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Communication 419/12

The Indigenous Peoples of the Lower Omo (represented by Survival International Charitable Trust)

V

Federal Democratic Republic of Ethiopia

Adopted by the

African Commission on Human and Peoples' Rights

During the 72nd Ordinary Session done virtually from 19 July to 02 August 2022.



Hon. Commissioner Remy Ngoy Lumbu
Chairperson to the African Commission
on Human and Peoples' Rights



Ms. Abiola Idowu-Ojo
Executive Secretary to the African
Commission on Human and Peoples' Rights



Communication 419/12 – The Indigenous Peoples of the Lower Omo (represented by Survival International Charitable Trust) v Federal Democratic Republic of Ethiopia

Summary of the Complaint:

1. This Complaint was brought against the Federal Democratic Republic of Ethiopia (Respondent State)¹ by Survival International Charitable Trust (the Author) on behalf of the Indigenous Peoples of the Lower Omo (the Complainants) on 20th April 2012. The Lower Omo Peoples are a collection of distinct communities comprising the Bodi, Daasanach, Hamar, Karo, Kwegu (or Muguji), Mursi, and Nyangatom peoples domiciled in the Southern Nations Nationalities and Peoples' Regional State (SNNPRS) in southwest Ethiopia.
2. The Complainants allege that the Respondent State is undertaking two major development projects – the Gibe III dam construction and the Kuraz Sugar Project both in the SNNPRS of Ethiopia which has a potential to greatly imperil the economic, social and cultural life of the Lower Omo Peoples.
3. The Complainants claim that the Lower Omo Peoples are mostly agro-pastoralists whose primary means of subsistence is the cultivation of food crops such as sorghum and corn, and who rely on milk, meat and cattle for food and trade. The Complainants also claim that the Lower Omo Peoples depend on hunting in the surrounding forests to supplement their food sources, obtain hyde from animals for clothes, and cultivate bees for honey.
4. The Complainants claim that the Lower Omo Peoples depend on a combination of flood retreat cultivation, rain fed farming in the bush belt, and cattle herding in the woody grasslands all over the Lower Omo. To exploit these resources, the Complainants claim that the Lower Omo Peoples often move from place to place within their territories, according to the flood circle of the Lower Omo valley.
5. The Complainants allege that the two projects undertaken by the Respondent State will deprive the Lower Omo Peoples the ability to continue to practice the flood retreat cultivation on which they have depended for centuries, and that the associated large-scale irrigation from the dam for the Kuraz sugar plantations will affect lands traditionally used by indigenous communities in the Lower Omo to graze livestock and grow food.

¹ The Federal Democratic Republic of Ethiopia ratified the African Charter on 15 June 1998.





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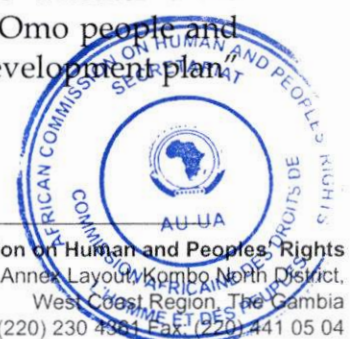
6. The Complainants state that, while the affected indigenous Omo communities recognize that the state is entitled to exploit its vast hydropower and sugar production potential, the Government has neither made an effort to inform the Lower Omo Peoples of the adverse impacts of the project nor obtained their prior consent on the Gilgel Gibe III Hydroelectric Power Project (Gibe III dam) before work commenced in 2006.
7. The Complainants claims that the Kuraz Sugar Project involves the involuntary resettlement of large numbers of people, especially the Mursi who are billed to be removed, from their ancestral land to larger population centres in the vicinity of the Eastern irrigation canal without any effort by the Respondent to inform or consult the people prior to the start of the project.
8. In order to make way for the Kuraz Sugar project, the Complainants allege that many members of the Bodi Community have already been forcibly moved from their traditional land and habitations against their will to a much more arid land at Gura. In order to continue with the projects, the Respondent State is allegedly maintaining a strong military presence in South Omo and night patrols are carried out in parts of the affected communities in order to stifle dissent. Those opposed to the projects have been arrested and that at the time this Communication was filed, about 200 Bodi, 30 Mursi and 20 Suri people were already in custody in Hana or Jinka.

Articles alleged to have been violated

9. The Complainants allege that the Respondent State has violated the provisions of Articles 20(1), 21(1), 22(1) and 24 of the African Charter.

Prayers of the Complainants

10. The Complainants pray the Commission to:
 - (a) Urge the Respondent to conduct independent investigations into the effect of Gibe III and the Kuraz Sugar Project on human rights, health and means of subsistence of the Complainants;
 - (b) Urge the Respondent to make an objective appraisal, based on the data from such independent investigations, to determine whether these projects can operate without endangering the Lower Omo people and their livelihoods, and prepare a detailed "livelihood development plan" for the affected communities in the Lower Omo.





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- (c) Call upon the Respondent to suspend further work on both the Gibe III and Kuraz and any further villagization of the complainants while these steps are undertaken.

Procedure

11. The Complaint dated 16th April 2012 was received at the Secretariat of the Commission (the Secretariat) on 20 April 2012 and registered as **Communication 419/12 – The Indigenous Peoples of the Lower Omo (represented by Survival International Charitable Trust) v the Federal Democratic Republic of Ethiopia**.
12. At its 12th Extra-Ordinary Session, the Commission became seized of the Communication and the Parties were notified thereof on 17th August 2012. The Complainant was accordingly invited to make its submission on admissibility.
13. In response to the notification of seizure, the Complainants wrote to the Secretariat on 23rd August 2012 to request that the original Complaint be considered as its Submission on Admissibility. By email dated 14th November 2012, the Complainants again wrote to reaffirm its intention to rely on the original Complaint as its Submission on Admissibility.
14. On 14th November 2012, the Secretariat transmitted the Complaint as the Complainants' Submission on Admissibility to the Respondent State and requested the latter to submit its Observations on the Admissibility of the Communication. On 30th January 2013, the Secretariat received the Respondent State's Submission on Admissibility and forwarded the Submission to the Complainant on 7th February 2013.
15. On 4th March 2013, the Secretariat received the Complainants' comments on the Respondent State's Submission on Admissibility along with the Complainant's request for Provisional Measures.
16. The Complainants request for Provisional Measures was considered and granted by the Commission in July 2013. On 16th July 2013, the letter requesting the Respondent State to take measures to prevent further eviction of the Victims was sent to the Respondent State.
17. At its 14th Extra-Ordinary Session held in Nairobi, Kenya from 20 to 24 July 2013, the Commission declared the Communication admissible. Notice of the Commission's decision was transmitted to the parties by letter and *Note Verbale* respectively of 12th August 2013 with a request to the Complainant to present submissions on the merits.





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18. On 17th October 2013 the Secretariat received the Complainant's submissions on the merits which it acknowledged and transmitted by courier to the Respondent State on 21st December 2013 with a request for the latter to present its written observations on the merits within 60 days of notification.
19. After the 60 days for filing of the Respondent's written submissions had elapsed without the Respondent State presenting any arguments on the merits, the Commission adopted a default decision on merits at its 17th Extra-Ordinary Session held in Banjul, the Gambia from 19th to 28th February 2015.
20. On 2nd and 4th March 2015, the Commission informed both parties of the adoption of the decision based on the submissions before it at the time. However, the text of the decision was not transmitted to the parties' pending authorisation of publication under the 38th Activity Report of the Commission by the African Union (AU) Executive Council and AU Assembly.
21. During the 56th Ordinary Session of the Commission held from 21st April to 7th May 2015, before the 38th Activity Report of the Commission was presented to the AU policy organs, the Respondent State submitted a request via Note Verbale N° 4-1/4/67/15 dated 6th and 7th May 2015 for a reconsideration of the Commission's default decision on the ground that it had not been afforded a fair hearing.
22. Upon receipt of the Respondent's request, the Commission withdrew the merit decision from its 38th Activity Report to the AU policy organs to allow for a consideration of the Respondent's application.
23. After a review of its internal processes, the Commission found that while there was some evidence suggesting that a Note Verbale N° ACHP/419/12/ETH/1418/13 transmitting the Complainant's merits submissions to the Respondent State and inviting the latter to submit its observations on the merits had been shipped to the Respondent State by DHL courier on 21st December 2013, there was no proof of delivery of the parcel to the latter.
24. Given the lapses encountered with transmitting the Complainant's submission on the merits to the Respondent State, the Commission during the 18th Extra-Ordinary Session in Nairobi, Kenya held from 29th July to 7th August 2015 considered that the Respondent State may not have been invited to present its observations on the merits and, thus, not accorded the opportunity to be heard on the merit. As such, the Commission:

(a) Set aside the merit decision adopted during the 17th Extraordinary Session;



- (b) Re-opened the procedure for written submissions on the merits of the Communication;
 - (c) Directed the Secretariat to transmit the decision on admissibility and the Complainants' submissions on the merits to the Respondent State with a request to the latter to present its observations on the merits in accordance with Rule 108(1) of the 2010 Rules of Procedure, and the Complainants to be subsequently accorded the opportunity to present a reply, if any, in terms of Rule 108(2) of the Rules of Procedure; and
 - (d) Affirmed that both parties retain all other procedural rights.
25. By Note Verbale N°ACHPR/COMM/419/12/ETH/1334/15 date 25th August 2015, the Commission retransmitted its decision on admissibility as well as transmitted the Complainants' Submissions on the Merits to the Respondent State.
26. On 3rd September 2015, the Complainants submitted an Addendum to Complainants' Brief on Merits dated 4th September 2015 with the Final Report by the Development Assistance Group (DAG).
27. On 27th November 2015, the Respondent State submitted its written arguments on the merits in response to the Complainants' Submissions on the merits.
28. On 16th December 2015, the Complainants requested for extension of time to submit additional observations on the Respondent's brief on the ground they had only received the Respondent State's written submissions on 14th December 2016. By correspondence dated 5th January 2016, the Commission approved the Complainants request for the deadline for replying to the Respondent's written submissions to be extended pursuant to Rule 108(2) of the 2010 Rules of Procedure of the Commission. The deadline for the Complainants to submit their reply was extended to 27th January 2016.
29. On 27th January 2016, the author submitted the Complainants' Additional Observations dated 4th September 2015 together with an additional supplemental bundle, which were duly forwarded to the Respondent by the Secretariat.
30. By Note Verbale dated 30th March 2016, the Respondent State made a request for extension of time to respond to the Complainants' additional observations on the merits filed on the 27th January 2016. By correspondence dated





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31. On 6th June 2016, the Respondent State submitted its response to the Complainants' Additional Observations and an annexed batch of documentary evidence in support of the Respondent's arguments.
32. Following a 5th May 2021 request by the Commission to both parties for updated information on this Communication with regard to the current status of the Gibe III Dam Project and the Kuraz Sugar Project, the Complainants and the Respondent submitted information update on 20th May 2021 and 15th June 2021, respectively.
33. With all the parties' submissions duly entered, the matter was set down for the Commission's determination.

Admissibility

Submissions of the Complainants

34. The Complainants have not presented any submissions on the Admissibility requirements in Article 56(1), (2), (3), (4), (6) and (7) of the African Charter but dwells on Article 56(5) of the Charter and submit that they have complied with the requirements for Admissibility under the African Charter.
35. In relation to Article 56(5) of the African Charter, the Complainants contend that they do not need to exhaust local remedies because the exceptions to the requirement to exhaust local remedies apply to this Communication on the grounds that effective and sufficient local remedies are not available in the Respondent State. The Complainants provide two main reasons for their contention that effective local remedies are not available to the Victims in the present Communication.
36. First, the Complainants argue that local remedies are not available to the Victims because the Respondent State does not recognize their legal right to their traditional territories in spite of constitutional provisions which guarantee the right of pastoralists to free land for grazing and cultivation as well as a right not to be displaced from their lands. The Complainants argue that legislation for implementation of the Constitutional provision has not been enacted and existing legislation that guarantees compensation for acquired land is only available to holders of formal land title which excludes the present Victims.
37. Secondly, the Complainants argue that local remedies are not available or effective because the Victims are too scared to access these remedies "for fear of the consequences for them or their families". The Complainants submit further that Non-Governmental Organisations (NGOs) in Ethiopia also fear



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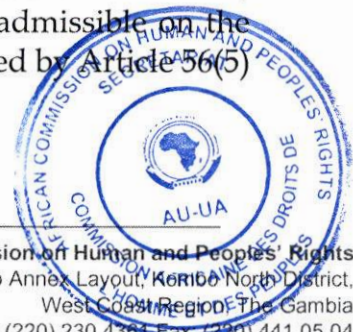
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repercussions for bringing domestic action against the Respondent State. Citing a "Campaign for Reform of the World Bank" report, the Complainants claim that "no groups are talking publicly about the risks of the dams due to concerns of government persecution".

38. Further citing an Amnesty International Report, the Complainants argue that NGOs are unable to bring actions on behalf of the Victims because one of the effects of the Respondent State's Charities and Societies Proclamation is "entrench... and institutionalise the climate of fear pervading the work of human rights defenders in Ethiopia".
39. The Complainants argue further that apart from the difficulties already pointed out, there appears to be no fora capable of providing effective redress for a Victim in the Respondent State because "*neither the Human Rights Commission nor the courts are able to provide the Lower Omo peoples with an effective remedy*". The Complainants contend that the Ethiopian Human Rights Commission lacks the power to provide effective redress while the courts are physically and financially inaccessible to the Lower Omo peoples.
40. While it concedes that the access to justice situation in the Respondent State has improved since 2004, the Complainant alleges that the Lower Omo communities, including individual members of those communities cannot afford a lawyer and no member of those communities is a qualified lawyer that can take up the case.
41. The Complainants argue further that the Lower Omo peoples are also prevented from exhausting local remedies because there is no procedure for bringing legal action relating to peoples' rights before courts of the Respondent State since only individual rights are accorded legal recognition. The Complainants allege further that even a representative action is not possible as organizations such as the Mursi Indigenous Community Association which could have brought such action have had their licences revoked without reasonable cause. Accordingly, the Complainants conclude that there are no adequate, effective and sufficient local remedies to be exhausted.

Submission of the Respondent State

42. The Respondent State does not present any arguments on the Admissibility requirements in Article 56 (1)(2)(3)(4)(6) and (7) of the African Charter. However, the Respondent State contends that the Communication is inadmissible on the grounds that local remedies have not been exhausted as required by Article 56(5) of the African Charter.





