

## **Agricultural Investments: The New Frontier of Human Rights Abuse and the Place of Development Agencies**

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### **Introduction**

Food security remains a concern in many countries. The fact that the global population is on a constant increase translates to increased demands for food to meet the nutritional needs of the populace. Climate change has further exacerbated the situation as productivity of farms in many parts of the world has dwindled. New techniques have been devised for agriculture to meet food and other needs with a concomitant demand for land to facilitate the establishment of large farms. Acquisition of land continue to occur in different areas including places where land tenure insecurity is replete. Communities in these areas have been forced to relinquish ancestral claims to their lands and move elsewhere to pave way for the establishment of large farms. Some of these agricultural investments have been financed by donor agencies that have partnered with governments. Kenya and Uganda are key examples where multilateral donor agencies have funded large scale agricultural projects. Development agencies inadvertently or overtly play a role in human rights abuse in these two countries. This paper highlights on injustices that have been visited upon the occupants of land acquired for the purposes of large scale farming with the financial assistance of development agencies. The paper proceeds by examining agricultural projects that have been initiated in Uganda and Kenya with the aid of donor agencies and the implications of such projects to the human rights discourse. The paper proposes stringent measures to be adopted by the donor agencies funding agricultural projects in both Kenya and Uganda.

### **The Problem of Food Insecurity**

Kenya and Uganda are two East African countries which relatively share similar climatic conditions. In both countries, agriculture form the backbone of the economy though subsistence farming is common in the two countries. In Kenya, the agricultural sector directly contributes 24% of the Gross Domestic Product (GDP) and 27% indirectly through linkages with manufacturing, distribution and other service related sectors.<sup>1</sup> It is estimated that the government derives approximately 45% of its revenue from agriculture and the sector further contributes over 75% of industrial raw materials and more than 50% of export earnings.<sup>2</sup> Being the largest employer in the economy, the agricultural sector provides income for a majority of Kenyans to enable them meet their basic needs.

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<sup>1</sup> KARI, 'Food Security Report' available at <http://www.foodsecurityportal.org/kenya/food-security-report-prepared-kenya-agricultural-research-institute> accessed 20th March 2016. Food security is defined as " a situation in which all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food which meets their dietary needs and food preference for an active and healthy life" (Kenya Food Security Steering Group, 2008).

<sup>2</sup> Ibid.

In Uganda, the agricultural sector is dominated by smallholders and the income of 75 percent of households come from agriculture.<sup>3</sup> More than 15 percent of the Ugandan GDP derives from agriculture.<sup>4</sup> Statistical trends however indicate declining amounts of agricultural production since the late 1980s when agriculture accounted for 51 percent of GDP.<sup>5</sup> The production of staple crops has been on a decline and this poses danger to the nutritional needs of the populace. In both Kenya and Uganda, climate change has resulted in dwindling food production rates. The introduction of largescale agriculture has also seen loss of biodiversity as traditional food crops which are known for their high nutritional values are no longer grown. This is particularly evident in places where there is poor land tenure security, particularly in rural areas. The introduction and encouragement of growth of genetic monocultures has a resultant effect of destroying indigenous genetic resources.<sup>6</sup> In Kenya, the problem of food insecurity is particularly prevalent in arid and semi-arid lands, where numerous development projects have been initiated.

Climate change together with continued loss of biodiversity have brought about food security concerns in Kenya and Uganda. This comes against the background of an international human rights framework where the access to food is seen to be a critical right as it is the basis of the survival of human beings. The right to food is thus seen to be a fundamental human right but contrary to the elevated position of this right, there is stark hunger in Kenya and Uganda and this is an illustration of the failure of the two states to fulfil their obligation in guaranteeing this right. The Universal Declaration of Human Rights lays the basis for the right to food through its provision in Article 25 where access to food is considered a human rights issue. The Committee on Economic Social and Cultural Rights has in General Comment 12 stated that 'the right to adequate food is realized when every man, woman and child, alone or in community with others, has the physical and economic access at all times to adequate food or means for its procurement.' Access is, therefore, a critical element in seeking to realize the right to food.

The impediments to access to food, both human and nature induced, have resulted in a poor state of nutrition in the two countries. Poor governance and policies also contribute to food insecurity.<sup>7</sup> The government can be said to be making poor policies where a majority of the population is excluded from contributing positively towards growth and when policies are tailored to serve certain vested interests without taking consideration of the needs of other sections of the society. The success of any agricultural society is, therefore, intricately interrelated with the extent to which policies are inclusive

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<sup>3</sup> The World Bank, 'Uganda: Agriculture for Inclusive Growth in Uganda' World Bank June 2011.

<sup>4</sup> NDP, 'Uganda: National Development Plan 2010/11-2014/15' Government of Uganda 2010.

<sup>5</sup> The World Bank, 'Uganda: Agriculture for Inclusive Growth in Uganda' World Bank June 2011.

<sup>6</sup> Calestous Juma, *The Gene Hunters: Biotechnology and the Scramble for the Seeds* (Princeton University Press, 1989).

<sup>7</sup> FAO, 'Regional Overview of Food Insecurity Africa' available at <http://www.fao.org/3/a-i4635e.pdf> accessed 21st March 2016.

and the nature of economic integration in the country.<sup>8</sup> Food security is, therefore, dependent on the national policies adopted by policymakers. In order to be effective in curbing food insecurity, the policies adopted ought to be driven at ensuring sufficiency, reliability, quality, safety, timeliness, and other aspects of food necessary for healthy living and thriving populations.<sup>9</sup> Particular consideration ought to be put on the needs of vulnerable populations in order to ensure that access to food by these groups is guaranteed.

