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# IMPROVING HUMAN RIGHTS PERFORMANCE IN EU CLIMATE POLICY

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## The role of European states in climate measures, and access to justice for affected populations



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*The Barro Blanco hydroelectric dam, Panama.*

### Acknowledgment

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## INTRODUCTION

The 2015 Paris Agreement under the United Nations Framework Convention on Climate Change (UNFCCC) not only emphasizes the importance of providing financial resources to developing countries in order to support the implementation of climate change policies, but it also, for the first time, calls on state parties to respect, promote and consider their human rights obligations when taking action to address climate change.<sup>1</sup>

In the past, projects to combat climate change, in particular the implementation of certain projects of the Clean Development Mechanism (CDM), have repeatedly been associated with negative human rights impacts in the Global South: for example, resulting in forced evictions, displacements, and involuntary resettlements. Though the anchoring of human rights in the preamble of the Paris

Agreement was a major achievement, further steps will be necessary to operationalize human rights and human rights responsibilities in practice. After first outlining the extent of direct (extraterritorial) human rights obligations of the EU and its member states, this policy brief focuses on the potential for improvement on the European level, and presents recommendations with respect to:

- UNFCCC emission reduction mechanisms and the European carbon market;
- Human rights due diligence in the financing of mitigation projects;
- Ensuring access to justice for affected persons.

<sup>1</sup> The Paris Agreement states in its preamble: 'Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.'



*The expansion of the Panama canal and the development of Panama city have increased Panama's energy demands.*

## EVIDENCE FROM THE RESEARCH

The research project ClimAccount 'Human Rights Accountability of the EU and Austria for Climate Policies in Third Countries and Their Possible Effects on Migration' focused on analyzing the international dimension of negative human rights impacts, and the involvement of European actors (institutions and corporations) in the implementation of climate policies. The project's extensive literature review identified two main fields in which European actors assume responsibility: the regulation of carbon markets, and the financing of climate projects. Moreover, the project carried out three in-depth case studies of climate projects associated with negative human rights impacts:

◆ The Barro Blanco hydro power plant in Western Panama was under construction from 2008-2016 and in May 2016 began flooding its reservoir. The project affected indigenous territory and displaced a

number of indigenous families. The project costs of approximately USD 75 million are financed by three development banks: the German DEG (Deutsche Investitions- und Entwicklungsgesellschaft), the Dutch FMO (Financierings-Maatschappij voor Ontwikkelingslanden N.V.), and the Central American Bank for Economic Integration (CABEI).<sup>2</sup>

◆ The Bujagali hydro power plant, located on the Victoria Nile River in Uganda, required the resettlement of several thousand people. The project was cancelled in 2003, but construction was taken up again by a new company in 2005. The project received loans from a portfolio of lenders, including the International Finance Corporation (IFC), the European Investment Bank (EIB), the African Development

<sup>2</sup> Banco Centroamericano de Integración Económica.

Bank, a number of European development finance institutions (the German DEG and KfW (Kreditanstalt für Wiederaufbau), and the Dutch FMO, collectively providing USD 142 million), and others.

- ◆ The Olkaria IV geothermal project in Kenya necessitated the resettlement of 2,000 people. The total project costs amount to approximately USD 1.4 billion. Several international and national financial institutions were involved in funding the project, including the World Bank, the EIB, the German KfW and the French AFD (Agence Française de Développement). European financiers co-operated under a formalized co-funding arrangement: the Mutual Reliance Initiative (MRI).

All three projects are registered under the Kyoto Protocol's Clean Development Mechanism. And all of them have been investigated by the institutional (extra-judicial) complaint mechanisms of the international financial institutions (IFIs) involved.

The research revealed that the issue of human rights in the context of climate change measures (in this case CDM projects) is influenced by complex and multi-faceted international and national circumstances. These effect and even hamper the realisation of human rights of project-affected people and impede their access to justice. The following highlights the most important aspects of this phenomenon. The first part deals with the issue of human rights in the climate policy regime and the role of the EU in this context. The second part highlights the role of financing institutions with regard to climate change measures, and presents the most important conclusions from the case studies in terms

of human rights concerns in the context of climate financing. The fields singled out for particular attention include due diligence, participatory rights, displacement/resettlement, and the delegation of responsibilities. A further crucial issue considered is access to justice: in particular grievance/complaints mechanisms at the institutional as well as at the operational level, and the question of extraterritorial human rights obligations and climate project finance.

