

# Displaced, Evicted or Resettled by Climate Change Measures

Neglecting the Rights of Affected Communities in the Case of the Bujagali Hydropower Plant<sup>1</sup>

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The impact of climate change on human rights and migration has attracted widespread attention in recent years. The United Nations Human Rights Council has, for example, voiced its concern “that climate change poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights” (HRC 2008, Preamble). Closely connected with the impact of climate change on human rights is the interrelation between climate change and migration. The Intergovernmental Panel on Climate Change (IPCC)<sup>2</sup> has pointed out the consequences of climate change for migration several times. In its Fifth Assessment Report the IPCC states that “[c]limate change over the 21st century is projected to increase displacement of people [...]. [...] Changes in migration patterns can be responses to both extreme weather events and longer-term climate variability and change, and migration can also be an effective adaptation strategy. There is low confidence in quantitative projection of changes in mobility, due to its complex, multicausal nature” (IPCC 2014, 73). The latter indicates what has repeatedly been substantiated by an extensive body of multi- and interdisciplinary research carried out during the last few decades: The interrelation between climate change and migration is a multi-faceted and complex phenomenon, where causal relationships are hard to establish and possible future developments and forecasts are difficult to project (e.g. Geddes 2015; Hugo 2010; Kälin 2010; Piguet et al. 2011).

However, not only climate change has adverse consequences for human rights and may lead to different forms of migration. Climate policies as well have been increasingly scrutinised concerning their effect on human rights in general and forced movement of people in particular. Already in 2009, a report published by the Office of the United Nations High Commissioner for Human Rights (OHCHR) pointed out that climate-related activities such as mitigation and adaptation measures<sup>3</sup> may have negative implications on human rights such as the right to food or the rights of indigenous people, and may even lead to displacement (OHCHR 2009, 22–23). Examples include forced eviction because of land grabbing for the production of agro-fuels (e.g. Schade 2011), displacement of indigenous groups because of reforestation programmes (OHCHR 2009, 23), the resettlement or even eviction of people because of geothermal projects (e.g. Schade 2016) or the construction of hydropower plants (e.g. Hofbauer/Mayrhofer 2016). With the example of the Bujagali Hydropower Plant in Uganda, a project registered under the Clean Development Mechanism (CDM) of the Kyoto Protocol (KP), this article argues that the human rights of people affected by climate protecting activities are not adequately taken into account in the global climate policy regime, which leaves them vulnerable to the violation of their rights including forced eviction, displacement or resettlement processes that fail to comply with human rights standards. It furthermore illustrates that such measures are usually embedded in a complex national and international political and legal context that makes

it difficult for project affected persons (PAPs) to hold involved actors accountable and to access justice.

In the following, firstly the role of human rights in the climate policy regime in general and the CDM in particular will be discussed. The second section presents the most important facts concerning the Bujagali Hydropower Plant in Uganda and the third section analyses problematic issues from a human rights perspective in this context. A short concluding section summarises the most important insights of the paper.

### **Human rights and the international climate policy regime**

In 1992, the United Nation Framework Convention on Climate Change (UNFCCC) was adopted, which set up a legal framework and initiated a political process with the aim to globally combat climate change. The aim was to mitigate the advancement of global warming by reducing the global greenhouse gas output and at the same time to adapt to unavoidable changes in the environment caused by a changing climate. Human rights were not taken into account for a long time. The 2011 Cancún Agreement mentioned for the first time that climate change has adverse effects on the enjoyment of human rights (UNFCCC 2011, Preamble). However, only the 2015 Paris Agreement acknowledged that also climate action may have an impact on human rights by including a passage on human rights in its preamble which calls on state parties to respect, promote and consider their obligations on human rights when taking action to address climate change.

As already mentioned, the Bujagali Hydropower Plant was registered as a project under the CDM, a mechanism that aims at contributing to climate change mitigation. The CDM is based on Article 12 of the KP, which sets out two equally weighted objectives: to assist so-called “developing” states in achieving sustainable development and to assist “industrialised states” in achieving compliance with their emission reduction commitments. Once a CDM project has completed a pre-determined project cycle, the project participants receive emission reduction credits, so-called Certified Emission Reductions (CERs), which industrialised states can purchase and count towards their Kyoto commitments. Industrialised country governments may be directly involved in projects, but the usual model is the purchase of CERs from projects operated by private businesses. Some jurisdictions such as the EU have also established domestic emission trading systems (ETS) where companies may use CERs to comply with domestic obligations up to a certain extent.