### **Land Rights Situation in Kenya and Uganda**

The practice of agriculture inevitably requires land. Land is however a scarce resource and proper safeguards ought to be put to ensure that the limited land available is put to maximum use. Unavailability of land for agriculture further puts rural communities at a precarious situation as large-scale commercial producers tend to encroach on the land held by the rural communities. This situation becomes complicated where tenure insecurity is rife as it pits the communities against the large-scale agricultural producers. Unfortunately, this is the case in many parts of Kenya and Uganda where tenure insecurity is prevalent. This section examines the land rights situation in Kenya and Uganda and it points to the fact that insecure tenure makes communities vulnerable to exploitation by largescale agricultural producers who have more resources. The failure by governments to establish proper land governance frameworks to enable secure land tenure for the communities living in such areas is also highlighted.

Being a finite resource, mechanisms have been devised to ensure that the limited land is held and distributed in a manner that ensures its efficient use. Tenure arrangements have been devised to ensure that land is held in a manner that guarantees its maximum use. Land tenure denotes the relations that persons have in relation to land.<sup>10</sup> Investigating the land tenure in a given area warrant the answering of a tripartite question, who holds, what interest, in what land.<sup>11</sup> Land can be held by various categories of persons including; communities, the government, and private persons. Three important steps are usually followed before land rights are granted to either of these landholding entities. Adjudication is used to determine who owns what interest in what land, thereafter, scattered units are consolidated and registration of the consolidated units follow lastly.<sup>12</sup>

In both Kenya and Uganda, land tenure transformations have occurred over the years. Various historical, ecological, demographic, technological and socio-political

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<sup>8</sup> Ibid 7.

<sup>9</sup> Calestous Juma, *The New Harvest* (Oxford University Press, 2011) 1.

<sup>10</sup> Paul Bohannon, 'Land', Tenure and Land-Tenure' in Daniel Blebuyck (ed), *African Agrarian Systems* (Oxford University Press, 1963).

<sup>11</sup> Kwamena Bentsi-Enchil, 'Do African Systems of Land Tenure Require a Special Terminology?' 9(2) Cambridge Journal of African Law (Summer 1965).

<sup>12</sup> H.W.O. Okoth-Ogendo, 'Formalizing 'Informal' Property Systems: The Problem of Land Rights Reform in Africa' available at [https://learning.uonbi.ac.ke/courses/GPR203\\_001/document/Property\\_Law\\_GPR216-September,\\_2014/Articles/formalising\\_the\\_informal.pdf](https://learning.uonbi.ac.ke/courses/GPR203_001/document/Property_Law_GPR216-September,_2014/Articles/formalising_the_informal.pdf) accessed 20th March 2016.

factors have contributed to tenure transformation.<sup>13</sup> These transformations have largely seen the introduction of foreign ideologies in the management of land which are attributed to the introduction of colonial rule in both Kenya and Uganda. When the British declared the two countries to be their protectorate, the laws of England were transplanted in the two colonies and this includes land laws. Prior to this, land in Africa was held by communities organized at different social levels. These lands held by communities have been defined as commons. According to Okoth-Ogendo, the defining characteristics of the commons are that; land is held as a transgenerational asset; it is managed at different levels of social organisation; and it is held in function-specific ways meaning that land was granted for purposes such as cultivation, grazing, hunting, transit, recreation, fishing and biodiversity conservation.<sup>14</sup> These characteristics are important and are what define communal holdings.

Colonial rule brought with it new forms of land holding. Private land was introduced as it was considered that common holdings were wasteful. Under private ownership, land could now be registered under the name of individual owners who could exercise dominion over the land. Individuals would claim dominion over a given piece of land once it had been adjudicated, consolidated and registered. Various justifications were given by the colonial government for the introduction of private forms of land holding with the notable one being by R.J.M. Swynnerton who in what is known as the 'Swynnerton Plan' stated;

*"Sound agricultural development is dependent upon a system of land tenure which will make available to the African farmer a unit of land and a system of farming whose production would support his farming...He must be provided with security of tenure through indefeasible title as will encourage him to invest his labor and profits into the development of his farm and as will enable him to offer it as security against such financial credits as he may wish to secure."*<sup>15</sup>

This Plan hailed private tenure as what was needed for sustainable agriculture. Private tenure was also praised as being key in unlocking the potential that land has. Most of the land related policies adopted by Kenya and Uganda have focused on privatization of land at the expense of such holdings like communal lands. Public land has also received much protection by governments in both countries as this category is held and managed by the state.

Community land, therefore, falls at the bottom of the tier with regard to the protection accorded to the various categories of land. This in effect translates to the lowest form of protection accorded hence vulnerability of this category of and to illegal acquisitions. The land rights of communities have not been protected in many parts of

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<sup>13</sup> See Smokin Wanjala, 'Land Tenure and Soil Conservation in Kenya', in Smokin Wanjala (ed), *Essays on Land Law: The Reform Debate in Kenya* (Faculty of Law, University of Nairobi, 2000).

<sup>14</sup> H.W.O. Okoth-Ogendo, 'The Tragic African Commons: A Century of Expropriation, Suppression and Subversion', Keynote Address to African Public Interest Law and Community-Based Property Rights Workshop, Arusha, Tanzania.

<sup>15</sup> R.J.M. Swynnerton, 'A Plan to Intensify the Development of African Agriculture in Kenya', 1955.

Kenya and Uganda and this exposes these communities to abuse of their land rights by persons seeking to dispossess them. As will be seen in the subsequent sections, tenure insecurity is also a source of chaos which usually end up in violent conflicts among communities. This results in underutilization of land in the areas where such violence occur.

The guarantee of tenure security is key in a context where there are rapid changes in land use associated with economic development, climate change, urbanization, growth of demand for food and industrial materials, and the need to feed a rapidly growing population.<sup>16</sup> Failure to do this is a recipe for chaos and conflicts among various stakeholders. It has also been noted that the effects of weak land governance is particularly harmful for the poor in developing countries for whom land is a primary means to generate a livelihood; a key vehicle to invest, accumulate wealth, and transfer such wealth between generations; and a key part of their identity.<sup>17</sup> Where poor land governance policies exist, the poor stand to lose out. Violence is inevitable in the context of such exclusions.