The most important findings include:

- ◆ Though social safeguards under the CDM are poorly developed, the EU and its member states now have the chance to contribute to its improvement, particularly with respect to accessing EU carbon markets;
- ◆ The main leverage for EU actors to improve the human rights performance of specific projects is related to their role as financiers. The human rights due diligence of financing institutions should, in particular, be enhanced with respect to (a) prior assessment, (b) the participation of project-affected persons, (c) the substantive standards relevant for human rights acceptable outcomes regarding forced evictions and relocation, and, perhaps most importantly, (d) the adequacy of human rights considerations in climate financing through co-funding and related delegations of responsibilities.
- ◆ Extra-judicial complaint mechanisms, on the institutional as well as on the operational level, have a crucial role in improving access to justice for project-affected persons in cases of project maladministration.

## EXTRATERRITORIAL HUMAN RIGHTS OBLIGATIONS AND CLIMATE FINANCE

**H**uman rights are traditionally perceived as a matter owed by states to their nationals or those residing in their territory. Though the pertinent treaties are entered into at the international and regional level, implementation occurs domestically, in a vertical relationship between state and individual. States therefore owe human rights obligations primarily on the basis of a territorial point of attachment. However, due to the reality that the actions of states can impact upon the lives of individuals and communities far beyond their own sovereign territory,

the question of extraterritorial human rights obligations – thus, the extraterritorial reach of human rights treaties – has become central to the debate on how to achieve the universal protection of human rights.

The territorial scope of the application of human rights treaties hinges upon the interpretation of their so-called jurisdictional clauses. The International Covenant on Civil and Political Rights (ICCPR) and European Convention on Human Rights (ECHR) both contain such jurisdictional clauses,



limiting the applicability of the Conventions to persons ‘within the jurisdiction’ or ‘within [the] territory and subject to [...] [the] jurisdiction’ of state parties (Article 2(1) ICCPR, Article 1 ECHR). These clauses relate to ‘a particular kind of factual power, authority, or control that a state has over a territory, and consequently over persons in that territory’ (De Schutter *et al.* (2012) 1102). To date, however, no authoritative body has addressed whether the impacts resultant from the implementation of climate policies or projects financed by national or international finance institutions in third states fall within the scope of jurisdiction of the respective human rights treaties, despite numerous instances having raised international concern. A number of arguments may be made to extend the protection offered under the ICCPR, and the ECHR to these



Olkaria geothermal plant, Kenya.

scenarios. Moreover, these arguments can also be extended to those human rights instruments which do not contain such stringent jurisdictional limits, *i.e.* the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Charter of Fundamental Rights of the European Union (CFR).

Even though the criterion for extending the jurisdictional scope of civil and political human rights obligations (ECHR, ICCPR) beyond a state’s territory remains a strict one, there are some discernible developments which point to a wider interpretation of the required standard of ‘exercise of effective control of an area’ through the ‘exercise of public powers’ (spatial model). It is important to emphasize that the host state where the project is implemented is never absolved from its human rights obligations. However, in situations where the financial partner exercises substantial functional control over a project’s implementation and operation, especially through the exercise of *de facto* legislative or executive authority, or through the

administration of justice, it is possible that regional human rights bodies may in future respond to this *de facto* control demonstrated and by extending the scope of the ECtHR’s or ICCPR’s application.

The CFR – addressed both to EU institutions, bodies, offices and agencies, and to member states when they are implementing EU law – does not contain any provision on its potential extraterritorial applicability. Nevertheless, it has been argued by scholars and the European Commission that EU external action, when attached to its human rights competences, must be in conformity with the CFR (European Commission, COM(2013) 271 final (2013); Report of the Expert Group on



Water point at RAPland, Kenya.

Fundamental Rights (1999) 18<sup>3</sup>; Wouters (2001)). Hence, once EU law is shown to apply extraterritorially – *e.g.* on the basis of some sufficiently close jurisdictional link arising from principles of general international law – fundamental rights (as incorporated into the CFR) are applicable as well (*cf.* Moreno-Lax/Costello (2014) 1664).

An even stronger argument can be made with regard to economic and social rights. Thus, the ICESCR is conceptualized in a broader sense than the ICCPR and is

<sup>3</sup> ‘The issue of “range of application” also implicates the European Union’s external relations. A union that claims to be bound and guided in its internal policies by the duty to respect fundamental rights must, if its credibility is not to be challenged, consider those same rights as a leading principle in its external relations. This is a matter in which action has, of course, already taken place. Thus, for example, Article 177(2) of the EC Treaty explicitly states that Community policies in the area of development cooperation must contribute to respect of human rights. Also, a human rights clause is now a common element of agreements concluded between the Community and third countries.’

therefore more susceptible to extraterritorial application. Like the CFR, it does not contain an explicit jurisdictional clause.<sup>4</sup> In particular, the obligation of **international cooperation** (as contained in Article 2(1) ICESCR) reinforces the further obligations contained in the ICESCR. In the context of climate policies, this would, *inter alia*, require states to make efforts to ensure that human rights are considered in the formulation of international or institutional policies (see ‘Climate policies and human rights’).