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43. With regards to Article 56(5) of the African Charter, the Respondent State contends that local remedies have not been exhausted despite the fact that they are available, effective and sufficient. The Respondent State submits that contrary to the claims in the Complaint, its legal system provides for both the legislative and the institutional framework for the realisation of the rights of the Victims in this Communication.
44. On the legislative framework, the Respondent State submits that Article 40(5) of its Constitution as well as its Rural Land Administration and Land Use Proclamation No 456/2006 jointly guarantee pastoralists such as the Victims a right of access to land and a right not to be displaced from their own lands without the payment of compensation proportional to the developments made on the land. The State Party states further that the rights claimed on behalf of the Victim are all guaranteed in its Constitution in addition to the fact that by Article 9(4) of its Constitution, international agreements such as the African Charter are an integral part of its domestic law and serve as a basis for legal claims before its national courts.
45. The Respondent State submits further that local remedies are available to the Victims because under its laws, an alleged victim of human rights violation has an option to either approach the Ethiopian Human Rights Commission or the regular courts for redress. The Respondent State contends that access to its Human Rights Commission is open to anyone including spouse, family member, representative or even a third party acting on behalf of an alleged victim. Based on its submission that none of these national institutions were approached, the Respondent State contends that available effective and sufficient local remedies have not been used by the Complainants and the Communication should be declared inadmissible.

Complainant's Comments on Respondent State's Submission

46. The Complainants submit, in response to the Respondent State's observations, that effective and sufficient local remedies are not available to the Victims because only a court order would assist the Victims in prohibiting their involuntary displacement.
47. The Complainants contend further that as a result of the Ethiopian Charities and Societies Proclamation which prohibits foreign organisations from operating in the territory of the Respondent State, the Author is unable to assist them access the national courts. The Complainants state further that even if it were possible for a foreign organisation to assist in bringing a case before the national courts, the Respondent State's legal system is not equipped to deal with litigation of a



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large scale such as the present case. Citing *Article 19 v Eritrea*,² the Complainants argue that they do not need to exhaust local remedies in such a situation.

48. The Complainants further submit that apart from the fact that the Ethiopian Human Rights Commission is not a judicial remedy as envisaged under the African Charter, neither the Ethiopian Human Rights Commission nor the regular courts would be able to make the kind of orders that will protect the Victims from further displacement or villagisation. Citing *Cudjoe v Ghana*,³ the Complainants sum up that there are no effective or sufficient local remedies for the Victims to exhaust in respect of the present Communication.
49. In relation to the legislative framework necessary to sustain the claims of the Victims, the Complainants submit that Articles 40(4) and (5) of the Respondent State's Constitution creates a dichotomy between the land rights of peasants and pastoralists. The Complainants argue that the Implementation law that the Respondent State refers to in its observations relate to the rights of peasants but not pastoralists such as the Victims. Accordingly, the Complainants argue that Constitutional provision in favour of the pastoralists such as the Victims remain unenforceable by the national courts and are subject to Proclamation 456/2005 which empowers the State to displace or evict pastoralists from land supposedly for public purposes.
50. The Complainants submit further that the right to self-determination guaranteed in the Respondent State's Constitution is only available to peoples with a legislative council. It being the case that the Victims have no such legislative council, the Complainants argue that the right is not available to the Victims. The Complainants add that even the African Charter is not in practice applicable before the local courts because the African Charter has not been published and translated into the local language as required by the Constitution.
51. The Complainants submit finally that the courts are not empowered to directly apply or interpret the Constitution and its provisions as the power to do so resides in the Parliament which is a political body. The Complainant therefore submits that the Communication satisfies Article 56(5) of the African Charter since the Respondent State has failed to prove that effective and sufficient local remedies are available to the Victims.

The Commission's Analysis on Admissibility

² Communication 275/2003 - *Article 19 v Eritrea* (2007) ACHPR.

³ Communication 221/98 - *Cudjoe v Ghana* (1998) ACHPR.





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52. Article 56 of the African Charter requires the Communication to satisfy the seven Admissibility conditions listed therein. The Commission notes that the Parties have not proffered any arguments on the requirements in Article 56 (1)(2)(3)(4)(6) and (7). However, the Commission's own assessment of the Communication indicates that the conditions in those provisions are satisfied. Accordingly, the Commission's analysis will focus on the requirement to exhaust local remedies as set out in Article 56 (5) of the Charter.
53. Article 56(5) of the African Charter provides that Communications received by the Commission shall be considered if the 'are sent after exhausting local remedies, if any, unless it is obvious that the procedure is unduly prolonged'. As the Commission has previously indicated, where local remedies are available, effective and sufficient, the onus to exhaust such local remedies or demonstrate that they have been exhausted or attempted lies on the author of a Communication.⁴
54. The Complainant in the present Communication does not claim to have exhausted or even attempted to exhaust any local remedies in the Respondent State. Instead, the Complainants have argued that it should be exempted from the requirement to exhaust local remedies because in its opinion, effective and sufficient local remedies are not available to the Victims in the Respondent State.
55. The Respondent State disputes the claim that local remedies are not available and asserts instead that effective local remedies exist and should first have been utilised by the Complainants.
56. The Commission recalls that where a State Party asserts that effective and sufficient local remedies are available within its legal system, the onus is on that State Party to prove the assertion.⁵ In *Zimbabwe Lawyers for Human Rights and Another v Zimbabwe*, this Commission noted that where a Complainant claims that local remedies did not have to be exhausted because they are ineffective, unavailable or insufficient, without the need for proof on the part of the Complainant, a burden is imposed on the Respondent State to prove the contrary.⁶ The Respondent State 'must then show that the remedy is available, effective and sufficient'.⁷ It is only after the Respondent State has established the existence of effective and sufficient remedies that the burden shifts back to the

⁴ See *Article 19 v Eritrea* (2007) para 65.

⁵ *Article 19 v Eritrea* (2007) para 51.

⁶ Communication 284/2003 - *Zimbabwe Lawyers for Human Rights & Another v Zimbabwe* (22009) ACHPR 102.

⁷ As above.





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Complainant to demonstrate that those remedies were exhausted or ineffective in the specific case.⁸

57. In relation to the present Communication, the Commission needs to determine whether the legislative and institutional framework required for an effective judicial realisation of the collective rights invoked in favour of the Victims exist in the Respondent State.
58. The crux of the Respondent State's argument is that by a combination of its Constitution and the Rural Land Administration and Land Use Proclamation No 456/2005, land-related human rights guaranteed in the African Charter can be claimed within its legal system either before the Ethiopian Human Rights Commission (EHRC) or before its national courts. The Respondent Parties argues further that by constitutional effect, the African Charter itself is directly applicable before its courts. Accordingly, the Respondent State submits that it has an appropriate legislative framework and its institutions can provide effective and sufficient remedies for the rights invoked in favour of the Victims in the present Communication.
59. In relation to the need for an appropriate national legislative framework for effective domestic application of Charter guaranteed rights, the Commission has previously observed in its decision in *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*,⁹ that where a right or set of rights is not covered by domestic law, it is unlikely that an action invoking those rights will succeed in that legal system. Thus, it has to be determined whether the existing legislative framework in the Respondent State allows for domestic judicial protection of the rights claimed in this Communication.
60. The Complainants allege that the Victims do not have any legal title to land and therefore fall outside the constitutional and statutory protection guaranteed under the laws of the Respondent State. In this regard, the Complainants have demonstrated that national law required for the implementation of existing constitutional guarantee has not been enacted as far as pastoralists are concerned. The Complainants have also demonstrated that the conditions required for direct application of the African Charter have not been put in place. This, according to the Complainants, makes the Africa Charter currently inapplicable in the Respondent State's legal system.

⁸ As above.

⁹ Communication 155/96 - *Social and Economic Rights Centre (SERAC) and Another v Nigeria* (2001) ACHPR 37.





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61. The Complainants have also demonstrated the difficulty that the Victims face if they tried to enforce constitutional provisions that guarantee a right to self-determination as a means of resolving the issues at stake. In the face of the evidence before it, the Commission agrees that if at all it exists, the legal framework to sustain the Victims' claims in the present Communication is uncertain. The existence of a national implementation law that is specifically tailored to implement the constitutional provisions in favour of the pastoralist is not doubtful. The Respondent State has also failed to show how the African Charter can be applicable in its national courts. Accordingly, the Commission finds that the legal framework to sustain the Victims' claim in the Respondent State is unclear and uncertain.
62. The Commission also needs to determine whether the institutional framework necessary for the application of the relevant laws exists in the Respondent State. While the Complainants allege that effective and sufficient local remedies are unavailable, the Respondent State asserts that both its National Human Rights Commission and its courts are effective institutions available to the Victims.
63. As the Commission has previously held, the term "*local remedies*" as used in the African Charter refers to an internal remedy of a judicial nature.¹⁰ This is consistent with the Commission's position that local remedies that a Complainant is expected to exhaust under Article 56(5) of the African Charter should be remedies that are effective to the extent that they offer a prospect of success and are sufficient to the extent that are capable of rectifying the alleged violation.¹¹
64. The Commission notes that although it asserts that the EHRC has powers to receive and investigate complaints alleging human rights violation, the Respondent State has not indicated that the decisions of the EHRC are binding. Where the local remedy held out by a State Party is one that lacks powers that bind the government and its agencies, such a remedy falls short of the standard of remedies that international law requires a Complainant to exhaust.¹² The Commission is therefore, of the view that a petition to the Respondent State's EHRC is not a judicial remedy and does not hold the promise of an effective and sufficient remedy. The Complainants are accordingly not under an obligation to

¹⁰ Communication 221/98 - *Cudjoe v Ghana*, para 13.

¹¹ Communication 246/2002 - *Mouvementivorien des Droits Hunzains (MIDH) v Cote d'Ivoire* (2008) para 55.

¹² See Communication 1184/2003 - *Brough v Australia* (2006) HRC para 8.7; Communication 1159/2003 - *Sankara v Burkina Faso* para 6.4.



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exhaust the remedy presented by the EHRC since it may be available, but it is not effective and sufficient.¹³

65. The Commission notes the Respondent State's contention that its national courts are also available for the Complainants to have approached before bringing a Complaint to the Commission. The Complainants provide at least four reasons why they consider the courts in the Respondent State to be remedies that are unavailable, ineffective and insufficient. The Complainants allege that the Victims and the NGOs which could have acted on their behalf fear that there will be consequences for bringing an action against the government before the courts.
66. The Complainants also allege that the courts are physically and financially inaccessible to the Victims. While they concede that access to the courts have improved since 2004, the Complainants insist that the Victims cannot afford to engage a lawyer and no member of their communities is a lawyer. It is also submitted that the Respondent State's legal system does not have any procedure for claiming collective rights. The Complainants have also alleged that by the operation of the Ethiopian Charities and Societies Proclamation, foreign NGOs cannot enter into the territory of the Respondent State to litigate on behalf of the Victims.
67. The Commission recalls its early jurisprudence that in certain conditions where terror and fear exist it would be illogical to require the exhaustion of local remedies.¹⁴ Fear of reprisals against Victims and/or their lawyers is sufficient evidence that local remedies are not accessible. In the present Communication, the Commission notes that the Complainants cite reports of the Campaign for Reform of the World Bank and Amnesty International regarding an alleged general climate of fear prevailing among civil society groups in the Respondent State. However, the Complainants do not adduce any evidence of specific threat to the Victims or anyone acting on their behalf regarding an attempt to approach the courts over the facts leading to the present Complaint.
68. As the Commission noted in *Anuak Justice Council v Ethiopia*,¹⁵ beyond statements of apprehension based on general reports, the Complainant needs to adduce concrete evidence and demonstrate that the apprehension alleged is founded on actual risk. Against the fact that the Complainants have failed to offer any evidence that there is a basis for the alleged fear, the Commission is unable to

¹³ Also see *Ejido 'Ojo do Agua' v Mexico* (1999) IACtHR (Info 73/99) para 16.

¹⁴ Communication 147/95 - 149/96 - *Jawara v The Gambia* (2000) paras 35 - 36. Also see the dictum of the European Court of Human Rights in Application 21893/93 - *Akdivar v Turkey* (1996) ECHR, para 74.

¹⁵ Communication No. 299/05 - *Anuak Justice Council v Ethiopia* (2006) ACHPR.





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agree that there is such a regime of fear that excuses the Complainants from showing that local remedies have been exhausted.

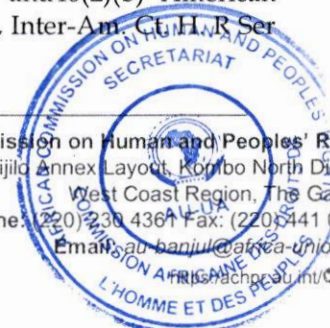
69. Regarding the Complainants' submission that the local remedies presented by the national courts are physically and financially inaccessible and that the Victims are too indigent to afford a lawyer, the Commission notes that the Respondent State has not presented any response. Since the Complainants concede that the courts are now accessible physically, the Commission's analysis will focus on whether the indigence of the Victims qualifies them to be excused from the requirement to exhaust local remedies.
70. In *Purohit and Another v The Gambia*,¹⁶ the Commission noted that certain categories of persons require legal aid in order to be able to exhaust local remedies. While the Commission holds the view that mere indigence of a victim does not trigger a finding that exceptions to the requirement to exhaust local remedies apply, the Commission is conscious of the fact that the rule is neither absolute nor capable of being applied automatically.¹⁷ In line with Article 60 of the African Charter, the Commission recalls the opinion expressed by the Inter-American Court of Human Rights that although indigence on its own does not excuse a person from exhausting local remedies, economic status can prevent a person from enjoying the guarantees in a human rights instrument.¹⁸ The Inter-American Court of Human Rights went further to opine that "if legal services are required either as a matter of law or fact in order for a right guaranteed ... to be recognized and a person is unable to obtain such services because of his indigency, then that person would be exempted from the requirement to exhaust domestic remedies".¹⁹
71. The Commission notes that the Respondent State does not dispute the Complainants' claim that the Victims are indigent people. The Commission further notes the particular legal regime in the Respondent State which prevents foreign organisations to directly or indirectly access the national courts on behalf of the Victims. In the face of indigence and the absence of any form of free legal aid provided by the State Party or any other group, the Commission takes the view that it would amount to undue formalism to require the Victims to exhaust local remedies.

¹⁶ Communication 241/2001 - *Purohit v The Gambia* (2003) ACHPR.

¹⁷ *Lehtinen v Finland* (2006) ECtHR (Application no 43160/98) 7.

¹⁸ Exceptions to the Exhaustion of Domestic Remedies (art. 46(1), 46(2) and 46(2)(b) American Convention on Human Rights), Advisory Opinion OC-11/90 of Aug. 10, 1990, Inter-Am. Ct. H. R. Ser. A: Judgments and Opinions No. 11 (1990) paras 20, 22.

¹⁹ As above.





72. Regarding the Complainants' claim that the Respondent State's legal system has no procedure for claiming collective rights, the Commission notes that the Respondent State replies that its courts are independent and open to everyone with "*a justiciable matter*". The Respondent State fails to respond to the specific claim that no procedure exists for claiming collective rights protected in the African Charter.
73. The Respondent State does not also demonstrate how the courts could have provided effective and sufficient remedies for the Victims in this particular circumstance. As the Commission has previously noted, merely listing "in abstract^o the existence of remedies without relating them to the circumstances of the case, and without showing how they might provide effective redress in the circumstances of the case" does not satisfy the onus on the State Party to demonstrate the existence of local remedies that the Complainant ought to exhaust.²⁰
74. The Commission takes the view that the Respondent State has failed to supply enough specific evidence to demonstrate that available local remedies have the potential to be effective and sufficient in addressing the claims of the Victims in this Communication. Accordingly, the Commission finds that the Respondent State has not satisfactorily discharged the onus placed on to show that effective and sufficient local remedies exist which the Complainant ought to have exhausted. No burden has therefore shifted back to the Complainant.
75. Accordingly the Commission is convinced that the State Party has not provided effective and sufficient remedies that the Victims could have accessed. The Commission therefore takes the view that one of the exceptions to the requirement to exhaust local remedies applies to this Communication as there are no remedies to be exhausted. The Commission finds that Article 56(5) of the African Charter has been satisfied.