### **Land grabbing for agricultural projects: trends and actors**

Acquisitions of land ought to be done in a transparent manner taking cognizance of any existing claims that may exist. Whenever acquisitions are done without following due process established by the law, conflicts are bound to occur as a result of the competing claims to the land. Land grabbing usually occurs where there is an illegitimate seizure of an interest in land from a person. The International Land Coalition has defined land grabbing as deals that lack free, prior and informed consent by land-users, do not include socio-environmental impact assessments, and are carried out corruptly and without proper democratic participation.<sup>18</sup> The Tirana Declarations by over 150 representatives of civil society organisations, social movements, grassroots organisations, international agencies and governments, defines large-scale grabbing as acquisitions or concessions that are one or more of the following;

*(i) In violation of human rights, particularly the equal rights of women; (ii) not based on free, prior and informed consent of the affected land-users; (iii) not based on a thorough assessment, or are in disregard of social, economic and environmental impacts, including the way they are gendered; (iv) not based on transparent contracts that specify clear and binding commitments about activities, employment and benefits sharing, and; (v) not based on effective democratic planning, independent oversight and meaningful participation.*<sup>19</sup>

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<sup>16</sup> Klaus Deininger *et al*, *The Land Governance Assessment Framework: Identifying and Monitoring Good Practice in the Land Sector* (The World Bank, 2012) 11.

<sup>17</sup> *Ibid* 15.

<sup>18</sup> <http://www.landcoalition.org/en>

<sup>19</sup> International Land Coalition, 'Tirana Declaration: Securing land access for poor in times of intensified natural resources competition' May 2011 available at



Certain key elements have been outlined which are identifiable in any form of land grabbing. One key element is the exchange of land ownership and control of the land.<sup>20</sup> Such control is in many cases usually disputed by the persons who have lost control and it may at times occur forcefully. Acquisition of control is also usually done in a non-transparent manner and without involving some of the affected parties.<sup>21</sup> The definition also takes cognizance of the fact that there are certain marginalized groups within the society such as women that are likely to be affected more by land grabbing. Free, prior and informed consent is also a critical element to look at in determining whether an action amounts to land grabbing. It must, therefore, be shown that members of the communities where land is acquired were involved in the acquisition process through consultations and that their views were taken into account. From the IFC's definition above, it is clear that land grabbing is usually facilitated by a combination of actors to the detriment of another group which is not usually armed with legal and financial safeguards. The definition also demonstrates that selfish interests usually take precedence over environmental and other considerations where land grabbing occurs.

Both the private sector and governments are key facilitators of land grabbing. In many countries, the government plays a central role in the management and administration of land. Land transactions in these countries can, therefore, not be done without being sanctioned by the government. In Kenya, all land belongs to the people of Kenya collectively as a nation, as communities and as individuals.<sup>22</sup> The government, through the Ministry of Lands and the National Land Commission, is tasked with the management and administration of the various categories of land in the country. In Uganda, land belongs to the citizens of Uganda and the Uganda Land Commission is tasked with the management of all land in Uganda.<sup>23</sup> Disposal of land in these two countries is clearly within the mandate of the government through its appointed agencies which are to define the terms in which transactions in land are to be made. Governments can acquire land within their countries for national projects. Governments can also acquire land within their countries and grant leases to foreign governments seeking to undertake projects.<sup>24</sup> Foreign investors or government investors are generally countries that have heavy reliance on food imports to feed their populations and includes Gulf States such as Bahrain, Qatar, Kuwait, Saudi Arabia and some North African countries

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[http://www.landcoalition.org/sites/default/files/documents/resources/tirana\\_declaration\\_ilc\\_2011\\_eng.pdf](http://www.landcoalition.org/sites/default/files/documents/resources/tirana_declaration_ilc_2011_eng.pdf)  
accessed 6th April 2016.

<sup>20</sup> TNI, 'The Global Land Grab' available at <https://www.tni.org/files/download/landgrabbingprimer-feb2013.pdf>  
accessed 5th April 2016.

<sup>21</sup> Ibid 4.

<sup>22</sup> Constitution of Kenya (2010) Art. 61.

<sup>23</sup> Constitution of the Republic of Uganda (1995) Chapter 15.

<sup>24</sup> Cotula, L., *et al*, *Land grab or development opportunity? Agricultural Investment and International Land Deals in Africa* (IIED/FAO/IFAD, 2009)

such as Egypt and Libya.<sup>25</sup> Countries such as China where rapid population growths have been experienced also fall in this category.

The private sector also usually plays a role in land grabbing as financiers of the projects and also as the acquirers of the grabbed land. As highlighted in the preceding sections, increased demands for food and biofuels has resulted in massive investments in alternative sources of these resources and this has seen huge financial inflows into developing countries for the establishment of large-scale farms. Money flowing from the private sector usually comes from banks, investment houses, private equity, pension and hedge funds.<sup>26</sup> International financial institutions such as the World Bank and the European Union have also facilitated the phenomenon of land grabbing and this has been through market-based land reform policy recommendations to governments in developing countries which have put much focus on privatization.<sup>27</sup>

As noted in the previous section, the private sector plays a big role in facilitating land grabbing. This is attributed the fact that the private sector mostly consists players who can access financial resources at ease and most of these entities are usually driven by the need to maximize profits. A Report by the World Bank notes that there appears to be significant interest in countries with weak governance which largely consist Sub-Saharan Africa countries where massive foreign investments have been directed.<sup>28</sup> The need to maximize profits usually drivers actors in the private sector to compromise government officials in countries with weak governance to enable them access farmlands and this may be to the detriment of land owners in these areas.