Since the first CDM project was registered in 2004, the mechanism has developed very dynamically. By January 2016, more than 8,000 CDM activities were registered.<sup>4</sup> The CDM pipeline of projects and programmes includes very diverse activities, ranging from the installation of large-scale wind farms to small-scale programmes that aim at increasing energy efficiency at the household level. Most of these activities are implemented by private companies. The dynamic development of the CDM has to a large extent been triggered by demand for CERs from Europe, mainly by companies covered by the European Union Emissions Trading Scheme (EU ETS). However, with the EU ETS currently suffering from a large oversupply of emission allowances, demand for CDM credits was significantly reduced, which has also resulted in record low CERs prices. With the current crisis of the CDM, the number of new CDM projects was significantly reduced and the future of the mechanism and its role in the new global agreement concluded in Paris in 2015 is still somewhat insecure. Article 6 of the Paris Agreement mentions the establishment of

a “mechanism to contribute to the mitigation of greenhouse gas emissions and support sustainable development” (Paris Agreement 2015, Article 6.4). The rules and procedures thereto still need to be adopted. However, Section III, para. 38(f) of the Decision on the Adoption of the Paris Agreement recommends to the COP that these should be based inter alia on the “[e]xperience gained with and lessons learned from existing mechanisms and approaches adopted under the Convention and its related legal instruments”. Thus, in practice, this might mean that the CDM procedural rules will be adapted to the new mechanism.

The CDM “modalities and procedures”, adopted as part of the Marrakesh Accords (MA)<sup>5</sup> in 2001, set out the detailed rules for the implementation of projects (UNFCCC 2006, Decision 3). They deal almost exclusively with questions of how to quantify emission reductions. They contain no explicit reference to human rights and no respective safeguards. Hence, the only possibility for addressing human rights in the context of the CDM is the mechanism’s goal of contributing to sustainable development and a requirement to invite and duly take account of stakeholder comments. These items are addressed as part of the Project Design Document (PDD).<sup>6</sup> However, no uniform definition of what sustainable development is and how it is best achieved was agreed on at international level. Instead, state parties decided that it is up to the host states of CDM activities to define sustainable development and to establish respective criteria.

There are also no internationally agreed procedures under the CDM scheme for conducting local stakeholder consultations. While the EU suggested including such standards and procedures when the MA were negotiated, developing states rejected these proposals as being incompatible with their national sovereignty (Yamin/Depledge 2004). The MA therefore do not go beyond requiring confirmation by the host country that the project assists it in achieving sustainable development, without giving further specification (UNFCCC 2006, para. 40a).

Besides being involved in the carbon trading scheme, industrialised countries are also involved in concrete climate change measures in third countries, such as the Bujagali dam, via financing. Financing was recognised by the Bali Action Plan of 2007 as a key aspect in the development of low-carbon energy projects and climate adaptation. Financing of CDM projects and other climate response measures is carried out through a framework of funding offered by bilateral and multilateral financial institutions (development banks) and is often the key entry point for European institutions to be involved in concrete climate change measures in third countries. Very often such international financing institutions (IFIs) have adopted policies (so-called social safeguards) in order to prevent negative social impacts on project affected communities. However, these policies are not necessarily compliant with human rights law. In addition, IFIs very often have established grievance and complaint mechanisms, which are non-judicial instruments that provide a forum to people negatively affected by projects to obtain justice.

### **The Bujagali Hydropower Plant**

The Bujagali Hydroelectric Power Plant (BHP) is located on the Victoria Nile River in the Buikwe District in the Central Region of Uganda and was registered as a run-of-river CDM project in October 2011. In 1999, the Government of Uganda commissioned US-based AES Nile Power (AESNP) to build and operate the BHP as well as the corresponding transmission line. However, AESNP withdrew from the project in 2003 before

construction started, due to a variety of reasons including lowered expected economic returns, local and international environmentalist campaigning against the project, corruption investigations and financing gaps (World Bank 2005; McCull 2010). The company had, though, already completed economic, social and environmental assessments, and had resettled families and communities earlier in 2003.

