.

I note that one of APF's "senior counselors" is a high-ranking official of the World Bank named Ian Johnson. He will readily confirm that the Bank's Operational Policies 4.10 and 4.12 go even further, and that they apply not only to the involuntary resettlement of indigenous communities but to "the involuntary restriction of access to legally designated parks and protected areas." I understand that the Bank may have already rejected an APF approach about the Nech Sar National Park, at least in part because of concerns about APF's likely impact on local communities.

Third, the proposed undertakings may offer APF its only defence to the charge that it has been complicit in a serious abuse of Mursi human rights. This could have significant consequences for APF and its directors, and perhaps also for some of its donors.

Complicity in human rights abuse

Mursi rights

- (1) As I have said, for at least two centuries the Mursi have practiced flood retreat and rain fed cultivation on both banks of the River Omo, for several months of each year. The areas of land occupied for these purposes depend upon flood and rainfall levels in the year in question. This cultivation makes a vital contribution to the Mursi diet. Without it, they simply would not survive. Unrestricted access to the banks of the River is vital both to their physical well-being, and to their way of life and culture. For many years past the Mursi have also hunted in the Park and grazed cattle there.
- (2) None of this has apparently made any impression on APF. So far from acknowledging the rights associated in almost every other part of the world with the long occupation of traditional lands, APF has regarded any Mursi rash enough to cultivate the West bank of the Omo as a criminal trespasser! One of the supposedly "illegal activities" identified in your December 2006 report is Mursi "clearing for cultivation on the park side of the Omo bank". The report goes on to propose "a meeting with the Mursi to address the illegal hunting and clearing. Penalties and law enforcement in the park will be explained and enforced."
- (3) I do not begin to understand the basis for this view of the law. The Mursi are entitled, as I have said, to the protection of Articles 25, 32 and 40 of the Constitution of Ethiopia. They are also entitled to invoke Article 9(4), which provides that "All international agreements ratified by Ethiopia are an integral part of the law of the land".
- (4) One international agreement ratified by Ethiopia (and by the Netherlands) is the UN Convention on Civil and Political Rights, Article 2(2) of which states that "in no case may a people be deprived of its own means of subsistence". Does APF seriously contend that the crops cultivated on the West bank of the Omo do not form an essential means of subsistence for the Mursi?
- (5) UN General Comment No 23 confirms that the cultural rights enshrined in Article 27 of the Convention include the right to pursue "a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law."
- (6) Ethiopia has also ratified the Convention on the Elimination of All Forms of Racial Discrimination. So, as it happens, has Belize. Only two weeks ago the Chief Justice of the Belize Supreme Court delivered a judgment in which he observed that it could not be seriously disputed that as a party to CERD "Belize is under an obligation to recognize and protect the claimants' Maya customary land tenure rights, as an indigenous group. The United Nations Committee on the Elimination of All Forms of Racial Discrimination (which is mandated to monitor states' compliance with CERD) has confirmed that the failure of states to recognize and respect indigenous customary land tenure is a form of racial discrimination that is not

compatible with CERD. The Committee therefore in 1997, issued a call upon states: "to recognize and protect the rights of indigenous peoples to own, develop, control and use communal lands, territories and resources and where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return these lands and territories." General Recommendation XXIII: Rights of Indigenous Peoples."

Is it to be said that this Convention protects the Mayans but not the Mursi? Why?

- (7) Ethiopia is also a signatory to the Convention on Biological Diversity. Decision VII/28 of the 7th Conference of Parties to the CBD urges State Parties to "ensure that any resettlement of indigenous communities as a consequence of the establishment or management of protected areas will only take place with their prior informed consent that may be given according to national legislation and applicable international obligations."
- (8) Article 14(1) of ILO Convention 169, to which the Netherlands is a party, expressly recognizes the right of indigenous peoples "to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities." The Belize Chief Justice noted that the Convention had not been ratified in that country, but went on to say that

"it is not in doubt that Article 14 of this instrument contains provisions concerning indigenous peoples right to land that resonate with the general principles of international law regarding indigenous peoples."

(9) Article 16(1) proclaims right of those peoples "not to be removed from the lands which they occupy". Article 16(2) states that "Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned".

(10) Since no "appropriate procedures" have been established by the laws or regulations of Ethiopia which give the Mursi any opportunity for effective representation, it is legally impermissible to relocate them without their free and informed consent.

