



# Identifying the Human Rights Impacts of Palm Oil

*Guidance for Financial Institutions and Downstream Companies*



## **Identifying the Human Rights Impacts of Palm Oil: Guidance for Financial Institutions and Downstream Companies**

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April 2022

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Forest Peoples Programme is an international human rights organisation that supports the rights of forest peoples. It is registered as a Limited Company and Charity in the UK and as a Stichting in the Netherlands. Forest Peoples Programme has NGO consultative status at the United Nations (ECOSOC). The authors would like to thank Tom Griffiths, Gabriela Quijano and Andy Boulding.

Forest Peoples Programme was commissioned to produce this report by Global Canopy as part of a wider TNFD-Supported palm oil pilot. Global Canopy, is a founding partner and official piloting partner of the Taskforce on Nature-related Financial Disclosures (TNFD). Global Canopy is a data-driven not for profit that targets the market forces destroying nature. They do this by improving transparency and accountability. They provide innovative open-access data, clear metrics, and actionable insights to leading companies, financial institutions, governments and campaigning organisations worldwide to help them make better decisions about nature, forests and people.

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# Executive Summary

This report carried out by Forest Peoples Programme for the Global Canopy compiles what is known about the human rights impacts of palm oil development and provides guidance on how to address these abuses. The study was conceived as a contribution to the Taskforce on Nature-related Financial Disclosure (TFND), an industry-NGO consortium developing a framework to ensure that financial institutions and downstream companies have a positive, not negative, effect on nature. TFND also seeks to align itself with the UN's Sustainable Development Goals and to uphold internationally recognised human rights.

The study explores the complicated links between downstream companies and investors and impacts on the ground, from plantations to mills, traders, refineries, manufacturers and retailers, noting that the most serious challenge to traceability is between mills and actual growers. Although certification schemes like the Roundtable on Sustainable Palm Oil (RSPO) attempt to trace supplies down to field level, audits often omit independent small-and medium-growers, while the RSPO's Mass Balance certificates allow palm oil associated with human rights violations (and deforestation) from multiple sources to be mixed with more responsibly produced palm oil.

It is a duty of States to respect and protect rights and provide remedy in the case of violations, however, the UN Guiding Principles on Business and Human Rights (UNGPs) and the OECD Guidelines for Multinational Enterprises (OECD Guidelines) are clear that companies and financial sector enterprises also have a responsibility to uphold internationally recognised human rights and provide remedy even where national laws may not require this. To this end, as part of their broader human rights due diligence (HRDD) efforts, these actors are urged to undertake human rights impact assessments (HRIA) in order to avoid or mitigate negative impacts and identify needed remedies for past harms.

A searching review of the available literature shows that palm oil development is all too often associated with serious human rights abuses, including: violations of the territorial rights of indigenous peoples; the expropriation of the lands of local communities and even titled land holders; abuse of collective rights to self-determination, self-representation and free, prior and informed consent; denial of right to participation by rightsholders; destruction of both physical and intangible cultural heritage; loss of livelihoods and access to vital resources and; pollution of ecosystems essential for human health and well-being, with consequent impacts on health. Multiple sources show systematic violations of the rights of workers – notably to free, collective bargaining, fair pay, and safe and healthy working conditions. There are numerous reported incidents of: forced labour; the use of child labour; the intimidation, harassment, torture and even killings of human rights defenders; the use of paramilitaries and State security forces to suppress dissent and; discrimination against women in plantations, including exclusion from decision-making, sexual violence, and unsafe living and working conditions. Many smallholders are brought into the supply chain through untransparent agreements which burden them with unexpected debts and provide them unfair remuneration for the palm fruits they produce. Adequate procedures to address grievances and provide remedy for violations are often wanting.

**"Palm oil development is all too often associated with serious human rights abuses, including: violations of the territorial rights of indigenous peoples; the expropriation of the lands of local communities and even titled land holders; abuse of collective rights to self-determination, self-representation and free, prior and informed consent"**

A close review of NGO and CSO HRIAs of the palm oil sector framed by the UNGPs show that HRIAs are effective at revealing all these kinds of abuses. Nevertheless, carrying out independent HRIAs is challenging, especially in terms of: negotiating permissions to carry out the studies; gaining access to rightsholders; protecting interviewees and witnesses from reprisals; assuring due attention to women and other marginalised groups and; gaining access to government and corporate information, notably of legal permits and concession boundaries. However, by following existing, published guidance for undertaking HRIAs, independent assessors can circumvent most of these problems. The report then spells out in detail the steps needed to ensure sound assessments.

Whereas HRIAs are designed to identify and address specific risks and harms in order to mitigate and address them, some investors and downstream companies with wide portfolios and diversified suppliers are challenged to carry out HRIAs of all the growers in their value chains. The review looks in detail at the advantages and disadvantages of different metrics and measures for assessing potential and actual impacts and prioritising assessments. Whereas interview-based HRIAs are necessary for identifying and addressing specific violations, human rights risk assessments and quantitative approaches are suited to initial levels of due diligence and thus targeting HRIAs at the most serious areas. Assessments can be enhanced by well-judged use of infographics and ‘traffic light’ colour coding of risks and harms.

The report explores the tension between the responsibility of companies to uphold human rights and provide remedy for violations, on the one hand, and the expectation of downstream companies and investors just to avoid risky investments and exclude suppliers linked to rights violations, on the other hand. Moving from avoiding harm to doing good requires companies to undertake full HRIAs as they provide the depth of information needed to fully understand the negative existing and potential human rights impacts of suppliers’ operations, and to take actions to address them and not just avoid them.

The final section of the report makes a series of detailed recommendations, first directed at downstream companies and financial institutions and second at TFND itself. Downstream companies and financial institutions need to adopt and mainstream their own human rights policies and procedures and install capacity to implement them. They must set out clear requirements of their suppliers, investees and borrowers of the human rights policies and standards they are expected to adhere to with the aim of avoiding human rights violations and mitigating negative impacts. Where possible, downstream companies and financial institutions should establish mechanisms to share the costs and tasks of engaging with suppliers, investees, and borrowers. They need to recruit their own teams to oversee, commission and/or carry out human rights due diligence, human rights risk assessments and human rights impact assessments, following the detailed guidance provided. They must make full disclosure of their supply chains and investment portfolios and of the findings of these assessments. And they need to adopt procedures to provide remedy for violations or directly incentivise such, including providing direct support to rightsholders. Where serious violations are identified, divestment and cutting off suppliers should be measures of last resort when efforts to provide remedy have demonstrably failed.

TFND itself needs to make realisation of the SDGs and the upholding of human rights a more explicit part of its aims, priorities and procedures. When TFND considers risks and impacts, this must be in terms of risks and impacts on people and environments and not just risks and impacts on investments and reputations. One important step towards this conceptualisation of risks and impacts will be to explicitly integrate the already existing responsibilities of companies and financial enterprises to respect human rights—and associated HRDD processes—into each step of the LEAP approach.

# Glossary

Beneficial owner	The natural person(s) who ultimately owns or exercises control over a company.
Corporate Group	The totality of corporations that are related to one another, consisting of a parent company, or beneficial owner(s), and the subsidiaries that they own or control. A top-level group is the highest-level named group.
A corporation or company	<p>An enterprise, firm, or other organisational and legal entity involved in the production, provision, trade, or sale of goods and services (including financial services). This definition encompasses all company ownership structures, including privately-held, publicly traded, and state-owned companies as well as companies in which states hold an interest. A company can be part of a corporate group or act as an independent player. (Source: Accountability Framework initiative).</p> <p>A parent company is an entity which owns more than 50% of the shares in another company (its subsidiary). A subsidiary is an entity where another company holds (whether as a legal owner or as beneficial owner) more than 50% of the issued share capital.</p>
Cultural heritage	The legacy of physical and intangible assets that a group or society inherits from past generations, maintains in the present, and preserves for future generations. This may include (i) tangible forms of cultural heritage, such as moveable or immovable objects, property sites, or structures having archaeological, paleontological, historical, cultural, artistic, or religious values; (ii) unique natural features that embody cultural values, such as sacred groves, rocks, lakes, and waterfalls; and (iii) intangible forms of culture, defined as the practices, innovations, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts, and cultural spaces associated therewith. Source: UNDP SES Standard 4: Cultural Heritage.
Customary or traditional lands, territories, and resources	Those lands, territories, and resources that indigenous peoples and some local communities govern by a system of “customary land tenure”, which refers to the set of rules and norms that a people or community have developed that govern the use, occupation, allocation, access to, and management of lands and natural resources. These are the lands, territories, and resources that indigenous peoples and some local communities own by right. This right may or may not be recognised by national laws and by a legal title, but it is recognised by international human rights law. These may include farming, hunting, fishing, or gathering grounds that indigenous peoples depend upon for their subsistence, medicines, or livelihoods; mining areas indigenous peoples source materials from for tool- or craft-making or livelihoods; religious or sacred sites; areas maintained by indigenous communities for conservation purposes; or other important cultural heritage sites or networks of sites.
Financial service provider	An individual, business, or organisation that provides financial services, including registered banks and non-bank deposit takers; credit providers and finance companies; fund managers, investment portfolio managers; insurers and; issuers. Financial services are the processes by which consumers or businesses acquire financial goods.
Ground-truthing	Sourcing information about the operations, performance, and related (actual or potential) human rights and environmental impacts of upstream companies through independent field investigations.
Human rights impact assessment (HRIA)	An assessment that aims to identify actual and potential human rights impacts of a business project or set of activities as well as recommended measures for preventing, mitigating, and otherwise addressing those identified impacts. HRIAs may be done on particular sites, operations, geographies, or supply chains. HRIAs are important components of a business’s human rights due diligence process.

Human rights risk assessment (HRRRA)	An assessment that aims to identify potential human rights impacts, i.e., risks to human rights. HRRRA are “snapshot” assessments and consider business operations at a particular point in time. They often involve briefer investigations than full HRIAs and may conclude there is a need for a full HRIA. HRRRA are used by businesses with complex supply/value chains who may not be able, in the short term, to carry out complete human rights due diligence across the entirety of their supply/value chains.
Human rights due diligence (HRDD)	The process businesses must undertake to identify, prevent, mitigate, and account for how they address their adverse human rights impacts. HRDD is a continuous and ongoing process of managing a business’s potential and actual human rights impacts and it includes assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. (Source: UNGP).
Indigenous peoples	Peoples who, though not specifically defined under international law, share common characteristics, which may include some or all of: self-identification as indigenous; historic continuity with pre-colonial or pre-settler societies; distinct social, economic, cultural or political institutions and traditions; strong cultural and physical relationships with particular territories, lands, and natural resources; and experience of marginalisation and systemic discrimination by more dominant sectors of society. No single factor is determinative, and groups may be considered indigenous under international human rights law even where national laws do not recognise them as such.
Leakage market	The trading of unsustainable palm oil from growers and producers that are not compliant with No Deforestation, No Peat, No Exploitation (NDPE) policies. There are three types of leakage market: (1) Companies with NDPE policies which have published their list of suppliers but are not implementing their supply chain commitments at group level; (2) Companies with NDPE policies that have not published their list of suppliers; and (3) Companies which have not adopted NDPE policies at all.
Local communities	A heterogeneous grouping of peoples and communities, other than indigenous peoples (although as used colloquially, local communities are sometimes indigenous peoples), who are often affected by the development of agricultural commodities. This term is used to include, e.g., tribal peoples (as the term is understood in ILO Convention 169 or in the Inter-American human rights system), Afro-descendant communities (from both collective and individual traditions), traditional communities, as well as others. It may include communities that hold title on an individual basis as well as a collective basis. Some local communities who share similar characteristics as indigenous peoples, particularly who have similar collective customary land ownership and political traditions, may share similar rights as indigenous peoples. Other local communities who have individualistic traditions may not share these collective rights.
NDPE policies	No Deforestation, No Peat, No Exploitation (NDPE) policies emerged in response to the failure of palm oil “sustainability certification” to adequately stop environmental and social abuses and to pressure from NGOs, the market and politicians globally to halt deforestation. NDPE policies involve more detailed comprehensive commitments going beyond the requirements of law or certification schemes. ‘No deforestation’ is typically realised through protecting High Conservation Value (HCV) and High Carbon Stock (HCS) areas, ‘no peat’ through avoiding planting on peat of any depth, and ‘no exploitation’ through protecting human rights, including workers’ rights and the rights of indigenous peoples and local communities including to free, prior and informed consent (FPIC). NDPE policies are voluntary corporate sustainability commitments and apply not just to a company’s own operations but to all its suppliers. However, unlike certification standards, these policies have not been standardised and are not consistently verified.



Plasma	Palm oil smallholdings under a government-regulated scheme. Under this model, the company obtains rights to develop the plantation on local community lands, clears the area and develops the plantation, a portion of which (typically 80%) is often held by the company while often a smaller area (typically 20%) is planted for smallholders. However, the company may choose to manage the whole operation under a ‘one-roof-management’ scheme.
Secrecy Jurisdiction	A jurisdiction which has put in place legal arrangements to enable individuals and businesses to avoid disclosure of information such as ownership and control, value of assets and financial transactions. Such arrangements enable individuals/businesses to escape public scrutiny or undermine the laws, rules, and regulations of other jurisdictions elsewhere, using secrecy as a prime tool.
Shadow Company	A company which shares the same beneficial owner as a corporate group, but which has not been claimed or publicly acknowledged as part of that group.
Smallholder	Farmers growing oil palm, sometimes along with subsistence production of other crops, where the family provides the majority of labour and the farm provides the principal source of income and where the planted area of oil palm is usually below 50 ha in size.
Scheme Smallholder	Farmers, landowners or their delegates that do not have the: Enforceable decision-making power on the operation of the land and production practices; and/ or Freedom to choose how they utilise their lands, type of crops to plant, and how they manage them (whether and how they organise, manage, and finance the land).
Independent Smallholder	All smallholder farmers that are not considered to be Scheme are considered Independent Smallholder farmers. (Source: RSPO 2018)
Supply Chain	A term from the field of operations management that refers to the network between a company and its suppliers to produce and distribute a product to the consumer. A business’s supply chain includes entities from which it sources supplies needed to create a product or service and those to which it supplies products or services.
Value Chain	A term from the field of business management that refers to the full set of activities, including finance, that convert inputs into a product or service by adding value. A business’s value chain includes entities with which it has a direct or indirect business relationship and which either (a) supply products or services (including finance) that contribute to the business’s own products or services, or (b) receive products or services (including finance) from the business.  *The terms “supply chain” and “value chain” are related terms that originate from different fields and have different definitions but are often used interchangeably in business and human rights discourse. Although financial institutions are also involved in supply chains, this report will use the term “value chain” when it wishes to be clear about the inclusion of reference to financial institutions (e.g., investors and other financiers).
Universal Mills List (UML)	The UML was created by World Resources Institute, Rainforest Alliance, Proforest and Daemeter to identify and map 1,815 palm oil mills across 26 countries to provide a better framework for companies looking to monitor and report on their commitments. The UML integrates company data contributed by processors, traders and consumer goods manufacturers, the Roundtable of Sustainable Palm Oil, FoodReg, and downstream companies, such as Unilever and Mondelēz International.

# Abbreviations

AAK	(previously) Aarhus Karlshamn company
ADM	Archer Daniels Midland company
ACHPR or African Charter	African Charter on Human and Peoples' Rights
ACHR or American Convention	American Convention on Human Rights
ADRIP	American Declaration on the Rights of Indigenous Peoples
AfCHPR	African Commission on Human and Peoples' Rights
AfCtHPR	African Court on Human and Peoples' Rights
AFi	Accountability Framework initiative
AMAN	Aliansi Masyarakat Adat Nusantara (Indigenous Peoples' Alliance of the Archipelago)
BLC	Bunge Lodders Croklaan
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
CPO	Crude palm oil
CRC	Convention on the Rights of the Child
EPO	Equatorial Palm Oil
ESG	Environmental and social governance
ESIA	Environmental and social impact assessment
FFB	Fresh fruit bunch
FPIC	Free, prior and informed consent
GAR	Golden Agri Resources
HCSA	High carbon stock approach
HCV	High conservation value
HRDD	Human rights due diligence
HRIA	Human rights impact assessment
HRRA	Human rights risk assessment
IACHR	Inter-American Commission of Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social, and Cultural Rights
ILO	International Labour Organisation
NDPE	No Deforestation, No Peat, No Exploitation

NGO	Non-governmental organisation
OECD	Organisation of Economic Cooperation and Development
OHCHR	Office of the High Commissioner for Human Rights
PKO	Palm kernel oil
RSPO	Roundtable on Sustainable Palm Oil
SDG	Sustainable Development Goal
TNFD	Taskforce on Nature-related Financial Disclosure
UDHR	Universal Declaration of Human Rights
UML	Universal Mill List
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNGP	UN Guiding Principles on Business and Human Rights
UNDROP	United Nations Declaration on the Rights of Peasants

# 1 | Scope and relevance

## 1.1 Context and purpose of this report

The impact that finance can have on nature — and the risks and opportunities that this represents to finance in return — is gradually being recognised by the financial sector. In response, an international finance sector-led coalition, in consultation with a wider forum of financial industry actors, corporations, academic institutions and conservation NGOs, embarked on a process to set up a Taskforce on Nature-related Financial Disclosure (TNFD) in 2020. The goal of the TNFD is to “provide a framework for organisations to report and act on evolving nature-related risks, in order to support a shift in global financial flows away from nature-negative outcomes and toward nature-positive outcomes.”<sup>2</sup> While the TNFD aims for the framework to “better align economic activities with the Sustainable Development Goals (SDGs) and help to ensure respect for internationally-recognised human rights – including the rights of indigenous peoples and local communities that play a key role in safeguarding nature”,<sup>3</sup> there is still minimal elaboration in the TNFD framework beta v0.1 and v0.2 on how human rights impacts regularly coincide, and often link, with nature-related impacts in supply chains and investment portfolios and exactly how the TNFD will align with the SDGs and international human rights law.

In light of this, Global Canopy, a founding member of the TNFD, commissioned this report to support the wider ambitions of the TNFD by identifying key nature-related human rights impacts linked to palm oil and where possible other forest-risk commodity supply chains. Global Canopy specifically requested that the report “provide information and recommendations on how organisations working within, or investing in, these supply chains can identify, assess and measure their own nature-related human rights impacts”.

This report identifies key human rights impacts in palm oil supply chains;<sup>4</sup> sets out an overview of the nodes and actors in palm oil value chains; reviews existing approaches and methodological tools for human rights impact assessments (HRIA); identifies best practice for HRIAs; and discusses challenges in the measurement of human rights impacts. Finally, the report provides recommendations for two target audiences. First, it sets out recommendations for companies and financial institutions<sup>5</sup> in the palm oil sector on how they can fully integrate human rights in their risk and impact assessments and wider corporate governance and due diligence. And secondly, it sets out recommendations for TNFD on how to mainstream human rights across future iterations of the TNFD framework, including in definitions (e.g., of ‘risks’ and ‘impact’), practical methods and in associated guidance.

## 1.2 Relevance – why assess human rights impacts?

Other than being an expressed aspiration in the current TNFD scope, there are powerful justifications for aligning the future TNFD framework with international human rights standards:

**The legal dimension of respecting human rights:** Human rights are a foundational justification for the establishment of the United Nations and underpin the current framework of international relations and are embedded in international legal and normative frameworks. Though states are the main duty-bearers responsible for respecting, protecting and fulfilling human rights, the UN has made it clear via its Guiding Principles on Business and Human Rights (UNGPs) that companies and enterprises in the financial sector also have responsibilities to respect human rights – and they are expected to do so by carrying out human rights due diligence processes to “identify, prevent, mitigate and account for how they address their impacts on human rights”.<sup>6</sup> These expectations are also contained in the OECD Guidelines for Multinational Enterprises (OECD Guidelines), and practical guidance for their implementation has been developed, including specifically for enterprises operating in the financial sector as well as for responsible business conduct along agricultural supply chains.<sup>7</sup> A number of states are in the process of translating their duty of ensuring that third parties respect international human rights law,<sup>8</sup> into legislative instruments that will contain direct human rights obligations for companies.<sup>9</sup> (See section 3 for an overview of the legal and normative human rights framework referred to in this report).