In 2005, the project was taken up again under a new consortium formed by Sithe Global Power (US-based) and The Aga Khan Fund for Economic Development's Industrial Promotional Services Division. Together, they formed Bujagali Energy Limited (BEL), which owns and runs the hydropower dam. This project now only covers the construction of the hydropower dam itself. The transmission line was separated into a different project, the Bujagali Interconnection Project.<sup>7</sup>

In 2006, R.J. Burnside International Limited carried out the Environmental and Social Impact Assessment (ESIA) that included stakeholder consultations. The project's starting date was 21 December 2007, when the full notice to proceed was issued (Nampungu 2011; CDM 2014). The implementation agreement with the Government of Uganda obliged BEL to develop an Emission Reduction Project, which included the PDD and the commercialisation of emission reduction credits. The Government of Uganda received 60% and BEL 40% of the CERs. The final version of the CDM PDD was completed on March 5, 2014 (CDM 2014).

On 22 June 2011, the Ugandan Designated National Authority confirmed the voluntary participation of Uganda in the Bujagali CDM project with a Letter of Approval. The Letter confirms that Uganda has acceded to the KP in 2002 and that the project contributes to the sustainable development of Uganda.

The project received loans of approximately USD 630 million from a portfolio of lenders, including IFC and the European Investment Bank (EIB) (both USD 130 million), the African Development Bank (AfDB) (USD 110 million), a number of European development finance institutions (the German DEG and KfW, as well as the Dutch FMO collectively providing USD 142 million), as well as loans by commercial banks Absa Capital (South Africa) and Standard Chartered Bank (UK) (USD 115 million) (World Bank 2007). The World Bank (WB) Group also provided high-risk guarantees through its International Development Agency (IDA) and Multilateral Investment Guarantee Agency (MIGA). The project lenders and guarantors approved the financing package of the project from April to December in 2007 (CDM 2014).

Right from the preparatory phase of the project, the BHP was accompanied by opposition from traditional communities and local as well as international Environmental Justice Organisations such as the National Association of Professional Environmentalists (NAPE), the Uganda Wildlife Society, International Rivers and Save Bujagali Crusade. Complaints centred on the alleged inadequacy of the resettlement and the compensation of the affected people and claimed that they had lost their livelihoods. Furthermore, public consultation on the BHP was claimed to have been inadequate (EJAtlas 2014). NGO actions included the publication of alternative reports and letters of complaint and petitions. In 2006, a request was made for conducting of a compliance review of BHP and BIP at the AfDB's Compliance Review and Mediation Unit (CRMU). Complaints were also filed with the World Bank's Inspection Panel (WB IP) by the same civil society organisations in 2007, claiming that in the course of the project, the WB failed to comply with its own operational policies and procedures, and raising environmental, hydrological, social, cultural, economic, and financial concerns against the project. In late 2009,

NAPE together with European NGOs Counter Balance, CLAI, and Sherpa together with legal representatives of affected local people also filed a complaint with the complaints mechanism of the EIB, claiming that the project failed to meet European development objectives, to assess the economic and environmental soundness of the project, to guarantee fair compensation to affected communities, and to ensure the implementation of the mitigation measures (EIB Complaints Mechanism 2012). The European Investment Bank Complaints Mechanism conclusion report was released on 30 August 2012.

Construction of the Bujagali hydropower dam was finished in late 2012, and the facility is now fully operational. This also means that BEL retains only a small staff of technical engineers on site for operating the dam.

### **Problematic issues from a human rights perspective**

There are many problematic issues which were voiced before, during and after the construction phase of the Bujagali dam and which lead to longstanding disputes with and proceedings against the lenders as well as the operating company (see above). A major point of criticism concerns the involuntary resettlement of families and communities from the project site. According to the calculation of the Independent Review Mechanism (IRM) of the AfDB about 8,700 people (1,228 households) had either been resettled or had lost assets (AfDB 2008, 24) during the resettlement for the original project carried out by AESNP. The Investigation Report published by the WB IP in 2008, found a number of incompliances with its resettlement policies, including the following:

- Lack of an adequate baseline assessment in the Assessment of Past Resettlement Activities and Action Plan (APRAP) such as flawed sampling of stakeholders, flawed sample survey of displaced persons' livelihoods and standards of living, and carrying forward the shortcomings in the original resettlement plan.
- Shortcomings in the consultation process of people who had moved and had been compensated: "The consultation strategy was structurally flawed because it excluded the majority of displaced persons and limiting the scope of consultations to previous commitments." (WB Inspection Panel 2008, 143)
- Unfulfilled promises made in the prior project and "incomplete or insufficient livelihood restoration activities, leading to potential hardship on certain categories of affected people." (WB Inspection Panel 2008, 147) Especially livelihoods with regard to the loss of fishing and agriculture were inadequately restored. The WB Inspection Panel stated "that the Project did not comply with the mandate of Bank policy to improve or at least to restore, in real terms, the livelihoods and standards of living of the people displaced by the Project. Many affected people also believe that other promises made under the prior project were not kept." (Ibid. xiv)
- Insufficiencies with the issuing of land titles.
- No proper identification of vulnerable people, especially in the context of livelihood risks.
- Failure to achieve sharing in project benefits and community development.

In 2009, the complaint submitted to the Complaint Mechanism of the EIB (EIB CM) reiterated some of the grievances and argued that the resettlement process had failed to comply with EIB standards, e.g. non-implementation of commitments made by BEL, poorly constructed houses in which people were resettled, no electricity and no running water,

loss of the main source of income (i.e. fishing) of resettled people, no fair and adequate compensation of affected people in general, violation of domestic law and shortcomings concerning the cultural and spiritual resettlement (NAPE et al. 2009).

According to the EIB Conclusions Report published in August 2012, some of these issues have been mended since (EIB CM 2012). However, interviews with resettled communities during a field study<sup>8</sup> showed that there is still dissatisfaction with the resettlement in many ways: an ill-chosen resettlement site, loss of income and poor consultation processes were mentioned among prominently. Many of the people have allegedly already left the resettled village to search for a better place of residence. The case reveals that there are some serious problems which became evident during the process and which are a serious threat to the fulfilment of their rights:

Firstly, although it is the state which is responsible to guarantee the human rights of its citizens as well as those of people on its territory, climate response measures are often implemented in states with a poor human rights record and a weak judicial system to access justice by people adversely affected by the project. Concerning the Bujagali case, interviewees indicated that it was pointless to make use of Ugandan courts, as there seems to be a lack of capacity and impartiality of the Ugandan courts as the Ugandan state was very supportive of the project.

Secondly and closely connected with the first point, it is very hard to hold institutions and actors accountable for actions that cause human rights violations in other states, e.g. European or international and bilateral banks that finance climate response measures in other states. Although there has been a growing debate in the last years under which circumstances states assume extraterritorial human rights obligations, the determination of such rights, which can be claimed in a judicial forum is difficult to make (Hofbauer 2016). Thus, PAPs are very often left to address non-judicial grievance mechanisms voluntarily set up by financing institutions in order to enforce their rights. Concerning the Bujagali dam, those grievance mechanisms were of particular importance. PAPs assessed institutional grievance mechanisms of the AfDB, WB and the EIB. Although these mechanisms are very important concerning the PAPs' access to justice, they also have shortcomings in terms of accessibility, independence, compliance with human rights law and lacking binding character of their decisions (Ammer et al. 2016, 75–97).

Thirdly, the Bujagali dam as a CDM project demonstrates that the rights of people affected by climate change-related projects are not adequately taken into account in the global climate policy regime. The following issues are important:

The right to participate in the decision-making process, which would contribute to guarantee the rights of affected people was clearly neglected in the resettlement process in the context of the BHP. Although CDM procedures require to invite and duly take account of stakeholder comments it leaves it up to the host state to define procedures for participation. As mentioned above and as confirmed by the WB IP, the consultation procedures concerning the resettlement process in Bujagali were flawed (WB Inspection Panel 2008, 143; Nampungu 2011, 49–51). The NGO NAPE stated that the people “were merely informed, coerced and even threatened into accepting the relocation in most cases learning the details from the press instead.” (Nampungu 2011, 50) In addition, although the validation report for the CDM states that “several rounds of local stakeholder consultation and engagement have been carried out” (ERM CVS 2011, 97), this clearly refers to the PDD publication process, which took place well after the relocation of the PAPs. In general, the CDM not only fails to meaningfully engage with the PAPs, there is also a lack of remedies

against the approval of a project by the CDM Executive Board, which is furthermore not mandated to review human rights allegations (Ammer et al. 2016, 36).