Moreover, in consideration of the wider scope of application of the ICESCR, states must not interfere with the capability of other states to meet their obligations. This especially obliges states to *respect* economic, cultural and social rights in other states and *prevent* third parties from violating these rights where they are in a position to do so. This includes the **obligation** of states to **regulate**: *i.e.* to install a legislative and administrative framework capable of providing protection to individuals and communities affected by activities which they are in a position to influence.

<sup>4</sup> See also the 2011 Maastricht Principles on Extra-Territorial Obligations in the Area of Economic, Social and Cultural Rights in this regard.

In the given context of project finance (see ‘The role of financing institutions’), this particularly entails the **extension of procedural safeguards** (such as participatory involvement in environmental (and social) impact assessments (E(S)IAs)), the **setting of adequate standards**, the **monitoring** of the project’s implementation, and the **enforcement** of such standards.

In conclusion, as also confirmed by the Maastricht Principles on Extra-Territorial Obligations in the Area of Economic, Social and Cultural Rights (2011)<sup>5</sup>, **states involved in the approval and financing of projects should ensure that their institutions have appropriate policies and due diligence standards in place**. In particular, relocations for development purposes must not be carried out without a comprehensive **human rights-based resettlement and rehabilitation policy in place**.

<sup>5</sup> The (non-binding) Maastricht Principles were adopted by a group of international legal experts, constituting an important ‘milestone in the long journey of full recognition and definition of extraterritorial human rights obligations.’ (Vandenhoele (2013) 806)

## CLIMATE POLICIES AND HUMAN RIGHTS

The recent outcome of the Paris summit of the UNFCCC defines a potentially new market-based mechanism in Article 6. This will likely resemble the Clean Development Mechanism (CDM) in many ways, and so



Local transport to indigenous territory, Panama.

lessons from the CDM will have a key role to play in its set-up.

With the start of discussions on its institutional design, there is an important window of opportunity for the challenges faced by the CDM to be addressed, and to require that project approval and steering must depend on compatibility with basic human rights standards.

### Learning from the CDM

The CDM under the UNFCCC’s Kyoto Protocol has two equally weighted objectives: to assist developing countries in achieving sustainable development and to assist industrialized countries in attaining compliance with their emission reduction commitments. To this end, projects that reduce emissions in developing countries are co-financed by industrialized partner countries.



Once a CDM project has completed a pre-determined project cycle, the project participants receive emission reduction credits, so-called Certified Emission Reductions (CERs). These can be used to contribute towards compliance with the emission reduction goals of industrialized countries.

The CDM's so-called 'modalities and procedures' set out the rules of the mechanism. These rules deal almost exclusively with questions of how to quantify emission reductions. There is no mention of human rights. The only entry point for human rights concerns is the requirement that projects contribute to sustainable development, and an obligation to invite and duly take account of stakeholder comments.

However, there are no internationally agreed criteria or procedures for assessing CDM projects' contributions to sustainable development, nor are there internationally agreed procedures for conducting local stakeholder consultations. It is therefore up to host countries to define the sustainable development criteria and set the procedures for local stakeholder consultations. Most host countries have rather general lists of non-binding guidelines instead of clear criteria. This makes it easy for project applicants to comply with the requirements: The sections that address sustainable development in project design documents and validation reports usually employ vague wording and avoid concrete and verifiable statements. Similarly, stakeholder consultations are often rudimentary, unregulated and badly documented. Furthermore, all these



Maasai women from the (resettled) Cultural Centre, Kenya.

processes take place before project implementation. The CDM rules contain no mechanisms for addressing problems that may not have been apparent in the project design and approval phase. While there is a possibility for host states to reject projects and to withdraw approvals for non-satisfactory projects, most host countries do not thoroughly investigate projects from a human rights perspective.

Attempts to reform the CDM in order to give its second objective of sustainability more weight have been met with resistance on the grounds that a stronger integration of sustainability concerns would impinge on the national sovereignty of host countries.

However, the Paris Agreement has opened up space for a better integration of human rights concerns within a future market-based mechanism. The acknowledgement of human rights as an integral part of decisions on climate action provides a strong opportunity to better integrate measures which safeguard against human rights violations in a future mechanism:

- ◆ The introduction of safeguards can help to avoid human rights violations by providing standards and guidance for realising human rights-compatible CDM-type projects within a future mechanism. They should prevent the mechanism from providing resources to projects that involve human rights violations, or present a high risk of leading to human rights violations.
- ◆ Following the Maastricht Principles on Extra-Territorial Obligations in the Area of Economic, Social and Cultural Rights (2011), the state parties to the UNFCCC could and should require all projects to undergo a human rights impact assessment (HRIA). They should also require stakeholder consultations pursuant to clear procedural requirements for all projects and make projects with negative impacts ineligible for registration. Similarly, the Guiding Principles on Business and Human Rights (GPBHR, Guiding Principles) call on states to require human rights due diligence from companies in cases of a state-business nexus. Consequently, there should also be a procedure to de-register projects where human rights violations become apparent only during the implementation of a project.