**The human rights dimension of nature-related risks:** Very often it is impossible to separate risks to nature and risks to people who live in and rely on it. Negative impacts on nature can frequently lead to violations of human rights. For example, as described later in this report, deforestation and pollution have been documented to lead to negative health, economic, social, and cultural outcomes for people. And crucially, a healthy, clean, and sustainable environment is a recognised human right in itself, so activities that pollute, destroy, or degrade the environment can amount to, not only lead to, a violation of human rights.<sup>10</sup>

Often, lack of respect for human rights can also contribute to negative outcomes for nature. In particular, it is widely recognised that the violation of the collective customary tenure rights of forest peoples and communities, i.e. the lack of land tenure security, is an underlying driver of deforestation and forest degradation.<sup>11</sup> This is because forests and other ecosystems managed and customarily owned by indigenous peoples and other communities with customary tenure systems are generally in better health than those under any other type of management, and tenure security is an important condition that enables communities to sustainably manage their land and challenge external interruptions and threats.<sup>12</sup> Further, the disruption of communities' rights to carry out their traditional livelihoods (e.g. through being deprived of access to their traditional farming, fishing and hunting grounds), can also derail efforts to protect nature, due to people being forced to take up less sustainable livelihoods elsewhere. In fact, indigenous peoples and local communities – via their customary laws and traditional land, environment and water management systems, their sustainable farming practices, and their deep traditional medicinal knowledge - provide important contributions towards a number of the SDGs, which they can only do if their rights are protected and respected.<sup>13</sup>

Important ethical and sustainable production and supply chain methodologies and standards, such as the High Conservation Value (HCV) approach, the High Carbon Stock Approach (HCSA) and the Accountability Framework initiative (AFi), are working to ensure an integrated approach to environmental and human rights protection.<sup>14</sup>

**The financial dimension of ignoring human rights:** Evidence shows that social opposition against developments and projects on the ground constitutes a significant financial risk to companies and investors in agricultural, energy and extractive sectors, especially when these cause serious violations of human rights, such as eviction, resettlement and disruption of local livelihoods.<sup>15</sup> Often, such opposition leads to long disruption of project operations, and sometimes to permanent shut-down, for example through physical blockades on the ground or via legal complaints and court cases. In addition to directly affecting financial bottom-lines, cases of social conflicts could be the source of serious reputational risks for the upstream companies, downstream buyers, and their financiers.<sup>16</sup>

**"Negative impacts on nature can frequently lead to violations of human rights [...] lack of respect for human rights can also contribute to negative outcomes for nature."**

### 1.3 Methodology

This report was developed between January and March 2022 by a team from the Forest Peoples Programme (FPP) with combined extensive knowledge of the palm oil sector and global palm oil supply chains, international human rights law and standards, commodity certification standards, ethical and sustainable commodity supply chain methodologies and frameworks, and corporate human rights responsibilities (including human rights due diligence as set out in the UNGP, the OECD Guidelines and associated guidance – see e.g. footnote 7). FPP is an international human rights organisation that supports the rights of forest peoples, especially to their lands, territories, resources, and self-determination, that has been working on human rights standard-setting in relation to forest-risk development since 1990. The organisation's work has included detailed inputs to the elaboration of commodity supply chain standards and methodologies such as the RSPO, FSC, HCSA, HCV and the AFi.

This report is based on a desk review of a large amount of academic literature, civil society and NGO research and reports, laws and legal jurisprudence, media reports, government publications, intergovernmental organisations'

publications and sectoral guidelines, and company reports – all listed in the reference section at the end of this report. The section on human rights impacts (section 4) also specifically draws on FPP’s long standing work and relationships with forest peoples and communities affected by agricultural and forest commodity production on the ground. For that section, a number of cases and complaints brought by affected communities to courts and non-judicial mechanisms were also reviewed.

The section reviewing existing practices for HRIAs (section 7) is based largely on an analysis of eight such assessments the team was able to identify that have sought to directly interview rightsholders. One of them is a community-level HRIA conducted by FPP and local Indonesian organisations of the palm oil sector in Central Kalimantan in 2021. During the course of that assessment, the local research team carried out interviews, focus group discussions, gender sensitive questioning and surveys in eight villages with palm oil concessions overlapping their customary lands.

The section (8) presenting a methodological framework and practicable tools for HRIAs for downstream companies and financial institutions is based on the findings of section 7 as well as an analysis of guidance that has been developed since the adoption of the UNGP in 2011. This includes guidance and tools developed by the UN Special Representative on Business and Human Rights, the UN Office of the High Commissioner on Human Rights (OHCHR), the UN Guiding Principles Reporting Framework, the World Bank, the International Finance Corporation, Rights and Democracy, Oxfam, Business for Social Responsibility, the Institute for Development and Peace (INEF), the Danish Institute for Human Rights, and FPP.

Finally, the conclusions and recommendations of the report are grounded in and build on international law, standards, and methodologies related to corporate human rights responsibilities, including international human rights treaties and jurisprudence, the UN Declaration on the Rights of Indigenous Peoples, the UNGP, the OECD Guidelines and the AFI.



Wilmar’s palm oil estate on the outskirts of Pontianak, West Kalimantan, Indonesia

# 2 | Tracing the Palm Oil Supply Chain

## 2.1 What is a supply chain?

A supply chain can be defined as the network between a company and its suppliers to produce and distribute a product to the consumer. A business's supply chain includes entities from which it sources supplies needed to create a product or service and those to which it supplies products or services. In the context of agricultural commodities, such as palm oil, 'the network between companies and their suppliers' can be broadly substituted by a set of activities that produce fresh or processed products from farms or plantations, using appropriate technologies that add value to the final products. A typical palm oil supply chain can be split into three main groups of activities, namely, upstream, midstream, and downstream. Upstream activities are referred to as the harvesting and transporting of the fresh fruit bunch (FFB) which become the raw material, crude palm oil (CPO), of the palm oil producer. Midstream activities include the production, storage, and transportation of crude palm oil whilst downstream activities involve storage and distribution of palm oil products to end customers.<sup>17</sup>

## 2.2 Traceability, due diligence, and certification

Traceability is best defined as "the ability to access any or all information relating to that which is under consideration, throughout its entire lifecycle, by means of recorded identification".<sup>18</sup> When applied to the palm oil trade this could translate to 'knowing all palm sources within one's supply chain all the way to the plantation level (including smallholders)'.<sup>19</sup> In recent years market pressures and regulatory requirements have demanded greater transparency and traceability of palm oil supply chains. These developments come as some markets consider tightening regulation of supply chains through a due diligence obligation.<sup>20</sup> The nature of due diligence legislation increases demand from the global market for sustainable palm oil (such as those certified by RSPO) as well as amplifies the need for evidence of a product's source and legality – i.e. the need to demonstrate transparent and traceable supply chains. Knowledge of a product's source brings greater assurance of the conditions of its production, and increased potential for accountability in instances of human rights violations.

Companies may be liable to legal action if they claim their supply chains are free from exploitation when this is false or misleading, or where no sufficient evidence can be produced. Traceability is, therefore, vital for consumers, downstream companies and investors seeking to demonstrate that they are upholding good governance, human rights, and due diligence. One of the principal obstacles to traceable palm oil supply chains is a lack of transparency over who ultimately owns or controls the plantation concessions from where fresh fruit bunches (FFBs) are sourced (see section 2.9 below on challenges with traceability), compounded by a complex supply chain as the next section will explore in more detail.

## 2.3 Plantations

Plantation estates remain the most opaque part of the supply chain. Although locating production areas is essential for downstream actors seeking to identify, address, track, and report on the human rights impacts of their supply chains, the location and owners of palm oil plantations often are not publicly disclosed either by palm oil traders or by government registries; only mills and other supply chain facilities are listed meaning that neither the sustainability nor even the legality of upstream sources can be assured. In Indonesia, for example, significant gaps persist in available information on plantation ownership; as only roughly one third of estates hold the final, traceable Business Use Permits (Hak Guna Usaha—HGU)<sup>21</sup> – the last in a series of licences that palm oil companies must obtain before being allowed to start planting.<sup>22</sup>

Clarifying the legal status of palm oil plantations remains challenging. In Liberia, the Liberia Extractive Industries Transparency Initiative's (LEITI) audit of concessions issued since 2010 found that the overwhelming majority had been allocated in violation of various laws.<sup>23</sup> In Indonesia, different ministries still contest whether or not it is legal to share information about concession boundaries,<sup>24</sup> leaving a notable black hole in the transparency of where FFBs are sourced.

FFBs are transported from plantations to mills which are commonly located nearby, for processing into crude palm oil (CPO) – extracted from the palm fruit—and palm kernel oil (PKO) – extracted from the palm seed. The FFBs must arrive within 48 hours of harvesting to prevent the fruit from becoming spoiled from a rapid rise in free fatty acids which could adversely affect the quality of the CPO.<sup>25</sup> Mills located closer to areas of production tend to produce better quality CPO and have a higher oil extraction rate. The distance between plantation and mill, therefore, is commonly limited to an area of 50–100km.<sup>26</sup>

## 2.4 Mills

In the conventional milling process, FFBs are sterilised and stripped of the fruitlets which are then processed and pressed to extract the CPO, meanwhile the palm oil seeds (or nuts) are separated from the fruit’s fibre in the press cake and cracked to obtain palm kernels which are then crushed to obtain palm kernel oil (PKO). The CPO and PKO are then transported to a refinery for further chemical processing and manufacturing<sup>27</sup> or held at a storage facility (or “bulking station”) where it remains whilst truckloads of CPO/PKO gather for bulk transportation to the next stop on the supply chain.<sup>28</sup>

Currently, the best indicator to trace the commodity back to its point of origin are mill locations which provide a valuable estimate of where the supply for a specific mill is coming from. There has been notable progress in the palm oil sector transparency through company disclosure of suppliers and mill lists by downstream companies using a common reference known as the Universal Mill List (UML).<sup>29</sup> While many actors in the palm oil sector now disclose suppliers via the UML, nothing comparable yet exists for other forest-risk commodities (e.g., sugar, rubber, timber, pulp and paper and gold).

A significant number of downstream companies including Nestlé, AAK, ADM, BLC, Unilever and Cargill have developed traceability systems over the past five years to trace their palm oil supplies back to the mill level.<sup>30</sup> The palm oil sector, sustainable business advisors and NGOs have developed unique codes for palm oil mills worldwide.<sup>31</sup> Several large palm oil companies now disclose their suppliers using these unique codes that assists transparency and public scrutiny, and supplier lists include indirect suppliers.<sup>32</sup> These lists still have yet to be further harmonised to assist supply chain mapping for due diligence and public accountability. To achieve this, all downstream companies would need to publish all direct suppliers connected with third party suppliers in their mill lists.

## 2.5 Refineries and Traders

Palm oil refineries are the strategic bottleneck in the palm oil supply chain. The supply chain has the typical hour-glass shape that can be observed in many commodity supply chains. In this case there are thousands of palm oil plantations and mills in the upstream segment of the chain, and there are a similarly large number of consumer goods companies in the downstream part of the supply chain. In the midstream sector, however, there are just a few dozen large refiners and traders, giving these actors a strategic role in the supply chain. A handful of corporate groups control processing and the crude palm oil trade (i.e. Wilmar, Musim Mas, Golden Agri-Resources, Cargill, and Asian Agri in Indonesia; and Sime Darby and Felda in Malaysia). These seven palm oil groups control 60 percent of the two countries’ total supply of FFBs, but their market share in processing and trade is estimated at almost 90 percent.<sup>33</sup>

Only the major corporate groups have the ability to invest in their own refining capacity, which gives them greater control over the market, and greater direct access to downstream buyers. Wilmar International Ltd., for example is the biggest trader of palm oil, with a global market share of roughly 43 percent.<sup>34</sup> The trading company operates a broad range of businesses, including palm oil cultivation, oilseed crushing, specialty fats, oleochemical, biodiesel, fertilizer manufacturing, edible oil refining, processing, and packaging for the end-consumer, merchandising, transport, and trading. Wilmar’s Pelintung mega-refinery, for example, is supplied by nearly 250 palm oil mills and other smaller refineries, (only 52 of which are RSPO-certified).<sup>35</sup> Such refineries are often located in main export ports to ship to the global market, and Wilmar even operates its own ships to transport the commodity.

Whilst these actors may have NDPE policies—which some argue to be the strongest current private instrument available to cut the direct link between human rights abuses and palm oil production in their own plantations (as well as third-party suppliers)—to make this mechanism function effectively would require the entire industry to



follow such commitments, which currently is not the case. Non-cooperating refiners continue to ‘leak’ unsustainable palm oil into the market, either by not implementing their NDPE policies or by not having such policies at all. In India, the world’s largest importer of CPO, three of the four leading refiners have no NDPE commitment. These cases create a crucial ‘leakage market’.<sup>36</sup> In Indonesia and Malaysia, investigations have found that eight of the top twenty-five refiners still form part of the ‘leakage market’.<sup>37</sup>

## 2.6 Smallholders and medium growers

Small-scale growers supply a major proportion of the palm oil market, notably for domestic consumption in West and Central Africa, where oil palms have been cultivated for thousands of years. In addition around one third of the world’s globally traded palm oil is sourced from small farms of less than 50 hectares in size.<sup>38</sup> Across Indonesia, for example, small- and medium-holdings are estimated to cover 5.6 million hectares or 41 percent of the country’s total oil palm plantings.<sup>39</sup> Whilst in Africa, smallholders and medium growers supply between 60 and 80 percent of the Fresh Fruit Bunches (FFB) acquired by processing mills.<sup>40</sup> Yet, downstream companies face challenges in establishing smallholder traceability in their supply chains.

Independent smallholders rarely have direct relationships with mills, but instead tend to sell their FFB to intermediaries, which sell their purchases in bulk to mills offering advantageous prices.<sup>41</sup> Smallholders seek to avoid being bound by contractual commitments to specific mills so they can take advantage of fluctuations in supply and demand to optimise prices. For their part many mills prefer to avoid committing to fixed prices and service provisions due to quality control concerns. This dynamic acts as a major challenge to downstream companies seeking to stop sourcing from untraceable suppliers.

Most large palm oil companies have two supply streams: production of FFBs from their own concessions; and FFBs produced by smallholders. To generalise, there are three types of small and medium growers in the palm oil sector: ‘plasma’ or tied farmers (under company-managed schemes),<sup>42</sup> independent smallholders<sup>43</sup> (small-scale farmers who are not linked to any particular company or mill) and medium growers who operate larger farms employing non-family labour.<sup>44</sup> In the Malaysian model – and still prevalent in older palm oil areas of Indonesia – mills have contracts with smallholders who are seen as ‘outgrowers’, and are managed through a range of contractual structures mediated by government agencies or companies. In new palm oil zones and forest frontiers, the ‘nucleus estate – plasma’ scheme tends to dominate.<sup>45</sup> The relationship between smallholders, medium growers and the plantation companies they work with, or the processing companies they supply, has a significant influence on the social and economic wellbeing of smallholders, workers and their families in many countries (see section 4).<sup>46</sup>

## 2.7 Buyers

Palm oil is a buyer-driven commodity. The expansion of production has to a large extent mirrored the significant growth in demand for palm oil from the global markets.<sup>47</sup> The principal buyers of palm oil comprise a wide range of consumer goods manufacturers and retailers, delivering a range of products in the food, biofuel, chemical, pharmaceutical, and cosmetic industries. While much processing and refining of CPO and PKO takes place in Indonesia, Malaysia and Singapore, most manufacturing takes place in the countries of consumption and in China, where transnational corporations manufacture products for consumers around the world.<sup>48</sup>

Multinational companies, such as Unilever,<sup>49</sup> Procter & Gamble, PepsiCo, and Nestlé amongst others, purchase large quantities of CPO and PKO or their derivatives for use in their production processes.<sup>50</sup> In response to growing consumer pressure, many of these actors have pledged to eliminate human rights abuses from their supply chains, however numerous investigations demonstrate that some buyers continue to lack policies on ethical sourcing,<sup>51</sup> whilst others fail to implement them effectively.<sup>52</sup> One of the principal complaints relates to buyers’ failure to carry out the requisite checks (both legal and according to voluntary standards) on their supply chains to identify, prevent and address potential and actual human rights violations on the ground as well as unethical practices (such as apparent corruption). The overreliance on paper-based assessments of compliance, which is often generic in nature, from secondary sources<sup>53</sup> and company self-reporting contributes to major gaps in due diligence processes.

‘Scorecard’ initiatives and sustainability assessment platforms that rank commodity producers and traders on aspects of their environmental, social and governance (ESG) performance<sup>54</sup>, tend to focus on public disclosure and policy adoption rather than performance on the ground, which is harder to assess.<sup>55</sup> As part of due diligence processes, investors and downstream companies would benefit from using local information and evidence from civil society to augment and ‘ground-truth’ the self-reporting by companies they invest in or buy from.<sup>56</sup> This includes questioning the reliance of data providers and ESG risk firms on paper-based compliance metrics. This has prompted some buyers, such as Unilever, to take initiatives to trace the “first mile”<sup>57</sup> of the supply chain from the farm to the mill to assess compliance on the ground.

## 2.8 Certification schemes

Amid growing calls for a clear mechanism by which potential and actual violations identified are effectively conveyed along the supply chain to those who can make operational and investment decisions, a significant number of major companies and traders have elected to become members of certified multi-stakeholder commodity schemes<sup>58</sup> including the Roundtable on Sustainable Palm Oil (RSPO). Many of these schemes in turn are part of the International Social and Environmental Accreditation and Labelling Alliance (ISEAL) that provides a code of conduct for sustainability standards.<sup>59</sup> Standards across different certification schemes are variable, with differential treatment of core standards like free, prior and informed consent (FPIC) and respect for customary tenure rights.<sup>60</sup>

Voluntary certification schemes only cover a portion of global markets and producers. Critics of the schemes point to weak compliance and assurance frameworks that suffer conflicts of interest and methodological problems in their audit systems, quality assurance, grievance procedures and remedy mechanisms.<sup>61</sup> The most recently updated standards adopted by the RSPO in 2018 include comprehensive rules set for human rights and FPIC protocols with impacted rights-holders,<sup>62</sup> however, major sustainability and accountability loopholes remain in the RSPO framework of standards.<sup>63</sup>

RSPO ‘mass-balance’ supply chain certification, for example, where standards and audits focus on palm oil mills certifying supplies of FFBs from RSPO certified plantations, allow independent processors, traders, and retailers to mix certified and uncertified sources without any explicit requirements for supply chain management or due diligence on human rights and the environment. Even if crude palm oil (CPO) is certified at the plantation level, it is soon mixed with CPO from other sources before it is refined and fractioned to produce a variety of edible oils and fats and non-food applications.

Under RSPO’s ‘mass balance’ certification, 75 percent of the mills feeding into RSPO-member Unilever’s supply chain are not certified<sup>64</sup> and yet Unilever claims that 94.3 percent of their CPO and PKO “came from physically certified sources: RSPO Mass Balance or an equivalent standard”.<sup>65</sup> There is no information on the original source of the palm oil – the farms and the plantations on which the FFBs were grown – and those mills which are listed include those belonging to plantations and groups linked to human rights abuses and deforestation.<sup>66</sup>

Furthermore, existing non-judicial palm oil industry accountability mechanisms such as the RSPO complaints system remain typically slow and ineffective. These grievance mechanisms are not always perceived as safe and accessible by rightsholders and human rights defenders, and such mechanisms are still failing to deliver effective remedies for affected communities.<sup>67</sup> As of February 2021, there were 29 open complaints in the RSPO system. The longest has been open twelve years.<sup>68</sup> On average, it takes 700 days before complaints are closed. According to RSPO, the most frequent complaints concern free, prior and informed consent (FPIC) and certification bodies.<sup>69</sup>

RSPO certification audits and sustainability surveillance assessments have in many cases been found to fail to register, or to downplay, land disputes and conflicts affecting indigenous peoples and local communities.<sup>70</sup> Social audit failings are rooted in insufficient auditor capacity on human rights and land tenure matters as well as conflict of interest bias and perverse incentives to minimise or overlook non-compliance.<sup>71</sup> To the extent that there has been no significant difference found between certified and non-certified plantations.<sup>72</sup> Less credible certification schemes such as the Indonesian Sustainable Palm Oil (ISPO) standard introduced in 2011 by the Government of Indonesia do not uphold international standards on human rights and have been denounced by indigenous peoples and NGOs for failing to require genuine sustainable production benchmarks.<sup>73</sup>



Not all palm oil in Indonesia is exported. Palm oil product being sold in supermarkets.