The CDM rules are “silent on the adequate protection of the right to property/tenure and leave the determination of property rights largely within the discretion of host states. As these issues are essential for the successful implementation of CDM projects, the failure to address these aspects at an early stage of project implementation creates not only risks for the participants but can also seriously endanger the effective enjoyment of rights of affected populations.” (Ibid., 46) The Bujagali resettlement process revealed several problematic points in this context: Not only were people excluded from the selection of the resettlement site, there were also issues concerning the quality of houses, infrastructure, land and other services (WB Inspection Panel 2008, xiv). The consequences for the resettled communities thereof are landlessness, homelessness, unemployment, food insecurity, community dislocation and aggravated or delayed access to public services such as schools and hospitals (Nampungu 2011, 67–74).

Another point of concern is the fact that CDM rules leave the assessment of socio-economic impacts to the host country to determine and do not lay down clear indicators within the CDM project cycle to guarantee that the project will have a positive impact on human rights (Ammer et al. 2016, 99). The shortcomings concerning the social and environmental assessment in the Bujagali case were documented not only by the WP IP but also by NGOs (WP Inspection Panel 2008; NAPE et al. 2009).

## Conclusions

Human rights are inadequately incorporated into the global climate change policy and legal framework, which leaves communities affected by climate response measures vulnerable to the violations of their rights and may even lead to displacement, eviction and forced resettlement. The Bujagali dam in Uganda demonstrated that people resettled and displaced due to the construction of the dam were in many ways worse off afterwards, and their rights were not respected in an adequate manner. The inclusion of human rights concerns into the preamble of the 2015 Paris Agreement opens the window for a more thorough and comprehensive inclusion of human rights safeguards into global climate change framework in general, and into a possible new market-based mechanism replacing the CDM in particular. Possible measures could be a mandatory Human Rights Impact Assessment of all projects before approval, clear procedural requirements for stakeholder participation processes or the possibility of de-registering a project when human rights violations become apparent only during or after project implementation. European states as state parties to the UNFCCC should use their influence to institutionalise human rights safeguards in all market-based mechanisms. In addition, European states should use their role as buyers of credits to improve the human rights record of such projects, e.g. requiring safeguards from the projects they purchase credits or they approve (Hofbauer et al. 2015, 5–7). In general, it is important that policy makers become aware that the protection of people has to be at the core of the protection of the environment. Introducing human rights at all levels of climate change policies would considerably enhance this objective, and could contribute that people resettled in this context are better off afterwards or that displacement and evictions of those persons are prevented in the first place.

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## Notes

- 1 This article is based on research conducted in the context of the project ‘ClimAccount – Human Rights Accountability of the EU and Austria for Climate Policies in Third Countries and their possible Effects on Migration (KR13AC6K11043)’ funded by the Austrian Climate and Energy Fund, ACRP 6th Call, that was implemented by the Ludwig Boltzmann Institute of Human Rights (Vienna/Austria), the University of Bielefeld (Germany) and the Wuppertal Institute for Climate, Environment and Energy (Germany)
- 2 The IPCC is an intergovernmental body entrusted with the assessment of the science related to climate change. The IPCC is composed of scientists from all over the world and was established by the World Meteorological Organization and United Nations Environment Programme in 1988 to provide policymakers with regular assessments “on a comprehensive, objective, open and transparent basis the scientific, technical and socio-economic information relevant to understanding the scientific basis of risk of human-induced climate change, its potential impacts and options for adaptation and mitigation” (Principles Governing IPCC Work, Art. 2).

- 3 The OHCHR defines mitigation and adaptation as follows: “Mitigation aims to minimize the extent of global warming by reducing emission levels and stabilizing greenhouse gas concentrations in the atmosphere. Adaptation aims to strengthen the capacity of societies and ecosystems to cope with and adapt to climate change risks and impacts.” (OHCHR 2009, 6)
- 4 Currently registered projects can be found under <https://cdm.unfccc.int/Projects/projsearch.html>
- 5 The Marrakesh Accords contain detailed implementation rules for the Kyoto Protocol, particularly regarding emissions accounting and the functioning of (the) flexible mechanisms
- 6 Before a project is registered through a decision by the CDM Executive Board. Projects proponents need to prepare a PDD according to a prescribed format developed by the Board
- 7 Also the construction of the transmission line resulted in the displacement and resettlement of people. As this project was not a matter of the CDM, the focus of this article is on resettlement and displacement in the context of the BHP
- 8 During a field research visit in 2015, members of the resettled communities, representatives of civil society organisation and of BEL, representatives of financing institutions and other actors were interviewed



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