- As parties to human rights treaties, European states should use their political weight in the UNFCCC to ensure that its mechanisms do not impact negatively on human rights: *e.g.*, by giving strong support to an institutionalized safeguards system within international market-based mechanisms.

## Climate protection and the EU

Under the EU's emission trading system (ETS), European companies may use CDM credits to comply with domestic obligations. The conditions for doing this are spelled out in the so-called EU Linking Directive.<sup>6</sup> While the Linking Directive is mostly silent on human rights, it does refer to the criteria of the World Commission of Dams<sup>7</sup> in Article 11b (6) when dealing with hydropower projects exceeding 20 MW generation capacity. This marks a notable exception to other project types because of the criteria's aim of supporting the principles of equality, participation and accountability.

The EU and EU member states have three possible points of intervention in order to better incorporate human rights in climate protection activities.

- Firstly, the transfer of CDM credits to industrialized countries requires the issuance

<sup>6</sup> Directive 2004/101/EC of the European Parliament and of the Council of 27 October 2004 amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in respect of the Kyoto Protocol's project.

<sup>7</sup> The World Commission on Dams (WCD) criteria consist of seven strategic priorities, which are expressed in the form of achieved outcomes. The criteria are based on the notion that most dam projects have negative effects on society and environment.

of a letter of approval to the project by an industrialized country. EU member states could decide to only issue approvals to CDM projects on the basis of a HRIA.

- Secondly, several EU member states are themselves substantial buyers of CDM credits. They could therefore require the same safeguards from the projects they purchase CDM credits from as for the issuance of letters of approval.
- Thirdly, the EU could decide to only allow credits from projects in the EU ETS that have undergone an HRIA. In addition, since each CDM credit has a unique serial number which includes a project identifier, CERs from projects that are involved in human rights violations could also be individually banned from use in the EU ETS. The latter approach has been pioneered by Switzerland, which excludes carbon credits from use for domestic obligations if the associated emission reductions were achieved in conditions violating human rights or causing significant negative social or ecological effects.

These same measures that could significantly improve the CDM's track record for human rights would have to apply to any future mechanism that helps the EU fulfil its greenhouse gas mitigation commitments under the Paris Agreement. Introducing the measures early in the CDM context would aid the transition from one mechanism to the other, and provide planning security for project implementers.

## THE ROLE OF FINANCING INSTITUTIONS

The Bali Action Plan of 2007 recognized financing as a key component in the development of low-carbon energy projects and climate adaptation. Financing is carried out through a framework of funding offered by bilateral and multilateral financial institutions. The ClimAccount case studies revealed that financing is the key entry point for European institutions to be involved in concrete climate change measures in third countries. Therefore, financing institutions should adhere to the most important (human rights) instruments and mechanisms.

- The GPBHR represent an internationally accepted soft-law instrument with the 'objective of enhancing standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities'. It is, therefore, recommended that international and national financial institutions involved in climate financing adhere to these principles in all their operations.

- It is further recommended that international financial institutions and national development banks adopt the Equator

Principles. These aim to ensure that financed projects are 'developed in a manner that is socially responsible and reflects sound environmental management practices' (Equator Principles, Preamble). The Principles also recognize the significance of climate change, biodiversity and human rights, and, where possible, seek to avoid negative impacts on project-affected ecosystems, communities and the climate.

## Due diligence and project finance

In the context of bilateral and multilateral project finance, 'due diligence' is of key importance for operationalizing safeguard policies and international human rights standards. Both international environmental law and human rights law entail a due



The Bujagali hydroelectric dam, Uganda.

diligence obligation<sup>8</sup> for states to ensure that their own policies, actions or failure to act do not impede the realization of (human) rights in other states. In particular, it entails the obligation to regulate the conduct of private parties in order to protect individuals from harmful activities and ensure that appropriate remedies are available (*cf.* McCorquodale/Simons (2007) 618). In the case of IFIs that are owned by one or several states, states' leverage and duty to regulate corporate behavior is particularly high (GPBHR, Principle 4). Moreover, the due diligence obligation has also increasingly been recognized as extending to non-state actors, *e.g.*, IFIs and corporate entities, and applies within their respective spheres of influence (GPBHR, Principle 15).