Decision of the African Commission on Admissibility

76. In view of the above, the Commission declares this Communication Admissible in accordance with Article 56 of the African Charter.

²⁰ Article 19 *v* Eritrea (2007) ACHPR para 73. Also see Communication 1159/2003 – *Sankara v Burkina Faso* (2003) HRC.



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Merits

Summary of the parties' submissions

A. Complainants' submissions

77. The arguments below are the submissions of the Complainants, having regard to their written submissions on the merits (including the Addendum to Complainants' Brief on the Merits) dated 4th September 2015, the additional observations dated 26th January 2016, the further observations dated 31st August 2016 and the latest information update on the projects, together with all the bundles of documentary evidence respectively attached to their submissions before the Commission.
78. The Complainants submitted that the Respondent State, in pursuit of the Gibel Gibe III Dam Project and the Kuraz Sugar Project ("Gibe III and "Kuraz"), has repeatedly violated the rights of the Complainants protected under Articles 20(1), 21(1), 22(1) and 24 of the African Charter.
79. The Complainants submitted that the Respondent's arguments, that the claims in this Communication are designed to obstruct its development or advance a romanticised ideal of the Lower Omo people that has no place in a contemporary society, are misconceived. They submitted that the Lower Omo peoples are not opposed in principle to development or dams, and do not want or expect to be insulated from modernity. However, they submitted that contrary to what proponents of large development projects often argue that development would trickle down to the indigenous communities caught in the slipstream, project-affected communities are most often the principal losers.²¹
80. The Complainants submitted in the context of the Lower Omo that the sugar cane project will take the best grazing land and leave the Complainants dependent on food aid, earnings from casual work on the plantations, and the sale of their photographs to tourists; and that they will not be lifted out of poverty, but driven ever deeper into it.
81. The Complainants submitted that only if they are able to decide for themselves whether, when and how quickly they want to change their way of life is there any prospect that they will survive, let alone profit from, the huge projects now underway in the Lower Omo.

²¹ Cernea, Michael. Reforming the foundations of involuntary resettlement: introduction, in M. Cernea and HM Mathur (eds) *Can compensation prevent impoverishment? Reforming resettlement through investment and benefit-sharing*. Oxford: Oxford University Press, 2008.



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82. The Complainants submitted that the rights conferred by Articles 20(1), 21(1), 22(1) and 24 of the African Charter are not qualified and that the principle of self-determination is a common thread that connects all the aforementioned Articles of the African Charter. They also noted that none of these Articles was subject to the proviso attached to the right to property contained in Article 14 of the African Charter, which states that property may be encroached upon "in the interests of public need or in the general interest of the community."
83. The Complainants relied on Article 10 of the Vienna Declaration and Programme of Action supported by the Respondent and 170 other States, which states that: "While development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights." They also submitted that not even the desire to increase food security can trump human rights as affirmed by the United Nations Food and Agricultural Organisation.²²
84. As such, the Complainants submitted that the issue for the Commission's determination is not whether the Complainants will "benefit" from Gibe III or Kuraz or whether their rights can be encroached upon in the general interest of the community, but rather whether in its rush to complete these projects, the Respondent State had acted in breach of Articles 20(1), 21(1), 22(1) and/or 24 of the African Charter.
85. The Complainants submitted that two deep-rooted attitudes of the Respondent State have led to the breach of each of these Articles of the African Charter: Firstly, the Respondent's apparent indifference to the rule of law. They submitted that the Respondent State had repeatedly shown that it was not prepared to allow its procurement and environment impact assessment laws designed to protect people and the environment to stand in the way of "progress".²³
86. Second, the Complainants submitted that the Respondent State is determined to get rid of the pastoralist way of life of the Lower Omo people. They submitted that the Respondent considers the Lower Omo people as backward and uncivilised and seeks to transform them into farmers at the earliest opportunity,²⁴ in contravention of its constitutional obligation to protect pastoralists under the

²² The Complainants also relied on the United Nations Food and Agricultural Organisation's *Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* page 100 of the attached bundle.

²³ Article 25 of the Procurement Proclamation 430/2005; Article 3 of Environmental Impact Assessment Proclamation 299/2002.

²⁴ See the speech allegedly made by Prime Minister Meles Zenawi in the South Omo in January 2011 cited at pages 7-8 [para 20] of the Complainants' Written Submission on the Merit.



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Constitution of the Federal Democratic Republic of Ethiopia (Constitution).²⁵ The Complainants submitted that in breach of the Constitution, the Respondent State appropriated to itself vide Proclamation No. 456/2005 the power to arbitrarily evict pastoralists from land and transfer same to private hands.²⁶

87. The Complainants also submitted that the view that pastoralism is unworthy of the Respondent State's protection is also reflected in the omission, from the first environmental impact assessment of Gibe III, of any reference at all to the impact of the dam on downstream communities. And that the Respondent State paid no attention to the report by the World Commission on Dams (WCD) on the impacts of large dams on downstream communities.
88. The Author submitted that it instituted this Complaint on behalf of the Complainants due to fear of the consequences for them and their families if they had lodged the Complaint themselves; and that it had not been possible to file witness statements of the people of the Lower Omo or obtain the assistance of local NGOs for the same reason. The Author claimed that, in January 2013, the officials of the Respondent State had informed a gathering of tribal peoples, non-governmental organisations (NGOs) and missionaries in Jinka that there would be consequences if they disclosed any information about developments in the Lower Omo to foreigners.²⁷ That journalists have been effectively muzzled in Ethiopia resulting to the point of fleeing the Respondent State more than any other country in the decade preceding 2013.
89. The Complainants also submitted that whatever the truth of the criticisms that continue to be levelled against Gibe III, it has had or will have at least two undisputable consequences for the Complainants:
- (a) It will eliminate the annual flood on which the Complainants depend for their subsistence; and
 - (b) The steady and constant flow of water down the Omo, which will replace the seasonal floods, will allow the irrigation of large tracts of land in the Lower Omo. This in turn will result in the displacement of the Complainants to make way for sugar cane, cotton and biofuel plantations. An earth dam has already been built for this purpose, just over 200 km downstream from the dam.

²⁵ Article 40(5) of the Constitution of the Federal Democratic Republic of Ethiopia.

²⁶ Article 5(3) of Proclamation No. 456/2005.

²⁷ Will Hurd's witness statement of October 2013 at page 211 of the Bundle attached to the Written Submissions.





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90. With regards to the Kuraz, the Complainants submitted that, contrary to the Respondent State's allegations of having conducted the necessary preparations and Environmental Impact Assessment (EIA) study, no study at all of the impact of the Kuraz on the Lower Omo peoples was carried out "before the commencement" of the Project; and that if such a study existed at all, the Respondent State chose not to release it to the public.
91. The Complainants submitted that even the original EIA of Gibe III was produced only after work had already started on the construction of the dam, but was confined to the middle basin of the Omo and ignored altogether the Lower Omo and the Complainants. And that it was only until 2008, after two years into the project, that the EIA was revised to include selected findings and recommendations from an "Additional Study" of downstream impacts and re-named the Environmental and Social Impact Assessment (the "ESIA").
92. Based on this, the Complainants submitted that the EISA appeared to have been compiled without the involvement of any of the Peoples of the Lower Omo contrary to international guidelines and case law, which both show that the participation of indigenous peoples is an essential component of an effective impact assessment.²⁸
93. The Complainants took issue with the ESIA's proposal to release "controlled flood" from the dam reservoir annually to mitigate the dam's impact on downstream communities, over a period of 10 days in late August or early September. The Complainants submitted that the proposal to replicate the natural flood of the Omo was not sufficient to compensate the communities for all adverse effects of the dam or avoid the 'severe damages [sic] to downstream communities' for the following reasons:
- (a) Any benefit that the controlled floods might confer on the Complainants would be dependent on the Respondent State's determination; and
 - (b) The decision whether to allow a controlled flood, when and for how long, rests alone with the Respondent State, which the latter may or may not grant if the flood reaches a level sufficient to benefit downstream communities would also

²⁸ Citing the Akwé: Kon Voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities (Secretariat of the Convention on Biological Diversity, Geneva, 2004) Decision VII/16 F COP-7 UN Doc. UNEP/CBD/COP/7/21 (13 April 2004)); and *Saramaka People v Suriname* Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008. Series C No. 185 para 41, fn 23; *ACHR Case of Pueblo Indígena Kichwa de Sarayaku v Ecuador*, Fondo y reparaciones, Judgment of 27 June 2012 Series C No. 245 paras 212-20 [Spanish Only].





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inundate the irrigation infrastructure or if release the flood would significantly reduce electricity production.

(i) Alleged violation of Article 20(1) of the Charter

94. The Complainants submitted that by virtue of Article 20(1) of the African Charter, they are, at the very least, entitled to be given an opportunity to effectively participate in the decisions whether to embark on Gibe III and Kuraz and the opportunity either to give or withhold their prior informed consent to both projects. And that the Respondent State's failure to afford them either of these opportunities is a breach of Article 20(1) of the African Charter.
95. The Complainants consider that they could have effectively participated in the decisions to proceed with Gibe III and Kuraz only if:
- (i) The Lower Omo peoples had done so prior to the making of each decision, particularly before the Ethiopian Electric Power Corporation (EEPCO) entered into a legal obligation to proceed with the dam;
 - (ii) The Lower Omo peoples had done so in sufficient numbers to ensure that they were representative of their communities as a whole. The complainants claim that only about 93 members of the community, representing 0.1% of the community and excluding include the Hamar, Bodi or Kwegu, were consulted during the course of six meetings held between May and December 2007; and that even the Respondent State's own Public Consultation and Disclosure Plan shows that people downstream of the dam were not consulted until at least 10 months after contracts had been exchanged by which time work had already commenced on the dam;
 - (iii) The Lower Omo peoples had done so with sufficient knowledge of the likely impact of the Projects on their communities to enable them to come to an informed view whether to support the Projects. The Complainants claim that when the USAID and the Author visited the affected communities, they found that the communities knew little or nothing about the project;²⁹

²⁹ The Complainants relied on the Written Witness Statement by Will Hurd at page 219, Page 123 of the Bundle of Documents attached to their Written Submissions on the Merits [the USAID Washington report] and the UN Special Rapporteur report at pages 105/106 – see United Nations General Assembly 'Report by the Special Rapporteur on the rights of indigenous peoples, James Anaya' UN Doc A/HRC/18/35/Add.1 22 August 2011 Annex IV para 119.





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- (iv) The Lower Omo peoples had done so in the knowledge that they could choose not to support the Project without suffering any adverse consequences; and
- (v) The Lower Omo peoples had done so according to their customs and traditions and 'in a form appropriate to the circumstances'.³⁰

96. The Complainants submitted that none of the above criteria was satisfied in connection with the Gibe III or Kuraz.
97. The Complainants further emphasised that, with respect to the Kuraz project, they were given no opportunity at all to participate in the decision to plant sugar cane on their customary lands. That their first knowledge of the project came about from the Prime Minister's speech delivered in Jinka in January 2011; but as the speech made clear, the decision to convert those lands to sugar cane plantations and to proceed with the development that year had already been made.

(ii) Alleged violation of Article 21(1) of the Charter

98. The Complainants submitted that Article 21(1) of the African Charter gives effect to the economic aspect of the right of self-determination established by Article 20(1).
99. The Complainants further submitted that the territories on which they have traditionally grazed their livestock is an invaluable natural resource, which the Kuraz project had already encroached on without their consent and due consultation of the affected peoples. They submitted that the loss of their grazing lands will make it impossible for the Complainants to maintain their herds. They also submitted that by being forced by the Respondent State to sell their cattle under the circumstances, their right not to be deprived of their wealth (and of their means of subsistence under Article 1(2) of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights has been violated.
100. The Complainants submitted that even if the Omo River and/or the lands allocated to sugar were regarded in whole or part as the natural resources of the Respondent State, the denial of access to the River Omo and/or to their grazing lands will still have violated their rights under Article 21(1) of the African Charter

³⁰ *Endorois case*.





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because of the arbitrary manner in which the Respondent State has put its plans into effect.

101. The Complainants submitted that they are "non-participants" in the Gibe III and Kuraz and have been offered no share in the benefits that will accrue from sugar cane production on their grazing pasture.
102. The Complainants also submitted that the Respondent State's claim that all displaced persons have been or will be given substitute plots of land equal in size to their previous holdings and proportionate compensation does not justify a breach of Article 21(1) of the African Charter.

(iii) Alleged violation of Articles 22(1) of the Charter

103. The Complainants submitted that both Gibe III and Kuraz will have major impacts on their lives and that the Respondent State's failures to conduct any (or a proper) impact assessment of either Project and to seek or obtain their free, prior and informed consent to either of them are violations of the Complainants' right to development under Article 22(1) of the African Charter.
104. The Complainants submitted that when a large-scale development is likely to have a major impact on the territory of a particular community, the State has to obtain the community's free, prior and informed consent to it.
105. The Complainants submitted, including in the Addendum to Complainants' Written Brief, that evidence of the Respondent State's breaches of Article 22(1) of the African Charter is summarised at paragraphs 44, 55 to 68 and 81 to 90 of their written Submissions and they also rely on the Respondent State's failure not only to obtain their free, prior and informed consent to not undertake Gibe III and Kuraz but also to consult them about both Projects before committing itself to it.

(iv) Alleged violation of Article 24 of the Charter

106. The Complainants submitted that Gibe III and Kuraz will deny them an environment which is either satisfactory or favourable to their development. And that in breach of Article 24 of the African Charter, the Respondent State has failed to conduct any proper study of the environmental impact of either Project or of the risks that the projects pose to public health.
107. The Complainants submitted that the environmental impact of the Gibe III will affect them more directly than anyone else in Ethiopia as it will end the annual floods. The Complainants submitted that they will no longer be able to recession cultivate sorghum, millet, maize, peppers or beans. And that even if they are



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offered access to and are able to use the new irrigation channels, these are likely to be far less sustainable.