Land grabbing is particularly rife where land is held communally as much protection has not been accorded to community land compared to public and private land. Communities inhabiting rural areas in most developing countries are usually not aware of the mechanisms they can use to secure their unregistered lands and this exposes these lands to unlawful acquisitions. In certain cases, members of these communities who have been entrusted with managing land on behalf of other members of the communities usually conspire with the acquiring entities to deprive the other community members of their land. In such cases, only a few in the community benefit at the expense of a vast majority who are left landless. This may be a cause of disputes within the community as lack of trust is bred among the members.<sup>29</sup> Where land is acquired in this manner then it cannot be said that the land was acquired with the consent of the affected community.

## Case studies

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<sup>25</sup> Sindayigaya, W., 'Foreign investments in agriculture-Land Grabbing' available at [http://www.zukunftsstiftung-entwicklung.de/media/Bilder\\_ZSE/UEber\\_Uns\\_Dateien/Grundlagentexte/Land\\_grab\\_article.pdf](http://www.zukunftsstiftung-entwicklung.de/media/Bilder_ZSE/UEber_Uns_Dateien/Grundlagentexte/Land_grab_article.pdf) accessed 6th April 2016.

<sup>26</sup> Ibid 11.

<sup>27</sup> Ibid 12.

<sup>28</sup> Klaus Deininger *et al*, *Rising Global Interest in Farmland: Can it Yield Sustainable and Equitable Benefits* (The World Bank, 2011) 141.

<sup>29</sup> See Collins Odote and Smith Otieno, 'Getting It Right: Towards Socially Sustainable Exploitation of the Extractive Industry in Kenya' (2015) 1 East African Law Journal.

### **Uganda: Land grabbing by palm oil producers**

Poor farmers in Uganda have borne the brunt of the global increased demands for palm oil which is used in the food and biofuels industry. The demand for palm oils has seen the clearing of huge tracts of forests in various parts of the world and Uganda has found itself on the list of countries where multinationals continue to acquire land for the establishment of these plantations. The Ugandan government is also keen on attracting foreign investors for a range of projects including carbon offset tree plantations, petroleum exploration and drilling and the development of large scale oil palm plantations.<sup>30</sup> This is a phenomenon common, especially in developing countries, which are keen on catching up with their western counterparts on development and as a result, investor friendly policies are usually adopted by the governments. Investments by multinationals in Uganda may however not necessarily translate to economic growth. On the contrary, as will be established in the subsequent discussions, these projects have the probability of depriving local communities of access to natural resources and may exacerbate rural poverty and increase risk of food crises.<sup>31</sup>

64.5% of land in Uganda is suited for agriculture and 27% is cultivable.<sup>32</sup> Over 47% of land in Uganda is under cultivation<sup>33</sup> and from this it is clear that agriculture forms the mainstay of the Ugandan economy. Given the proximity of Uganda to various freshwater bodies, the country has a huge potential for irrigation to meet the demands of the market-oriented agricultural economy. In 2000, the Ugandan government launched a plan to modernize agriculture and this was largely to be done through the conversion from subsistence to commercial agriculture. This project was particularly driven at the modernization of the coffee industry. It is reported that on August 18, 2001, the Ugandan army violently expelled over 400 local peasants from their farms to pave way for the establishment of a coffee plantation by a subsidiary of a German coffee company.<sup>34</sup> The forced eviction by the government for the establishment of these coffee farms was in violation of the human rights of the farmers in these areas.

Prior to this, in 1998, the Ugandan government, with support from the United Nations International Fund for Agricultural Development (IFAD) and the World Bank, launched a Vegetable Oil Development Project (VODP) in a bid to increase domestic

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<sup>30</sup> Friends of the Earth, 'Palm oil land grab in Uganda: Wilmar International's violations in Kalangala Island' available at [http://libcloud.s3.amazonaws.com/93/7b/3/3078/Issue Brief 5 - Wilmar in Uganda.pdf](http://libcloud.s3.amazonaws.com/93/7b/3/3078/Issue%20Brief%205%20-%20Wilmar%20in%20Uganda.pdf) accessed April 12, 2016.

<sup>31</sup> National Association of Professional Environmentalists, 'A Study on Land Grabbing cases in Uganda' NAPE (April 2012).

<sup>32</sup> USAID, 'USAID Country Profile: Uganda Property Rights & Resource Governance' available at [http://www.usaidlandtenure.net/sites/default/files/country-profiles/full-reports/USAID Land Tenure Uganda Profile.pdf](http://www.usaidlandtenure.net/sites/default/files/country-profiles/full-reports/USAID_Land_Tenure_Uganda_Profile.pdf) accessed April 12th 2016.

<sup>33</sup> Uganda Bureau of Statistics, '2014 Statistical Abstract' available at [http://www.ubos.org/onlinefiles/uploads/ubos/statistical\\_abstracts/Statistical Abstract 2014.pdf](http://www.ubos.org/onlinefiles/uploads/ubos/statistical_abstracts/Statistical_Abstract_2014.pdf) accessed April 12, 2016.

<sup>34</sup> FIAN Fact Sheet, July 2012 available at [http://webcache.googleusercontent.com/search?q=cache:http://www.fian.org/fileadmin/media/publications/2012.07 Land grabbing in Uganda Fact sheet Mubende.pdf](http://webcache.googleusercontent.com/search?q=cache:http://www.fian.org/fileadmin/media/publications/2012.07_Land_grabbing_in_Uganda_Fact_sheet_Mubende.pdf)



production of vegetable oils in partnership with the private sector.<sup>35</sup> The project entailed the introduction of commercial oil palm production, as well as more traditional oil seed developments in eastern and mid-western districts of Uganda.<sup>36</sup> This project is being undertaken on Bugala Island in Kalangala district in Lake Victoria. Prior to the introduction of the project in the island, a majority of the inhabitants of the island depended on fishing, subsistence farming and tourism.<sup>37</sup> Implementation of the projects is being undertaken jointly by the Ugandan government and the private sector consortium, Oil Palm Uganda Limited (OPUL) which was formed in 2003 and brings together foreign investors from Wilmar International<sup>38</sup> and Bidco limited. The funding for the project mainly comes from the Government of Uganda, IFAD and the World Bank.<sup>39</sup>

### **Human rights implications of the Oil Palm project**

Human rights violations have arisen from the manner in which the Oil Palm project in Uganda has been implemented. These violations have been occasioned by both the government and the private sector partners in the project against the communities which are mostly helpless against the violators. The human rights abuses range from forceful evictions, economic marginalization, and other forms of environmental injustices. The poor human rights regime in Uganda particularly exacerbates the violations that have been visited upon the communities in the areas where the oil palm projects have been initiated. This section examines the human rights violations arising from the Oil Palm project and the implications that these violations have on the locals in these areas.