(11) Last month, the U.N. General Assembly with the support of the Netherlands adopted the Declaration on the Rights of Indigenous Peoples. Article 26 of the Declaration provides that "Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired." Article 10 states that "indigenous peoples shall not be forced from their lands or territories. No relocation shall take place without their free and informed consent."

(12) It follows that unless and to the extent that they have given their free and informed consent to surrender their rights, the Mursi remain entitled to the use and occupation of their traditional lands on both banks of the River Omo.

Consent

I am unaware of any evidence that the Mursi have given their free and informed consent to surrender any rights in any part of the Omo National Park: please refer to my letter to the Embassy. Nor have the Mursi received any independent advice on the choices open to them, in their own language or at all. They have had no access to lawyers. They have been told nothing about their constitutional or legal position. Article 17(3) of Convention 169 has been ignored.

If you contend otherwise, I should be grateful to know your reasons. In particular you may wish to explain from whom and when the Mursi have received advice. Please also identify the terms of any agreement on which you rely, and explain with whom and when each agreement is said to have been made. If any agreement refers to or is dependent upon the boundaries of the Park, please state where you believe this boundary to lie.

In the absence of this information impartial observers can only conclude that any attempt by Government forces to remove Mursi from the Park will constitute a serious violation of their rights under both the Ethiopian Constitution and international human rights law. The question which will then arise is whether APF is entitled to look the other way, to wash its hands of the matter.

Legal responsibility of APF

- (1) APF appears already to have answered this question in the affirmative. According to its website:

"It is not our place to determine the answers to questions around the use of the Park or its resources. We are only a not for profit organisation, and these are matters for democratic government to decide and implement."

- (2) This view may be convenient, but is utterly untenable. It is now well established that business entities are not entitled to hide behind the domestic laws and regulations of the countries in which they operate, or to pretend that responsibility for human rights violations lies only with the governments which threaten or perpetrate them.
- (3) This is why WWF, for instance, has stated that "the distinction between human rights and environmental concerns as two totally separate areas has become virtually indefensible, especially in relation to indigenous and marginalised peoples."
- (4) It is also why the International Finance Corporation has warned clients that "in cases where the relocation of indigenous peoples associated with a private sector project is carried out improperly by the government, the private company will face the risks of legal challenge to the project and community opposition. Therefore, as with other aspects of land rights, the company should look into whether the government has carried out its responsibilities appropriately."
- (5) The UN Norms on Transnational Corporations state that "transnational corporations and other business enterprises shall respect the rights of local communities affected by their activities and the rights of indigenous peoples and communities consistent with international human rights standards such as the Indigenous and Tribal Peoples Convention, 1989 (No. 169). They shall particularly respect the rights of indigenous peoples and similar communities to own, occupy,

develop, control, protect and use their lands, other natural resources, and cultural and intellectual property. They shall also respect the principle of free, prior and informed consent of the indigenous peoples and communities to be affected by their development projects. Indigenous peoples and communities shall not be deprived of their own means of subsistence, nor shall they be removed from lands which they occupy in a manner inconsistent with Convention No. 169."

- (6) Principle 2 of the UN Global Compact provides that "businesses should make sure that they are not complicit in human rights abuses" The Compact offers as an example of directly complicity "a company which assists in the forced relocation of peoples in circumstances related to business activity"
- (7) The application of this principle to conservation bodies is well documented. IUCN Guideline 3.4, for example, states that "New protected areas within indigenous and other traditional peoples' terrestrial, coastal/marine and freshwater domains should be established only on the basis of voluntary declaration"
- (8) The Joint IUCN Theme Working Group on Indigenous and Local Communities and Protected Areas has confirmed that "forced displacement of communities that have traditional and customary rights to use of resources in and around Protected Areas is unacceptable"
- (9) WPC Recommendation 5.24 urges all governments, NGOs and others to "ensure that existing and future protected areas respect the rights of indigenous peoples [and to] cease all involuntary resettlement and expulsions of indigenous peoples from their lands in connection with protected areas"
- (10) WWF Principle 37 confirms that WWF "will not promote or support, and may actively oppose, interventions which have not received the prior free and informed consent of affected indigenous communities. This includes activities such as the resettlement of indigenous communities and the creation of protected areas or imposition of restrictions on subsistence resource use".
- (11) The WWF Statement of Principles "fully endorses" the Declaration on the Rights of Indigenous Peoples, to which I have already referred.