108. With regard to the Kuraz, the Complainants Submitted that the wholesale conversion of the Complainants' territory to cultivate sugar cane has created an unsatisfactory environment for pastoralists as the plantations have made it virtually impossible for them to pursue their customary way of life.
109. The Complainants submitted that if the Respondent insists that it had due regard to the adverse impacts of the Gibe III and Kuraz on the rights of the Lower Omo peoples, then it must prove through documentary evidence that it assessed the impacts that the Gibe III and Kuraz were likely to have on the Complainants before it decided to embark on these Projects. And that failing which, the Commission will be entitled to make an inference that it acted in violation of the provisions of the African Charter.
110. On the basis of the foregoing, the Complainants prayed the Commission to urge the Respondent to:
- (1) conduct independent investigations into the effect of Gibe III and Kuraz on the human rights, health and means of subsistence of the Complainants.
 - (2) in the light of the data generated by this communication, make an objective appraisal whether these projects can operate without endangering the lives or livelihoods of the Complainants; and if so, develop a detailed "livelihood development plan" for this purpose.
 - (3) provide all information collated under (1) and (2) to the Complainants to enable them to give their free and informed consent to both projects.
111. The Complainants also prayed for the Commission to urge the Respondent to suspend further work on both the Gibe III and Kuraz and any further villagization of the Complainants while these steps are being undertaken before it is too late.

B. Respondent's submissions

112. The arguments below are the submissions of the Respondent State, having regard to their written submissions on the merits dated 27th November 2015, the response to the Complainants' additional observations dated 6th June 2016, and the latest information update information on the projects, together with all the bundles of documentary evidence respectively attached to their submissions before the Commission.





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113. The Respondent State submitted that as the second most populous country in Africa with a rich mosaic of nations, nationalities and peoples who speak more than 80 languages, not only is Ethiopia one of the most diverse countries in the world but also that pastoralism is one of the oldest socio-economic systems in the country.
114. The Respondent State submitted that there are 12-15 million pastoralists who reside on 61% of its landmass majorly in four lowland regions – Afar, Oromiya, Somali, and the Southern Nations, Nationalities and People's Regional States (SNNPRS), in Gambella and Benishangul areas.
115. The Respondent State claims that the main livelihood systems of pastoralists include pastoralism, farming, and petty income-earning activities, and that the primary means of subsistence in almost all pastoral communities is livestock husbandry in open grazing areas.
116. The Respondent State submitted that the Complainant's submissions provide only a partial glimpse at the rich diversity of the people of the South Omo Zone and their expectation for change and development in their communities. The Respondent State submitted that there are 16 nations, nationalities and peoples in the South Omo Zone seven of which live along the Omo River and are said to be affected by the Gibe III and Kuraz. These are the Bodi, Dassanech, the Hamar, the Kara, the Kwegu, the Mursi and the Nyangatom.
117. On the basis of the background to the seven affected groups of people in the Lower Omo, the Respondent State makes the following submissions.
- (i) Right to self-determination under Article 20*
118. The Respondent State submitted that contrary to the Complainants' assertion that they were denied the right to effectively participate in the decisions to proceed with the Gibe III and the Kuraz, all of the named peoples in the South Omo zone have traditional leaders and are represented by officials in their local districts, in the State Council and the Council of Nationalities of the SNNPR State and in the House of Peoples' Representatives and House of Federation of the federal government.
119. The Respondent State claims that all the representatives of the several pastoral communities of the South Omo Zone in both the State Council and the Council of Nationalities constantly engage their constituents on all matters related to their livelihoods, including about the Gibe III dam and sugar factories.

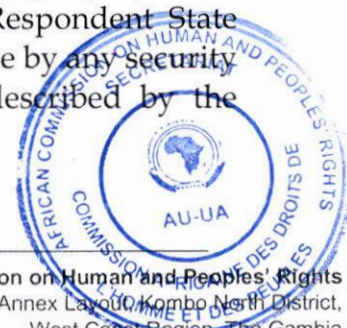


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120. In light of the scope of representation at various levels of state and federal government, the Respondent State submitted that the Complainants' arguments that the people of the South Omo are without representation is unfounded and should be discountenanced.
121. The Respondent State also submitted that, despite this prima facie evidence of representation, it conducted an extensive public consultation process that conclusively shows that the people of Bodi, Dassenech, Hamar, Kara, Kwegu, Mursi and Nyangatom have "freely determin[e]d their political status [and pursued] their economic and social development according to the policy they have freely chosen" in accordance with Article 20(1) of the African Charter.
122. The Respondent State submitted that the public consultation regarding the Gibe III Hydro-Electric Power Project (HEPP) began in 2007 with the local administrators and the EEPCO-hired experts who explained the possible impacts of the dam on the Omo River. The Respondent State submitted that the public consultations documented the concerns of attendees that there could be a reduction in the flow of Omo River and that this could impact their livelihoods. However, the consultations showed that the people were positive and that despite their concerns, wanted to know how they could reap benefits from the project.
123. With regards to the Kuraz, the Respondent State submitted that based on the proximity of the sugar factories to the areas where the People of Bodi reside, the Government of Ethiopia spent significant effort to consult practically every elder and village chief in Selamago Woreda. That the consultations were organized at the zonal, woreda and kebele levels where members of the community were invited to participate in public discussions, presentations, and question-answer sessions with administrators as well as with representatives of the People in the SNNPR Councils, the House of Federations and House of People's Representatives.
124. The Respondent State submitted that, contrary to the Complainants' assertion that the people of the Lower Omo have been harassed, intimidated, threatened, beaten, tortured, arrested and imprisoned, and forcefully displaced in order to discourage dissent and proceed with the Gibe III and Kuraz sugar project, no such vile human rights abuses have occurred. Rather, the Respondent State submitted that it investigated these allegations but no such abuse by any security personnel or the Ethiopian Defence Forces took place as described by the Complainants.





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125. The Respondent State submitted that Ethiopia remains firmly committed to the principle of self-determination, which tenet continues to be at the core of its constitutional and political makeup. This principle, the Respondent State submitted, is referenced in the Constitution and guarantees the rights of Ethiopia's diverse nations, nationalities and peoples to speak, write and develop their own languages as well as express, develop, promote and preserve their culture and history.
126. The Respondent State submitted that Ethiopia's highly diverse pastoralist and agro-pastoralist communities are guaranteed their full constitutional rights – in both principle and in practice – to determine their way of life, mode of subsistence, culture, and language.
- (ii) Right to dispose of natural resources under Article 21(1)*
127. The Respondent State submitted that, contrary to the Complainants' claim that the seven affected peoples of the lower Omo will be denied their right to freely dispose of their wealth and natural resources, there will be no deprivation of wealth and natural resources for two reasons. First, the annual floods for retreat agriculture will continue as the EEPCO has installed midlevel outlets to allow for controlled flooding for those who wish to continue the practice. Second, the Sugar Corporation did not deprive any of the seven affected peoples neither wealth or natural resources.
128. The Respondent State submitted that, assuming the Commission accepts the Complainants' far-fetched arguments that the floods which are neither predictable nor provide for sustainable food security for the Omo population, constitute 'wealth or natural resource', no deprivation has occurred. This is because all seven peoples have welcomed the projects wholeheartedly.
129. The Respondent State submitted that the extensive public consultations held between 2006 and 2014 by the federal government through the representatives of the EEPCO and the Kuraz Sugar Corporation revealed that the people view the project as gateways for fast-tracking development in the South Omo zone and achieving food security, an issue that has bedevilled them for decades.
130. On this basis, the Respondent State respectfully urged the Commission to reject the Complainants' allegations that the peoples are denied their right to freely dispose of their wealth and natural resources.





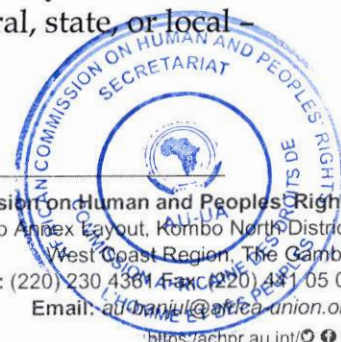
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(iii) Right to development under Article 22(1)

131. The Respondent State submits that while it agrees with the Complainants that "[t]he peoples of the Lower Omo are not opposed in principle to development, or to dams, and do not want or expect to be cocooned from modernity", it does not concede that the people of South Omo Zone will ultimately be the losers of Ethiopia's development efforts in the region or driven ever deeper into poverty.
132. The Respondent State submitted that Ethiopia, prior to the construction of the Gibe III HEPP, generated only 2000 MW of electric power for a nation of almost 90 million inhabitants. The Respondent State submitted that such energy constraint severely limits growth in key areas of its economy, including the agricultural and industrial sectors.
133. The Respondent State submitted that the major objectives of its energy sector are to provide sufficient and reliable power sources for economic and social development as well as for irrigation activities.
134. The Respondent State also submitted that agriculture and other services account for 90% of Ethiopia's Growth Domestic Product. For this reason, Ethiopia has nonetheless pursued several initiatives to help increase agricultural productivity in the nation, one of these being the Agricultural Growth Program (AGP), which is a national initiative supported by the World Bank and other development partners that is targeting smallholder farming. The Program is designed to help increase agricultural productivity and market access for key crops and livestock in Ethiopia. It focused on 83 districts with high potential for agricultural growth in four regions of the country, including the SNNPR.
135. The Respondent State submitted that the Gibe III dam and the Kuraz were borne out of a necessity to end the cycle of poverty and underdevelopment in Ethiopia and to help lead the agricultural transformation.
136. The Respondent State also submitted that the Commune Development Program (CDP) was a federal government program initiated by the Ministry of Federal and Pastoral Development Affairs and aims to promote a suitable settlement pattern for development and access to social services.
137. The Respondent argues that the CDP is a 100% voluntary program, and that no one in Ethiopia is or can be forced to reside in a place where they do not want. Even if it desired it, no governmental entity in Ethiopia – federal, state, or local – can accomplish this folly in Ethiopia.





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138. The Respondent State reaffirms that the CDP does not displace anyone but merely seeks to bring socio-economic services to people who otherwise live in highly scattered settlements.

(iv) Right to a general satisfactory environment under Article 24

139. In response to the Complainants' submission that Gibe III and the Kuraz will deny the people of Bodi, Dassenech, Hamar, Kara, Kwegu, Mursi, and Nyangatom a general satisfactory environment favorable to their development in violation of Article 24 of the African Charter, the Respondent submitted that the government has enacted a series of environmental protection legislation and policies.

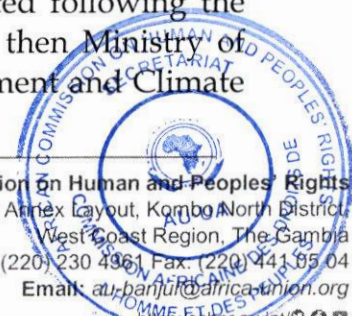
140. The Respondent State submitted that the Complainants' allegations of violation of Article 24 of the African Charter are on the most part based on fears and assumptions because development projects and activities in Ethiopia are carried out under strict guidelines, following a complex web of land, environmental, and labor policies. The Gibe III and the Kuraz are no exceptions.

141. The Respondent State submitted that the allegations do not take into account the fact that the EEPCO identified the potential impact of the dam and put in place mitigating measures, which in turn are included in the environmental and social impact assessment studies of the two projects.

142. The Respondent State submitted that no cause of action, either individual or collective, was brought in the federal or regional courts of the SNNRPS regarding either the Gibe III or Kuraz. And that, in any case, the Complainants can do so in the event the EEPCO and/or the Sugar Corporation should cause any damage to the environment.

143. With regards to the Complainants' allegation that an environmental impact assessment study was not performed for Gibe III and Kuraz prior to their construction, the Respondent State submitted that the impact assessment study for the Gibe III was performed between 2007 and 2008 before the start of the construction of the dam in 2010. The Respondent state submitted that this study was available on the projects and the World Bank's website for public comment.

144. Similarly, with regards to the Impact Assessment Study for Kuraz, the Respondent State submitted that that assessment was completed in 2012 before the Kuraz was launched in 2013. Both studies were conducted following the Environment Impact Assessment Guideline prepared by the then Ministry of Environment & Forestry and the current Ministry of Environment and Climate Change.





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145. The Respondent State submitted that it was incorrect for the Complainants to allege that the impact assessment study of the Gibe III does not include the downstream areas of the dam. This is because page 226 of the Environment and Social Impact Assessment of Gibe III provides a summary of the impact of the project downstream and refers to the detailed study over the downstream effects of the dam.
146. The Respondent State also submitted that the Complainants' claims that the impact assessment study was not transparent and failed to include a participatory process is baseless because the study was conducted under internationally accepted guidelines and treaties ratified by Ethiopia.
147. With regards to public consultation and the right of the people to be consulted on the development projects in their area, the Respondent State submitted that several consultations were held in accordance with the Environment Impact Assessment Guideline prepared by the Environment Protection Authority of Ethiopia which requires the participation of interested and affected parties. The Respondent State submitted that the guideline was followed to the letter in the course of conducting the environmental impact assessment of Gibe III.
148. The Respondent State denied that the public consultation sessions that were held with both the upstream and downstream communities were platforms for governmental imposition. Rather the Respondent State submitted that the consultations it held with the affected Omo communities were nothing but a genuine effort by the EEPSCO to provide an honest overview of the construction and to receive questions and concerns.
149. The Respondent State submitted that the consultations, done in the languages of the seven peoples, were held with the sole purpose of transparency, showing the advantages that come with the dam, and to gather the opinion and concerns of the impacted communities to allow the government to mitigate the short- and long-term impact of the dam.
150. The Respondent State also submitted that there is simply no evidential support for the Complainants' assertion that the Gibe III will deprive the peoples of the Lower Omo access to the Omo River for their livestock or lead to a loss of vegetation cover.
151. Based on the foregoing, the Respondent State submitted that the Complainants' claims that the Respondent State has violated Article 24 of the African Charter should fail inasmuch as Ethiopia has not denied the affected peoples of Bodi, Dassenech, Hamar, Kara, Kwegu, Mursi, and Nyangatom a general satisfactory



environment favorable to their development.

C. Complainants' reply

152. The Complainants submitted in reply to the Respondent State's brief on the merits dated 27 November 2015 that both parties largely accept that the Complainants are a "peoples". That they have the right to decide for themselves whether, when and how to change their way of life which is a fundamental element of Articles 20(1), 21(1), 22(1) and 24 of the African Charter. The Complainants submitted that it is agreed by the parties that the rights conferred by these provisions cannot be abridged in the interest of public need or in the general interest.
153. The Complainants submitted that not only did the Respondent State's arguments and the evidence in support thereof fail to refute the key allegations against the Respondent State, but also that the Respondent State confirmed that:
- (a) It failed to take into account while pursuing its development projects the rights of the Complainants under the African Charter or any other legal instrument contrary to Articles 20(1), 21(1), 22(1) of the African Charter;
 - (b) It took no effective steps to protect the Complainants' rights under Article 21 of the African Charter to freely dispose of their natural resources; and
 - (c) It took no effective steps to secure the Complainants free, prior or informed consent for either Gibe III or the Kuraz Social Development Plan.
154. In reply to the Respondent State's counter argument that the Omo annual floods are not a natural resource, the Complainants clarified that the concept of "natural resources" under Article 21 of the African Charter is a broad one that is unrestricted in its use in the African Charter as decided by the Commission in the *Endorois* case.
155. In reply to the Respondent State's submission or argument that flood retreat agriculture was not in itself sufficient to sustain the Lower Omo peoples, the Complainants submitted that Article 21 of the African Charter would have been robbed of any effect if it applied only to a natural resource which provided an indigenous people with its sole means of subsistence. This, they argued, is because most indigenous peoples depend on a variety of natural resources.
156. In reply to the Respondent State's argument that its proposal for a controlled flood to allow those who wish to continue flood retreat agriculture will be able to do so would be consistent with the African Charter, the Complainants submitted that not only was the proposal put



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forward without a proper assessment of the problem it was intended to solve, but also that the proposal would still have resulted in a breach of Article 21(1) of the African Charter. This, the Complainants submitted or argued, is because they would have lost their right to their natural resources under Article 21 of the African Charter without the Respondent State providing a suitable alternative.