### **Land Rights Violations**

The large oil palm plantations inevitably require land. Under the terms of the agreement, the Ugandan government was to provide 6,500 ha of land for the establishment of the oil palm estate.<sup>40</sup> Most of this land was, however, granted to BIDCO by the Ugandan government at the expense of members of the community inhabiting the area who did not hold formal rights to the land that they occupied.<sup>41</sup> This was inevitably a recipe for chaos between the community and the investors. Further, the weak laws on mailo (customary) land holding in Uganda did not adequately safeguard the interest of the

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<sup>35</sup> NAPE (n 31) 14.

<sup>36</sup> Republic of Uganda, 'Vegetable Oil Development Project 2: Start-Up and Implementation Support Mission' Government of Uganda (2012).

<sup>37</sup> NAPE (n 31) 14.

<sup>38</sup> Wilmar International is a global palm oil giant which has been implicated in the destruction of forest land in Indonesia for the establishment of palm oil plantations through funding from the World Bank. See <http://www.wilmar-international.com/>

<sup>39</sup> NAPE (n 31) 15. See also

[http://operations.ifad.org/web/ifad/operations/country/project/tags/uganda/1021/project\\_overview](http://operations.ifad.org/web/ifad/operations/country/project/tags/uganda/1021/project_overview). The World Bank however later pulled out of the project.

<sup>40</sup> Ibid 17.

<sup>41</sup> Ibid.

communities as against the investors. There have been reports of land conflicts that have arisen between BIDCO and the local community following allocation of land to the company and the forceful displacements that followed.<sup>42</sup>

Allocation of land for the oil palm plantations has further failed to take account of the any interests on land that may have been existent. In one case, a farmer claims to have been shocked when she woke up and found machines churning her land and razing her crops without being consulted and offered compensation to vacate the land.<sup>43</sup> Deprivations like these are a commonality given that a majority of the land holders in these areas do not have official land titles for the land that they occupy and they often cannot get redress when dispossessed.<sup>44</sup> Individuals who have title to their land are also oftentimes forced to sell their land at very low prices since they lack leverage to enable them properly bargain with the acquiring authorities. As documented in the case of land acquisition by OPUL, some of the farmers who received compensation lamented that the money that they received was insufficient for the value of the land that they lost and the food that was destroyed with others claiming that they were coerced into signing for the money.<sup>45</sup> These actions amount to forced displacement and constitute violation of the rights of the inhabitants of these areas.

These allegations have however been denied by the BIDCO executives led by the C.E.O who claims that these are 'deliberate smear campaign by a certain clique of individuals'.<sup>46</sup> His sentiments followed a petition from a farmers' association, the Bugala Farmers' Association, to the UNDP to cut ties with the cooking oil firm.<sup>47</sup> These back and forth between the farmers and the investor companies are evidence of the underlying grievances that exist which point to the fact that proper procedures may not have been followed during the acquisition of the land.

### **Economic exclusions**

The establishment of the largescale oil palm plantations disrupted the economic situations in the areas that these farms were established. Particularly, the inhabitants of these areas largely practices agriculture for subsistence use. The establishment of the large plantations translated to a concomitant decrease in the land used for farming by the inhabitants of these areas who now were forced into buying food for their consumption.

The Oil Palm project to some extent incorporated small holder farmers from the area and this was meant to ensure that the local community contributes and benefits

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<sup>42</sup> National Association of Professional Environmentalists, 'Land Grabbing: A Case Study of the World Bank group Investments in agribusiness in Uganda' NAPE(2011).

<sup>43</sup> See Alon Mwesigwa, 'Ugandan farmers take on palm oil giants over land grab claims' *The Guardian* March 3, 2015.

<sup>44</sup> NAPE (n 31) 17.

<sup>45</sup> Mwesigwa (n 43).

<sup>46</sup> Vimal Shah, 'Vimal Shah: Open letter to KOT' available at <http://www.capitalfm.co.ke/eblog/2015/11/06/vimal-shah-open-letter-to-kot/> accessed April 12, 2014.

<sup>47</sup> Lilian Ochieng', 'Vimal Shah refutes claims his firm ripped off farmers' *Daily Nation* February 23, 2016.

from the agricultural project.<sup>48</sup> However, most of the small holder farmers were forced to sell their land since they were not able to afford the fertilizer and other farm inputs required. One farmer had this to say;

*"I had a big piece of land of about 8 acres. When BIDCO came with the programme on planting oil palm, I was given agro-inputs for which I failed to pay for. I later lacked food to eat because I had planted oil palm on the only piece of land I had. I later sold the land cheaply after failing to get food to feed my children. I am now landless!"<sup>49</sup>*

This is an illustration of the fact that farmers who could previously provide for themselves and contribute positively in the economy have now been rendered helpless and unable to even provide for themselves. These farmers have also been excluded from benefiting from the oil palm farms that have been established on their lands since they are not able to farm and produce the oil palms. As seen in the above illustration, faced with the tough economic choices, the farmers are usually left with no choice but to sell their lands and this presents an economic disadvantage to them.