From a project lifecycle perspective, the due diligence obligations of project financiers arise at different stages of projects, particularly during pre-appraisal, appraisal, and monitoring of a project's implementation.<sup>9</sup>

<sup>8</sup> The concept of due diligence is applied in a wide variety of distinctive areas and serves to describe a certain standard of conduct expected in the respective circumstances at hand.

<sup>9</sup> Terminology used by the EIB (Environmental and Social Handbook, 2013).

The **pre-appraisal phase** serves to categorize projects according to the different risks involved and, hence, to determine the safeguards, type of E(S)IA, levels of participation of affected individuals and communities, and intensity of monitoring required. Thus, prior to authorizing activities which could potentially cause harm, project financiers are under the obligation to ensure that their decisions are based on an assessment of the risks involved in the project activity. As the standard of **due diligence is context-dependent**, factual circumstances such as historical conflicts or long-lasting resistance to the project's approval, in connection with the absence of a mutually acceptable agreement with the affected communities, result in a heightened level of due diligence being expected of the parties involved.



The Bujagali dam supplies about half of Uganda's electricity.

During the **appraisal phase** the E(S)IA and other important project planning documents are prepared for project approval. These documents should (and often do) include: a resettlement action plan; a census of affected communities; a proposal for the strategy/system of participation and the operational-level grievance mechanism (see section below); and, where necessary, special plans for indigenous peoples.

Due diligence is a **continuous obligation** and thus also relates to the project implementation process. Monitoring during the **implementation phase** serves to ensure compliance with the agreed standards and objectives recorded in the finance contract (with reference to planning documents). The monitoring process must be **proportionate and adequate** to the project's risks and impacts.

During all the mentioned phases, it is typically the banks' project teams who are in charge. It is mainly during project approval (between appraisal and implementation) when the banks' decision-makers assume their main responsibility for accepting or



improving upon project-specific standards that have already been determined.

## Participatory rights

A key concern inherent to all case studies relates to the failure of project financiers to ensure the adequate participation/consultation of affected communities in the course of the project's appraisal and implementation. In the context of forced evictions and involuntary resettlement within the complex local settings of developing countries, this shortcoming in procedural matters regularly contributes to the impairment of livelihood restoration, and infringes the substantive human rights of affected communities.

Effective consultation and genuine participation is acknowledged to be indispensable to the protection of project-affected people, particularly with respect to vulnerable groups and indigenous peoples.<sup>10</sup> Furthermore, consultation with people potentially affected by the project serves not only to identify stakeholders, but also to gain information on their perception of risks. It is also key to effective planning, successful implementation, and, more generally, to trustful operator-stakeholder relations. The manner in which the consultation and participation process is conducted is crucial in determining the course of a genuine participation process.

The Inter-American Court of Human Rights determined that for participation to be meaningful, it must be included at **each stage of project preparation and implementation**, in a **culturally appropriate manner** (see, *inter alia*, *Saramaka v Suriname (Ct)*, 2007, para. 133). Also, according to the Guiding Principles on Business and Human Rights, affected stakeholders must be engaged for the **identification and assessment** of human rights risks (GPBHR, para. 18(b)). This entails an obligation for lenders to adequately monitor the involvement of stakeholders.

The findings from the case studies suggest certain improvements on the part of financiers are necessary in order to comply with these requirements:

<sup>10</sup> See, *inter alia*, World Bank OP 4.12 (2013); Article 2(3) Declaration on the Right to Development, UN Doc. A/RES/41/128 (1986); Principles 7(3)(b),(c),(e) Guiding Principles on Internal Displacement (1998); Basic Principles and Guidelines on Development-based Displacement (2007), *inter alia*, paras. 38, 55(i); *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*, 2009; *Saramaka v Suriname*, 2006.

All above-mentioned documents for project appraisal concerning affected communities must be developed in a participatory manner. They must also continue to be involved throughout the implementation of the project in order to effectively monitor compliance with the objectives of these documents. Project appraisal should also include a HRIA, or an E(S)IAs which includes a human rights analysis. Where necessary, the objectives and strategies laid down in appraisal documents may require adjustment/up-dating during the course of implementation, in order to effectively safeguard human rights.

**Monitoring** of procedural aspects by IFIs requires the adequate documentation and reporting of participatory processes and the handling of complaints. Typically, the entity primarily in charge of providing planning documents, ensuring adequate participation, documenting the implementation and reporting to lenders *throughout the project lifecycle* is the operator/borrower. Some banks, such as the EIB, tend to base their own monitoring predominantly on the reports by operators.