157. The Complainants also submitted in reply that the fact that the EEPKO alone will determine whether, when and for how long to release water from the Dam, if at all, blatantly violates the peoples' right to freely dispose of their natural resources. They submitted that but for the failure to obtain the free, prior and informed consent of the Complainants, the proposal for a system of controlled floods would have not violated the provision of Article 21 of the African Charter.
158. The Complainants submitted that contrary to the Respondent State's contention that the vast majority of Omo pastoralists did not have a legal claim to land affect by the development projects, Article 21 of the African Charter is not contingent on land ownership.
159. In its further observations, the Complainants submitted that, contrary to the Respondent State's submission that Ethiopia has a supposedly decentralized and democratic system of political representation, they have not claimed any breach of the right of the Complainants as individuals to participate freely in the government of their country under Article 13 of the African Charter. Rather, the Complainants have confined their claim to breaches of their rights as peoples under Articles 20 to 24 of the African Charter. The co-existence of these rights in the African Charter reflects the principle that citizens are not expected to rely on their individual right to political representation to defend their collective rights as "peoples". Those collective rights merit and have been granted separate recognition.
160. The Complainants submitted that the Respondent State's submissions or arguments that it consulted members of the Bodi and Mursi communities in Hana City as well as in the villages on Kuraz do not sufficiently clarify whether the consultations took place before or after the Prime Minister's speech in January 2011 that the Kuraz project would start that year.
161. The Complainants submitted in reply that had the Respondent State taken any practical steps to identify and assess the health and other related risks which now confront the Complainants as a result of the project development, it would have stated this. And that the Respondent State's failure to do so suggests that the Respondent State has not investigated and mitigate the risks which the Complainants are concerned about in breach of Article 24 of the African Charter.



162. Based on these submissions, the Complainants invited the Commission to find that the Respondent State has acted in breach of Articles 20(1), 21(1), 22(1) and 24 of the African Charter, and prayed to the Commission for the following reliefs:

- (a) Call upon the Respondent State to ensure that the Complainants' right of access to their traditional lands is protected by law;
- (b) Call upon the Respondent State to establish an independent complaints mechanism to protect and prevent the rights of the Lower Omo people from encroachment;
- (c) Urge the Respondent State to ensure that re-settlements are voluntary, based on informed consent, and respect the cultural preferences of the people;
- (d) Urge the Respondent State to put in place mechanisms for guaranteeing greater transparency and more meaningful consultations;
- (e) Urge the Respondent State to require the relevant local government authorities as well as the plantation management to publish the environmental impact assessment report for the Kuraz and provide communities with a fuller picture of plans for the development of the valley, as required by Ethiopian law, so that they can make informed choices on issues such as resettlement;
- (f) Urge the Respondent State to provide a formal guarantee to protect communal grazing land in accordance with the domestic system of land administration; and
- (g) Urge the Respondent State to provide the Commission with a proposal for the livelihood reconstruction and long-term benefits for the Complainants as victims of the Gibe III and Kuraz development projects

The Commission's analysis on the Merits

163. The present communication alleges that the Respondent State violated the rights of the indigenous peoples of the Lower Omo under Articles 20(1), 21(1), 22(1) and 24 of the African Charter in the pursuit of two development projects in the Respondent State, namely: the Gibe III Hydroelectric Power Project and the Kuraz.

164. The names of the affected groups are the Bodi, the Dassanech, the Hamar, the Kara, the Kwegu, the Mursi and the Nyangatom, which are distinct communities located in the South Omo zone in the Southern Nations, Nationalities and Peoples Regional State of Ethiopia.

165. An allegation of a violation of any of the rights contained in Articles 19 to 24 of the African Charter warrants a consideration of the notion of group rights. This





is because peoples' rights are equally as important as individual rights.³¹ In this particular case, the communication alleges a violation of the rights of several groups of indigenous populations domiciled in the territory of the Respondent State. Having regard to the nature of the complaint, the Commission will now proceed to consider each of the allegations of the Complainants.

Alleged violation of Article 20(1) of the Charter

166. The Complainants allege that by virtue of Article 20(1) of the African Charter, the indigenous peoples of the Lower Omo are, at the very least, entitled to be given an opportunity to effectively participate in the decisions whether to embark on Gibe III and Kuraz and the opportunity either to give or withhold their prior informed consent to both projects. And that the Respondent State's failure to afford them either of these opportunities is a breach of the right to self-determination under Article 20(1) of the African Charter.

167. Article 20(1) of the African Charter provides that:

All peoples shall have right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.

168. In the case of *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya* (Endorois case), the Commission held that Article 20 of the African Charter provides for peoples to retain rights as collectives.³²

169. Based on the nature of the complaint, the Commission considers it relevant to first bear its mind on whether the victims are, indeed, "peoples" and whether they qualify as "indigenous" groups within the contemplation of the African Charter, before addressing the substantive issue of their right to self-determination under the African Charter.

170. In the recognition of collective rights, the African Charter deliberately refrains from defining the term "peoples". However, the Commission has over time clarified its own understanding of the notion of peoples' rights in its jurisprudence. In the case of *Gunme v Cameroon* (Gunme case), the Commission held that the notion of "peoples" is closely related to collective rights enumerated under Articles 19 to 24 of the African Charter; and that these rights can be

³¹ *Gunme v Cameroon* (2009) AHRLR 9 (ACHPR 2009) para 176.

³² *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (2009) AHRLR 75 (ACHPR 2009) para 150 (Endorois case).





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exercised by a people, bound together by their historical, traditional, racial, ethnic, cultural, linguistic, religious, ideological, geographical, economic identities and affinities, or other bonds.³³

171. By this interpretation, the Commission established a set of criteria for identifying whether a group can be considered a “people” under the African Charter. In other words, it is only a “peoples,” as a collective of individuals bound by a common history, tradition, race, ethnicity, culture, language, religion, ideology, geography, economy, identity and affinity, that can be the beneficiaries of the right to self-determination.³⁴

172. In the *Endorois* case, the Commission clarified that for a group to be considered a *people*, they should manifest certain objective attributes as a collective such as:

*a common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious and ideological affinities, territorial connection, and a common economic life or other bonds, identities and affinities they collectively enjoy – especially rights enumerated under articles 19 to 24 of the African Charter – or suffer collectively from the deprivation of such rights. What is clear is that all attempts to define the concept of indigenous peoples recognise the linkages between peoples, their land, and culture and that such a group expresses its desire to be identified as a people or have the consciousness that they are a people.*³⁵

173. In the instant case, it is not contested between the parties that the seven peoples of the Lower Omo, namely the Bodi, the Dassanech, the Hamar, the Kara, the Kwegu, the Mursi and the Nyangatom, allegedly impacted by the Gibe III dam and the Kuraz are “peoples” within the meaning ascribed to the concept under the African Charter.

174. In its written submissions, the Complainants submitted that the seven affected communities occupy or have occupied until recently the traditional territories delineated and shown on the maps in the attached bundle of documentary evidence.³⁶ The Complainants contended that since the Respondent State has not disputed that the Complainants are “peoples”, they are therefore entitled to the protection of Articles 20 to 24 of the African Charter.³⁷

175. The Complainants further submitted that even in the Respondent State’s Submissions on Admissibility, the Respondent State itself sought to rely upon the

³³ *Gunme and Others v Cameroon* (2009) AHRLR 9 (ACHPR 2009) para 171.

³⁴ *Gunme* case (n 33 above) para 171.

³⁵ *Endorois* case (n 32 above) para 151; Communications 279/03 and 296/05 - *Sudan Human Rights Organisation and another v Sudan* (2009) AHRLR 153.

³⁶ Merits Brief for the Complainants para 1.

³⁷ Merits Brief for the Complainants para 80.





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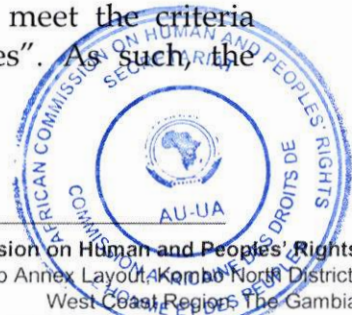
fact that as “peoples” the members of the affected communities in the Lower Omo had an “unconditional right to self-determination” under Article 39(1) of the Constitution of the Federal Democratic Republic of Ethiopia (Constitution). It argued that this could only be because the Respondent State accepts that the victims are “peoples” under the Constitution and the African Charter.

176. In its response, the Respondent State did not challenge the characterization of the peoples of the Lower Omo as “indigenous peoples”. Rather, the Respondent submitted that Ethiopia is a “rich mosaic of nations, nationalities and peoples” who speak more than 80 languages and has often been described as a “museum of peoples.”³⁸
177. From these submissions, it is not in contention that the seven identified groups of the Lower Omo in the Respondent State are “peoples” and therefore fall within the purview of Article 20(1) of the African Charter. However, the absence of any contention between the parties on whether the victims are “peoples”, by itself, is not a sufficient basis for grounding a finding that they are such within the context of the African Charter. For purposes of certainty, the Commission’s criteria for determining whether a collective of individuals constitute a “people” or group of “peoples” weighed against the established facts of each case should continue to be the objective basis for making such an assessment under the African Charter.
178. Based on the evidence presented before the Commission, including specifically the Ethnographic Map of South Omo³⁹ attached to the Complaint, it is clear that the seven communities allegedly affected by the Gibe III dam and the Kuraz Sugar Project have historically lived on the banks of and around the Omo River in the Respondent State. They are said to be pastoralist in nature, with cultures and traditions peculiar to each of them.
179. Besides the Respondent State’s Constitution referencing its diverse population as a collection of “nations, nationalities and peoples,”⁴⁰ the seven affected communities are factually shown to be domiciled along the Omo River, which is located in a unit of the Ethiopian federation known as the Southern Nations, Nationalities and Peoples Regional State (SNNPR). They are also factually shown to be largely pastoralist communities, each having its own ancestral lands, historical tradition, ethnic identity and cultural homogeneity common to it.
180. The Commission considers that the seven affected groups meet the criteria established in its jurisprudence for recognition as “peoples”. As such, the

³⁸ Respondent’s written brief on the Merits para 15.

³⁹ Annexure 1 to the Complaint dated 16 April 2012.

⁴⁰ Constitution of Ethiopia Art 8(1).





Commission has no reason to reject the characterization of the alleged victims as “peoples” within the context of Article 20(1) of the African Charter.

181. With regard to whether the affected peoples of the Lower Omo are “indigenous” peoples, the Commission has noted in its Report of the Working Group of Experts on Indigenous Populations/Communities and subsequent jurisprudence the difficulty associated with defining the concept of “indigenous” peoples under the African Charter.⁴¹ However, the term is often used in recognition of certain marginalized and vulnerable groups in a given society who suffer from particular problems. Such groups have not often been accommodated by dominating paradigms of development in their own country and, in many cases, they are being victimized by mainstream policies and thinking and their human and collective rights violated.⁴²
182. The Commission notes that the term “indigenous” is not intended to create a special class of citizens, but rather to address historical and present-day injustices and inequalities.⁴³ Due to past and ongoing processes in their countries, indigenous peoples or ethnic minorities need recognition and protection of their basic human rights and fundamental freedoms.
183. As the Commission has noted in its Report of the Working Group on Indigenous Populations not only is it a fact that Africa is characterized by multiculturalism, but also that almost all African states host a rich variety of different ethnic groups, some of which are dominant and some of which are in subordinate positions. All of these groups are indigenous to Africa. However, the Commission recognizes that some are in a structurally subordinate position to the dominating groups and the State, leading to marginalisation and discrimination. It is this condition that the notion of indigenous peoples seeks to address. The concept is directed at the root causes of the subordination and other problems that such peoples face and emphasizes the human rights dimension for addressing them.⁴⁴
184. The Commission recognizes that, in post-colonial African countries, certain groups who live on the fringes of modern-day society such as hunter-gatherers, pastoralists and some small-scale farmers, fall in this category.⁴⁵ Hence, the

⁴¹ African Commission ‘Report of the Working Group of Experts on Indigenous populations/Communities’ (2005) 14.

⁴² As above, 20.

⁴³ *Endorois case* (n 32 above) 149.

⁴⁴ African Commission’s Report on Indigenous Populations (n 41 above) 113-114.

⁴⁵ African Union Commission Department of Rural Economy and Agriculture *Policy Framework for Pastoralism in Africa: Securing, Protecting and Improving the Lives, Livelihoods and Rights of Pastoralist Communities’* (2010) 2.





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Commission in its Working Group on Indigenous Populations developed a set of four criteria for identifying indigenous peoples. These are: self-identification as a distinct collectivity as well as recognition by other groups; occupation and use of a specific territory; voluntary perpetuation of cultural distinctiveness; and experience of subjugation, marginalisation, dispossession, exclusion or discrimination.

185. In the present case, the peoples of the Lower Omo self-identify as indigenous. They have their own cultures and traditions. They are based on lands along and around the Omo River in the South Omo Zone which they have historically attributed as home. While the Bodi, Mursi, Dassenech, Hamar, Kara, Kwegu and Nyangatom are predominantly pastoralist, they have - to varying degrees - also practiced farming on lands which they have traditionally used for flood retreat and rain-fed cultivation and grazing. These pastoral communities live on the fringes of Ethiopian society. As the Respondent State notes in its submissions, many of these communities have historically lacked access to basic social services and some of these groups such as the Mursi are one of the "most exoticized and unfortunately caricatured people in the South Omo Zone and in the country."⁴⁶
186. The Commission finds that these attributes meet the four criteria for recognizing the peoples of the Lower Omo as indigenous. To the extent that these peoples of the Lower Omo self-identify as an indigenous group and are recognized as a historically vulnerable group who rely on pastoralism and flood retreat cultivation for their continued survival, they constitute "indigenous peoples" whose human and collective rights are entitled to be protected under the African Charter.
187. By the tenure of Article 20(1) of the African Charter, the right to self-determination by indigenous peoples can be exercised only in conformity with the sovereignty and territorial integrity of a State Party to the African Charter.⁴⁷ Based on the facts before the Commission, it is clear the indigenous peoples of the Lower Omo do not seek to challenge the territorial integrity or political unity of the Respondent State. Rather, they seek only to claim "internal" self-determination. Rather, the Complainants' allegation that the right of the Lower Omo peoples to self-determination has been violated is in two specific respects. First, that they were not afforded the opportunity to effectively participate in the

⁴⁶ Respondent Written Submissions on the Merits para 21(A).