Palm oil fruits

Reviews of certification schemes reveal that many continue to suffer from multiple accountability and compliance problems, with land rights and FPIC standards especially subjected to zero or poor compliance,<sup>74</sup> and continue to suffer significant shortcomings in terms of their reliability and credibility. It is recommended, therefore, that downstream companies should not rely solely on certification to demonstrate compliance with human rights standards.

## 2.9 Challenges with tracing corporate identity and structure

There is no publicly available database which contains comprehensive information on palm oil companies and the groups that control them. Many operations belong to formally established, stock-listed companies with conventional parent-subsidiary structures that list their subsidiaries on their websites or in their annual reports. Such companies can be attributed to groups based on these formal structures or declarations by a top-level group without extensive further research.

Tighter international regulations and policies have led some downstream companies to obscure their affiliations to avoid accountability. It is common for individuals or corporate groups to create ‘shadow companies’ without an immediately recognisable owner. They generally appear to belong to complex and ever-changing networks of companies owned by individuals or families whose links are often not publicly acknowledged.<sup>75</sup> In some cases, a well-known, high-profile palm oil company may have a cluster of clandestinely linked ‘shadow companies’ in addition to its acknowledged subsidiaries; in others there is no single ultimate parent company, and the group consists largely of privately held companies, not listed on any stock exchange.<sup>76</sup>

There are a number of reasons why the ultimate owners of a company or group of companies would want to obscure their control over operations, including tax avoidance/evasion, avoidance of accountability for environmental destruction or human rights violations, as well as to avoid compromising market access for their publicly acknowledged subsidiaries. Indonesia’s agricultural regulatory framework, for example, does not allow companies or corporate groups in the palm oil sector to acquire or lease land beyond a certain acreage as defined by land ceiling laws (which vary from between 20,000 to 100,000 hectares depending on the jurisdiction).<sup>77</sup> Investigations into the Sinar Mas group’s operations revealed alleged links to a number of ‘shadow companies’ which were not declared under its control.<sup>78</sup> Through obscured ownership of these majority-owned subsidiaries, the group is alleged to have effectively circumvented these laws all the while maintaining control.

To ensure accountability, definitions for what constitutes a corporate group need to be redefined,<sup>79</sup> going beyond straightforward ownership links (i.e. entities strictly under the same ‘beneficial ownership’ or ‘direct control’ structure) to include other forms of control (financial, managerial, operational, familial or other).<sup>80</sup> This will have implications on the principle of group-level responsibility, a key element of sustainability policies, such as NDPE policies whereby if one company or plantation is in breach, (regardless of whether it occurred in operations which are part of a supply chain, in receipt of finance, or in an entirely separate part of the group), the whole group is in breach, including all entities under common control.<sup>81</sup>

## 2.10 The challenges facing downstream companies and financial institutions

In order to definitively confirm that a given product contains palm oil from a specific NDPE-compliant plantation it is necessary that the palm oil is reliably certified at every step along the supply chain. Currently, only ‘Identity Preserved’ certification within the RSPO certification system offers this possibility. The ‘Identity Preserved’ supply chain model assures that RSPO certified palm products delivered to the end user are uniquely identifiable to a single mill and its supply base and is kept physically isolated from all other palm oil sources throughout the supply chain (including other segregated RSPO certified sustainable palm oil sources). Palm oil certified under systems other than the ‘Identity Preserved’ model cannot be traced effectively because stocks of various palm oil from various growers are mixed together along the processing pathway.

As previously noted, the vast majority of palm oil is not certified at all and not traceable along the entire supply chain. In non-certified palm oil production, the oil crushed from one palm fruit passes through many production steps and is mixed with fruits and then palm oil from multiple other plantations without any required documentation from a certifying body. This makes tracing a batch of non-certified palm oil back to one plantation estate

almost impossible. The reason for this is that palm oil supply chains involve multiple changes in corporate ownership as the commodity passes from growers to middlemen, mills, refiners, traders, chemical processors, manufacturers, to brand-name products and supermarket shelves.

The lack of producer and consumer country laws and policies on responsibilities of financial institutions allows financing and investments to continue to flow to companies linked to human rights abuses.<sup>82</sup> So, while downstream supply chain actors are rightly disclosing their palm oil mill suppliers, they are often still failing to properly detect and report on prior and existing cases of human rights abuse connected with corporate group and indirect suppliers whose mills and plantations are associated with land conflicts and violations against workers, indigenous peoples, rural communities and human rights defenders. It is not uncommon for some companies to make reference to their 'due diligence' systems in their public information, but there is rarely sufficient detail provided on the content, methods and verification practices applied nor company commitments and protocols to address detected adverse impacts and non-compliance.<sup>83</sup>

The UN Guiding Principles recognise that when faced with particularly complex value chains, companies may not be able to carry out comprehensive HRDD immediately across the whole value chain. In the short term, companies are advised to prioritise areas for HRDD action based on the seriousness of actual and potential human rights violations, the likelihood of adverse impacts, and the company's leverage over relevant actors. This does not provide a permanent excuse to avoid undertaking comprehensive HRDD, but instead encourages downstream and financial enterprises to take a dynamic approach to due diligence whereby they prioritise fully mapping their supply chain to understand and address its impacts, especially in those sectors and geographies which indicate the prevalence of more serious human rights abuses. This may entail a thorough evaluation of the relationships a business has with direct and indirect business partners,<sup>84</sup> to determine a company's actual and potential impacts on human rights based on a review of their respective human rights policies and practices, and community- or site-level human rights impact assessments.<sup>85</sup>

## 2.11 The role of financial institutions

Economies of scale in the palm oil sector favour mass production based on the plantation estate model. In Indonesia, for example, large private and State-owned plantations account for almost 60% of the country's palm oil production.<sup>86</sup> To finance these modes of production, palm oil companies are dependent on Financial Service Providers (FSPs). FSPs provide loans and credit facilities to palm oil companies to finance their day-to-day operations and facilitate their expansion through the issuing of bonds and shares to help them raise capital.<sup>87</sup>

The rapid expansion of the palm oil sector into large tracts of rainforest and lands traditionally owned and managed by indigenous peoples has resulted in a litany of documented human rights violations. These in turn pose a danger to companies' reputational and financial exposure as they are failing to meet their legal obligations and responsibilities to rightsholders.<sup>88</sup> This has resulted in greater scrutiny of FSPs<sup>89</sup>—some of whom are members of the TNFD.<sup>90</sup>

Asian FSPs (based in Japan, Hong Kong, Malaysia, Indonesia, and Singapore)<sup>91</sup> are the most significant source of financial services to the palm oil sector;<sup>92</sup> however, European/US FSPs continue to provide ample access to loans and underwriting services regardless of palm oil companies' business practices.<sup>93</sup> Financial markets are interlinked at the global level, and Asian FSPs are just as dependent on collaboration with their European and US counterparts as vice versa.

Studies have found investors globally hold USD \$45.7 billion in forest-risk bonds and shares, approximately half of which were held in the palm oil sector.<sup>94</sup> A quarter of these investments came from North American and EU investors, whilst 55% came from South-East Asia investors.<sup>95</sup> Despite this, only one of the fifty largest financial institutions investigated have a palm oil supply chain transparency and traceability policy (DBS Bank), a crucial requirement to counter the 'leakage market' for unsustainable palm oil. It is for this reason that the role of FSPs cannot be overstated – they have a key role in enabling the expansion of the palm oil sector, and also a unique opportunity to use their leverage to address the sector's human rights impacts.

## 3 | Rights Prioritised in this Report

This report focuses on human rights violations in the upstream end of the palm oil supply chain, specifically, in the growing and milling stages.<sup>96</sup> The rights prioritised in this report are those rights that have been well-documented in the palm oil sector and that have been identified as important issues in the RSPO's Principles and Criteria. This does not mean that other rights are not affected by upstream palm oil production and are not important to identify and address.

### 3.1 Relevant Human Rights Instruments

International human rights law and standards are set out in human rights treaties, human rights declarations, judicial and treaty body jurisprudence, as well as in national laws and jurisprudence. There are nine core international human rights instruments in the UN system<sup>97</sup>:

International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)  
International Covenant on Civil and Political Rights (ICCPR)  
International Covenant on Economic, Social and Cultural Rights (ICESCR)  
Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)  
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)  
Convention on the Rights of the Child (CRC)  
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW)  
International Convention for the Protection of All Persons from Enforced Disappearance (CPED)  
Convention on the Rights of Persons with Disabilities (CRPD)

In addition, there are eight fundamental labour conventions<sup>98</sup>:

Freedom of Association and Protection of the Right to Organise Convention, No. 87  
Right to Organise and Collective Bargaining Convention, No. 98  
Forced Labour Convention, No. 29  
Abolition of Forced Labour Convention, No. 105  
Minimum Age Convention, No. 138  
Worst Forms of Child Labour Convention, No. 182  
Equal Remuneration Convention, No. 100  
Discrimination (Employment and Occupation) Convention, No. 111

Important human rights instruments relevant to the context of palm oil production also include soft law declarations, the UN Declaration on the Rights of Indigenous Peoples, the UN Declaration on the Rights of Peasants, and the UN Declaration on Human Rights Defenders, and regional human rights treaties including the American Convention on Human Rights and the African Charter on Human and Peoples' Rights.

These human rights instruments—and the jurisprudence interpreting and elaborating upon them—define the obligations of states to respect, protect, and fulfil human rights. They also establish standards that businesses have a

responsibility to meet, independently of state obligations. Businesses' responsibilities to respect human rights—by identifying, preventing, mitigating, and addressing adverse impacts of human rights, even in the absence of relevant national laws or enforcement of such laws—have been well-established in international soft law instruments, including the UN Guiding Principles on Business and Human Rights and OECD Guidelines for Multinational Enterprises, as well as in norms created through businesses' policies on human rights. Some states have also begun to develop or implement legislation—such as the proposed EU due diligence legislation or the modern slavery legislation in the UK—requiring businesses to take certain actions to respect and protect human rights.

### 3.2 Categories of Rightsholders and Relevant Rights

There are many different (not mutually exclusive) categories of rightsholders who are affected by palm oil operations. This report focuses on affected indigenous peoples, communities, workers, human rights defenders, women, and smallholders. Some other groups, such as migrant workers and children, also face particular vulnerabilities to rights impacts with accompanying specific human rights law and standards that address them. While this report will reference some of those particular impacts, it will not provide a comprehensive analysis of all human rights impacts in the palm oil sector. Rather, this report is intended to provide an overview of some important and prevalent human rights violations and ways they may be identified. A human rights impact assessment performed on particular palm oil operations needs to assess all of the herein-mentioned rights impacts and more.

Affected communities refers to those communities whose rights are negatively affected by palm oil operations (both large-scale and smallholder operations). For many affected communities, many of the rights violations they experience are associated with the violation of their land rights at the initial stages of land acquisition (e.g., acquiring land without prior consultation and FPIC). Following acquisition, site preparation includes the clearing of existing vegetation, establishment of road and field drainage systems and palm oil terracing. Such processes may contribute to the deforestation of large areas and can affect the ability of indigenous peoples and local communities to utilise their lands to secure food or income or to engage in cultural practices, thus undermining their cultural, social, and economic rights. The actual operation of the plantation leads to a continuation of these rights infringements and can possibly exacerbate them as the use of chemicals and dumping of effluents in water sources can cause severe pollution impacts. Because these processes may have impacts that spread beyond the boundaries of the plantation, initial determinations of potential affected communities must include communities living outside the boundary but whose lands and rights may nonetheless be polluted, degraded, or otherwise affected.

During operations, plantation companies (and some smallholders and medium-growers) engage workers to plant palms, spray them with pesticides and fertilisers, collect fruits, and transport them. Some workers may be affected community members, while others may be transmigrant or migrant workers. At this stage, growers sometimes engage in practices that constitute abuses of labour rights.

Community members, workers, or others who oppose palm oil operations sometimes engage in advocacy at various stages to prevent the land acquisition or to later halt the operations, thereby becoming human rights defenders. Companies and their supporters often target human rights defenders and seek to silence their opposition to their operations, often resulting in violations of their rights to life, liberty, and security.

Women are also community members and workers affected by palm oil operations, but they often experience rights violations in different ways, or they may experience additional discrimination and marginalisation. In addition, women frequently experience sexual harassment or violence on palm oil plantations.

Smallholders and medium-growers may be affected community members, transmigrants, or small businesspersons. Some medium-growers operate in ways that violate rights as much as large plantations. However, many smallholders may also experience rights violations. Their participation rights tend to be violated when they are entering into smallholder schemes. Their exclusion from decision-making around smallholder schemes often results in smallholders being burdened with debt and receiving unfair prices for their produce, leading to violations of their economic and social rights.

## 4 | Summary of Available Information on Human Rights Impacts

There is a plethora of information in the public domain that should be alerting companies and investors to the human rights impacts of palm oil production. Sources of such information include reports published by news media outlets, international and regional human rights bodies, and NGOs, as well as decisions by national and local courts, and press releases or complaints published by communities themselves. Some studies, including one by the Dutch Banking Agreement<sup>99</sup> and another commissioned by the European Commission,<sup>100</sup> provide general overviews of human rights or social and environmental impacts in palm oil supply chains. Other publications, such as the Demanding Accountability analysis of Indonesian palm oil supply chains compiled by UK-based NGO the Forest Peoples Programme,<sup>101</sup> present case studies documenting rights impacts on specific communities and the companies and investors implicated. This section summarises some of the available information on the human rights impacts of palm oil production as well as some of the ways in which such impacts can be identified.

### 4.1 Affected Communities: Customary land rights

Reports by government agencies and NGOs document significant numbers of actual and potential land conflicts in the palm oil sector. For example, in 2010, the Indonesian government's National Land Bureau (BPN) reported to the RSPO that it had recorded 8,000 land conflicts across the archipelago, half of which were in the palm oil sector.<sup>102</sup> A report from the Consortium for Agrarian Reform (KPA) found that 2,047 land conflicts occurred in Indonesia from 2015 to 2019,<sup>103</sup> and the independent government body Ombudsman Republik Indonesia reported oil palm-related land conflicts to be the largest category of land conflicts across all sectors in 2016 and 2017.<sup>104</sup> One study found that in 2007, there were at least 40 court cases filed against palm oil companies in Sarawak, Malaysia alone.<sup>105</sup> In Liberia, it is estimated that 40% of the population reside inside concessions for rubber, oil palm, forestry, and the extractive sector.<sup>106</sup> While not all of these land conflicts are necessarily related to land rights violations, many correspond at least to alleged violations, and other violations may not be reflected in these reported datasets.

#### 4.1.1 Defining customary land rights<sup>107</sup>

Indigenous peoples have the right to own, control, use, manage and develop the lands, territories, and resources that they have traditionally owned, occupied, or used or otherwise acquired.<sup>108</sup> This right is held on a collective basis, and it exists whether or not the property is legally recognised, for example through a land title. The lands that may be protected by this right include farming, hunting, fishing, or gathering grounds that indigenous peoples depend upon for their subsistence, medicines, or livelihoods and ways of life, including lands and resource areas visited occasionally or seasonally; areas indigenous peoples source materials from for tool- or craft-making or livelihoods; religious or sacred sites; areas maintained by indigenous peoples for conservation purposes; or other important cultural heritage sites or networks of sites. Indigenous peoples' traditional lands are those lands governed by systems of customary land tenure, which refers to the set of rules and norms that a people or community have developed that govern the use, occupation, allocation, access to, and management of lands and natural resources.

Non-indigenous communities that have collective customary land tenure systems may have similar property rights.<sup>109</sup> This can include the right of ownership, or it can be rights of access and use without including the right of ownership. In addition, residents of communities, indigenous or otherwise, affected by oil palm operations may have individual land rights that may or may not be legally recognised in national or local laws. Some of these land rights may not necessarily be rights of ownership but may include rights of access, use, and management.<sup>110</sup>

Customary land rights include the right not to be forcibly evicted, involuntarily relocated, or otherwise physically or economically displaced from their lands.<sup>111</sup> The right not to be arbitrarily evicted also applies to individuals and communities without customary ownership rights.<sup>112</sup> The right to own property and the strong relationship indigenous peoples have with their lands also means that indigenous peoples (and other peoples or communities



with similar rights) have the right to give or withhold free, prior and informed consent to proposed actions that may affect their lands and rights (see also section 4.2).

#### ***4.1.2 Violations of customary land rights in palm oil supply chains***

Existing literature and reports indicate that indigenous peoples' and others' collective land rights are commonly violated in palm oil supply chains by corporate actors:

- Acquiring concessions to develop the land for palm oil or other commodities without consultation with and the consent of the customary owners of the land;
- Extracting and/or transforming natural resources, particular surface and ground water resources, for plantation development and mill operations depriving communities of drinking and irrigation water;
- Evicting communities or coerce them into resettling either physically or through economic pressures on the land; and
- Failing to resolve past and ongoing violations, namely, violations of land and resource rights that may have commenced prior to the company's involvement in any given supply chain but that remain unaddressed and continue through the time of the company's involvement.

#### Company acquisition and use of land and related resources without FPIC

There are countless examples of documented land rights abuses related to the failure to consult and obtain consent (which is both a violation of participation rights as well as of land rights). In many cases, a company initially abuses land rights by failing to consult with and obtain consent from communities prior to acquiring the land and commencing operations. The lack of consultation and consent, and companies' insistence that they do not need to consult once they have acquired development licences or permits, is a common theme. Reports have documented cases where communities did not know about palm oil development plans until they saw bulldozers on their lands.<sup>113</sup>

Companies often then continue these land rights abuses by entering into agreements to incentivise the communities to give up their lands and then failing to uphold those agreements. Communities often may not understand that they do not need legal documentation in order to assert their rights and are intimidated into accepting the land development. It should be noted that many times, communities accept agreements only because their lands have already been cleared without having ever been approached by the company.<sup>114</sup>

### **Example: Land grabbing in Ucayali, Peru**

A recent letter submitted to the UN Working Group on Business and Human Rights alleges the takeover of the lands of the indigenous community of Santa Clara de Uchunya in Ucayali, Peru.<sup>115</sup> The situation of the community of Santa Clara de Uchunya has also been the subject of precautionary measures issued by the Inter-American Commission on Human Rights<sup>116</sup> as well as attention from the UN Committee on the Elimination of Racial Discrimination under its early warning and urgent action procedure.<sup>117</sup>

The letter reports on a practice called "land trafficking", in which companies acquire lands for large-scale development through the fraudulent use of legal mechanisms that were intended to enable small farmers to obtain certificates of possession. The fraudulent acquisition (and subsequent sale) of 212 such certificates inside the untitled portions of the territory of Santa Clara de Uchunya enabled the palm oil company to take over almost 7,000 hectares of land to establish a palm oil plantation.

#### Lesson:

Company land acquisitions that appear on paper to be legitimate may nonetheless represent violations of land rights. Acquisitions of land for palm oil development should only proceed following careful investigations to identify parties holding or claiming rights over targeted lands.