In light of the power imbalance between operators and project-affected persons in many developing countries, it is recommended that lenders **directly consult with affected communities**, both with and without the operator, **during IFI field missions and that such direct consultations continue to be obligatory beyond the pre-appraisal and the appraisal phase, i.e. during implementation.**

To effectively accompany and monitor participatory processes all IFIs, including European ones<sup>11</sup> and the World Bank, need to employ their own personnel and resources to supervise the participatory processes taking place between operators and affected communities. To avoid situations like those occurring in the cases of Olkaria (allegations of taking sides, manipulation,

<sup>11</sup> Note on the EIB: It should be acknowledged that the EIB is one of the very few IFIs that apply human rights based standards (Benneker *et al.* (2016)). These have been introduced in 2013 after a gap analysis to adjust EIB safeguards to the norms set out by the CFR and the GPBHR (CONT (2012)). However, its safeguards lack detailed guidance for operationalization and corresponding resources to be implemented effectively.

intimidation) and Barro Blanco (failure to reach an agreement with the designated indigenous authorities), such supervision should either be conducted by the banks' own staff who have appropriate expertise, or by a hired **independent expert**, in a way that **avoids any potential for a conflict of interest**.

- ❖ Currently, at least in the case of the EIB, continuous reporting by staff to the management level (and hence board level) about project implementation processes is only required in individual cases. As forced evictions and involuntary resettlement entail very high human rights risks, continuous reporting about such measures and their associated problems in projects should become obligatory. This is in order to enable a bank's management and board to act in accordance with the applicable environmental and social safeguard policies.
- ❖ The EU and its member states, in their capacity as owners of the IFIs and members of their boards, should work towards adopting directives and initiating processes for the effective implementation of such recommendations.<sup>12</sup>

## Migration, displacement and resettlement

The implementation of climate policies may have a considerable impact on human rights particularly where the project includes some form of migration/displacement/resettlement. Moreover, **even though the climate regime is guided by the**

<sup>12</sup> Generally, acts of states remain acts of states even if they are implementing resolutions (UN) and directives (EU) of international organizations (Tomuschat (2013) 23; with respect to the EU see also ECtHR, *Bosphorus v Ireland* (2005)). Hence the same should apply to acts of omission. In the case of the EU both EU organs and EU member states have in this context the particular duty to comply with the human rights provisions of the CFR and its applicability to the 'wider world'. Moreover, EU member states might be held directly accountable with respect to their human rights duties gained as parties to international human rights treaties. EU organs display a great diversity with respect to their governing structures and delegation of powers. There exists evidence that EU agencies and bodies governed by representatives sent from national ministries, as is the case with the Board of Governors of the EIB, are usually characterized by a strong exercise of 'vertical accountability' towards the sending member state (Buess (2015) 98). Such an exercise of vertical accountability should be taken duly into account when assessing human rights accountability.

**concept of sustainable development** (Article 3, UNFCCC, 1992), **it currently fails to translate concerns about how climate change impacts humans into human rights obligations/standards**. (OHCHR, 2014) However, **how human rights inform climate policy is crucial as, e.g., mitigation policies not only influence access to land and natural resources but development policy options of states in general**. Thus, a key question of relevance in the context of climate project finance is to what extent project financiers ensure that resettlement/relocation/displacement has been undertaken in accordance with human rights obligations.

- ❖ The resettlement process under the guidance of IFIs is a key element in ensuring an outcome in conformity with international human rights standards. The resettlement action plan (RAP), including the **socio-economic baseline data set/census**, plays a central role in this process. Its conformity with institutional policies (*i.e.* the safeguards of the respective IFIs) – but also international human rights standards – is crucial for ensuring the adequate protection of the right to property/tenure and, consequently, for the determination of those entitled to receive compensation as well as for beneficial conditions for livelihood restoration and thus the right to an adequate standard of living.

- ❖ Particularly **vulnerable groups** require additional protection. In particular for indigenous peoples the **importance of land is often more than a matter of possession, but can include a material and spiritual element**. Prior to **project approval**, the financing institutions should ensure that **good faith** negotiations with the affected communities regarding, *e.g.*, site selection for resettlement, shall be conducted in a **transparent and consistent** manner, and that a **culturally appropriate participatory process** in order to obtain a **prior agreement** regarding land and resource rights have taken place. This is necessary in order to ensure that **sustainable outcomes** are reached and that potential conflicts arising in this regard during the implementation phase are avoided.

- ❖ The questions of existing property rights/customary land rights, and the sufficiency and suitability of selected resettlement

sites must be assessed in the course of the E(S)IA. Its conformity with international standards should be evaluated by independent experts.