⁴⁷ *Gunme case*, para 199. See also *Katangese Peoples' Congress v Zaire* (2000) AHRLR 72 (ACHPR 1995); *Communication 328/06 - Front for the Liberation of the State of Cabinda v Republic of Angola*, para 126. Also see *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights* para 41.



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decision-making processes leading to the Gibe III dam and the Kuraz Sugar Projects. Second, that they were not given the opportunity to decide whether or not to give their free, prior and informed consent to the two projects.

188. By the very nature of Article 20(1) of the African Charter, the right to self-determination is underscored by the freedom of peoples to determine their own development. Where this right is sought to be exercised in conformity within the sovereignty and territorial integrity of a State, it must be understood to include the right of the people concerned to freely and effectively participate in the processes of the state as well as in decisions on economic, social and cultural matters that directly impact the rights and interests.⁴⁸
189. This also means that the protection of the right to self-determination of peoples in the national context is not limited only to participation in the democratic processes of a State. It extends to the ability to pursue their own economic and social development according to the policy they have freely chosen. It also implies the obligation on the part of States Parties to ensure that vulnerable and marginalised peoples, including indigenous populations/communities, are able give or decide to withhold their free, prior and informed consent to any development project affecting them.
190. In the *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights*, the Commission declares that "States parties should ensure the prior informed consent by indigenous populations/communities to any exploitation of the resources of their traditional lands and that they benefit accordingly."⁴⁹ Similarly, in the *Endorois* case, the Commission held that any development or investment project that would have a major impact on territory of indigenous populations requires that the duty of the state not only to consult with the community, but also to obtain their free, prior and informed consent. Consequently, the Commission found that the consultations held by the Republic of Kenya with the Endorois people were inadequate as the people had not effectively participated in the process.
191. In this case, the Complainants submitted that the indigenous peoples of the Lower Omo have been denied an opportunity to effectively participate in the decisions to proceed with both Gibe III and Kuraz, and that their free, prior and informed consent is not possible without their participation. Considering the

⁴⁸ Article 3 of the United Nations Declaration on the Rights of Indigenous Peoples.

⁴⁹ *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights* para 41.



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potential for the Gibe III dam and the Kuraz to fundamentally change the traditional way of life of the Omo people, the Complainants contended that the indigenous peoples of the Lower Omo were entitled to effectively participate in the consultation processes. That the latter did not participate in the decisions to proceed with Gibe III and Kuraz because they: (a) were not involved in each decision on the two projects before the legal obligation to proceed with the dam was concluded; (b) did not participate in sufficient numbers to ensure that they were representative of their communities as a whole; (c) knew little or nothing about the project and so did not have sufficient knowledge of the likely impact of the two projects on their communities to enable them to come to an informed view whether to support them; thought they could choose not to support the Projects without suffering any adverse consequences, and (e) had done so according to their customs and traditions and in a form appropriate to the circumstances.

192. The Complainants submitted that only about 93 members of the community, representing 0.1% of the community and excluding the Hamar, Bodi and Kwegu, were consulted on the Gibe III dam project over the course of six meetings held between May and December 2007; and that even the Respondent State's own Public Consultation and Disclosure Plan shows that people downstream of the dam were not consulted until at least 10 months after contracts had been exchanged. The Complainants submitted that, by that time, work had already commenced on the dam.
193. The Complainants further submitted that, with respect to the Kuraz project, the peoples' first knowledge of the project came about from the speech by then Prime Minister, Meles Zenawi, delivered in Jinka in January 2011. To the Complainants, the speech made it clear that the decision to convert the peoples' lands to sugar cane farms and to proceed with the development that year had already been made.⁵⁰
194. Conversely, the Respondent State submitted that Ethiopia is one of the only states in the world with constitutional guarantees of the right to self-determination including secession, and one that has cherished the values of independence and self-determination throughout its history. In disputing that the Omo peoples were not adequately consulted before the decision to proceed with the Gibe III dam and the Kuraz, the Respondent State submitted that both projects were vital to the economic growth and prosperity of Ethiopia. The Respondent State

⁵⁰ These submissions of the Complainant are supported by several investigative reports of the World Commission on Dams, the United State Agency for International Development (USAID), Development Assistance Group (DAG) and research articulated.



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submitted that the right to self-determination of the indigenous peoples of the Lower Omo should be assessed based on their representation within the political structures of the Ethiopian federation. The Respondent State contended that all the affected nations, nationalities and peoples of the Lower Omo in the South Omo Zone of the SNNPR of Ethiopia are administered by elected representatives at the *Kebele*, *Woreda*, state and federal government levels, respectively.

195. The Respondent State contended that the Lower Omo peoples are represented in the SNNPR's legislature (made up of the State Council and the Council of Nationalities) and in the State executive through various governmental bureaus on pastoral, agricultural and other affairs. The Respondent argues that, at the federal level, pastoralist communities are also represented in the two chambers of the federal legislature, namely: the House of Peoples' Representatives (which has a Standing Committee on Pastoralist Affairs) and the House of Federation. These administrators and representatives, the Respondent argues, represented the voices of the affected communities at the various levels of government in which the decision to proceed with the two projects were taken.
196. The Commission notes that under the Respondent's Constitution, "[n]ationals have the right to participate in national development and, in particular, to be consulted with respect to policies and projects affecting their community."⁵¹ The Respondent State submitted that the government started public consultations with the Omo peoples on the Gibe III dam in 2007 before the project commenced and on the Kuraz in 2013.⁵²
197. From the foregoing, it is clear that the claim that participation in the consultations was inadequate must be balanced against the submission that consultation was done through the elected administrators and representatives of the peoples. That balance can only be struck by a scrupulous look at the evidence before the Commission. In the particular context of projects executed on indigenous lands, this Commission has previously noted that a government must consult the indigenous peoples on the use of their land in the public interest.⁵³ Consultation cannot be an alternative to obtaining the free, prior and informed consent of indigenous communities for the use of their ancestral lands. In the *Endorois* case, the Commission held that in the event that "any development or investment projects [...] would have a major impact within the Endorois territory, the state

⁵¹ Ethiopian Constitution Art 43(3).

⁵² Respondent's Written Submissions on the Merit para 37.

⁵³ *Endorois* case (n 32 above) para 291.





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has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions.”

198. The Commission is inspired by the decision of the United Nations Human Rights Committee in *Apirana Mahuika v New Zealand (Mahuika case)*,⁵⁴ where the Committee held that the enjoyment of the right of minority communities to their own culture “may require positive legal measures of protection by a State party and measures to ensure the effective participation of members of minority communities in decisions which affect them.” The Committee noted that:

*the acceptability of measures that affect or interfere with the culturally significant economic activities of a minority depends on whether the members of the minority in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy.*⁵⁵

199. In this case, there is no doubt that as pastoralist and flood-retreat farmers, the Omo peoples have deep ties to their ancestral lands on which they depend for their economic and cultural wellbeing and survival. Where indigenous peoples only seek to exercise the right to self-determination in conformity with the territorial integrity of a state, it should be understood to include the right, first, to be duly and adequately consulted before commencing a proposed development project and, second, to give or withhold their free, prior and informed consent to a proposed project.
200. Pursuant to Article 60 of the African Charter, the Commission is able to draw inspiration from the work of the United Nations in this regard. Under Article 3 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), Article 1(1) of the International Covenant on Civil and Political Rights and Article 1(1) of the International Covenant on Economic, Social and Cultural Rights, the right of indigenous communities to effectively participate in important decisions affecting them is recognised as an integral part of the right to self-determination.⁵⁶
201. Also, the UN Expert Mechanism Advice No. 2 (2011) on Indigenous peoples and the right to participate in decision-making has, in its interpretation of Article 3 of the UNDRIP, recognised the right to free, prior and informed consent within the context of the right to self-determination. In the Advice No. 2, the UN Expert Mechanism observed that the requirements of consultation and free, prior and

⁵⁴ Communication No. 547/1993, U.N. Doc. CCPR/C/70/D/547/1993 (2000) para 9.5.

⁵⁵ *Mahuika case* (n 54 above) para 9.5.

⁵⁶ UN Declaration on the Rights of Indigenous Peoples Article 3.





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informed consent form a crucial part of the right to self-determination.⁵⁷ The UN Expert Mechanism further noted that:

24. *The elements of free, prior and informed consent are interrelated; the elements of “free”, “prior” and “informed” qualify and set the conditions for indigenous peoples’ consent; violation of any of these three elements may invalidate any purported agreement by indigenous peoples.*
25. *The element of “free” implies no coercion, intimidation or manipulation; “prior” implies that consent is obtained in advance of the activity associated with the decision being made, and includes the time necessary to allow indigenous peoples to undertake their own decision-making processes; “informed” implies that indigenous peoples have been provided all information relating to the activity and that that information is objective, accurate and presented in a manner and form understandable to indigenous peoples; “consent” implies that indigenous peoples have agreed to the activity that is the subject of the relevant decision, which may also be subject to conditions.⁵⁸*

202. In the same way, the recognition in Article 20(1) of the African Charter of the right of peoples to “freely determine” their economic and social development must be understood to imply not only the requirement of consultation but also of the free, prior and informed consent of indigenous peoples. In the particular context of the right to self-determination, States Parties have an implied obligation to consult and obtain the free, prior and informed consent of communities in political, economic or social decisions affecting them.

203. With regards to proposed development or investment projects on the ancestral lands, territories or resources of indigenous populations, “consent” represents a community’s agreement to the proposed activity be undertaken. Consent is “free” when it is given without coercion, harassment, intimidation or manipulation by government or other actors. Consent is “prior” when it is given after due consultation with and participation by the affected community and before the decision to undertake a given project is made.⁵⁹ Consent is “informed” when it is given after receiving all relevant information concerning the project has been supplied, and the information – including its potential adverse impacts

⁵⁷ UN Expert Mechanism Advice No. 2 (2011): Indigenous peoples and the right to participate in decision-making A/HRC/18/42 paras 20.

⁵⁸ As above, paras 24-25.

⁵⁹ UN Declaration on the Rights of Indigenous Peoples Article 18. Also see UN Declaration on the Rights of Indigenous Peoples Articles 32-34; UN Human Rights Committee ‘General Comment 23: Article 27 (Rights of Minorities)’ para 7; UN Committee on Economic, Social and Cultural Rights ‘General comment No. 21: Right of everyone to take part in cultural life (art. 15, para. 1(a) of the International Covenant on Economic, Social and Cultural Rights)’ para 2.





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on the community - is accurate, objective and presented in a form and manner that is understandable to the community.⁶⁰

204. Furthermore, in the decision of the Inter-American Court in the case of *Saramaka People v Suriname*, it was held that in cases of:

*large-scale development or investment projects that would have a major impact with Saramaka territory the State has a duty, not only to consult with the Saramakas, but also to obtain their free, prior and informed consent according to their customs and traditions.*⁶¹

205. In this case, the Complainants submitted that the Gibe III dam and the Kuraz sugar projects meet the criterion that the free, prior and informed consent of the alleged victims must be obtained because the projects will have a potentially substantial or major impact on the affected communities.⁶² The Complainants contended that none of the affected indigenous communities have hereditary chiefs or elected representatives. That decisions are made at meetings attended by adult males in each community. And that elders are occasionally summoned to appear before local officials but have no authority to enter agreements on behalf of their community.

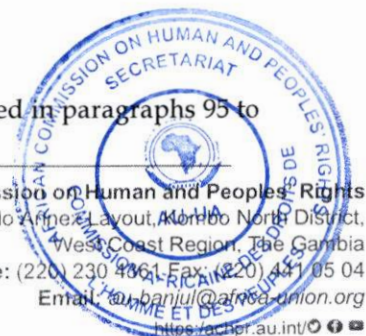
206. The Complainants further submitted that the participation of the indigenous peoples of the Lower Omo in the consultations on the Gibe III dam project was not timely because the EEPCO had already concluded the contract to construct the dam before actual consultations with the people occurred. The Complainants also submitted that only 93 members of the affected communities participated in the consultations, which was insufficient to render the consultations effective. The Complainants further submitted that the information provided to the 93 people who attended the consultations was inadequate as it did not clearly explain to the people what the assessment of the adverse impact of the dam was on their sources of livelihood. The Complainants submitted that none of those interviewed understood what consequences the construction of the dam would have on their lives and livelihoods.

207. From the Respondent State's account, not only has the government held consultations with administrators and elected representatives in the South Omo Zone, it has in certain cases "spent significant effort to consult practically every elder and village chief in Selamago Woreda" and other communities in respect of

⁶⁰ As above.

⁶¹ Judgment of 28 November 2007 Inter-Am Ct HR Series C 172 para 134.

⁶² In support of this proposition, the relied on their earlier arguments summarised in paragraphs 95 to 97 which are based on the USAID and DFID report.





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the Gibe III and Kuraz projects.⁶³ The Respondent State submitted that the consultations were organized at the zonal, woreda and kebele levels where community members were invited to participate in public discussions, presentations, and question-and-answer sessions with administrators and representatives of the communities.⁶⁴

208. Having considered the nature of the allegation and the serious human rights concerns that the two projects raise, the Commission notes that the interviews conducted and cited by the Complainants have no probative value having not been authenticated nor signed by the interviewees themselves, a person in authority or other duly authorised official. More so, the written depositions supporting these claims suffer from the same evidentiary deficit having not been duly endorsed by a notary public or a Commissioner for Oath. As an international body, the Commission cannot rely merely on the reports of third-party bodies or governmental agencies and non-governmental organisations to come to an informed conclusion.
209. Furthermore, both parties placed substantial reliance on the Final Report of the Development Assistance Group (DAG) mission to Ethiopia made up of representatives of the Finnish Embassy, the Swedish Embassy, the German Embassy, the Dutch Embassy, the United Kingdom Department for International Development, the United States Agency for International Development, and the European Union, all in Addis. The DAG mission report notes that the Government did not offer communities any alternative but to settle permanently, and that the focus of consultation appears to be an effort to persuade the communities to go along with this process, rather than debating options. After a careful consideration of the DAG mission report, the Commission notes that despite identifying apparent human rights challenges associated with the state-directed resettlement in the South Omo Zone, the Mission "team found no evidence of forced migration".⁶⁵
210. The Commission finds no indication that the peoples of the Lower Omo have been manifestly denied their right to freely determine their economic and social development or to participate in the consultations on the Gibe III dam. While the Commission agrees with the Complainants on the potential impact of the two projects on the affected communities, there is neither a direct nor primary piece of evidence on record to support its claim that the communities were unrepresented in the consultation processes held by the Respondent State on

⁶³ Respondent's Written Submissions on the Merit para 37(D).

⁶⁴ Respondent's Written Submissions on the Merit para 37(A)-(G).

⁶⁵ Development Assistance Group Final Report (2014) page 2.