The Forest Peoples Programme in collaboration with local partners has published a series of reports documenting rights abuses in the land acquisition processes of palm oil companies in Sarawak, Malaysia;<sup>118</sup> in Indonesia<sup>119</sup>; and in seven other countries in Southeast Asia and Africa.<sup>120</sup> These reports contain numerous examples of the above violations of land rights, as well as other violations of self-determination and participation rights through manufactured agreement to palm oil operations (see section 4.2). Case studies in these reports also document that companies do not respect prior agreements about where they can develop their palm oil plantation, either outright ignoring prior commitments about boundaries or moving boundary markers.<sup>121</sup>

#### Evictions or coerced resettlement

Forced evictions are the most visible and often considered the most extreme examples of land rights violations. Reports document that companies use a variety of tactics to forcibly evict people from their homes, including burning down homes;<sup>122</sup> firing guns to scare people off and bulldozing their homes;<sup>123</sup> or working with the military to beat people to try to remove them from the land.<sup>124</sup> In other cases, community members may be involuntarily relocated because the company's actions have left them with no viable alternatives (see also section 4.4).<sup>125</sup>

#### Inheritance of unresolved land disputes

In complex global supply chains, companies sometimes acquire (interests in) other companies or acquire lands or concessions from other companies who have already taken action(s) that infringe upon a community's land rights. If these land rights abuses have not yet been addressed, the new company taking over the concession has a responsibility to address them. It should be noted that the acquiring company, with appropriate human rights due diligence, should have identified the historic and ongoing abuses prior to the acquisition, and any acquisition should be made with the consent of the affected communities and with a view to resolving those abuses.

The inheritance of land disputes is common in the palm oil industry. For example, in Liberia, some former oil palm estates were abandoned during the civil war in the 1990s, and the concessions were later renewed or extended and sold to new companies. NGO reports have documented several instances following the same pattern.<sup>126</sup> In the 1960s and 70s, the former concessionaire of the palm oil estate violated community land rights by operating without FPIC, resettling communities without consent or adequate compensation, forcibly evicting families and burning down homes, and destroying crops or villages without compensation. These palm oil estates were then abandoned during the civil war period and in the post-2000s, concession agreements were renewed or signed with new companies, who then both failed to address these historic violations and often commenced new violations of land rights.

Some corporate acquisitions may be associated with well-documented and publicised rights abuses. Examples include PT Inti Nusa Sejahtera's acquisition of PT Mitra Austral Sejahtera (PT MAS),<sup>127</sup> which had been the subject of an RSPO complaint about violations of land rights,<sup>128</sup> and Straight KKM's acquisition of Feronia-PHC,<sup>129</sup> which had been the subject of numerous NGO reports about rights abuses.<sup>130</sup>

**"There are countless examples of documented land rights abuses related to the failure to consult and obtain consent (which is both a violation of participation rights as well as of land rights). Reports have documented cases where communities did not know about palm oil development plans until they saw bulldozers on their lands."**

## Example: Irresponsible divestment by Sime Darby of its interest in PT MAS

In June 2019, PT Inti Nusa Sejahtera acquired from Sime Darby its interest in PT Mitra Austral Sejahtera (PT MAS).<sup>131</sup> In the lead-up to the finalisation of the transaction, the communities whose lands had been taken over by PT MAS's operations strongly objected to Sime Darby's divestment from PT MAS,<sup>132</sup> which had been the subject of an RSPO complaint. The RSPO itself had previously passed a resolution calling upon its members not to divest from operations which were the subject of complaints. While the transaction was an attempt by Sime Darby to evade and pass off responsibility to address the ongoing rights abuses by PT MAS, it does not absolve Sime Darby from its responsibility for causing or contributing to those abuses.

### Lesson:

The responsibility of companies for inherited ongoing rights violations does not mean that companies can evade their responsibilities by divesting from operations. Any divestment from operations should be done only after consultation and with the consent of affected rightsholders.

## 4.2 Affected Communities: Right to self-determination

### *4.2.1 Defining the right to self-determination and associated rights*<sup>133</sup>

This section discusses the right to self-determination and associated rights, including the right to autonomy over internal affairs, the right to effective participation in decision-making, the right to be consulted, and the right to give or withhold free, prior, and informed consent (FPIC). The right to self-determination is a collective right of all peoples,<sup>134</sup> but it is also a foundational right for indigenous peoples.<sup>135</sup> The right to self-determination includes the right to autonomy or self-governance, which is the right of indigenous peoples to govern their own affairs through their own institutions, systems, and laws.<sup>136</sup> This necessarily includes the right to choose their own representative institutions.

The right to self-determination also includes the right to effective participation in decision-making. This includes the right to be consulted and to give or withhold their free, prior, and informed consent to matters which may affect their rights.<sup>137</sup> Respect for the right to effective participation helps to safeguard the other rights of indigenous peoples, and it will only be respected when companies also respect the right to autonomy and engage with the communities' freely chosen representatives.

Some non-indigenous local communities may have similar rights to effective participation in decision-making, which may include the right to free, prior, and informed consent in decisions affecting their rights. For example, the ILO Convention No. 169 and the Inter-American human rights system consider that the rights applicable to indigenous peoples also apply to tribal peoples.<sup>138</sup> By contrast, other non-indigenous communities may have rights to be consulted (e.g., prior to developments affecting their access to and use of natural resources) but not necessarily to give or withhold consent.<sup>139</sup>

### A note about FPIC

Reports and guides for responsible business conduct commonly focus on the right to free, prior, and informed consent without discussing the right to self-determination or other related rights. This is likely because securing consent is an action that can be seen as easily implementable – in company land acquisition checklists, it is easy to ask whether companies have engaged communities in consultation and whether communities have consented. However, overlooking the right to self-determination, the right to internal autonomy, or the right to effective participation in decision-making would be a mistake, as proper implementation of the right to FPIC both depends upon and is required for the respect of these other rights. For this reason, this report discusses these rights together without isolating the right to FPIC.

#### *4.2.2. Violations of self-determination rights in palm oil supply chains*

Indigenous peoples' and other peoples' right to self-determination and associated rights are commonly violated in palm oil supply chains when companies fail to ensure that communities effectively participate in decision-making around proposed palm oil operations. Companies frequently assert that they have done consultations with communities or may even have agreements signed with community members. However, research shows that many of these cases do not reflect the true exercise of self-determination by communities. Publicly available evidence documents instances of companies:

- Conducting cursory and/or non-participatory impact assessments
- Failing to consult with the communities' chosen representative institution(s) or through their customary decision-making processes
- Not providing communities with sufficient information
- Not meaningfully engaging in consultations with communities
- Using threats, violence, bribes, or deception to coerce communities into agreements with the company

##### Conduct of cursory and/or non-participatory impact assessments

The conduct of proper impact assessments serves to ensure that any consent communities give to a proposed palm oil or other operation is fully informed.<sup>140</sup> However, there is well-documented evidence that impact assessments often fail to meet human rights standards. Many countries have laws requiring the conduct of environmental and social impact assessments (ESIA) prior to the issuance of an environmental permit for commodities production. However, not only do these impact assessments rarely assess human rights impacts, ESIA's are routinely neglected or superficially carried out, and there is a lack of transparency in the monitoring process.<sup>141</sup> For example, in Indonesia, there have been instances of ESIA's (known as AMDAL's) following the same template and containing the same information despite projects having vastly different characteristics, and the AMDAL having the wrong factory name on it.<sup>142</sup> Companies also often commence site preparation prior to completion of the ESIA.<sup>143</sup> Many ESIA's are conducted without the effective participation of affected communities, or even without informing and providing them with the final document.<sup>144</sup> The failure to conduct appropriate assessments results in the failure to identify potential impacts on communities and means the impact assessments fail to serve the purpose of enabling communities to participate meaningfully in decision-making around the proposed operation.

##### Failure to consult with communities' chosen representative(s)

Companies often fail to consult communities through their chosen representatives or in a manner that is consistent with the community's decision-making rules. Sometimes companies deliberately talk to individual community members and choose those who are more favourable to the company's proposal to sign agreements with them.<sup>145</sup> Companies sometimes also choose to meet with village or sub-district officials whom communities say do not represent them in discussing questions of land title.<sup>146</sup> More broadly, companies often take individualised approaches to agreements, thereby taking advantage of divisions within communities and ignoring the right of communities to make decisions collectively.<sup>147</sup>

##### Insufficient information provided to communities

Companies in many cases do not provide communities with sufficient information to enable them to make informed decisions about the palm oil operations. Communities often are not provided with even basic information about proposed palm oil operations, such as maps of proposed plantation areas, and where relevant, smallholder areas.<sup>148</sup> Although sometimes, companies conduct land surveys as part of the preparatory phase of their development, communities are typically not invited to participate in the mapping process and do not receive copies of the resulting maps, meaning that customary lands are unlikely to be appropriately mapped.<sup>149</sup> Part of the provision of information is related to the conduct of impact assessments that help inform communities about possible positive and negative impacts from the proposed operation (see above). Even where impact assessments have been conducted, communities often report not receiving copies of documents from companies.<sup>150</sup> Indeed, in some situations, communities have reported not receiving copies of agreements signed with the palm oil plantation company.<sup>151</sup>

##### Lack of meaningful engagement with communities

Reports document companies treating consultations as mere informational sessions rather than engagements and dialogue with communities.<sup>152</sup> The failure to meaningfully engage is exacerbated by the conduct of consultations in a manner that community members cannot understand. For example, the language used in consultations may

be different from the communities' local language or may use technical and specialised terms.<sup>153</sup> Companies sometimes provide lengthy documents that communities do not have time or technical expertise to understand. They also fail to conduct consultations in a culturally appropriate manner, including by seeking signed agreements from individuals without allowing them to consult with their community.<sup>154</sup>

#### Use of various tactics to coerce communities into agreements with the company

Many companies have reportedly used a wide variety of tactics to ensure that communities sign agreements giving away their lands for palm oil development. Some reports have documented the use of threats or violence to coerce community members into signing such agreements.<sup>155</sup> Companies have reportedly bribed some community members to influence the decisions of other community members.<sup>156</sup> In other cases, companies make promises that induce community members into signing agreements but do not document and later do not follow up on those promises.<sup>157</sup> Companies also sometimes reach agreements with communities to clear certain amounts of land but later clear more land than community members had agreed to. Some community members may not be able to read the language in which any agreements are drafted and may sign documents that they do not realise are agreements to give up their lands.<sup>158</sup> Communities commonly do not have legal advisers accessible to them prior to signing such agreements.

As just one example of one tactic, an investigation by Human Rights Watch and Aliansi Masyarakat Adat Nusantara found that in Indonesia, some Iban Dayak families agreed to resettlement outside the PT Ledo Lestari plantation area because the company had already cleared their forests and they were promised housing and land for gardening. Yet despite company promises, residents were called "thieves" when they attempted to harvest within the 50 metre range the company agreed would be their yard. One resident was arrested in 2018 for harvesting palm nuts from a tree in his yard.<sup>159</sup>

### **4.3 Affected Communities: Cultural rights**

#### ***4.3.1 Defining the right to culture***<sup>160</sup>

The right to culture is the right of individuals and communities to practice, protect, and develop manifestations of their culture.<sup>161</sup> For indigenous and local communities, cultural practices may include traditional livelihoods activities, such as hunting, fishing, farming, or gathering practices, or religious and spiritual practices.<sup>162</sup> They also include processes of decision-making and means of communication.<sup>163</sup> Cultural heritage may include human made and natural tangible objects or sites, such as artefacts, monuments, mountains, pools, or rivers, that have cultural, religious, or spiritual importance.<sup>164</sup> It may also include intangible cultural expressions, such as language, music, stories, and prayers, or traditional knowledge, such as healing practices.<sup>165</sup>

#### ***4.3.2 Violations of cultural rights in palm oil supply chains***

Violations of the cultural rights of indigenous peoples and local communities are typically associated with violations of land rights because of the intricate relationships such peoples and communities have with their lands. Cultural rights are also implicated in the right to self-determination, as communities' cultures may include different means of communication and decision-making (as discussed above in Section 4.2). These rights violations commonly manifest as companies:

- Destroying physical cultural heritage, including sacred sites, artefacts, or monuments
- Causing the loss of intangible cultural heritage
- Preventing communities from practising traditional livelihoods

#### Physical destruction of cultural heritage

The most direct examples of violations of cultural heritage rights occur when land clearance for palm oil plantations causes the physical destruction of cultural heritage such as sacred sites, artefacts, or monuments. In Indonesia, a frequently reported occurrence was the destruction of ancestral graves during land clearance,<sup>166</sup> as well as destruction of sites and resources used in burial and other rituals.<sup>167</sup> For some peoples, the destruction of parts of the forest can in and of itself be the destruction of important cultural heritage and inter-community linkages. One example is the Mani, who are a mobile people in Thailand and reported losing links with relatives because forest trails linking their areas have been lost and the areas cleared by palm oil development.<sup>168</sup>

#### Loss of intangible cultural heritage

The destruction of indigenous peoples' lands more broadly causes an erosion of intangible cultural heritage over time. This includes spiritual and cultural practices, customary institutional practices, traditional knowledge, and language. Palm oil expansion can destroy or otherwise restrict indigenous peoples' and local communities' access to the spaces or resources used to perform rituals or other spiritual practices. For example, the Orang Rimba peoples of Indonesia have traditional rituals which depended upon access to different parts of the forest; their birthing rituals involved choosing a tree for each baby that was born, and their burial rituals involved building high platforms in the forest to leave their dead.<sup>169</sup> The clearing of their forests means they can no longer perform these rituals. Other reports share similar case studies of indigenous peoples losing their cultural practices as a result of loss of sites and resources necessary for such practices.<sup>170</sup>

The clearance and transformation of their lands into plantations erodes indigenous peoples' ability to pass on cultural knowledge about their territories and landscapes, and knowledge about the management thereof.<sup>171</sup> The language used to talk about that traditional knowledge also gets lost over time, and so does traditional knowledge about various plants and their uses.<sup>172</sup> The loss of access to natural resources is also accompanied by a loss of rituals that may have been performed to seek permission or guidance on the use of those resources.<sup>173</sup>

The use of tactics to divide communities and manipulate them into signing agreements with companies (see Section 4.2) can create rifts in community cohesion and a loss of trust in, and resulting weakening of, customary institutions.<sup>174</sup> These divisions within the community are exacerbated in some cases by the cessation of the traditional community meetings to discuss resource management.<sup>175</sup>

#### Inability to practise traditional livelihoods

Palm oil operation takeover of indigenous peoples' and local communities' lands often also means that communities can no longer practise their traditional livelihoods. This may include, for example, loss of access or ability to farm, fish, or hunt. The Iban Dayak people of Indonesia reported, for instance, traditionally living off of the rice they farm, the fish they catch, and the meat they hunt.<sup>176</sup> When PT Ledo Lestari cleared much of their forest habitat and began oil palm operations, families reported losing their farming lands, seeing dead fish in the rivers, and seeing a decimation of the wildlife population because their habitats were destroyed.<sup>177</sup> They also lost sources of income from selling rubber they tapped, rice they farmed, wood and tree bark they harvested, fish, and mats and baskets woven from forest materials.<sup>178</sup>

## **4.4 Affected Communities: Economic and social rights**

### ***4.4.1 Relevant economic and social rights***<sup>179</sup>

Economic and social rights are a broad category of rights whose fulfilment for indigenous peoples and local communities often depends in part upon their enjoyment of their rights to their lands, territories and resources. These include the rights to health, to an adequate standard of living, food, water, housing, livelihoods, and to a healthy environment. These are individual rights of all persons, and they also have collective aspects that are specific to indigenous peoples and other traditional peoples with collective rights. All persons have the right to the highest attainable standard of physical and mental health; to adequate and accessible food, water, and housing; and to a safe, healthy, and sustainable environment.<sup>180</sup> In the context of indigenous peoples, these rights include the right to maintain traditional health practices; to have access to culturally appropriate food, water, and housing; to be actively involved in developing social programmes affecting them; and to conserve and protect the productive capacity of their lands and territories.<sup>181</sup>

### ***4.4.2 Violations of economic and social rights in palm oil supply chains***

There are numerous ways in which economic and social rights may be affected by palm oil operations. Some have been detailed above, including loss of access to culturally appropriate food sources, forced resettlement into inadequate housing, or loss of traditional livelihoods. A few other common violations occur, including companies:

- Causing communities to lose access to food, medicine, water and other ecosystem goods and services
- Polluting the environment or causing changes in the climate, which consequently affect the economic and social rights of communities

### Loss of access to food, medicine, and water and other ecosystem goods and services

The previous section already discussed how palm oil operations can displace traditional livelihoods. The conversion of indigenous peoples' lands into oil palm plantations transforms traditional economies into economies dependent upon a monocrop, particularly where companies do not provide alternative livelihoods or sources of ecosystem goods and services.<sup>182</sup> The loss of ecosystem goods and services and income diversity results in increased vulnerability to economic shocks, and although the monetary cost of living in traditional economies is difficult to quantify, studies suggest that the conversion to monocrop economies yields negative economic benefits and leads to impoverishment.<sup>183</sup>

## **Example: Lack of respect for the right to FPIC by Equatorial Palm Oil in Grand Bassa County, Liberia**

In 2017, Equatorial Palm Oil (EPO) published the executive summary of a human rights impact assessment they commissioned looking at its human rights impacts on two palm oil plantations in Liberia, including Palm Bay Estate.<sup>481</sup> The summary report explained that the company had “strong policies and processes in place to seek FPIC for its land development work”.<sup>482</sup> The report references a 2016 Memorandum of Understanding the company signed with “members of the local Joghahn clan” and states that community members and NGOs have welcomed the company’s approach to seek FPIC from all neighbouring communities in the future.<sup>483</sup>

The full HRIA is not publicly available, however, and the executive summary is missing some critical details. Although it references the company’s past failures to seek FPIC, it does not say whether those past violations of land rights were addressed and whether restitution or compensation had been provided. In fact, other NGO reports note that the EPO took over the Palm Bay Estate concession from another company that had forcibly evicted families, including by burning down homes, in the 1960s.<sup>484</sup> The company’s HRIA report also does not provide any information about EPO’s corporate structure, although reports by NGOs document that EPO owns the concession at Palm Bay through its 100% ownership of LIBINC Oil Palm and that Malaysian company Kuala Lumpur Kepong Berhad later became a majority shareholder.<sup>485</sup> Nor does the report provide information regarding the community or governance structure of the Joghahn clan, a copy of the 2016 MOU between the company and the Joghahn clan, or describe whether the parties to the MOU were legitimate representatives of the community.