### **Other environmental injustices**

Large tracts of forest land were cleared to pave way for the establishment of oil palm farms. A large proportion of the land cleared are in areas previously covered by natural forest which was used by the locals for various purposes. It is estimated that 3,600 hectares of forest have been destroyed to make way for the plantations and this has deprived locals of food, medicine and livelihoods.<sup>50</sup> The destruction of the forests is also likely to interfere with the climate patterns in the area which may disadvantage the local communities. Activities in the island have also been blamed for the destruction of water sources due to pollution leaving hundreds without access to clean water.<sup>51</sup> Establishment of the plantations also has a negative implication on food security in the island as most farmers have been forced to abandon their traditional agricultural practices. Agricultural projects of this scale usually lead to the destruction of biodiversity and what is usually left is a sea of monoculture palm oil plantations.<sup>52</sup> This further threatens food security in the areas where the oil palm plantations have been established.

### **Kenya**

In Kenya, the Tana Delta is home to numerous largescale agricultural projects that have been initiated. Large tracts of land in the delta and adjacent districts have been set aside

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<sup>48</sup> Republic of Uganda, 'Vegetable Oil Development Project-Phase 2' (June 2012) available at <http://operations.ifad.org/documents/654016/87dde0a7-af04-4b9b-a1d3-93158d0e2b47> accessed April 12, 2016.

<sup>49</sup> NAPE (n 31) 18.

<sup>50</sup> Friends of the Earth, 'Palm oil land grab in Uganda: Wilmar International's violations in Kalangala Island' Friends of the Earth Issue Brief No. 5.

<sup>51</sup> Ibid.

<sup>52</sup> Greenpeace, 'Greenpeace Scorecard on Palm Oil Producers' available at <http://www.greenpeace.org/international/en/publications/Campaign-reports/Forests-Reports/Palm-Oil-Scorecard/> accessed April 12, 2016.

for large scale farming, bio-fuel production and for mining.<sup>53</sup> One such project, the Galana/Kulalu project, has been initiated by the Government of Kenya, through the National Irrigation Board, and the Israeli government through its development agency, Mashav.<sup>54</sup> The project seeks to put a total of 1,020,103 acres of land to use and this shall be done in the following manner; beef and game ranching is allocated 49,085 acres, green areas, 198,653 acres, horticulture 42, 817 acres, orchards 74,646 acres, sugarcane 177,136 acres, maize 93,540 acres, fish farming 9,577 acres, dairy 4,703 acres, apiculture 4,611 acres and agro-processing 5,334 acres.<sup>55</sup>

The project was initiated in line with Vision 2030, the country's development blueprint, where it is expected that agricultural development in the country shall be intensified through irrigation.<sup>56</sup> The project is also part of a wider government scheme to increase food production in the country and to guarantee food security. Further, several initiatives by the World Bank have encouraged partnerships between the government and the private sector in the agricultural sector in order to boost production of crops such as maize.<sup>57</sup>

The Galana/Kulalu project has been initiated in an area that has experienced numerous conflicts in the past as a result of the different claims for land by the various communities inhabiting the area.<sup>58</sup> Initiation of the project thus exacerbated the land conflicts that existed in the area as land for grazing and other agricultural practices by communities became limited with some communities having totally lost the land that they had for agriculture. The establishment of large plantations in the Tana delta is also a threat to biodiversity in the area and this has a concomitant effect of increased poverty rates which is likely to be borne by the communities in the delta.

### **Human rights implications for development agencies**

The foregoing discussions are indicative of the fact that development agencies can play an implicit role in human rights violations notwithstanding the fact that most development agencies do not usually play an active role in the implementation of projects. This is a departure of the traditional view on human rights violation where the state assumed a central role and hence liability has always been imputed against the state. The decision of the International Court of Justice in *Interpretation of the Agreement of 25*

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<sup>53</sup> Abdirizak Nunow, 'The Dynamics of Land Deals in the Tana Delta, Kenya' Paper Presented at the International Conference on Global Land Grabbing 6-8 April 2011

<sup>54</sup> See [http://mfa.gov.il/MFA/mashav/Latest\\_News/Pages/Israel-Kenya-Cooperation-in-the-GalanaKulalu-Project.aspx](http://mfa.gov.il/MFA/mashav/Latest_News/Pages/Israel-Kenya-Cooperation-in-the-GalanaKulalu-Project.aspx)

<sup>55</sup> See <http://www.nib.or.ke/index.php/resourceshttp://www.nib.or.ke/index.php/resources>

<sup>56</sup> *Kenya Vision 2030* (Government of Kenya, 2007).

<sup>57</sup> The World Bank, 'The Multilateral Investment Guarantee Agency Country Partnership Strategy for The Republic of Kenya for the Period FY 2010-13' Report No. 52521-KE, 15. available at [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2010/03/29/000334955\\_20100329224748/Rendered/PDF/525210CAS0IDA1101Official0Use0Only1.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2010/03/29/000334955_20100329224748/Rendered/PDF/525210CAS0IDA1101Official0Use0Only1.pdf)

<sup>58</sup> FIAN, 'Land Grabbing in Kenya and Mozambique: A Report on two research missions and a human rights analysis of land grabbing' 2010 FIAN.

*March 1951 between the WHO and Egypt*<sup>59</sup> changed this position as international institutions such as the World Bank and the World Health Organisation are said to have human rights obligations as part of international law. A similar holding was made in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, a subsequent Advisory Opinion by the ICJ, the ICJ stated that “the United Nations may be required to bear responsibility for the damage arising from” its acts or those of its agents acting in their official capacity.<sup>60</sup>

These bodies have international legal personalities hence hold certain rights and obligations which they must live up to. However, what these bodies have are human rights obligations unlike states which have human rights duties and can be party to human rights treaties. Human rights norms applicable to most international organisations and donor agencies may be sought in their constituting treaties, their internal rules and also in customary international law<sup>61</sup> as seen in the ICJ advisory opinion in the WHO case and also in the Special Rapporteur Advisory Opinion.