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Gibe III. If anything, the documents and photographic images included in its Bundle of Documents depict various instances of such consultations. In the absence of a critical piece of direct evidence from the affected peoples themselves or other compelling documentary evidence, the Commission is persuaded to give more weight to the evidence and arguments by the Respondent State, which show that the peoples were duly consulted on the Gibe III.

211. The Commission, however, emphasises that mere consultation with a few village chiefs, political administrators and traditional representatives, by itself, is insufficient consultation, if it does not lead to the effective participation of indigenous communities themselves, including women, persons with disabilities and the elderly. To not clarify this would invariably permit violating governments to substitute the international human rights requirement that indigenous peoples be adequately consulted on national policies with the consultation of a few partisan leaders. In respecting the right to self-determination of such communities under the African Charter, governments and corporate actors, whose business activities have potential adverse human rights implications on marginalised and vulnerable communities, have an implied human rights responsibility to ensure that they seek and obtain consent and broad community support through adequate consultation.
212. In this case, the evidence adduced by both parties shows that the seven affected peoples have exercised their right to self-determination not just through their representatives in the SNNPRS and federal governments, but also by directly participating in the public consultations on the construction of the dam and sugar factories. The Respondent State emphasises that no one in Ethiopia can be forced to relocate or reside in place where they do not want to.⁶⁶
213. Based on the evidence before the Commission, there is no indication that the Respondent State has forced the affected communities either to support the Gibe III dam and the Kuraz projects or to relocate to the villages built under the CDP. Rather, through direct and indirect consultation, the Respondent State seems to be working to persuade people to move into the alternative settlements in order to benefit from basic social services and acquire new farming skills. While there remains some concerns by the affected communities, they clearly are able to ventilate those concerns to the Respondent State through the consultation process or have recourse to the local judicial process.
214. As such, for the claim that the indigenous peoples of the Lower Omo were not given an opportunity to give or withhold their free, prior and informed consent

⁶⁶ Respondent's Written Submission on the Merit para 52(B).





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to succeed, the evidence on the record must clearly support the claim. The burden is on the Complainants to provide direct or first-hand testimony or other primary piece of evidence in this regard. The evidence must show that the opportunity for the people to express their right to self-determination either through participating in the consultation processes or to legally give or withhold their consent to the two projects was non-existent. This, in the Commission's view, is not the case.

215. In light of the above, the Commission finds that the right to self-determination under Article 20(1) of the African Charter has not been violated by the Respondent State.

Alleged violation of Articles 21(1) of the Charter

216. The Complainants allege that the Gibe III dam project will deprive the Lower Omo peoples of the annual floods and that the Kuraz Sugar Project has deprived or will deprive them of the lands converted to sugar cane farms, in breach of the peoples' right to freely dispose of their natural resources under Article 21(1) of the African Charter.

217. Article 21(1) of the African Charter provides that:

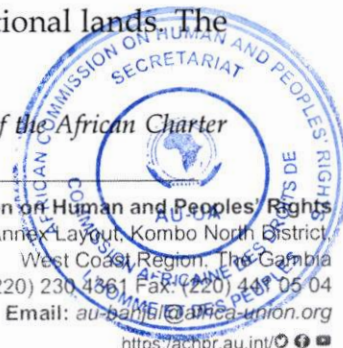
All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.

218. The Commission notes generally that, under Article 21(1) of the African Charter, the terms "wealth" or "natural resources" are not defined. However, in the *State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter relating to the Extractive Industries, Human Rights and the Environment 2018*, the Commission attempts to define both terms as concisely as possible. According to the Commission:

'Wealth' as used in Article 21 of the African Charter refer[s] to a people's tangible and intangible possessions having socio-economic value, including natural resources; and 'natural resources' as used in Article 21 refer to both the non-renewable resources including oil, gas and minerals and renewable resources, tangible and intangible, including the sun, soil, water, wind, fauna and flora. Natural resources thus encompass all assets or materials that constitute the natural capital of a nation.⁶⁷

219. It is the Complainants' submission that the annual floods of the River Omo are a "natural resource" of the Lower Omo peoples as are their traditional lands. The

⁶⁷ African Commission 'State Report Guidelines and Principles on Articles 21 and 24 of the African Charter relating to the Extractive Industries, Human Rights and the Environment' (2018) para 7.





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Complainants also submitted that their livestock is their “wealth” within the ambit of Article 21(1) of the African Charter. The Complainants contend that the loss of the annual floods to the Gibe III dam will affect their ability to grow crops that will sustain them for the greater part of the year and deny the people the right to “freely” dispose of their natural resources without their free, prior and informed consent. The Complainants submitted that the Respondent State’s proposal to release annual floods will not cure the breach of Article 21(1) of the African Charter.

220. The Complainants also submitted that the loss of the peoples’ traditional lands to the Kuraz will also entail the loss of all or most of the Complainants’ livestock which previously grazed on them and will have no choice but to sell their cattle. The Complainants contend that even if the Omo River or the lands allocated to sugar were regarded in whole or part as the natural resources of the Respondent State, the denial of access to the River Omo and to lands upon which to graze their cattle will still have violated the Complainants’ rights under Article 21(1) of the African Charter because of the manner in which the Respondent State has put its plans into effect. This is because the provision of substituted lands to displaced members of the affected communities, the Complainant submitted, would sedentarise the pastoralist communities and justify a violation of Article 21(1) of the African Charter.
221. The Respondent State submitted that the continuation of the annual floods through midlevel outlets installed on the dam by the EEPKO to allow for controlled will support continued flood retreat agriculture for those who wish to pursue that practice. The Respondent State also submitted that the Sugar Corporation did not deprive any of the seven named peoples their wealth or natural resources because the people have welcomed the projects and consider them as gateways to hasten development in the South Omo Zone.
222. The Respondent State submitted that the ancient practice of annual flood retreat agriculture is neither predictable nor provides sustainable food security for the people, issues which the projects are intended to solve. For those in the South Omo Zone who wish to continue flood retreat farming, the government argues that the EEPKO has installed outlets on the Gibe III dam at great cost to allow those farmers much more secure, regulated, and timely flooding occurrences as they continue to transition into more sustainable livelihoods.
223. The Respondent State also submitted that the Kuraz project will develop about 100,000 hectares rather than the initially proposed 175,000 hectares of land of





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sugarcane plantations and establish a total of 4 sugar factories.⁶⁸ The Respondent State re-emphasised that no single individual in the South Zone has been or will be displaced from his or her home as a result of the sugar development project.

224. Article 21(1) of the African Charter is closely associated with the right to self-determination under Article 20(1) of the African Charter.⁶⁹ The Commission agrees with the Complainants that the flood retreats forms part of the water resources of the Respondent State as well as the Lower Omo peoples. In the *Guidelines on the Right to Water in Africa 2019*, the Commission observed that indigenous peoples' access and use of natural resources in their territory are intrinsically related to their right to life, food, self-determination and the right to exist as a people.⁷⁰ Similarly, in the *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights*, the Commission declares that:

*States parties have an obligation to ensure the free, prior informed consent by indigenous populations/communities to any exploitation of the resources of their traditional lands and that they benefit accordingly.*⁷¹

225. As such, indigenous peoples have a right to participate in the decision to harness or dispose of their natural resources by the State. The Commission also affirmed the responsibility of States to ensure natural resource stewardship with and in the interest of the populations within their jurisdiction and affirmed the imperative to fulfil this responsibility in conformity with international human rights standards.⁷²
226. Similarly, in Resolution 224(LI)2012 on a Human Rights-Based Approach to Natural Resources Governance, the Commission emphasised the responsibility of States to take all necessary measures to ensure participation, including the free, prior and informed consent of communities, in decision making related to natural resource governance.⁷³ The Commission noted in that Resolution that States should ensure that respect for human rights in all matters of natural resources

⁶⁸ Respondent's Response to the Complainant's Additional Observations on the Merits para 91.

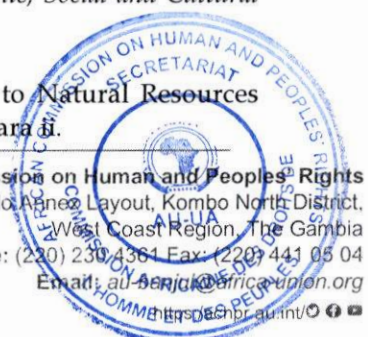
⁶⁹ African Commission 'State Report Guidelines and Principles on Articles 21 and 24 of the African Charter relating to the Extractive Industries, Human Rights and the Environment' (2018) paras 22 & 46.

⁷⁰ African Commission 'Guidelines on the Right to Water in Africa' (2019) para 27.

⁷¹ African Commission 'Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights' para 44.

⁷² African Commission 'Guidelines on the Right to Water in Africa' (2019) para 1.

⁷³ ACHPR/Res.224(LI)2012: Resolution on a Human Rights-Based Approach to Natural Resources Governance 51st Ordinary Session 18 April to 2 May 2012 Banjul, The Gambia para 6.





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development, management and governance, in investment agreements prevails.⁷⁴

227. As the Commission has previously stated in its jurisprudence, the right to freely dispose of wealth and natural resources located in ancestral or traditional lands is also vested in the indigenous populations by virtue of Article 21(1) of the African Charter.⁷⁵ In the case of *Social and Economic Rights Action Centre and Another v Nigeria (Ogoni case)*, the Commission made it clear that a people domiciled on a resource-rich territory within a state can claim the protection of Article 21 of the African Charter.⁷⁶
228. Although the *Endorois* case does provide a useful guide on how the alleged use of indigenous lands in the public interest can be determined to benefit or not benefit indigenous populations, it is not on all fours with the instant case. This is because, in that case, the Complainants claimed that they have a right to property with regard to their ancestral land pursuant to Article 14 of the African Charter. Hence, the Commission held – relying on persuasive jurisprudence from the Inter-American Court on Human Rights – that the right to property in Article 14 of the African Charter is linked to the right of indigenous peoples to natural resources located in ancestral lands. The Commission held that for Kenya to be justified in limiting the rights of the Endorois to Ruby mining on their ancestral lands, the Government was expected to satisfy the following two-pronged test that: (a) it was in the interest of public need and the general interest of the community; and (b) it was in accordance with appropriate laws. The Commission observed that none of these tests had been satisfied by the Respondent in that case and, as such, found a violation of the rights of the Endorois people under Articles 14 and 21 of the African Charter. The Commission held that the Endorois people have a right to freely dispose of their natural resources in consultation with the Respondent in that case.⁷⁷
229. In the present case, the Commission notes that the Respondent State has been in consultations with the seven affected peoples of the Lower Omo. The evidence before the Commission shows that the Omo people have been participating in these consultations directly and through their representatives. The evidence before the Commission also shows that the potential adverse human rights impacts of these projects have either been avoided or significantly mitigated.

⁷⁴ ACHPR/Res.224(LI)2012: Resolution on a Human Rights-Based Approach to Natural Resources Governance 51st Ordinary Session 18 April to 2 May 2012 Banjul, The Gambia para iv.

⁷⁵ (2001) AHRLR 60 (ACHPR 2001) para 58 (*Ogoni case*); *Endorois case* (n 32 above) 255.

⁷⁶ *Ogoni case* (n 75 above) para 58.

⁷⁷ *Endorois case* (n 32 above) paras 267-268.





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Regarding the annual floods, the Respondent State has undertaken mitigation measures to limit the impact of the construction of the dam on the peoples' annual flood retreat agriculture by releasing controlled floods periodically. Due to the construction of the dam, the Respondent State contends that the people are being taught modern farming techniques and that irrigation from the dam will help improve the farming practices of the affected communities.

230. With regard to the Kuraz, the Respondent State submits that no grazing land will be touched and that no one has been evicted from their land. Rather, the projects have paved the way for acquisition of private holding through the issuance of landholding certificates for each household resulting in land certificates been issued to 596 households in Selamago Woreda.⁷⁸ The Respondent State submitted that, under the SNNPRS land law, priority is given to farmers and pastoralists before lands can be provided to private developers.⁷⁹ The Respondent State submitted that there was ample state land that was used for the Kuraz Sugar project in the South Omo Zone⁸⁰ and, as such, no land was expropriated.⁸¹ The Respondent State submitted that the Constitution and Proclamation 455/2005 on Expropriation of Land Holdings for Public Purposes and Payment of Compensation provide for the processes and conditions that have to be fulfilled for expropriate to take plan.
231. From the evidence before the Commission, there is no indication that the Omo peoples are opposed to or have withheld their consent to the dam and the Kuraz sugar projects. There is also no indication that the mitigation measures adopted by the Respondent State to ensure that the Omo peoples have access to irrigation and annual controlled flood are unreasonable, have led or will lead to a loss of their livelihoods. In their information update to the Commission submitted in 2021, the Complainants acknowledged that the Respondent State had implemented the controlled flood release but complained that the Respondent State had only done so once since the dam started operations in 2016. Regarding the Kuraz, the Complainants do not dispute that the lands upon which the Kuraz project has so far been implemented is state lands rather than indigenous territories.
232. It is for the Complainants to show that the Omo peoples have not freely disposed of their natural sources and wealth located within the indigenous lands. The

⁷⁸ Respondent's Response to the Complainant's Additional Observations, para 105.

⁷⁹ SNNPR Proclamation No 110/2007 Article 5 (15).

⁸⁰ Respondent's Response to the Complainant's Additional Observations, para 106.

⁸¹ Ethiopian Constitution Article 40(8); Proclamation 455/2005: Expropriation of Land Holdings for Public Purposes and Payment of Compensation.





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evidence presented before the Commission by the Complainants does not disclose this. Unless there is compelling evidence to show that the Omo peoples were opposed to the construction of the Gibe III dam and that the lands upon which the Kuraz has so far been implemented are traditional lands forcefully acquired by the State, the Commission finds that there has been no violation of Article 21(1) of the African Charter.

233. In the circumstances, the Commission finds that the Respondent State has not violated the rights of the Omo peoples under Article 21(1) of the African Charter.

Alleged violation of Articles 22(1) of the Charter

234. The Complainants allege that the Omo peoples' right to development under Article 22(1) of the African Charter has been violated as a result of the Respondent State's failures to conduct a proper impact assessment of the Gibe III dam and the Kuraz and to seek or obtain their free, prior and informed consent.

235. Article 22(1) of the African Charter provides that:

All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

236. The African Charter is the only binding international human rights instrument of its kind that recognizes the right to development as a fundamental right of the collective. In the *Endorois* case, the Commission noted that the right to development is two-pronged – that is, it is both constitutive and instrumental, or useful as both a means and an end. The Commission held that fulfilling only one of the two prongs or a violation of either the procedural or substantive element of the right will constitute a violation of the right to development under Article 22(1) of the African Charter.⁸² By this Commission clarifies that the right to development is constitutive to the extent that it is recognized and protected by law; it is instrumental to the extent that it entitles and empowers its holders to be consulted, to contribute to and participate in decision-making processes concerning them so that other rights are not violated. In all of this, the freedom of choice must be present as a part of the right to development.⁸³

237. Under international human rights law, the right to development is closely associated with the rights of peoples to self-determination and to freely dispose

⁸² *Endorois* case (n 32 above) para 277.