### Lessons:

- Information about how companies have addressed (provided land restitution, agreed-upon compensation, and put in place preventative measures) past violations is important for understanding companies’ fulfilment of their human rights responsibilities (see section 4.1)
- Information about corporate structures is important to understand all the actors involved who have responsibilities for human rights (see section 2)
- Information about the affected rightsholder communities is important to better understand whether rights to self-representation and FPIC are being respected

Earlier civil society reports had raised concerns about EPO’s implementation of appropriate FPIC processes. An NGO report by the Forest Peoples Programme and Sustainable Development Institute published in 2015 (prior to the signing of the 2016 MOU between EPO and the Joghahn clan) suggested that the manner in which the company was engaging with the community “suggest[s] that it is no longer possible to secure FPIC in Joghahn”.<sup>486</sup> A human rights risk assessment done by Nomogaia in 2016 commented that despite the signing of the 2016 MOU, there remained risks that “consent will not be unambiguously obtained”.<sup>487</sup> A more recent NGO report similarly suggests allegations that EPO is trying to manufacture FPIC by targeting individuals and dividing communities.<sup>488</sup>

Lessons:

- NGO reports can provide salient information that, combined with information from clients and companies itself, can provide a more balanced overview of any given human rights situation
- Information about how FPIC processes are being implemented is important to understand whether any resulting agreement reflects a genuine exercise of the right to FPIC

All of these reports reference the fact that the EPO had been the subject of a complaint brought by the communities before the Roundtable on Sustainable Palm Oil in 2013 alleging that the company was planting on community customary lands without FPIC. The RSPO decision advised the company not to plant in disputed areas and to continue dialogue with the communities.<sup>489</sup> The 2016 MOU resulted from this RSPO decision. It was signed by representatives of all communities of the Joghban clan and provides that the company will not develop land in a designated “priority land area” and that the company will develop the other areas which had been “ceded by Consented communities”.<sup>490</sup> The MOU does not document the details of the agreement made by which the “Consented communities” ceded other lands. The RSPO closed the complaint in November 2016.<sup>491</sup>

Lessons:

First-hand sources of information, such as any agreement made at the conclusion of an FPIC process or related documentation of the supposed FPIC process and interviews with affected rightsholders, are crucial to understanding any given human rights situation and whether the right to FPIC has in fact been respected

News media and NGO reports in the past few years are surfacing allegations of continued land rights violations by EPO. These complaints are by communities who signed the 2016 MOU as “Consented communities”. Some community members say that they only ceded the land in the first place because the company intimidated and threatened them in the process.<sup>492</sup> Others say the company has not provided the promised consideration for the agreement, including compensation for crops, employment, funding for schools, clinics, and improved roads.<sup>493</sup>

Lessons:

- A lack of documentation of the substance of any agreements made may raise red flags about violations of the right to FPIC
- Where uncertainty over FPIC compliance is identified, financial and other downstream businesses should consider deploying independent verification of FPIC agreements as parts of their HRIA and human rights due diligence (via credible independent parties)
- Although human rights violations may appear to be resolved, continuous monitoring of the situation is important to ensure proper implementation of agreed measures to prevent and mitigate rights violations (see section 4.9)

Companies often promise jobs to affected communities to compensate for the loss of traditional sources of subsistence or income. However, these jobs are often insufficient to remedy the loss. According to one report, in Iban Dayak communities in Indonesia, palm oil company PT Ledo Lestari only employed 10 people out of 93 affected households, paying them between IDR 60,000-IDR 80,000 (US\$ 4.25-\$5.65) for eight hours of work per day. The loss of earnings meant that some families had to stop sending their children to school because it had become too expensive for them.<sup>184</sup> In the case of PT Sari Aditya Loka’s operations on Orang Rimba lands, the company did not employ many community members at all, claiming that the Orang Rimba are lazy and not good workers.<sup>185</sup> Although the company says it has instituted economic programs to support the Orang Rimba with livelihoods training and has a hunger alleviation program to distribute staples to families, these programs do not adequately address the negative impacts of the compa-



ny's operations. Many Orang Rimba encounter prejudice when they try to live and work outside the plantation, and combined with having a lack of money, few Orang Rimba visit markets to buy the provisions they need.<sup>186</sup> Instead, they sometimes scavenge and either eat or sell oil palm fruit to buy provisions, even though they risk being arrested and prosecuted for theft.<sup>187</sup> The situation has led to some Orang Rimba women and children begging along the highway.<sup>188</sup> The full range of their economic and social rights has been severely affected by the company operations, from the rights to food, water and health to the rights to work and education.

In some situations, communities may have access to alternative sources of food, but they may nonetheless be negatively impacted by palm oil operations. For example, even where communities still have lands to use for farming, the environmental impacts of the nearby palm oil operations can cause increased pests or polluted water that decreases crop yields.<sup>189</sup> The decreased numbers of community farms can mean that farms are more affected by birds destroying their crops, because there were not enough families farming together to keep rotational watch or to share the burden of birds eating crops.<sup>190</sup> In other cases, communities may be able to access farm lands, but at a cost. After Iban Dayak communities in Semunying Bongkang and Pareh lost their lands to palm oil company PT Ledo Lestari, some families were able to access farming lands but only by paying to rent lands in villages several kilometres outside the plantation area to be able to farm.<sup>191</sup> Where communities are no longer able to provide for their own subsistence, scientific studies show that the switch from self-provisioning economies to reliance on store-bought foods has a long-term negative impact on nutrition and health.<sup>192</sup>

#### Environmental pollution and climate change

Palm oil plantations often cause environmental pollution through the use of fertilizers and pesticides which seep into the soil or waterways. Soil erosion from deforestation can also affect water sources, some of which may dry or be covered up in the process of clearing land for plantations.<sup>193</sup> The pollution of fish habitats, drinking and bathing water sources, and water sources used for farming affect food security and the rights to water and work. The rights to health and a healthy environment have also been severely affected by water and air pollution. Birth defects have been associated with pollution caused by palm oil.<sup>194</sup> Burning of forests to clear land for plantation development and expansion can sometimes cause air pollution to exceed hazardous thresholds, and air pollution has been linked to respiratory diseases, child mortality, asthma, lung damage, low birth weights, miscarriages, and impaired cognitive developments.<sup>195</sup>

Palm oil mills produce palm oil mill effluents (POME), which are the liquid waste from the sterilization and clarification processes. POME is considered to be the most harmful waste produced in palm oil production. If left untreated, POME contaminates surface waters and produces a putrid smell.<sup>196</sup> The components of POME can cause fish to die; produce elevated toxins and bacterial growth that can make people sick; and can decrease peoples' ability to carry oxygen around the body, which is particularly dangerous for babies.<sup>197</sup>

In many cases, there have not been scientific analyses undertaken to verify complaints about environmental pollution and the resulting health impacts. However, community members report noticing getting rashes and itching from bathing in rivers and seeing lots of dead fish,<sup>198</sup> or experiencing unusual diseases after operations start.<sup>199</sup> Many of these pollution and environmental degradation impacts can affect communities who may be located further from the plantation and mill. Reports have documented in particular that POME, when dumped into rivers and streams, can travel for several kilometres downstream.<sup>200</sup>

In addition to causing environmental pollution, the conversion of forests into oil palm and other plantations has been shown to cause ecohydrological and climate changes. Studies have found that land conversion to oil palm plantations can contribute to changing flood patterns, while flood infrastructure developed by plantation companies have been blamed to channel runoff to neighbouring communities' lands.<sup>201</sup>

## **Example: Environmental and health impacts of palm oil development by the HAME Group in Guatemala**

The HAME Group and associated companies have been implicated in several cases of severe water pollution and resulting health impacts on nearby communities in Guatemala. Perhaps the most well-known is the case of the pollution of La Pasión River in 2015, which killed thousands of fish across 147 kilometres.<sup>202</sup> The scientific community in Guatemala concluded that the cause of the pollution was the contamination of the river by a blend of the poisonous compound malathion with palm oil processing effluents from the REPSA (Reforestadora de Palma de Petén S. A.) palm oil plant.<sup>203</sup> The fishermen community of Sayaxché is located 74 miles downriver from the REPSA plant and lost the source of their livelihoods as a result of the contamination. The case has attracted significant international attention, including from multiple UN Special Rapporteurs,<sup>204</sup> and although a Guatemalan court found that the company had committed ecocide, no formal charges were made in that respect.<sup>205</sup>

REPSA is operated by owners of the HAME Group. The HAME Group is also implicated in contamination of the La Noria and San Román rivers, as well as diversion of the rivers to their palm oil plantations.<sup>206</sup>

### Lesson:

Even in high-profile cases, judicial mechanisms sometimes fail to ensure appropriate redress is provided to victims of rights violations. Corporate responsibilities exist independently of state obligations, however, and companies in the HAME Group and REPSA value chain have responsibilities to act to address this continuing rights violation.

## **4.5 Workers: Labour rights**

Labour rights abuses in palm oil supply chains are well-documented. A report, Study of Labour Compliance in RSPO Certified Oil Palm Plantations in Indonesia, published by Profundo in 2018, for example, references and summarises numerous prior reports documenting labour rights violations in palm oil supply chains in Indonesia.<sup>207</sup> There are also countless news articles containing verified reports as well as allegations of labour rights abuses on palm oil plantations (and in palm oil mills) in different jurisdictions around the globe.

### **4.5.1 Defining labour rights<sup>208</sup>**

Labour rights refer to a set of rights that workers have. The most fundamental of these include<sup>209</sup> the rights to associate with others and to collectively bargain;<sup>210</sup> not to be subject to forced<sup>211</sup> or child labour;<sup>212</sup> and to non-discrimination in employment.<sup>213</sup> Other core rights include the right to fair remuneration<sup>214</sup> and safe and healthy working conditions.<sup>215</sup>

### **4.5.2 Violations of labour rights in palm oil supply chains**

Labour rights abuses are perhaps the most visible and well-known examples of human rights violations in palm oil supply chains. While many reports focus on these violations in larger plantations and mills, similar labour rights abuses occur on smallholder estates as well.<sup>216</sup> There are numerous well-documented instances of palm oil companies:

- Failing to respect the right to collective bargaining
- Engaging in practices evidencing or suggestive of forced labour
- Employing child labourers
- Paying below minimum wage
- Failing to ensure safe and healthy working conditions

### Failure to respect the right to collective bargaining

While companies may ostensibly respect the right of workers to organise and collectively bargain, there are several ways in which workers' right to freely associate and collectively bargain are compromised. In some cases, trade union representatives are also part of company management and workers do not trust the union, suggesting that the union is not independent.<sup>217</sup> For example, HRW research indicated that this lack of independence could partly explain the reason that a collective bargaining agreement workers reached with Plantations et Huileries du Congo (PHC) left many workers with wages below the World Bank's extreme poverty line.<sup>218</sup>

In addition, employees sometimes express fear of retaliation for speaking out about their conditions or making complaints<sup>219</sup> or fear of being laid off if they joined a union.<sup>220</sup> Some companies automatically enrol workers in unions without their consent; fail to initiate negotiations with unions on a collective bargaining agreements, or do not uphold their agreements with unions.<sup>221</sup> One assessment of the EPO Palm Bay Estate in Liberia found that although there is a union for permanent employees (not subcontractors) on the plantation and they entered into a collective bargaining agreement with the company, the company did not meet its commitments under that agreement.<sup>222</sup>

#### Forced labour

There are widespread reports of forced labour being used in the palm oil sector, including on plantations and in mills. In some cases, authorities in countries with laws banning the import of goods made with forced labour may be a useful source of information on suspected cases of forced labour. The United States Customs and Border Protection, for example, has active orders to detain palm oil and palm oil products produced by FGV Holdings Berhad and Sime Darby and their subsidiaries because of sufficient information indicating the use of forced labour on their plantations in Malaysia.<sup>223</sup> Other situations are well-documented but not always investigated or prosecuted by national authorities.

Indications of forced labour can include workers not being paid wages;<sup>224</sup> workers having to pay a recruitment fee;<sup>225</sup> or being required to work overtime without pay because of fear of dismissal or not making a decent wage,<sup>226</sup> all of which constitute labour rights abuses in and of themselves. Although legal interpretations vary on when economic coercion can create situations of forced labour, there are also indications from community members that they feel forced to work on plantations due to the lack of alternative options available to them to secure a livelihood.<sup>227</sup>

Migrant workers recruited from foreign countries to work on palm oil plantations are particularly vulnerable to forced labour or other abusive labour practices. Third party labour recruiters often identify workers for a palm oil company, requiring recruits to pay fees that they cannot afford and must later pay back out of their wages.<sup>228</sup> Palm oil companies have been documented to take advantage of the situation of migrant workers and to restrict their ability to leave the plantation by retaining passports or delaying or withholding wages so that workers cannot settle debts accrued during the recruitment and migration process.<sup>229</sup> The practice of using migrant labourers on plantations is particularly common in Malaysia, where government work permits also tie migrant workers to specific employers, which causes workers to fear deportation if they complain about their working conditions.<sup>230</sup>



Palm oil truck in Indonesia

## Example: Contested situation of forced labour in Langkat District, North Sumatra, Indonesia

News outlets, both domestic and international, reported that the district head (bupati) of Langkat district in North Sumatra, Terbit Rencana Perangin Angin, had over the course of twelve years held more than 600 people in cages on his property.<sup>231</sup> Evidence suggested that these people may have been working on Terbit's palm oil plantation involuntarily, pointing to a possible case of forced labour.<sup>232</sup> Terbit stated that they were drug addicts who voluntarily locked themselves up for rehab purposes, and some police also concluded that this meant they were not subject to forced labour.<sup>233</sup> Some experts quoted noted, however, that drug addicts are in a vulnerable position and there was no question that the situation was one of modern-day slavery.<sup>234</sup> The police and national human rights commission are still investigating the situation and have thus far identified several individuals believed to have died as a result of violence committed against them, others who were victims of physical abuse, and tools that could be used for torture.<sup>235</sup>

### Lesson:

While extreme cases of rights abuses such as this one may receive international attention, local newspapers and direct information from affected rightsholders are more comprehensive sources of information about possible rights violations. These sources of information are sometimes cited in NGO reports compiling information about rights violations.

Some cases of rights violations may not be considered to be such by government officials. However, a state's determination that a situation does not constitute a rights violation does not mean it is not. Companies may still be responsible for addressing situations that are considered violations of international human rights law, even if not considered to be violations of national law or national interpretations of international human rights law.

### Child labour

Research studies suggest that despite strong “no child labour” policies in palm oil companies, there are still cases of children working on plantations.<sup>236</sup> Some children work as much as adult workers, while others work after school or during school holidays.<sup>237</sup> Amnesty International identified cases of children dropping out of school to help their parents do the work because their parents were sick or to help their parents meet plantation targets.<sup>238</sup> While researchers identified customary practices and the lack of extra-curricular alternatives as one factor contributing to the prevalence of child labour, other factors include low wages; use of performance quotas to determine wages; penalisation of workers who do not reach their daily quotas; and lack of enforcement of “no child labour” policies.<sup>239</sup> In Malaysia, “stateless” children cannot go to school and so begin working on plantations at an earlier age.<sup>240</sup> Some reports found that during harvest season, foremen urge workers to bring their children to work to increase production, and on some plantations, the average age of child workers is 10 years old.<sup>241</sup>

### Unfair remuneration

Low wages are well-documented on palm oil plantations. The low wages paid are in part a result of wages being tied to unreasonable harvest quotas; some companies engage in the practice of paying only partial wages if workers do not meet the full quota.<sup>242</sup> Companies often rely on temporary contracts to avoid paying benefits to workers,<sup>243</sup> and even where workers meet their quotas, sometimes they are still not paid their full wages or they are paid below the minimum wage.<sup>244</sup> Workers report that if they complain about their wages, they may be out of a job entirely.<sup>245</sup>

As an illustrative example, according to an assessment conducted by independent consulting company Nomogaia, palm oil company EPO in Liberia hired workers as subcontractors paid by middlemen.<sup>246</sup> Subcontractors were asked to give themselves new names every six months and record themselves as new short-term hires to avoid having to offer them permanent employment.<sup>247</sup> Nomogaia calculated that even the highest rate subcontractors are paid, “[b]y any measure, these are not living wages”.<sup>248</sup> Workers were also often paid late and their wages were docked for no reason.<sup>249</sup>

## Example: Differences in labour use and smallholdings between palm oil and other sectors

Although many of the types of rights violations found in the palm oil sector are also common in other agro-commodity sectors, some differences in production models and governance systems result in differing rights impacts as well. Workers on palm oil plantations typically have little bargaining power compared to workers in other sectors. For example, harvesting and processing latex require highly skilled workers, meaning that workers typically enter into longer-term contracts and can earn almost half of the sale price of rubber. By contrast, harvesting palm oil requires less skill and workers are typically paid low wages.<sup>250</sup> Conversion of land into palm oil plantations also results in fewer livelihood options for local populations compared with other crops. Per acre, one corn plantation may require 112 days of work, while palm oil or sugarcane only require 36, and corn and beans grown by local farmers can create more indirect jobs for every person employed than palm oil or sugarcane.<sup>251</sup>

Different crops also present different considerations for smallholder livelihoods (see Section 4.8). Some smallholders in Indonesia reported converting their remaining customary lands into rubber farms both to earn additional income as well as to make clear to outsiders that they are using the land (as many customary agroforestry plots look to outsiders like natural forest and are treated as uninhabited or unused lands).<sup>252</sup> They comment that planting rubber appears to be a better alternative to planting palm oil. Some of the reasons for the preference are the systems that have been built around each crop. While the palm oil industry was more regulated by the government, smallholders were able to plant rubber on their own lands and could control their prices and buyers. Rubber also presented fewer start-up and transport costs and the trees produce other products that could be used or sold, whereas palm oil involved high costs and had relatively few other uses.<sup>253</sup> A research report by CIFOR also presents some of the differences between the two crops in gender roles and impacts.<sup>254</sup>

### Unsafe and unhealthy working conditions

Palm oil plantation workers are exposed to unsafe or unhealthy conditions both in their actual work as well as in their living environment, as they often live on the plantation in company-provided housing. In some cases, temporary workers are not provided with housing at all.<sup>255</sup> Workers are exposed to hazardous chemicals in the form of pesticides, herbicides, and fertilisers used to treat oil palms, but companies often do not provide the necessary personal protective equipment (PPE) that workers need when handling chemicals.<sup>256</sup> In some cases, while permanent employees may be provided with PPE, daily workers are required to buy their own.<sup>257</sup> Nor do companies provide adequate training about safe handling of chemicals.<sup>258</sup> Reports such as one by Human Rights Watch on palm oil plantation workers in the Democratic Republic of the Congo document symptoms experienced by workers consistent with exposure to pesticides: impotence, skin irritation and blisters, diminished or blurred vision, and headaches.<sup>259</sup> HRW's investigation found that the training for workers was done in French with few explanations in their local languages, and training materials did not adequately explain the risks of exposure to the chemicals used. Although company policies required workers to wear adequate PPE—including helmets, respirators, goggles, and protective gloves, overalls and boots—few workers were provided with these. The gloves and overalls workers were provided with were made of materials that absorbed chemicals, making them more dangerous, and the boots were of poor quality and tore easily.<sup>260</sup> Workers did not receive adequate medical care and attention, with company doctors reporting that they had limited equipment and knowledge to understand and treat illnesses caused by poisoning, and workers not receiving the results of medical examinations they do undergo.<sup>261</sup>

In palm oil mills, there are reports indicating a lack of occupational health and safety regimes, including markings for safety paths, risk assessments of occupational hazards, or provision of PPE for workers.<sup>262</sup> In palm oil mills in Nestle's supply chain in Indonesia, there were numerous workplace accidents, and although workers receive free treatment at the medical clinic, there was a shortage of doctors and clinics were typically only staffed by a pharmacist.<sup>263</sup>

Companies also often do not provide adequate housing. Worker camps sometimes have no sanitation facilities, meaning that oral-faecal disease transmission was likely because of open defecation near water sources.<sup>264</sup> More

generally, running water is not always available, and workers may have to spend their wages to buy drinking water and soap.<sup>265</sup> Worker housing can also be overcrowded, and the housing conditions have been found to not meet the requirements in a company's concession agreement.<sup>266</sup> Plantations also typically do not provide adequate healthcare resources or facilities, and poor road conditions and the limited availability of emergency transportation undermine workers' abilities to access medical clinics and hospitals outside the plantation.<sup>267</sup>

## **4.6 Human rights defenders: Rights not to experience harassment, threats, and violence**

### ***4.6.1 Defining human rights defenders and relevant rights***<sup>268</sup>

Human rights defenders are people who, individually or with others, act to promote or protect human rights in a peaceful manner.<sup>269</sup> They are defined by what they do more than their specific characteristics, and defenders may include a wide range of people.