## Delegation of responsibilities

All projects investigated are characterized by co-financing. In the case of the EIB, the share of projects which are co-funded per year is usually 60 percent and more. Amongst European IFIs, the Mutual Reliance Initiative (MRI) has been introduced in order to create synergies in project management and ease the compliance of project proponents with financiers' documentation and monitoring requirements. In practice this means that one financier has the lead in conducting pre-appraisal, appraisal, and monitoring, whereas the others are involved by means of a coordinating platform and the sharing of all documents. However, from a human rights perspective, the delegation of due diligence obligations does not entirely disburden the duty bearers. Hence, major challenges under the MRI, and other similar responsibility sharing agreements, concern (a) the division of work, which requires detailed guidance on how the non-leading co-funders can adequately exercise retained due diligence obligations; and (b) the handling of complaints, which, in the case of the MRI, is explicitly excluded from the delegation of responsibilities.<sup>13</sup> In the Olkaria case, the latter had the effect that the role of the lead financier under the MRI in charge of social due diligence, AFD, did not become a subject of the investigations by the active complaint bodies (EIB-CM and the World Bank's Inspection Panel). In contrast, poorly defined terms of reference on how to adequately exercise reduced

due diligence, and when (in critical situations) to resume full due diligence, may have contributed to the project's problems.

When delegating responsibilities from one institution to another, certain requirements should be met in order to ensure an adequate protection of affected communities. In particular, focus should be laid on achieving equivalent protection, including in terms of the substantive guarantees offered and the mechanisms controlling their observance.<sup>14</sup> Hence, any delegation of responsibility regarding environmental and social safeguards from one IFI to another should be accompanied by a legally binding Memorandum of Understanding (MoU) that:

- ❖ Clearly identifies the obligations of the project management staff of each bank under such division of work for all phases of the project lifecycle in order to ensure that retained human rights due diligence obligations are met. This may include developing indicators of when to resume again full responsibility.
- ❖ Ensures that adequate normative standards and adequate mechanisms for controlling implementation and access to justice (complaint and redress) in cases of maladministration are established. The latter may be achieved by extending the mandate of the most appropriate institutional complaint mechanism to include co-financing counterparts, so that the full investigation of cases can be guaranteed.
- ❖ Alternatively, an independent supranational complaint mechanism with a mandate for all (European) development banks should be established.<sup>15</sup>

<sup>13</sup> MRI Operational Guidelines, Executive Summary, as provided by EIB Infodesk via email on 16 February 2016. The full operational guidelines 'cannot be disclosed on the basis of the exceptions for disclosure laid down by the EIB Transparency Policy'.

<sup>14</sup> Cf. *Bosphorus v Ireland* (2005), paras. 155-156.

<sup>15</sup> See also the recommendations of Benneker *et al.* (2016) 126f.

## ACCESS TO JUSTICE

Access to justice constitutes a fundamental aspect of ensuring the effective protection of human rights and entails *inter alia* to have an effective forum for persons affected by human rights violations to obtain justice. The case studies revealed that project-affected persons are largely left to resort to either their home state, alternative grievance mechanisms of international financial institutions or bilateral development



The Bujagali dam is located on the Victoria Nile river, Uganda.





RAPland, Hell's Gate National Park, Kenya.

banks in order to enforce their rights. In addition, grievance mechanisms at the project level (operational-level) can play a role.

## Institutional level

Grievance or complaint mechanisms at the level of financial institutions are non-judicial instruments. They scrutinize compliance with policies adopted by institutions and not with general human rights law. Besides the points already mentioned in the section above it is recommended that:

- ◆ Multilateral and bilateral development banks, as well as private banks which are involved in financing projects under the climate regime, should establish independent grievance mechanisms which are provided with sufficient staff and resources. It is important to ensure that the maximum possible independence of these mechanisms is guaranteed, including through the selection of independent experts in a transparent manner, the provision of an independent and adequate budget, and the competence to decide upon the admissibility of a case and the type of investigation to be carried out.
- ◆ The safeguards adopted by banks should be in compliance with international and regional human rights standards.
- ◆ When more than one bank is involved in financing a project it is important that they apply coherent policies.
- ◆ With regard to the European Investment Bank, it is recommended that it be subject to political accountability by the European Parliament, *i.e.* it should be obliged to respond to European Parliament reports on its activities.

In addition, it is recommended that international financial institutions or bilateral development banks comply with the effectiveness criteria for



More than 8000 people were resettled for the Bujagali project.

non-judicial grievance mechanism as laid down by the Guiding Principles on Business and Human Rights (Principle 31). These include:

- ◆ (a) **Legitimacy:** This criterion requires the mechanism to enable trust from the stakeholder group for whose use it is intended, as well as being accountable for the fair conduct of the grievance process.
- ◆ (b) **Accessibility:** The mechanism must be known to all stakeholder groups for whose use it is intended, and provide adequate assistance for those who may face particular barriers to access.
- ◆ (c) **Predictability:** The mechanism needs to provide a clear procedure with an indicative time frame, including clarity on the types of process and outcomes available and the means of monitoring implementation.
- ◆ (d) **Transparency:** The mechanism must keep the parties to a grievance procedure informed about its progress, and provide sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake.
- ◆ (e) **Equity:** The mechanism must ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in the grievance process on fair, informed and respectful terms.
- ◆ (f) **Rights-compatibility:** The mechanism must ensure that outcomes and remedies comply with internationally recognized human rights.
- ◆ (g) **Continuous learning:** This criterion implies drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms.