Further, international development agencies have realized that there is need to incorporate human rights objectives in development projects. Good business models identify the need to take human rights concerns into account as this ensures the ‘social acceptability’ of the businesses or projects among target communities.<sup>62</sup> This has resulted in the adoption of a human rights based approaches to development by a number of international development agencies.<sup>63</sup> Moreover, most of international development agencies are state organs hence their activities can result in the state being held liable for violations that arise.<sup>64</sup> States funding development agencies are bound by human rights obligations and are required to take their international human rights obligations into account when acting through the development agencies.<sup>65</sup> The World Bank, through its pronouncements, has been on the forefront in recognizing the fact that its activities have a human rights bearing. The Bank has particularly acknowledged the link between development and human rights and it has recognized the fact that it ought to take into account relevant social and environmental factors.<sup>66</sup> The World Bank, through the International Finance Organisation, has also undertaken initiatives to encourage the private sector stakeholders in development projects to undertake initiatives to determine whether projects are not only economically sustainable but also to ensure that such

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<sup>59</sup> Advisory Opinion I.C.J. Reports 1980

<sup>60</sup> Advisory Opinion, 1999 I.C.J. 62, 89 (29 Apr.)

<sup>61</sup> Banoit Mayer, ‘Development is no Excuse for Human Rights Abuses: Framing the Responsibility of International Development Agencies’ paper presented at Oxford Conference on Development Induced Displacement and Resettlement (2013).

<sup>62</sup> Odote and Otieno (n 29).

<sup>63</sup> Celestine Nyamu-Musembi and Andrea Cornwall, ‘What is the “rights-based approach” all about?: Perspectives from International Development Agencies’ IDS Working Paper 234, 46.

<sup>64</sup> Mayer (n 60).

<sup>65</sup> See ILC Draft Articles on Responsibility of International Organisations (2011), Commentary Article 58, para. 4.

<sup>66</sup> The World Bank, ‘Abuse-Free Development: How the World Bank Should Safeguard Against Human Rights Violations’ (2013) Human Rights Watch.



projects meet the demands of social and environmental sustainability.<sup>67</sup> Incorporation of sustainable practices in development funding has been established to have an array of advantages in addressing challenges such as social inequality, climate change, resource scarcity and loss of biodiversity.<sup>68</sup>

Notwithstanding this, numerous development agencies continue to finance projects that have led to grave human rights abuses in various parts globally. The case of Kenya and Uganda are classic examples of this. As seen in the preceding sections, the Oil Palm project in Uganda has been funded by among others, the United Nations International Fund for Agricultural Development (IFAD) and the World Bank (later withdrew from the project).<sup>69</sup> In Kenya, on the other hand, the Israeli government through its development agency, the MASHAV, has funded one of the biggest agricultural projects in the history of the country.<sup>70</sup> This paper has demonstrated that there are numerous human rights questions underlying these projects. Such concerns range from forceful displacements, violence against local communities, threats to food security and increased burdens on marginalized groups like women. The development agencies funding these projects inadvertently or overtly have a role to play in these human rights violations.

This section examines how development agencies through their interaction with development projects can reduce the likelihood of acting as perpetrators of human rights abuse especially within the context of the agricultural investments discussed in the preceding sections. Various approaches including, the use of contracts, human rights due diligence and community development agreements are proposed. It is argued that failure by the development agencies to take these measures may found their liability in human rights abuses arising from the OPUL and Galana/Kulalu projects in Uganda and Kenya respectively.

### **Human Rights Due Diligence**

Despite the importance of conducting human rights due diligence, it is likely that the development agencies in both the Oil Palm and the Galana/Kulalu projects did not uphold human rights due diligence to identify and mitigate the likely human rights violations that would arise from the projects. This is evident from the numerous human rights questions that continue to arise from the projects where communities continue to lose out as the government and private investors reap from the agricultural projects. It is however notable that the World Bank withdrew from the Oil Palm project in Uganda because it feared that the expanded oil palm project would not comply with its internal

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<sup>67</sup> See

[http://www.ifc.org/wps/wcm/connect/topics\\_ext\\_content/ifc\\_external\\_corporate\\_site/Sustainability+and+Disclosure](http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/Sustainability+and+Disclosure)

<sup>68</sup> Francis Kariuki, 'Sustainability in the Financial Sector in Kenya' KBA WPS/01/15

<sup>69</sup> NAPE (n 31) 14. The World Bank later pulled out of the project.

<sup>70</sup> See [http://mfa.gov.il/MFA/mashav/Latest\\_News/Pages/Israel-Kenya-Cooperation-in-the-GalanaKulalu-Project.aspx](http://mfa.gov.il/MFA/mashav/Latest_News/Pages/Israel-Kenya-Cooperation-in-the-GalanaKulalu-Project.aspx)

forestry safeguard policies.<sup>71</sup> It is not clear whether the World Bank had conducted a human rights impact assessment to determine the implication of the project on human rights.

As noted in the foregoing, investments in development activities carry certain risks. Investors are usually faced with business and legal risks relating to human rights when they devote resources to such projects.<sup>72</sup> Certain decisions made may lead to economically unsustainable investments while other decisions may result in harm to the communities where investments are placed. This, therefore, calls for measures to be adopted to ensure that business and development agencies do not unknowingly play a role in human rights violation among communities where investments have been made. One such initiative that has been widely adopted is performance of human rights due diligence.

The United Nations Guiding Principles Reporting Framework provide guides on business and human rights which require, among others, that business entities conduct human rights due diligence process to: assess their actual and potential human rights impacts; integrate the findings and take action to prevent or mitigate potential impacts; track their performance; and communicate their performance.<sup>73</sup> These guiding principles were developed on the basis that non-state actors have a responsibility to respect human rights in their interaction with investment activities. As pointed out in a report by John Ruggie, the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporation and other Business Enterprises, human rights due diligence should be initiated as early as possible in the development of a new activity or relationship.<sup>74</sup> This, therefore, means that such assessments should be taken before a venture is commenced to highlight the likely implications of the project. This does not, however, end here but continues at every stage of a project since there is a likelihood of change in dynamics which may have implications on human rights. Investors and companies, therefore, have a continuing obligation to always monitor the human rights implications of their activities.