Human rights defenders are entitled to the same rights as other people, but the key rights that are implicated in situations involving defenders are, the rights to life, security, and physical and mental integrity.<sup>270</sup> Violations of these rights are commonly committed in response to individual or community opposition to corporate activities. These rights are both individual rights of all persons, as well as collective rights of indigenous peoples to live in freedom and peace as distinct peoples. This set of rights is often formulated in the negative, as rights not to experience harassment, threats, torture, or unlawful killing. These rights are closely interconnected with the rights to equal protection of the law and access to justice. For indigenous peoples in particular, the remoteness of their communities and their marginalisation by dominant sectors of society can both embolden perpetrators of harassment and violence as well as lead to difficulties in investigating and prosecuting such abuses<sup>271</sup>

### ***4.6.2 Violations of the rights of human rights defenders in palm oil supply chains***

The human rights abuses in the palm oil supply chain have not been uncontested by rightsholders themselves, and reports document company actions to try to suppress opposition to their operations. Companies in palm oil supply chains have violated the rights of human rights defenders by:

- Intimidating, threatening, harassing, extorting, torturing, or killing human rights defenders
- Failing to prevent other actors in their value chains or supporting their operations from violating the rights of human rights defenders

#### Direct abuses against human rights defenders

There are numerous documented cases of intimidation, threats, harassment, extortion, and violence against human rights defenders in the context of their opposition to agrobusiness operations.<sup>272</sup> These acts are often perpetrated by company security guards or by company actors in collaboration with police or military personnel. In some cases, palm oil executives pay police to coerce villagers into signing agreements at gunpoint or to act in retaliation for acts of protest against the company.<sup>273</sup> Notably in Latin America, there are numerous reports of companies employing mercenaries and para-militaries to suppress human rights defenders.<sup>274</sup> Targets of harassment and violence can be particular individuals or community members in general. Although arrests or acts of violence are often targeted at individuals, the result is to create an environment in which communities are afraid to protest the company's presence and actions.<sup>275</sup>

## **Example: Violence against community members involved in complaints against Feronia-PHC operations in the DRC**

In 2018, RIAO-RDC (Réseau d'Information et d'Appui aux ONG en République Démocratique du Congo) filed a complaint on behalf of nine communities against palm oil company Feronia-PHC with the Independent Complaint Mechanism (ICM) operated jointly by the Dutch, French, and German development banks. Following the submission of this complaint, communities reported an increase in intimidation, harassment, and violence.<sup>276</sup> Incidents have included the national military firing bullets against protesters; the killing of a member of RIAO-RDC, Joël Imbangola Luneza; violent arrests by police, accompanied by company security guards, of villagers who had attended a meeting with ICM's panel of experts to share their complaints, and subsequent holding of those villagers without charges for months.<sup>277</sup>

Since the complaint was filed, Feronia filed for bankruptcy and the palm oil company was purchased by a new company, Straight KKM. When a delegation from Straight KKM visited in February 2021, communities organised a protest, and in response, policy and company security personnel arrested a group of protesters, who were reportedly subjected to torture while in custody.<sup>278</sup>

The complaint was declared admissible by the ICM in January 2019, but it took a couple more years before the mediation process advanced with the appointment of a mediator.<sup>279</sup> In the meantime, some community complainants lost confidence in the grievance mechanism, feeling that the ICM expert panel had abandoned them by failing to assist or intervene when villagers were arrested following a meeting with the ICM expert panel.

### Lesson:

Threats, intimidation, harassment, and violence against human rights defenders are serious human rights abuses that may require immediate action to prevent further violence and death. Although grievance mechanisms follow processes that may take time to resolve, having mechanisms in place to respond to retaliation against complainants is important to protect the rights of defenders.

### Failing to prevent abuses against human rights defenders

Sometimes the actors committing abuses against human rights defenders are other companies in the palm oil value chain; government actors; or even other community members who support the palm oil operation. Even if companies are not playing a direct role in such acts, they might contribute to these abuses by failing to take action to prevent them or supporting them. For example, while it is not always clear that companies are directly requesting or paying government officials to arrest or prosecute human rights defenders, they may be indirectly causing the rights violations by falsely reporting crimes.<sup>280</sup> One tactic used by companies is to accuse local community members of theft of oil palm fruits, or other equipment like fertilisers.<sup>281</sup>

Companies sometimes take advantage of the abuses to try to coerce community members into agreeing to company operations. In 2005, Iban Dayak village members in Indonesia held a protest of the destruction of their forest by PT Ledo Lestari.<sup>282</sup> The government brought in the military to quell the protest and detained two village leaders for organising the protest.<sup>283</sup> Someone introducing themselves as the director of the PT Duta Palm Nusantara group (of which PT Ledo Lestari is a member) visited the two village leaders and offered them money and aid in their release if they supported the oil palm plantation.<sup>284</sup>

## **4.7 Women: Rights not to experience sexual violence and discrimination**

Women make up half of the populations in communities affected by palm oil development and a significant percentage of the labour force. In Indonesia, it is estimated that about half of the palm oil labour force is women.<sup>285</sup> This is not true across the sector, however; in Guatemala, estimates are that women comprise less than 2 percent of the workforce on palm oil plantations.<sup>286</sup> Although many impacts of palm oil development apply to entire communities, women often experience differentiated or specific rights violations. The discrepancy in the percentage of women employed by palm oil companies is in and of itself one example of such difference.

#### ***4.7.1 Differentiated experiences of rights violations***<sup>287</sup>

Women are entitled to the same human rights as men, but women have historically suffered and continue to suffer discrimination in the protection and fulfilment of their rights as well as gender-based violence. This systemic and persistent discrimination against women means that women sometimes experience additional rights violations compared to men, or they have differentiated and sometimes exacerbated experiences of rights violations. It is for this reason that human rights law requires that specific attention must be paid to the rights of women.<sup>288</sup>

#### ***4.7.2 Violations of women's rights in palm oil supply chains***

Palm oil companies often cause or contribute to women's experience of discrimination or violence. Corporate actors often violate women's rights by:

- Failing to prevent sexual violence against women by their employees
- Failing to consider women's needs when negotiating agreements with communities
- Failing to provide accommodation or benefits for female workers, particularly working mothers
- Causing or contributing to other rights violations of which women have differentiated or exacerbated experiences

#### Sexual violence against women

The establishment of palm oil plantations is associated with the structural emergence of sexual violence against women. Plantations often hire migrant male workers, and this influx of outsiders, in a generally patriarchal context that turns a blind eye to violence against women, has been associated with increased levels of alcohol abuse near communities and sexual assaults on women.<sup>289</sup> In addition, due to the expansiveness of oil palm plantations around community lands, women are exposed to the risk of sexual harassment and violence when they travel through the plantation, for example to their abode, garden parcel, or to the market.<sup>290</sup> Women in particular are exposed to the risk of sexual exploitation if they want to be given a job, their legal wage or their salary.<sup>291</sup>

### **Example: Abuses of women's rights on Socapalm plantations in Cameroon**

Numerous civil society reports have documented the human rights abuses, particularly violations of women's rights, associated with Socapalm plantations in Cameroon. Much of the violence against women is committed by security guards and military personnel who have been called in by the company to support their security. These security personnel search, rape, and torture women when they are found with oil palm nuts or fruits.<sup>292</sup> They also raid homes while women are cooking to inspect their food and confiscate palm nuts and palm oil presses, even when those belong to the community members.<sup>293</sup>

Socapalm reported that the presence of the military was necessary to secure the plantation and prevent theft, and that the authority to stop villagers using their own oil presses belonged to the government, not the company.<sup>294</sup>

#### Lesson:

State authorities sometimes participate in rights abuses (see Section 5) in communities affected by private sector concessions, investments and operations. Though not direct perpetrators, companies are sometimes nonetheless causing or contributing to these abuses and have responsibilities to prevent, mitigate, and otherwise address them.



#### Lack of inclusion of women in negotiations

Women are often excluded from decision-making spaces, and any agreements negotiated between communities and companies ignore specific needs of women. Sometimes women are customarily excluded from community meetings, and men do not share information from those meetings with women, even informally.<sup>295</sup> In some communities, village chiefs represent the concerns of women when asked to do so.<sup>296</sup> In others, though, women do not have the added protection of their leaders and are exposed to sexual violence, abuse, and criminalisation for advocating against palm oil development on their lands.<sup>297</sup>

As just one example, at meetings in 2009 and 2010, representatives of PT Ledo Lestari held meetings with male Iban Dayak community members to negotiate compensation and rehabilitation packages.<sup>298</sup> Because no women participated in these meetings, specific impacts on women went unaddressed in these agreements.<sup>299</sup> These included the loss of community networks and livelihoods from weaving, and difficulties accessing land and managing resources to provide food for their families.<sup>300</sup>

In Indonesia, smallholdings provided as partial compensation for the takeover of customary lands are routinely titled to male heads of households even in areas where the customary landowners are equally men and women, as among most Dayak peoples in Borneo, or where lands are inherited and held matrilineally, as among the Minangkabau of West Sumatra.<sup>301</sup>

#### Lack of accommodation or benefits for female workers and maternal workers

Female workers, and particularly mothers, have specific needs that require accommodation from employers. Such accommodations or benefits are rarely provided in the palm oil sector, however. Studies have found that women rarely receive days off for menstruation.<sup>302</sup> Plantation workers in Indonesia are only entitled to three months' maternity leave at their ordinary rate of pay, and women who are employed as casual workers (the majority) are not even entitled to that statutory amount of leave.<sup>303</sup> Women have also reported being dismissed from their jobs once they disclose pregnancies, meaning that many women end up hiding their pregnancies as long as possible.<sup>304</sup> The lack of time to attend prenatal check-ups and exposure to hazardous and arduous working conditions, as well as lack of time spent on postnatal care, also result in negative impacts on the mother's and children's health.<sup>305</sup>

#### Other differentiated or exacerbated experiences of rights violations

Many types of rights violations affect both men and women, but women sometimes experience those impacts in different ways. Some of this is as a result of systemic discrimination against women. For example, on palm oil plantations, women are typically only employed as casual workers rather than permanent employees in the nursery or plant maintenance division.<sup>306</sup> The tasks women are hired for on plantations are considered low-skill tasks and women are usually paid less than men as a result.<sup>307</sup> Women are sometimes more likely to be hired to spray chemicals than men and thus more exposed to poisonous substances without being given appropriate safety equipment, trainings, or medical check-ups.<sup>308</sup> Women are also often forced to support their husbands and work without pay: one report found that the quotas set for harvest labourers were impossible to meet and companies expected labourers to bring helpers, often their wives, to assist them in meeting their quotas without providing any additional pay.<sup>309</sup>

Other differentiated experiences of rights violations are a result of the different roles women play within communities. In communities affected by palm oil plantations in Guatemala, women are typically responsible for caring for family members. This includes preparing food, managing water, and caring for the elderly and sick.<sup>310</sup> With the clearance of forests by palm oil plantations, women had to walk further to collect medicinal plants and identify alternative food sources.<sup>311</sup> Pollution of water sources meant women spent more time walking to collect clean water, and the increased prevalence of pollution-related disease increased the care burden on women.<sup>312</sup> In other cases, when families seek to rent land outside the plantation area for farming, women have a harder time finding land to rent and are more often forced to work in the company for income (needed to pay for expenses like school fees).<sup>313</sup> One academic study on women and food security in Ghana and Cameroon found that the development of agriculture plantations had compromised food security, particularly for women.<sup>314</sup>

## 4.8 Smallholders: Land, participation, and economic and social rights

Smallholders are important actors in palm oil supply chains who contribute a significant percentage of total palm oil output (see Section 2). As such, their operations can and do cause and contribute to human rights abuses, particularly as they relate to damage to land and environment. They are, however, also actors whose rights can be and are violated by palm oil companies and investors.

### 4.8.1 Relevant rights of smallholders

Smallholders, who are often indigenous families, local families, or transmigrants, generally fall into two categories: independent smallholders or smallholders affiliated with government-sponsored or -mandated smallholder schemes.<sup>315</sup> Different types of smallholders hold different rights, and identifying violations of smallholder rights requires an understanding of the specific contexts in which smallholders participate in any given value chain. Civil society reports, such as an IIED report on smallholders,<sup>316</sup> can help provide important background in this regard. This section predominantly focuses on those smallholders who are participating in various smallholder schemes. In general, the rights that are typically implicated in the creation and maintenance of smallholder schemes are land rights, rights to participation in decision-making, and economic and social rights, particularly the right to adequate and sustainable livelihoods.

### 4.8.2 Violations of smallholders' rights in palm oil supply chains

Violations of smallholders' rights in palm oil supply chains can occur in different ways depending on the characteristics and types of smallholder. However, these rights violations commonly occur in situations of companies:

- Failing to respect customary land rights when establishing smallholder schemes
- Excluding smallholders from decision-making around land allocation and pricing
- Causing smallholders to live in perpetual debt or to be unable to make adequate livelihoods

#### Failure to respect land rights in establishment of smallholder schemes

Smallholding schemes can take a variety of forms but typically involve plantation companies supporting smallholders and engaging them through a contract which obliges them to sell to the company or an associated mill. In general, smallholders enter into agreements with plantations in which they receive a small parcel of land on which to plant oil palm and later sell their produce to the company. These agreements typically require smallholders to relinquish any land rights they hold or claim to the company and they may also involve the taking out of a loan by the smallholder. Some schemes are arrangements between companies and smallholder cooperatives through which individual smallholders operate. Where estates are established without the consent of indigenous and local communities, there is a broader violation of customary land rights (see section 4.1). In some situations, community members decide to participate in smallholding schemes because their land rights have already been violated.

Civil society and academic reports have documented that plasma smallholder agreements and the process for reaching them often disrespect the smallholders' underlying land rights.<sup>317</sup> In Indonesia, some smallholders report being coerced into signing these agreements, while others did not fully understand the agreement and thought that ownership of the land would eventually revert to them once the palm oil company's lease expired.<sup>318</sup> Sometimes the smallholdings that were allocated were not the ones they agreed to and were in neighbouring villages or districts.<sup>319</sup> In other cases, the smallholdings that were allocated were smaller than anticipated because the company did not have as much land as it thought or it allocated some areas to transmigrant workers.<sup>320</sup>

#### Exclusion of smallholders from decision-making

Smallholders are often excluded from various stages of the establishment of smallholder schemes. Many smallholders report that the financial details of the smallholder schemes are not clearly explained to them prior to them signing agreements to participate, resulting in smallholders being burdened with loans passed off to them by the palm oil estates and mills.<sup>321</sup> Many smallholders do not have contracts with mills (and are contractually bound to sell to one plantation company), and even larger smallholders with more than one hundred hectares of land sometimes depend upon relationships with companies to help them sell their produce.<sup>322</sup> Reports find that smallholders do not get documentation of their payments from their cooperatives, and do not know what their remaining

debts are.<sup>323</sup> Some estimates are that it would take about 18 years to pay off the debts from the time palm oil crops become productive, by which time smallholders need additional loans so they can clear old oil palms (which are too tall to harvest) and replant them.<sup>324</sup>

Once smallholder schemes are established, smallholders are excluded from the process of setting prices and payment for fresh fruit bunches. In some cases, provincial government commissions, which include representatives of oil palm estates and mills, set prices for fresh fruit bunches.<sup>325</sup> Smallholders are then paid by the cooperative to which they are assigned, and cooperatives often deduct various fees, such as for the cooperative's costs or security.<sup>326</sup> The cooperatives are not directly representative of the smallholders, and smallholders do not have opportunities to participate in either the price setting exercise or in decision-making around how the cooperative ultimately pays them.<sup>327</sup> There are other case studies documenting patterns of smallholders selling fresh fruit bunches through collectors who set prices without using the government pricing mechanism.<sup>328</sup> Smallholders in those situations may not know the government reference price and have limited bargaining power to negotiate the sales prices.<sup>329</sup>

#### Causing situations of perpetual debt or inability to earn adequate livelihoods

As a result of the above-mentioned lack of inclusion in decision-making spaces and breach of agreements, smallholders often do not make sustainable livelihoods from their smallholdings. Some end up in situations of debt bondage, effectively working for years to pay off the loans they took out to enter the smallholder scheme.<sup>330</sup> Even independent smallholders who do not enter into loan schemes with companies reportedly earn incomes below the poverty line.<sup>331</sup> Some report that they do additional work to supplement their income, including as labourers on the palm oil estate.<sup>332</sup> The inability to earn adequate livelihoods in turn affects other rights, including by depriving smallholders of income necessary to buy food or access healthcare and education.

### **Example: Poverty and food insecurity among smallholders in Palawan, Philippines**

Social problems associated with the palm oil industry are well-documented not only by civil society but also by research institutes. One report by the Stockholm Environment Institute documented, among other things, the impact of palm oil development on smallholder livelihoods in Palawan, in the Philippines.<sup>333</sup> The report found that many farmer cooperatives entered into outgrower schemes with palm oil company Agumil Philippines, Inc. (AGPI), which involve unfair contracts leading to high debt burdens, a resulting lack of income, and an inability to obtain alternative food sources. The outgrower schemes require cooperatives to obtain a bank loan for start-up costs and enter into a contract with the AGPI, which provides seedlings and technical expertise as well as the matching funding required to take out the loan. For the majority of cooperatives in this scheme, they were unable to meet production targets and thus could not meet the loan repayment schedule. Their debt burden is increased by AGPI's imposition of an interest rate on additional expenses and a management fee, while their income is reduced by the contractual obligation to deliver their fresh fruit bunches to one specific mill, leading to fixed low prices for palm oil output. The cooperatives' contracts with AGPI additionally prevent farmers from growing other crops in the plantation area, and many indigenous farmers were unable to obtain permits to gather non-timber forest products. The resulting situation is one of unstable livelihoods and food insecurity for these smallholder farmers.

#### Lesson:

Actors in palm oil value chains should consider the ways in which institutional structures, such as lending structures, may cause or contribute to rights violations, such as how lending terms and conditions may result in situations of effective debt bondage for smallholders. Downstream companies and investors have responsibilities to identify these issues and to use their leverage to prevent, mitigate, and remedy rights abuses.

## 4.9 Right to remedy

Many of the previously mentioned rights violations are continuing violations that commenced in the past because there has never been appropriate remedy provided to address the situation. The failure to provide remedy for rights abuses is not only a failure to address violations in line with corporate human rights responsibilities, but it is also a rights violation in and of itself.

### 4.9.1 Defining the right to remedy

International human rights law guarantees people the right to an effective remedy if their rights are violated.<sup>334</sup>

The UNGPs also recognise the need to ensure that victims of rights abuses can access effective remedy.<sup>335</sup> Remedy could be provided through state-based or non-state-based mechanisms; this report focuses on non-state-based measures and the responsibilities of non-state actors. International guidance on effective non-state-based grievance mechanisms calls for such mechanisms to be legitimate, accessible, predictable, equitable, transparent, rights-compatible, and to engage in continuous learning and strengthening of its own effectiveness.<sup>336</sup>

### 4.9.2 Failure to provide remedy in palm oil supply chains

Some palm oil companies, for example palm oil estates and mills in Nestle's supply chain, do not have grievance mechanisms.<sup>337</sup> While others have grievance mechanisms, complaints filed by aggrieved communities often remain unaddressed. For instance, the customary authority, Dominique Azayo Elenga, of the Yanzeka grouping submitted a complaint through PHC (DRC)'s grievance mechanism alleging that the company's Yaligimba mill was contaminating the community's drinking water sources.<sup>338</sup> Yaligimba's environment manager informed Azayo that the company tested the water and found it was not harmful, so the company did not feel it was necessary to compensate the community.<sup>339</sup> He offered the community a settlement in response to the complaint, but the offer did not include compensation and the community never received a copy of the water test. The PHC general director told HRW researchers he was unaware of the complaint.<sup>340</sup>



Government inspector surveys a palm oil plantation in Ucayali, Peru

The grievance mechanisms of parent companies, investors, or certification bodies have been similarly ineffective (see Section 2.8). In many cases, communities are unaware that they can seek redress further up the value chain, the portals for submitting complaints are not easily accessible, and some grievance mechanisms present language barriers for local communities.<sup>341</sup> Companies may engage in various tactics to coerce communities into withdrawing any complaints filed, and grievance mechanisms do not always have the mechanisms to prevent or address such behaviour.<sup>342</sup> Communities have found that complaints processes and the roles of panels or personnel appointed to address the complaint are not always clear.<sup>343</sup> Grievance mechanisms also have failed to ensure confidentiality of meetings with complainants where security was a concern and failed to address retaliatory actions that may interfere with the complaints process (see section 4.6). Where grievance mechanisms result in remedial or corrective actions being ordered or recommended, there are often not clear procedures for follow-up or monitoring of implementation.<sup>344</sup>

Many grievance mechanisms also fail to have measures to ensure equitable access between complainants and respondents, who are usually better-resourced. There are problems of transparency, with long delays in making relevant documents publicly available or at least available to the complainants.<sup>345</sup> Where complaints are filed through certification schemes like the RSPO, companies could withdraw their membership from the certification scheme completely prior to a decision, leaving no option for enforcement.<sup>346</sup>

### **Discussion: Appropriate remedy may require withdrawal from development and rights restitution**

The rights of indigenous peoples and local communities to their lands, territories, and resources, and the associated rights to consultation and consent, may mean that the only appropriate remedy for a given rights violation is restitution of lands to the affected communities. Some scholars have similarly noted that “remedy” as currently practised by many governments and corporations are what they term “procedural governance fixes” that fail to genuinely recognise the right of indigenous peoples and local communities to control what happens on their lands.<sup>347</sup> A report on the RSPO complaints procedures reflected that the greatest benefits of using the procedure included temporary freezes on operations; official RSPO recognition of the legitimacy of the community’s concerns; and forcing companies to the negotiating table.<sup>348</sup> The report recognised, however, that the results of RSPO complaints were not always solutions that provided for long-term protection of human rights.