The case studies revealed that affected communities only learned during the course of problematic project implementation that such institutional level complaint mechanisms existed and that they can turn to them. Hence, the mechanisms lacked the requirement of accessibility. It is recommended that affected communities are informed by IFIs actively (at the start of the project and at other crucial steps in project implementation) about their rights and the procedures for accessing their institutional level mechanisms. It is the duty of IFIs' high-level decision-making bodies to ensure respective standards and monitoring.

## Operational level

Operational-level grievance mechanisms shall generally follow the standards set out in the Guiding Principles on Business and Human Rights. These are basically the same as for institutional mechanisms, complemented by the criterion to be based on engagement and dialogue (GPBHR, Principle 31(h)). The commentary on para. 31(h) further details that 'since a business enterprise cannot, with legitimacy, both be the subject of complaints and unilaterally determine their outcome, these mechanisms should focus on reaching agreed solutions through dialogue. Where adjudication is needed, this should be provided by a legitimate, independent third-party



*The Bujagali project has been investigated by the World Bank and the EIB-CM.*

mechanism.' The commentary on para. 31(d) moreover clarifies that imbalances between enterprises and affected stakeholders, with respect to access to information, expert resources, and the financial means to acquire them, have to be addressed to ensure a fair process. The commentary on para. 29 additionally clarifies that such mechanisms should not 'preclude access to judicial or other non-judicial grievance mechanisms'.

Of the three case studies, Olkaria is the one where the greatest efforts to establish an operational-level grievance mechanism were made. However, the mechanism was only established after crucial steps in involuntary resettlement (first census and selection of the resettlement land) had already been determined and generally lacked the trust of a considerable number of project-affected persons because of past experiences and transparency gaps with respect to procedures and documentation. These combined factors prevented the mechanism from functioning effectively in cases of major disagreements, and this in turn contributed to human rights violations and delays in implementation.

- ◆ To avoid these types of problems, it is first of all necessary to ensure that IFI safeguards (in terms of standards and monitoring) should unequivocally guarantee that operational-level mechanisms are available from the start of any resettlement planning.
- ◆ Secondly, IFIs usually consider it the duty of the operator to run grievance mechanisms making them prone to power imbalances between operators and affected persons. Therefore, mediation of conflicts by third parties must be an integral part of such mechanisms, and formally and practically accessible to all stakeholders, *i.e.* without procedural or financial barriers.

## CONCLUDING REMARKS

**T**he 2015 Paris Agreement called upon state parties to respect, promote and take into consideration their human rights obligations when taking action to address climate change.

Based on research findings this policy brief summarizes recommendations in the fields of carbon

markets regulation and the financing of climate projects. It is believed that the implementation of these recommendations by the EU and member states would constitute a major step towards fulfilling the Paris Agreement's call to prevent human rights violations occurring through the implementation of climate policy.

## Index of abbreviations

AFD	Agence Française de Développement	GPBHR	Guiding Principles on Business and Human Rights
CABEI	Central American Bank for Economic Integration	HRIA	Human Rights Impact Assessment
CDM	Clean Development Mechanism	ICCPR	International Covenant on Civil and Political Rights
CERs	Certified Emission Reductions	ICESCR	International Covenant on Economic, Social and Cultural Rights
CFR	Charter of Fundamental Rights of the European Union	IFC	International Finance Corporation
DEG	Deutsche Investitions- und Entwicklungsgesellschaft	IFI	International Financial Institution
E(S)IA	Environmental (and Social) Impact Assessment	KfW	Kreditanstalt für Wiederaufbau
ECHR	European Convention of Human Rights	MRI	Mutual Reliance Initiative
ECtHR	European Court of Human Rights	OHCHR	Office of the United Nations High Commissioner for Human Rights
EIB	European Investment Bank	UNFCCC	United Nations Framework Convention on Climate Change
EIB-CM	European Investment Bank-Complaint Mechanism	WCD	World Commission on Dams
ETS	Emission Trading System		
FMO	Financierings-Maatschappij voor Ontwikkelingslanden N.V.		

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More than 50 planned hydro plants are threatening Panama's rich biodiversity.



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*Local community of the Naminya resettlement, Uganda.*



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