⁸³ *Endorois* case (n 32 above) para 278. Also see Communication No. 1457/2006 - *Poma and Peru HRC* 27 March 2009 para 7.6



of natural resource.⁸⁴ In the United Nations Declaration on the Right to Development, this is affirmed in Article 1(2) which provides that:

The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

238. Similarly, the Commission notes that Article 23 of the United Nations Declaration on the Rights of Indigenous Peoples provides as follows:

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

239. In the *Endorois* case, the Commission cited with approval a Report of the United Nations expert mechanism on indigenous peoples' rights, which states in relation to development projects affecting indigenous people that the necessity for free, prior and informed consent requires that "indigenous peoples are not coerced, pressured or intimidated in their choices of development."⁸⁵

240. As such, the Commission agrees with the Complainants' submission that the right to development entitles a community to be consulted prior to a decision that affects it. The Complainants contend that the consultation must be conducted in good faith, in a culturally appropriate manner and with the objective of reaching agreement. The Complainants further submitted that when a large-scale development is likely to have a major impact on the territory of a particular community, the State has a responsibility to obtain the community's free, prior and informed consent to it. And that if the project is allowed to proceed, the State must ensure mutually acceptable benefit sharing in the exploitation of natural resources and also improve the capabilities and choices of the affected group during the process.

241. The Complainants submitted that for the state to execute its responsibility in this regard, an impact assessment must be carried out before the decision is made whether to proceed further. The Complainants submitted that by virtue of the

⁸⁴ Communication 227/99 - *Democratic Republic of Congo v Burundi, Rwanda, Uganda*, 29 May 2003, para 95.

⁸⁵ *Endorois* case (n 32 above) para 279. Also see Parshuram Tamang 'An Overview of the Principle of Free, Prior and Informed Consent and Indigenous Peoples in International and Domestic Law and Practices' (2005) para 48 (page 12).





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Environmental Impact Assessment Proclamation 299/2002, an environmental and social impact assessment (ESIA) approved by the Ethiopian Environmental Protection Agency was necessary for holding consultations on the two projects. The Complainants contended that the requisite ESIA for the Gibe III dam was undertaken two years after construction began, while no assessment was undertaken for the Kuraz or, if at all, that that information relating thereto was never made public. The Complainants submitted that construction of the dam started in 2006 before environmental approval was received two years later in 2008.

242. In response, the Respondent State submitted that Ethiopia is recognized to have achieved inclusive growth and, as of 2015, was on track to meet most of the Millennium Development Goals (MDGs). The Respondent State also emphasized that Ethiopia remained one of the continent's most vulnerable countries. The Respondent State highlighted that it was in response to the food insecurity faced by over seven million people and the dependence by most of its citizens on rain-fed agriculture amidst increasing draught, that it launched the Growth and Transformation Plan (GTP). The Respondent State contends that the GTP places emphasis on ensuring effective public participation in implementation and monitoring of the Plan. The Respondent State also submitted that the Climate-Resilient Green Economy Strategy is also integrated into the GTP.
243. The Respondent State also submitted that one important green resource identified in the Climate-Resilient Green Economy Strategy that will help the country reach its energy goal is hydroelectric power. The Respondent State contends that prior to the construction of the Gibe III dam, the country generated only 2000MW of electric power for a nation of almost 90 million inhabitants. The Respondent State submitted that the rural parts of the nation where most Ethiopians live, only a few households have access to electricity. As such, the Respondent State contends that it would be shirking from its responsibility if it fails to exploit its abundant hydroelectric power resources to achieve poverty eradication.
244. Responding to the Complainants' submission that the lack of a proper impact assessment deprived the Omo peoples of the opportunity to give their free, prior and informed consent, the Respondent State submitted that consultations held between 2007 and 2008 included consultations on the impact assessment of the dam before constructed started in 2010. With respect to the Kuraz Sugar project, the Respondent State submitted that the environmental impact assessment for Kuraz Sugar Development was finalized in 2012 before the project began in 2013. The Respondent State submitted that the study outlined probable impacts of the project and suggested mitigating

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measures. The process was participatory as the people of the areas concerned and other stakeholders, including the Nyangatom and Selamago Woredas found on the left side of the Omo River and also the people of Bacha, Dime, and Berayle who live on the left bank of the project area were consulted.

245. In the agricultural sector, the Respondent State submitted that it is implementing the Agricultural Growth Programme, which was designed to help increase agricultural productivity and market access for key crops and livestock in 83 districts, including the SNNPRS. The Respondent State submitted that both the Gibe III dam and Kuraz were borne out of a necessity to end the cycle of poverty and underdevelopment in Ethiopia and help lead the agricultural transformation in the country.
246. The Respondent State also submitted that the CDP is a water centered settlement scheme for people, livestock and crop production, which displaces no one. The Respondent State claimed that the primary reason for the CDP's existence is to boost food security and address the difficulties associated with making socio-economic services available to people who live in highly dispersed settlement, make agricultural extension work possible, and health facilities, school, veterinary clinics, flourmills, and water supply more accessible. The Respondent State submitted that the CDP, which is a programme started in 1997 in the Benishangul regional state and now extended to other pastoralist communities in Ethiopia, is a purely voluntary programme.
247. The Respondent State further submitted that the Government has also started the Pastoralist Communities Development Project (PCDP). The PCDP, the Respondent State submitted seeks to establish effective models of public service delivery, investment and disaster management in the arid and semi-arid Ethiopian lowlands that address pastoral communities' priority needs, improve their livelihoods, alleviate poverty and reduce their vulnerability. The Respondent State claims that the PCDP follows the principle of community demand-driven development where the beneficiaries of the project identify their own needs and contribute in cash and kind towards realizing them. And through the establishment of the Pastoralist Affairs Bureau in the SNNPRS, the Government is able to focus on issues that affect pastoral and agro-pastoral communities in the state, improve their lives, address the economic and social problems that affect them, and unlock their economic potential.
248. The Commission notes that the Ethiopian Constitution expressly recognises the right of all its peoples to sustainable development and to be consulted with



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respect to policies and projects affecting their community.⁸⁶ The full disclosure of all information on the impact of the dam and the Kuraz project was essential for the peoples to exercise their freedom to choose or their free, prior and informed consent. The Commission notes that the Respondent State held public consultations with the affected communities between 2006 and 2014, and that public disclosure was made during those consultations and on the web. However, there is no scintilla of proof to show that there was ever such a disclosure of the environmental and social impact assessment of the Kuraz Sugar Project to the people, the public or on the project website.⁸⁷

249. Having ruled that the evidence before the Commission does not sufficiently support the Complainants' allegation that the Omo peoples have not been adequately consulted, the Commission also finds that the evidence in support of Complainants' case does not establish that the Respondent State had violated the Omo peoples' right to development in respect of the Gibe III dam. The Commission finds that the Respondent State made reasonable public disclosure on the impact of the dam through the national and local consultations held with the people and on the project's website. However, with respect to the Kuraz project, the Commission finds that there was no public disclosure of the impact of the project on the peoples' rights, livelihoods and way of life. The absence of such critical information was fundamental to the peoples' exercise of their free, prior and informed consent to any development project affecting them.
250. In the circumstances and for the avoidance of doubt, the Commission makes two findings on this issue. First, that in respect of the Gibe III dam, the Commission finds that the Respondent State has not violated Article 22(1) of the African Charter. Second, for the failure to undertake an ESIA or publicly disclose the report of the ESIA in respect of the Kuraz Sugar Project, the Commission finds that the Respondent has violated Article 22(1) of the African Charter.

Alleged violation of Articles 24 of the Charter

251. The Complainants allege that the Respondent State violated Article 24 of the African Charter because the Respondent State failed to conduct a proper study of the environmental impact for both Projects to identify the risks the projects pose to public health.

⁸⁶ Ethiopian Constitution Article 43.

⁸⁷ On this issue, see the observations of the UN High Commissioner for Human Rights dated 2 September 2011; UN Special Rapporteur on the Rights of Indigenous Peoples – James Anaya, Letter: Mandate of the Special Rapporteur on the Rights of Indigenous Peoples' 22 October 2012 UN Doc. A/HRC/25/20, paras. 10-11; and UN Special Rapporteur on the Rights of Indigenous Peoples' 22 October 2012 UN Doc. A/HRC/25/20, paras. 10-11.





252. Article 24 of the African Charter provides that:

All peoples shall have the right to a general satisfactory environment favourable to their development.

253. In the *Guidelines on the Right to Water in Africa*, the Commission noted that States parties should ensure that both state and non-state actors alike respect the rights of peoples to a satisfactory environment.⁸⁸

254. Similarly, in the *Ogoni* case, the Commission held that the right of peoples to a general satisfactory environment not only entails the right of a people to a clean, safe and healthy environment, but also imposes an implied obligation on State Parties to take reasonable measures to avoid environmental degradation, promote conservation and secure an ecologically sustainable development and use of natural resources.⁸⁹ In that case, the Commission observed that government's compliance with Article 24 of the African Charter:

*... must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicizing environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.*⁹⁰

255. The Complainants submitted that the Constitution of the Respondent State recognizes the right of the people to both consultation and expression of their views in the planning and implementation of environmental policies and projects that affect them directly.⁹¹ The Complainants submitted that in breach of both the African Charter and its Constitution, the Respondent State failed to conduct any meaningful assessment of the environmental impact of Gibe III or any assessment at all of the impact of Kuraz.

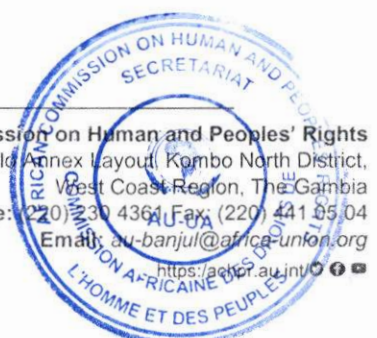
256. The Complainants submitted that not only will Gibe III end the annual floods, but that the Omo people will no longer be able to recession cultivate sorghum, millet, maize, peppers or beans. The Complainants submitted that even if the people are actually able to use the new irrigation channels, these are likely to be far less sustainable. The Complainants also submitted that the Gibe III reservoir will capture vast quantities of water which would have otherwise continued 600

⁸⁸ African Commission 'Guidelines on the Right to Water in Africa' (2019) para 10 (also paras 3.2, 16.5, 16.9, 30.3 & 33.2).

⁸⁹ *Ogoni* case (n 75 above) para 52.

⁹⁰ *Ogoni* case (n 75 above) para 53.

⁹¹ Ethiopian Constitution Article 91(3).





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km down the Omo. This, the Complainants submitted, will result in a reduction in the volume of water of between 57% and 60% in the river, and eliminate much of the riverine forest and woodland on which the Complainants are also reliant. The Complainants also submitted that the water reduction in the Lower Omo will further reduce or eliminate the peoples' access to the river to water their livestock and lead to a decline in fish stocks on which the Kwegus, the Nyangatoms and Daasenachs have traditionally relied.

257. With regard to the Kuraz, the Complainants submitted that the wholesale conversion of the Omo peoples' territory to sugar cane farms could hardly be "satisfactory" for the pastoralists because the sugar plantations have made it virtually impossible for them to pursue their customary way of life. The Complainants submitted that the public health risks associated with large-scale irrigation schemes include the increased transmission potential of vector-borne diseases, and especially malaria, which is already endemic in the lower Omo; the spread of disease agents such as HIV through the influx of large numbers of migrant workers, and the contamination of ground and surface water by factory emissions, fertilizers and crop protection chemicals. The Complainants submitted that in the Awash Valley, below the Koka High Dam, the pollution of water resources by pesticides, herbicides and fertilizers used on commercial farms has been a particular problem for local people who have to use irrigation canals for all their domestic purposes as well as for watering their livestock. And that these problems are extremely likely to recur in the Lower Omo.

258. In response to the Complainants' allegations, the Respondent State submitted that the allegations are for the most part based on fears and assumptions. The Respondent State submitted that it has a robust legal and policy framework on environmental issues that address the rights of its peoples.⁹² The Respondent State submitted that development activities and projects are carried out in strict observance of environmental laws and rules, which if violated may be redress in the courts and through other administrative processes. The Respondent State submitted that the ESIA study on the dam was transparent, participatory and reflective of the concerns of the affected communities. The Respondent State submitted that during the consultation, many of those who participated were more concerned about the impact of the dam on the floods, their access to water for their livestock and fishing.

259. The Respondent claims that, in proceeding with the construction of the dam, it adopted two mitigation measures. First is the short-term measure of

⁹² Ethiopian Constitution Articles 44, 92 & 93; Environmental Impact Assessment Proclamation of 2002; Environmental Policy of Ethiopia 2007.





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implementing a seasonal release of controlled floods from the dam. Second is the long-term measure of training members of affected communities on more sustainable irrigation farming for improved yields and livestock production. These claims are supported by the written declarations of the Respondent's witnesses. The Respondent also debunked the Complainants' submissions that the construction of the dam will lead to a loss of vegetation cover, loss of fishing and access to the river for livestock was unsupported.

260. In the *Ogoni* case, the Commission found that the evidence of pollution caused by oil development on the territories of the Ogonis amounted to a violation of the people's right to a general satisfactory environment. In the present case, the Commission is not satisfied that the evidence provided by the Complainants have made out a case to show that the Respondent State has violated the peoples' right to a satisfactory environment. There is also no evidence before the Commission that the development of the Kuraz has affected or will affect any vegetative cover or access to water for their livestock and for fishing in the South Omo zone. For the right to a general satisfactory environment to be considered to have been violated, a Complainant must prove that the existing conditions for normal life have been substantially upset by the activities of the Respondent or a third party supported by the Respondent. In the absence of any such evidence, the Commission finds that there has been no violation of Article 24 of the African Charter.

Decision of the Commission on the Merit

261. In view of the above, the Commission:

- (i) Finds that the Respondent State has not violated the provisions of Articles 20(1), 21(1), 22(1) (in respect of Gibe III dam) and 24 of the African Charter.
- (ii) Finds that the Respondent State violated Article 22(1) of the African Charter in respect of the Kuraz Sugar Project.
- (iii) Requests the Respondent State to conduct an environment, social and human rights impact assessment study on the Kuraz Sugar Project to determine the potential or actual adverse impacts of the project on the indigenous peoples of the Lower Omo; or if the report of such a study already exists, requests that the Respondent State immediately discloses the report publicly and make it directly available to the affected peoples of the Lower Omo and the general public, within ninety (90) days of the notification of this decision.



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- (iv) Requests the Respondent State to inform the Commission within one-hundred and eighty (180) days of being notified of this decision, the measures taken to implement the present decision in accordance with Rule 112(2) of the Rules of Procedure of the Commission 2010.

Done in Banjul, The Gambia, from 19 July – 2 August 2022 during the 72nd Ordinary Session of the African Commission on Human and Peoples' Rights held from 19 July to 2 August 2022.