#### Lesson:

Genuine grievance mechanisms should recognise that respect for an affected community’s rights may require the cessation of finance and/or operations entirely and restitution of lands taken without consent.

## 5 | Underlying Factors and Responsibilities for Rights Violations

While palm oil plantation companies directly cause many rights violations, there are also some factors outside of their direct control that underlie or set the conditions for these rights violations. In many cases, these relate to the recognition and protection of human rights by the government of the country in which palm oil operations are taking place. These factors may also involve the responsibilities of companies further down the value chain and obligations of the governments of the countries in which they are based. This section will describe some of these factors as well as the ways in which companies incentivise, contribute to, or benefit from these rights violations.

### Lack of government recognition of customary rights

Governments often issue licences or permits for palm oil (or other) development to companies without any recognition of existing customary land rights. Indeed, land sold or leased to palm oil companies is often characterised by governments as vacant, idle or degraded land, when in fact most of these areas are existing agricultural lands and indigenous peoples' customary lands.<sup>349</sup>

To illustrate the problem, in Indonesia, there are onerous processes for the recognition of customary land rights, and many indigenous communities do not have legal certificates recognizing their customary rights.<sup>350</sup> For example, a lawsuit filed in 2014 by Semunying Jaya villagers in Indonesia against palm oil company PT Ledo Lestari seeking restitution of their customary lands was unsuccessful because the community does not have a government certificate showing that they are a recognized indigenous group with customary rights to their lands and forests.<sup>351</sup> Thus, although regulations in Indonesia require that the bupati (district governor) can only issue a location permit for natural resource concessions after reviewing land ownership and competing rights,<sup>352</sup> there are few indigenous communities with recognised ownership rights for bupati to consider. In fact, in both law and practice, companies benefit from simplified or unenforced processes for obtaining legal permits to begin operations.<sup>353</sup>

Palm oil plantation companies benefit from this lack of recognition of land rights, and their concession agreements with governments suggest that their desire to hold encumbrance-free concessions can incentivise the continued failure to recognise community land rights. Liberia's concession agreement with palm oil company EPO, for instance, states that the government gives the company "title to and possession of" the land and commits to "defend and protect those rights for the benefit" of the company.<sup>354</sup> This same motivation also underlies the move to draw up agreements (often not understood by communities) in which communities relinquish their land rights in favour of palm oil development. Governments' failure to recognize customary land rights can in fact result in the criminalisation of indigenous and local community members, who are accused by companies of stealing fruit from their plantations. The accusations often arise when companies expand their plantations beyond the intended boundaries into lands which communities are actively farming.<sup>355</sup>

Although the obligation to legally recognise and protect customary land rights lies with governments, companies and investors in palm oil value chains have a responsibility to prevent and avoid contributing to these rights abuses. This means that companies have a responsibility to identify the existence of customary land rights and to respect those even where those rights are not recognised under national laws. At a minimum, this entails respecting the right of communities to control and manage their lands and to negotiate any agreements for use of their lands as primary decision-makers. It also means respecting communities' decisions not to invite palm oil development on their lands.

### Lack of clarity around land rights

A related challenge to achieving respect for land rights is that in many palm oil-producing countries, there are not clearly delimited boundaries for customary lands. This is in part a result of conflicting land registration systems<sup>356</sup> or land registration documents as well as the absence of work done to delimit land boundaries.<sup>357</sup>

Conflicting and overlapping land rights are also a product of the history of some of the palm oil-producing countries. In the Philippines, large-scale internal migrations began in the 1950s and the government encouraged resettlement into the customary territories of some indigenous peoples, which it considered public lands.<sup>358</sup> Many

settlers engaged in informal land transactions with indigenous residents, some of whom moved further inland as a result.<sup>359</sup> In Liberia, the civil wars of the 1990s caused significant internal displacement within the country.<sup>360</sup>

While companies cannot unilaterally clarify the boundaries or nature of existing land rights or interests, the lack of knowledge about where customary lands lie does not absolve companies of responsibilities to respect land rights. Companies have a responsibility to determine where customary land rights may exist and to avoid infringing upon associated land rights.

#### Government acceptance of or participation in rights violations

Palm oil plantation companies often find themselves operating in permissive environments in which governments take few enforcement actions even where they know of illegal activities. HRW and AMAN reported in 2019 for instance that there were no indications from their research that Indonesian authorities took any action to hold corporations accountable when they did not adhere to existing laws.<sup>361</sup> Another study interviewed Indonesian government officials in the district of Sambas who admitted to knowing about land conflicts and issuing land permits even before land conflicts were resolved, but stated that the government offices had insufficient budgets to investigate such conflicts.<sup>362</sup> A HRW study done in the DRC found that labour inspectors did not always conduct investigations into reports of abusive labour practices.<sup>363</sup>

More egregiously, though, governments often participate in, and are the main perpetrators of, rights violations. This is sometimes the result of corruption of government officials who cause land conflicts by granting palm oil concessions despite knowing of pre-existing customary land rights.<sup>364</sup> In some cases, government officials are themselves landowners or have vested interests in palm oil development.<sup>365</sup> Governments have also signed contracts with palm oil companies in direct violation of national forestry laws.<sup>366</sup> Other cases involve government officials pressuring communities, including by threatening them with imprisonment, to give up their lands.<sup>367</sup> Government perpetration of and participation in rights violations is most apparent when military or police forces are mobilised to suppress opposition to palm oil operations.<sup>368</sup>

Another common scenario is that governments (beyond individual government officials) are actively involved in persuading communities to give up their lands for palm oil development. The Konsep Baru (New Concept) scheme in Sarawak, Malaysia is one example, in which communities agree to palm oil development on their lands in return for a 30% ownership interest (held by the government in trust) in a palm oil joint venture.<sup>369</sup> The government holds a 10% interest while the private company holds the remaining 60%.<sup>370</sup> Communities report participating in the scheme without fully understanding what it would mean for their lands to be held in trust or to participate in a joint venture.<sup>371</sup>

As with recognition of land rights, corporate responsibilities to respect human rights exist independently of state obligations. Palm oil plantation companies have a responsibility not to commit human rights abuses and not to seek government support to do so. They also have responsibilities not to benefit from rights violations committed by governments or to contribute to or exacerbate those abuses.

#### Failure to implement appropriate human rights due diligence and human rights policies

Businesses have a responsibility to conduct human rights due diligence to identify, address, track, and report on their actual and potential human rights impacts. However, palm oil companies frequently do not have adequate human rights due diligence policies, protocols, or procedures in place and do not conduct appropriate due diligence. Palm oil plantation companies, particularly larger parent companies, often have human rights policies that on paper commit to upholding indigenous peoples' and workers' rights. These policies are not always implemented in practice, however. For example, Astra Agro Lestari, the parent company of PT Sari Aditya Loka, has a sustainability policy with a section on human rights in which it commits to uphold the rights of workers and indigenous peoples, including the right to FPIC, and to provide rightful compensation for rights violations.<sup>372</sup> However, in spite of this policy, the company stated that they could not provide appropriate compensation, namely, restitution of or alternative lands, for the violation of indigenous peoples' land rights.<sup>373</sup>

While this lax implementation may not directly cause or contribute to rights abuses, it may result in reduced scrutiny of the company's operations and misleading perceptions of the company's human rights record and ESG ratings. Companies have responsibilities to respect and uphold human rights not on paper, but in practice. Some research

has suggested that poor implementation of corporate policies can be a result of internal conflicts between sustainability and operations staff at companies who are working towards perceived competing objectives, with operations staff prioritising short-term profitability.<sup>374</sup> This suggests that better integration of human rights policies and values throughout corporations, as well as embedding of human rights staff into operations teams, are needed to improve the implementation of human rights policies. Protocols or procedures to operationalise human rights policies may also help, although it is important to remember that the adoption of policies, protocols, and procedures are only a means to the end of fulfilling human rights responsibilities and are not an end in and of themselves.

**"More egregiously, though, governments often participate in, and are the main perpetrators of, rights violations...In some cases, government officials are themselves landowners or have vested interests in palm oil development."**



Deforestation inspection in the Santa Clara de Uchunya community, which has been resisting the expansion of palm oil monoculture on their ancestral territory. Ucayali, Peru 2020. See example box on page 25



## 6 | Geographic Differences

While the previous section of the report summarised some common human rights violations in palm oil supply chains, identifying specific (actual and potential) rights violations and actions that can be taken to address them requires an understanding of geographic differences in palm oil production. Different histories, laws, and socio-economic contexts can create conditions that either facilitate or prevent rights abuses. Countries with a recent history of civil war or paramilitary violence, such as Liberia or Colombia, are affected by widespread internal displacement of communities with a resulting complication in identifying and securing land tenure to customary landowners. Jurisdictions such as West Papua in Indonesia, in which there is an active independence movement and a corresponding strong military presence, or other conflict zones may also present additional risks of pervasive human rights violations that require particular attention.

Other areas of geographic difference relevant for human rights in the palm oil sector include models of palm oil production; legal regimes for protection of indigenous peoples' rights and workers' rights; ratifications of international human rights treaties; and general human rights situations. These geographic differences should inform how companies identify actual and potential human rights abuses in their palm oil supply chains and the types of actions companies should consider taking in response to identified violations. This section presents a non-comprehensive sampling of some geographic differences that are necessary to take into account in identifying and addressing human rights violations.

### Models of palm oil production

Different countries have different histories and patterns of palm oil production. These differences affect the traceability of the supply chain, as well as the types of violations (such as debt bondage and land rights violations) that may be prevalent in palm oil supply chains in that jurisdiction.

Malaysia, for instance, has transitioned from a system in which the vast majority of palm oil estates were para-statal in the early 1990s to the vast majority being controlled by private companies in the early 2000s.<sup>375</sup> Indonesia also has a long history of palm oil production.<sup>376</sup> This means that, particularly for buyers entering into new business relationships in Indonesia and Malaysia, a significant number of land rights violations may result from long-standing and unresolved abuses, and some may involve the responsibilities of multiple actors or even the obligations of the government.<sup>377</sup> By contrast, palm oil expansion is more recent in Latin America, while in West and Central Africa, where oil palm originates, large-scale plantations have seen a recent spurt.<sup>378</sup> For example, several new large-scale palm oil plantation deals were announced in Cameroon in 2011 after Indonesia declared a moratorium on new palm oil plantations.<sup>379</sup> While this may mean there are fewer historical and ongoing rights abuses to address, the presence of potential rightsholders may also be less well documented and it is less likely that rightsholders have documentation of any claimed land rights.

Production models also differ across jurisdictions. Small- and medium-holder production is more difficult to trace than large-scale plantation production, although where there are supported smallholder schemes, production may be tied to specific plantations or mills. The types of smallholdings may also provide an indication of the types of associated rights violations, such as whether debt bondage is a likely issue, or whether small- or medium-holdings in fact cause or contribute to land and associated rights violations. For example, medium-holdings may involve many of the same types of rights abuses as plantations, and independent smallholdings may involve land conflicts where the smallholdings are held by non-local individuals.

In Indonesia and Malaysia, currently the two largest palm oil producing countries, the majority of production is by large-scale corporations, though there are still significant percentages of smallholder production. Both countries have several supported smallholder schemes. Indonesia has two main types of smallholder schemes. The first, known as nucleus-plasma, involves plantation companies developing smallholder plots around their main estate. The second is Koperasi Kredit Primer Anggota (KKPA), which allowed farmer cooperatives to borrow funds to start palm oil smallholder plots on lands surrendered by indigenous and local communities.<sup>380</sup> In Malaysia, there are several different smallholder schemes, including ones run by the Federal Land Development Authority (FELDA), the Federal Land Consolidation and Rehabilitation Authority (FELCRA), and Rubber Industry Smallholders Development Authority (RISDA). These three schemes support smallholders to develop palm oil or to switch to palm oil production.<sup>381</sup>

Other countries, particularly those that are seeing more recent palm oil expansion, have larger percentages of smallholder production. In the Congo basin, smallholders are the majority of palm oil producers, although low yields on farms and in processing mills mean that they only make up about one-third of actual production.<sup>382</sup> Additionally, unlike in Indonesia and Malaysia, the vast majority of palm oil mills are non-industrial facilities and operate independently of large companies.<sup>383</sup> In Peru, about 60% of palm oil production is on smallholder lands.<sup>384</sup> In Thailand, about 70% of planted areas are smallholdings, mostly held by migrant settlers who are encroaching on the traditional lands of indigenous peoples.<sup>385</sup> These production models may change over time, however, as governments allocate more land for palm oil concessions and smallholders face obstacles in getting formal land recognition.<sup>386</sup> In addition, the official statistics of the amount of land held by smallholders may be inaccurate, particularly where there are documented practices of companies controlling large plantations by buying up smallholder certificates (see Example from Peru, page 35).<sup>387</sup>

#### Legal regimes for protection of rights

An understanding of different legal regimes in different countries is not only important to ensure compliance with local laws and regulations, but to understand some of the underlying factors that may facilitate rights abuses in the palm oil sector. Some important laws to understand are those on the recognition and protection of indigenous peoples' and local communities' land rights, as well as laws governing requirements for obtaining concessions and licences, and for commencing palm oil operations.

Recognition and protection of indigenous and local communities' land rights is lacking in many countries, although some laws do exist. Currently in Indonesia, recognition of indigenous peoples' rights depends upon whether a group is legally recognised as indigenous by the local authority. A national Bill on the Recognition and Protection of Indigenous Peoples' Rights, which would set a process for the recognition of indigenous peoples' and their territories and for resolving land disputes, is pending adoption by Parliament.<sup>388</sup> In Malaysia, customary land rights are recognised through British colonial-era laws that are either still in place or incorporated into common law.<sup>389</sup> The Philippines has adopted an Indigenous Peoples Rights Act, the implementing regulations of which protect indigenous peoples' right to "accept or reject a certain development intervention in their particular communities."<sup>390</sup> Other laws contain protections for the right to consultation before projects are implemented in local communities.<sup>391</sup> Liberia passed a Land Rights Act in 2018 which protects the right of communities to own customary land.<sup>392</sup>

Local laws also differ in the requirements for obtaining concessions or licences, or for commencing operations. In Indonesia, companies are required to conduct, among other processes,<sup>393</sup> an environmental impact assessment (AMDAL) prior to being able to receive an environmental permit for the proposed development work.<sup>394</sup> The new Omnibus Law abolishes that requirement for certain projects, including large-scale agricultural development,<sup>395</sup> though the Omnibus Law itself has been declared conditionally unconstitutional.<sup>396</sup> Laws in Cameroon provide for some rights of consultation in the process of granting concessions and doing ESIA.<sup>397</sup> The Liberia Land Rights Act allows concessions predating the Act to remain in place, but any extension of the concession requires the free, prior, and informed consent of the customary owners of the land.<sup>398</sup>

#### Applicable international human rights treaties

While companies have responsibilities to respect human rights that are independent of those of States, understanding governments' international legal obligations is important to assessing areas of leverage to address human rights impacts. For example, Malaysia has not ratified the ICCPR, ICESCR, or CERD, all of which provide important protections for indigenous peoples and human rights defenders. Malaysia has, however, like other countries that produce palm oil, endorsed the UN Declaration on the Rights of Indigenous Peoples. The UNDRIP is not a binding instrument, but it describes what has been accepted as international human rights law relevant to indigenous peoples. While most palm oil producing countries have ratified ILO Convention No. 29 on forced labour and No. 182 on the worst forms of child labour, Malaysia and Thailand have not ratified Convention No. 87 on the freedom of association and right to organise, nor has Thailand ratified Convention No. 98 on the right to collective bargaining.

# 7 | Experiences with Human Rights Impact Assessments of Palm Oil

Conventional thinking about human rights, as it has evolved since the UDHR was adopted in 1948, places the obligation for upholding rights on States that have accepted these standards, first by joining the United Nations—and thereby subscribing to the UN Charter and the UDHR—and then by ratification of specific human rights treaties. State parties thus have a legal obligation as ‘duty-bearers’ to uphold the rights of ‘rightsholders’.

Since 2003, UN agencies have adopted a ‘Common Understanding’ on the need to adopt a Rights-Based Approach to development cooperation. This includes ‘assessment and analysis in order to identify the human rights claims of rightsholders and the corresponding human rights obligations of duty-bearers as well as the immediate, underlying, and structural causes of the non-realization of rights.’ The common understanding includes appreciation that: ‘people are recognized as key actors in their own development, rather than passive recipients of commodities and services... participation is both a means and a goal... both outcomes and processes are monitored and evaluated... analysis includes all stakeholders... focus on marginalised, disadvantaged, and excluded groups... accountability to all stakeholders.’<sup>399</sup>

The question of whether corporations as legal persons also have a responsibility to respect human rights and provide remedy for violations they cause or to which they contribute was not clearly addressed by the UN until, after years of deliberation, the UN adopted the UN Guiding Principles on Business and Human Rights.<sup>400</sup> As mentioned in earlier sections, these make clear that companies do have a responsibility to respect human rights even where this is not legally required by national laws. The UNGP also lays out the requirement that companies should carry out ‘due diligence’ with the aim:

*to identify, prevent, mitigate and account for how they address their impacts on human rights (Principle 15)..... [including] assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed (Principle 17).<sup>401</sup>*

Subsequently, there has been a proliferation of advice on how Human Rights Impact Assessments (HRIA) should be carried out. In this study we have drawn on the numerous guides to HRIAs developed by specialised agencies and NGOs.<sup>402</sup> The following common elements are brought out by these guides. Measures should be taken so HRIAs ensure participation, non-discrimination, empowerment of rightsholders, transparency and accountability. Best practice requires that assessment teams should thus include local researchers (including women field researchers), be inclusive to ensure broad participation, and take care to ensure the involvement of women, vulnerable groups and marginalised sectors of society. Where possible, assessments should benchmark the pre-project situation and should look at both the positive and negative impacts of a supply chain and related business operations, financing, investment and development activities. Validation of data and allegations should be ensured through the collection and evaluation of corroboratory information, multiple sources of evidence and triangulation, using usual human rights investigation standards. Information, assurances or allegations from the single sources should be clearly identified as uncorroborated. Measures should also be taken to ensure anonymity of any and all interviewees that request it, to protect informants and avoid repercussions. HRIAs should also identify the relative severity of actual and potential violations and make recommendations on how impacts can be prevented or at least mitigated and harms remedied.