The terms of the 2005 Agreement, and in particular of clauses 1.1, 1.2 and 2.10 will necessarily make APF a party to any exclusion of Mursi from land within the Omo National Park. If that exclusion takes place in breach of the principles I have listed, I do not myself see how APF could escape a charge of complicity in the consequent breach of Mursi rights,

It will not matter that APF did not contemplate that this might be a consequence of the Agreement at the time it was made. This is an unfortunate consequence of its failure to consult the Mursi about the draft Agreement, as you candidly admitted in your letter to me of 16 March 2007. It is also a consequence of your failure to conduct any assessment of the social economic or cultural impact that its plans were likely to have on the Mursi. Even now APF appears to have no formal policy to identify the risks that its activities might pose for the rights of local people, or to monitor or contain those risks.

Nor will it be any answer for APF to say that it does not itself want the Mursi to be evicted from or denied access to the Park; or that it is entitled to rely upon the Government to honour the Constitution; or that it has not itself violated any local law.

The law on complicity is on the move. There is a real possibility that APF and/or its donors could be held legally accountable for Mursi evictions in proceedings brought against them either in the Netherlands or in the United States (in particular under the Alien Tort Claims Act). Survival has played a crucial role in the court victory recently won by the Bushmen of Botswana, and with other interested parties will consider its next steps in the light of your response to this letter.

The way forward

I am aware of APF's repeated expressions of goodwill, and of its stated aim to make the Mursi and other groups its "partners in conservation". I know of your intention to consult the Mursi about your management plan. I know that you have recently appointed a new Community Coordinator for the Park, and about the work of Dr Tröger.³

This is all well and good; but no "partnership" or management plan, however well-intentioned, can confer rights upon the Mursi or give them back what has been taken from them. They need security, as we all do. If you offer the proposed undertakings they will have this, and APF itself should avoid the legal complications to which I have referred.

It will still be necessary to identify the traditional lands of the Mursi within the boundaries of the Park to which the undertakings apply, and to establish the means by which the Mursi can give or withhold their free and informed consent to any restriction or surrender of their rights.

These are both matters which should be agreed in direct discussions between APF and Mursi. The sooner those discussions take place, the better it will be for all concerned. For the reasons I have stated, however, it is Survival's very firm view that no discussions are likely to bear fruit unless APF has first committed itself to respect the basic rights of the Mursi in the way I have described. General expressions of good intent will not be enough. Specific and unequivocal assurances are what is required.

I have focused on the plight of the Mursi, but believe that APF must resolve very similar issues in relation to other indigenous peoples living in or adjacent to the Park: I have particularly in mind the Dizi, Me'ent, Kwegu, Mguji, Nyangatom and Suri.

I look forward to hearing from you as a matter of urgency.

Yours sincerely,

Stephen Corry
Director

³ As far as I have been able to establish, however, you have yet to comply with your obligation under Clause 1.4 to establish a joint "Liaison Committee" with local communities.

Attached: Development Conservation and Utilization of Wildlife Proclamation No 541/2007

cc: Piet Klaver, Chairman, APF
Mavuso Msimang, Vice Chairman, APF
Rene Hooft Graafland, APF
Dick de Kat, APF
Nico Visser, APF
Winnie Sorgdrager, APF
Caroline Tisdall, APF
Arjan Hamburger, Ministerie van Buitenlandse Zaken
Dr A. Jacobi, Directie Mensenrechten en Vredesopbouw
H E Berhane Gebre-Christos, Embassy of The Federal Democratic Republic of Ethiopia,
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H E Alphons Hennekens, Ambassador, Royal Netherlands Embassy, Ethiopia
Janney C Poley, Royal Netherlands Embassy, Ethiopia
Rodolfo Stavenhagen, UN Special Rapporteur on Indigenous Peoples
Dr Bernd Eisenblatter and Wolfgang Schmitt, Directors, GTZ
Dr Safaine Troeger, GTZ
Directoraat-Generaal Internationale Samenwerking
Mr A.S. Smit, Centraal Bureau Fondsenwerving
Stichting DOEN
Heras Hekwerk
VolkerWessels
ICCO
Lisa Brodey, Regional Environmental Office for East Africa, US Department of State
David Sheppard, Head WCPA, IUCN
Grazia Borrini-Feyerabend, Vice Chair CEESP, IUCN