Several measures can be adopted by development agencies in order to ensure that they meet their human rights due diligence requirements. Development agencies ought to facilitate stakeholder engagements in order to ensure that proper safeguards are put in place to identify and deal with any likely harm that may arise. Further, stakeholder involvement especially with local communities ensures that there is free, prior and

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<sup>71</sup> IFAD, 'Republic of Uganda Interim Evaluation: Executive Summary of the Vegetable Oil Development Project' EC 2010/63/W.P.4 at 17

<sup>72</sup> John F. Sherman and Amy Lehr, 'Human Rights Due Diligence: Is it too Risky?' Initiative Working Paper No. 55. John F. Kennedy School of Government.

<sup>73</sup> UN Guiding Principles Reporting Framework available at [http://www.ungpreporting.org/wp-content/uploads/2015/02/UNGuidingPrinciplesReportingFramework\\_withimplementationguidance\\_Feb2015.pdf](http://www.ungpreporting.org/wp-content/uploads/2015/02/UNGuidingPrinciplesReportingFramework_withimplementationguidance_Feb2015.pdf) accessed April 18th 2016.

<sup>74</sup> See Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework A/HRC/17/31.

informed consent from these communities before investors engage with them.<sup>75</sup> Development agencies can also contract the services of external advisors to advise on whether projects they are investing in conform with human rights dictates.<sup>76</sup> Human rights due diligence also demands that grievance mechanisms are established to outline how disputes are to be resolved whenever they arise<sup>77</sup> taking consideration of the demands of justice. Where the investment has likely risks, the development agency can demand for risk mitigation measures by the entities being funded and this should detail the action to be taken where such risks arise where the risk is significant and cannot, in the development agency's judgment, be mitigated sufficiently, the agency may opt not to pursue the business opportunity.<sup>78</sup>

In order to meet the demands for due diligence, it is important that inspection panels such as that established by the World Bank be incorporated into the working of the development agencies to ensure accountability in the conduct of the development agencies. The World Bank, through the Inspection Panel has departed from the traditional top-down approach to development and the Inspection Panel ensures that people affected by development activities are given a greater voice in activities carried out by the World Bank that may affect their rights and interests hence bringing greater transparency and effectiveness to operations financed by the World Bank.<sup>79</sup> The main shortcoming, however, of the model adopted by the World Bank is that it focuses mostly on compliance of the Bank with its internal policies but fails to examine whether the implementers of the Bank-funded projects comply with human rights standards and other safeguards.

### **Contractual approaches**

In both the Oil Palm project in Uganda and the Galana/Kulalu irrigation project in Kenya, local communities were not accorded adequate opportunity to participate in the projects. On the contrary, participation by the communities was shunned as seen under the Oil Palm project where locals were given the option of either taking the nominal compensation offered or totally not receiving any compensation. This is the trend in many parts globally where participation of local communities in development is generally insufficient and ought to be encouraged.<sup>80</sup> Local communities can be incorporated into these projects through the use of multi-actor investment contracts.

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<sup>75</sup> UN Guiding Principles on Business and Human Rights: Discussion Paper for Banks on Implications of Principles 16-21

<sup>76</sup> Ibid 22

<sup>77</sup> Ibid.

<sup>78</sup> Ibid 22.

<sup>79</sup> The World Bank, 'Accountability at the World Bank: The Inspection Panel at 15 years' (IBRD, 2009) 2.

<sup>80</sup> See Donald N. Zillman, Alastair R. Lucas and George Pring (eds), *Human Rights In Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford University Press, 2002).

Through these contracts, communities are able to share goals and aspirations with regard to particular investment projects.<sup>81</sup> The binding nature of contracts make these agreements plausible for effective vindication of claims by communities as governments and private actors can be held liable where violations occur. Tripartite contracts transform the duty to consult local communities into contractually enforceable duties and hence tilting power relationships in favor of local communities. Further, a contractual approach ensures that disputes arising from the projects are resolved within the context of the contracts and this enables the communities to have clear platforms to present their grievances and to have them resolved whenever they arise. Where communities are in total disagreement with a project, it is recommended that the resolution of such disagreements should occur outside the contractual framework.<sup>82</sup>

### **Conclusion**

Agricultural investments are key in guaranteeing food security and also play an important role in improving the livelihoods of persons practicing agriculture for commercial purposes. These investments are particularly welcomed in different parts of Africa where vast tracts of land exist and there is a huge youth population who can work on the plantations. The establishment of these large-scale farms, however, may have certain human rights implications some of which have been discussed in this paper. Development agencies funding agricultural projects are in a precarious situation as they may unwittingly or overtly act as human rights violators. In Kenya and Uganda, we have seen that the agricultural projects that have been initiated with the funding of development agencies have had human rights implications on local communities albeit the positive contributions that these projects were intended to make. This paper places communities at the center of development and argues, among others, for human rights due diligence to be undertaken by development agencies investing in agricultural projects in Uganda and Kenya. The proposals in this paper takes cognizance of the fact that communities have the right to development which must be sustainable. It is also important that development agencies direct certain percentages of funding towards the establishment or strengthening of national or community-level institutions that affected communities can utilize to vindicate their rights whenever abuses occur. Strengthening of land governance institutions is one important starting point.

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<sup>81</sup> Ibironke Odumosu-Ayanu, 'Governments, Investors and Local Communities: Analysis of a Muti-Actor Investment Contract Framework' (2014) *Melbourne Journal of International Law*

<sup>82</sup> *Ibid* 26.