With respect to the palm oil sector, it is important to recognise that some of the key human rights requirements—such as fair land acquisition, free, prior and informed consent, respect for customary rights, workers’ rights, gender and non-discrimination - have been embedded in the Principles and Criteria (P&C) of the Roundtable on Sustainable Palm Oil (RSPO) since 2005 and these requirements have been gradually cemented in updated versions, including requirements for companies to adopt human rights policies and implement measures to protect human rights defenders and whistle-blowers.<sup>403</sup> RSPO member companies seeking to open plantations are required to carry out environmental impact assessments and participatory social impact assessments, as well as High Carbon Stock and High Conservation Value assessments, all prior to land clearance. Assessment of compliance with the requirements of the P&C is tasked to accredited certification bodies. However, the RSPO makes no requirements for Human Rights Impact Assessments as such.

## 7.1 Actual assessments of the palm oil sector

This study has identified only seven HRIAs, and one human rights risk assessment (HRRAs) framed by the UNGP which have been carried out in the palm oil sector and which sought to directly interview rightsholders.<sup>404</sup> These were carried out by NGOs, CSOs and independent national institutions, but they are useful models and hold important lessons for downstream company and financial institution supply or value chain HRIAs (as will be discussed in section 8).

In 2014, the Indonesian Institute for Ecosoc Rights (IER), working with the Palangkaraya-based Commission for Justice, Peace and Integrity of Creation (JPIC) and Lembaga Kebudayaan Dayak, an indigenous peoples' organisation, carried out a very detailed examination of the palm oil sector in three districts of Central Kalimantan.<sup>405</sup> In 2017, the Dutch trade union, CNV, published a detailed study of labour rights in two palm oil operations in Sumatra,<sup>406</sup> and the US NGO, Nomogaia, published a report on the performance of one of Equatorial Palm Oil's operations in Liberia.<sup>407</sup> The following year, the Danish Institute for Human Rights published a detailed labour rights assessment for Nestlé of the situation in Golden Agri Resources' operations in North Sumatra,<sup>408</sup> and the Dutch organisation, Profundo, commissioned by RSPO, carried out a study of labour rights in four provinces in Sumatra and Kalimantan.<sup>409</sup> This was followed, in 2019, by the publication of a study by Human Rights Watch and the Indonesian national indigenous peoples' alliance, AMAN, on the human rights impacts of oil palm plantations on indigenous peoples in Indonesia,<sup>410</sup> which Human Rights Watch followed up with an exposé of other land rights conflicts in 2021.<sup>411</sup> An academic study, published in 2021, also examined the impact of oil palm development on children's rights.<sup>412</sup> Finally, also in 2021, Forest Peoples Programme working with the Indonesian NGOs Yayasan Masyarakat Kehutanan Lestari and PROGRESS, published the findings of a detailed review of human rights in 8 palm oil-impacted villages in two districts of Central Kalimantan,<sup>413</sup> framed by their piloting of Jurisdictional Approaches to palm oil certification.<sup>414 415</sup>

Taken together, the findings of these eight HRIAs are sobering. They reveal the systematic abuse of human rights across the sector, aligned with human rights impacts described in section 4. The very detailed study by IER and colleagues revealed a pattern of purposeful land grabbing in Central Kalimantan, whereby Dayak customary lands were taken over by the companies without sharing adequate information and with little or no compensation. Communities lost the majority of their arable lands. Sacred sites and cemeteries were bulldozed, and protests were suppressed by paid thugs and security services. These impacts not only violated individual and collective property rights, but also peoples' right to their culture, severely affecting their ability to continue rituals, religions and to sustain their traditional ecological knowledge. Without access to fisheries, farmlands and forest products like wild fruits and medicines, communities were deprived of their livelihoods and means of subsistence and obliged to depend on wage labouring and store-bought processed foods.<sup>416</sup>

The HRIA carried by Forest Peoples Programme and colleagues also in Central Kalimantan seven years later showed no improvement. Exactly the same routines to take over lands were still being pursued by the oil palm companies with the same human rights consequences. Customary land rights were not respected, nugatory compensation was paid for the expropriation of farmlands, adequate information was not provided and there was no free, prior and informed consent.<sup>417</sup> In Seruyan district, only two of 32 companies had provided legally required smallholdings, meaning that communities deprived of lands faced precarious livelihood options. The local government noted that there were some 300 land conflicts in the Seruyan District alone.<sup>418</sup> According to Human Rights Watch and AMAN, indigenous peoples in Indonesia number some 50 to 70 million people, making up about a quarter of the country's population. Their HRIA illustrated how land expropriation in favour of palm oil development without meaningful consultations or compensation, let alone FPIC, is common across the archipelago and this has negatively impacted these peoples' rights to their forests, lands, livelihoods, food, water and culture.<sup>419</sup> The follow-up HRIA by Human Rights Watch reveals that migrants in West Kalimantan, who were relocated under the Government's Transmigration programme, are also losing land to oil palm plantations.<sup>420</sup> Framed as a risk assessment rather than an impact assessment, Nomogaia's research on EPO's estate in Liberia found serious or probable risks of violations of property rights (land), as well as environmental harms.<sup>421</sup>

In terms of the core labour conventions, the studies also uncovered systematic violations. Nomogaia's study identified risks of child labour and of violations of safe working conditions, free collective bargaining and just remuneration among workers.<sup>422</sup> The Institute for Ecosoc Rights study revealed: the loss of traditional occupations; the lack of protection of worker's rights; an absence of opportunities to organise as trade unions and engage in free collective bargaining; bad working conditions; high occupational risk with low health and safety provisions; pay below the minimum wage; lack of social security for workers who were unfairly retained as temporary workers and; potential

situations of forced labour. Female workers, often employed as sprayers, were provided inadequate protective clothing and were not allowed maternity or menstruation leave.<sup>423</sup> CNV's study of workers' situations in Riau, Sumatra, in the operations of two RSPO member companies, Wilmar and Sime Darby, concluded that these 'RSPO-certified palm oil companies structurally violate the labour rights of their workers.'<sup>424</sup> The study revealed: abuse of child labour; workers forced to carry out unpaid overtime; discrimination against union members; absence of free collective bargaining; pay below the legal minimum wage and; poor health and safety. Women workers were also found to suffer inadequate provisions for maternity and menstruation leave and also to be paid below the legal minimum wage.<sup>425</sup> The labour rights assessment by the Danish Institute of Human Rights of the operations of another RSPO member, Golden Agri Resources, in Sumatra also found: low pay; workers being obliged to work overlong hours; absence of health and safety provisions, notably in mills and; lack of grievance mechanisms. In some cases, workers did not enjoy the right to freedom of association and free collective bargaining. The study also uncovered some cases of exploitation of child labour and widespread use of unpaid family labour to help contracted workers achieve their targets.<sup>426</sup> ProFundo's study for the RSPO identified 'nine prevalent labour issues in Indonesia's palm oil sector, namely: child labour, forced labour, discrimination, unethical hiring and contracting practices, insufficient income and income insecurity, lack of freedom of association and collective bargaining, unfair targets and insufferable working hours, unhealthy and unsafe working conditions, and a lack of gender equality and social protection for women.'<sup>427</sup> Finally, the HRIA carried out by Forest Peoples Programmes and partners uncovered the same suite of problems. The study also carefully reviewed the existing laws and found that almost all these violations of workers' rights are illegal, highlighting the problem of lack of enforcement capacity and the impunity of palm oil companies. A pervasive problem revealed by these studies is that a majority of long-term workers are illegally retained as casual workers with limited rights and security.

**"Dayak customary lands were taken over by the companies without sharing adequate information and with little or no compensation. Communities lost the majority of their arable lands. Sacred sites and cemeteries were bulldozed, and protests were suppressed by paid thugs and security services. These impacts not only violated individual and collective property rights, but also peoples' right to their culture, severely affecting their ability to continue rituals, religions and to sustain their traditional ecological knowledge."**

## 7.2 Challenges

These human rights impact assessments were tailored to their specific contexts and circumstances, and all had to adjust to the sensitivities of both companies and rightsholders, which required the teams making challenging practical and ethical judgements about what methods to use and what information had to be suppressed.

Permissions: Notably, these experiences with HRIAs pursued very different approaches in the way they dealt with producer companies. Profundo, for example, which was contracted by RSPO to carry out its review, sought the permission of the companies before making visits. The result was that the majority of RSPO member companies declined to be assessed. In the end, only after assurances were given that the identity of the companies would be suppressed, were four RSPO member companies prepared to agree to be assessed.<sup>428</sup> In the case of the HRIA carried out for Nestlé by the Danish Institute for Human Rights and TFTI, the research was developed in close liaison with Golden Agri Resources (GAR), sites were selected with GAR involvement and the draft text was also shared with GAR management before being finalised and released. Even so, wide stakeholder engagement was achieved and while management was aware of who was being interviewed, nearly all interviews themselves were undertaken out of earshot to protect interviewees from repercussions.<sup>429</sup>

Most of the other assessments were purposefully carried out without companies' express permission in order to ensure independence, generate confidence with interviewees and to protect the identity of informants.<sup>430</sup> The risk that there might be reprisals against interviewees was reduced by assuring anonymity. The downside of this approach was that it restricted interviewers from having access to plantation workers housed in estate cantonments under company supervision.<sup>431</sup>

The Institute for ECOSOC Rights (IER), as well as seeking to carry out independent interviews in the communities, did also seek company permission to interview estate workers. However, they found that only a few companies would allow this, subject to the interviews being carried out with company staff present, which severely limited what could be discussed. IER also noted difficulties getting the confidence of villagers to speak out even when company management was not present. As they explained:

*Conflicts between community members, conflicts between the local people and the local government, as well as conflicts between people and the corporations have created an atmosphere of insecurity and made it difficult for people to speak openly to outsiders about oil palm plantations. Some communities and individuals even refused to be interviewed within the borders of their village. They only agreed to be interviewed and to have a discussion outside their village, because they were afraid that the so-called 'preman' (thugs) hired by the corporations would terrorize them if it was found out that they were speaking to outsiders.<sup>432</sup>*

The HRIA conducted by Forest Peoples Programme was carried out through independent interviews in eight villages without seeking companies' prior permissions. This did make it hard to interview many migrant estate workers living in the cantonments. The District Governments of Seruyan and Kotawaringin Barat also helped the researchers develop schedules for complementary interviews with 18 companies. However, only one company agreed to be interviewed.<sup>433</sup> The final report had to be redacted to disguise the names of villages, villagers and even the companies involved in order to protect those involved from repercussions.<sup>434</sup>

Access: Even when prepared to travel without express company permissions, some human rights assessors have faced problems accessing villages within the estates, as companies regularly fence off their plantations or control access through guard posts. Even the villagers themselves living within these estates can face problems getting to and from their farms, accessing markets and regional centres and getting to and from clinics, schools and other services.<sup>435</sup>

Sampling and verification: Conventional human rights research derives part of its findings from multiple testimonies, in which allegations of abuses are recorded in interviews. The aim is then to cross-check and triangulate findings through further interviews with other parties witness to the same incidents. Such face-to-face methods through one-to-one interviews and focus group discussions generate far more insightful findings than statistical surveys but are time-consuming, with the result that sample size of all the surveys reviewed were relatively limited. This does lessen the reliability of the findings for identifying statistically valid trends but provides for much more secure findings in terms of a burden of proof (see Section 8). All of the studies noted above adopted the face-to-face approach rather than broadcast statistical surveys.

Reprisals and protection: A major consideration of all these HRIAs was how to ensure that interviewees or informants providing sensitive information would not be subject to reprisals. This was especially challenging in cases where company personnel accompanied researchers. Assurances that information will be reported anonymously in final reports is one important element but did not reassure all interviewees. Carrying out interviews in ways that fully protect identities is hard in community settings where everyone can see who is being interviewed and where it is the norm of social life for visitors to wander in and out of other people's homes. In community meetings and focus group discussions, the risk that company-paid informants would leak information back to the companies was noted.

Gender balance: All these HRIAs made provisions to ensure the participation of women, by including women researchers in the field teams, and some also took steps to convene special women-only focus groups discussions to give women more confidence to share their experiences and concerns. Nevertheless, despite these efforts, most of the studies admitted that fewer women than men participated and there was notable hesitancy among women to share.

**Information:** A common problem faced by these assessments was the reluctance of government officials to release basic information about the extent of company leases, the overlaps with community lands and the status of legally required social and environmental impact assessments. Both IER and FPP found that government officials preferred to make generic or unspecific comments rather than answer direct questions.

### 7.3 Methodological Lessons

These experiences with HRIAs reveal the real difficulties that exist in the palm oil sector that prevent a transparent examination of the human rights situation and social conditions of communities, workers, women and other rightsholders. Even after decades of ‘naming and shaming’ by NGOs, the proliferation of suits, complaints and challenges through courts, grievance mechanisms, UN treaty bodies and other tribunals, there remains strong resistance to sectoral reform and improvements in corporate conduct, which is slowing any transition from ‘naming and shaming’ to ‘knowing and showing’.

Notwithstanding, there are some clear lessons that emerge from these experiences, most of which reaffirm the general advice of existing HRIA guidance. To be useful, HRIAs must be carried out independently, which means the investigation teams need to be adequately resourced, able to travel and provide for themselves *without* the use of company transportation and accommodation, free from the accompaniment and scrutiny of company staff and security personnel. HRIA teams also need to have editorial autonomy, act transparently, share and validate draft findings with rightsholders and publish the analysis and results. Researchers have to make conscious efforts not to be exclusionary, to be gender inclusive and openly participatory, as well as protecting identities and assuring anonymity. Specific provisions are needed to protect interviewees from reprisals. Findings should be validated by sharing the drafts back with interviewees before final publication. Independent efforts to interview company and government officials should also be made, although the reality is that many companies routinely refuse such. Most studies find that literature reviews and the collection of basic government data helped prepare the groundwork, while proper legal analysis greatly assisted in the framing of recommendations, by showing which problems result from inadequate laws and standards and which from lack of enforcement.



Forests razed for oil palm plantations, affecting the ancestral territory of the Shipibo-Konibo people of the Santa Clara de Uchunya Indigenous community. Ucayali, Peru. 2021



Community forests in Santa Clara de Uchunya, Ucayali, being burnt down by land invaders in an area under significant pressures from aggressive oil palm expansion

## 8 | HRIA methodological framework and practicable tools for downstream companies and investors

This section presents a methodological framework and some principles and practicable tools for supply chain HRIAs, informed by the earlier sections of this report and by some of the many sources of guidance for corporate HRIAs that have been published over the past twenty years.<sup>436</sup> However, before doing so, it is important to clarify the differences between HRIAs and human rights risk assessments (HRRAs) as well as human rights due diligence (HRDD). While related (and while definitions of each may vary and overlap in parts),<sup>437</sup> – they are distinct in their focus.

HRIAs and HRRAs are assessments that can be used by companies to carry out HRDD, which is a continuous process that companies must undertake to “prevent, mitigate and account for how they address their adverse human rights impacts.”<sup>438</sup> HRDD’s focus is to “proactively manage potential and actual adverse human rights



impacts”.<sup>439</sup> HRDD involves four key steps: identifying and assessing actual or potential adverse human rights impacts that a company may cause, contribute to, or be linked to; addressing those impacts; tracking the effectiveness of measures taken to address those impacts; and communicating how impacts are being addressed.<sup>440</sup> HRIAs and HRRAs are sometimes thought of as one-off assessments that capture human rights impacts at particular moments in time, while HRDD is thought of as an ongoing process that may involve multiple HRIAs or HRRAs. As such, HRIAs and HRRAs are tools that can help companies and financial enterprises, including investors, implement their duty to carry out HRDD. HRDD requires the establishment of internal systems within a company that can manage its human rights impacts and risks, and these same systems may, once established, assist in carrying out proper HRIAs (see steps for supply chain HRIA below).

The primary focus of HRIAs—which can be focused on particular operations, sites, geographies, or supply chains—is on the impacts on rightsholders (actual and potential rights outcomes) and how they can be prevented, mitigated, and remedied, whereas HRRAs are a form of rapid assessment that often focuses on or include reputational and liability risks for companies. According to Nomogaia:

An HRRAs ... is a “snapshot” assessment, considering an operation at a particular point in time, while taking into account past actions and anticipating likely risks. It is designed to be particularly helpful for potential lenders, partners and equity investors doing their own human rights due diligence on a potential investment... [I]t is not designed to reach a final judgement on all human rights issues it uncovers. For some issues, it does identify and articulate clear human rights impacts. For others, either the existence of the impacts, their extent, or their connection with the business operation will be uncertain.<sup>441</sup>

The distinction between HRIAs and HRRAs reflects a fundamental tension between protecting the interests of rightsholders and minimising investment risks to companies respectively. This distinction is apparent in the TNFD’s mission, which combines elements of both of these:

“Our mission: To develop and deliver a risk management and disclosure framework for organisations to report and act on evolving nature-related risks, with the ultimate aim of supporting a shift in global financial flows away from nature-negative outcomes and toward nature-positive outcomes”.<sup>442</sup>

Risk management is framed as a means to the ultimate aim, which is defined in terms of a shift in outcomes (including human rights outcomes). Therefore HRIAs, with their focus on documenting rights outcomes and generating recommendations on how to remedy negative outcomes are essential for working towards this aim. They provide the depth of information needed by investors and downstream companies to fully understand the negative human rights outcomes of their suppliers’ operations, and to take actions to address them.

## 8.1 Steps in a supply chain HRIA

The principal steps in a supply chain HRIAs are outlined below. They commonly involve mapping supply and investment chains, mapping and identifying rightsholders, tracing products (in this case, palm oil) up the chains to the site of production, evaluating human rights-related policies and procedures at all stages along the chain, and carrying out assessments of rights outcomes on the ground. The emphasis and recommendations resulting from this process may vary depending on the scope and purpose of the HRIA. For example, a supply chain HRIA done to determine whether to enter into a relationship with a new supplier might examine in more depth a supplier’s human rights policies and procedures and performance in order to make recommendations about how the downstream company or financial service provider might try to create leverage to address identified impacts before entering into a new relationship, e.g. via human rights and environmental preconditions for starting a business relationship. By contrast, a supply chain HRIA done in response to specific allegations of abuse will have to emphasise measures that must be taken to evaluate and address identified rights abuses. Regardless, it must be reiterated that the assessment of rights outcomes on the ground is the core element of effective HRIAs and the main focus is typically on upstream operations, where there is the greatest potential for rights impacts, while supply chain HRIAs must consider rights outcomes at all points in the chain.

### ***8.1.1 Establishing a human rights impact assessment team and developing a plan***

The first step is that the investor or downstream company appoints an independent interdisciplinary team to carry out or commission the different elements of a supply chain HRIA team. Collectively, the team needs to have expertise in human rights law, in supply chain analysis, in anthropology or a related qualitative social science discipline, and in the relevant sector (e.g., palm oil) and countries. This means that for supply chains that reach across more than one country, separate teams or team members may be needed for each of them. Expertise in GIS is also useful for assessing impacts on customary lands, and if the HRIA is to be part of a wider assessment process that also looks at environmental impacts, at least one senior team member needs to have a good overview of both social and environmental issues to ensure there is appropriate integration between them. The company or business conducting or commissioning the HRIA should ensure that the assessment team is adequately resourced and has sufficient independence and institutional backing to ensure the cooperation of other divisional staff and of suppliers, and to report the results objectively without fear of negative repercussions, even when their findings are negative.<sup>443</sup>

### ***8.1.2 Desk-based scoping: assembly of relevant information<sup>444</sup>***

The assessment team carries out an initial desk study to assemble all readily available information on the following. As this information is assembled, the assessors identify gaps and areas of obvious concern so that these can be investigated in more detail in the subsequent steps:

- i. The business's supply / value chains: what companies are involved, what their operations are and how they relate to one another, where their operations are located and what information is available on their human rights and social track record overall and in specific cases. This study should especially aim to identify independent sources of information and evidence on the same suppliers, business partners and/or portfolio clients
- ii. The business context, including all available information on the human rights-related policies, commitments and operational procedures of the company, its clients and business partners, and, where applicable, its suppliers and/or investees and subsidiaries in the supply and value chains under assessment. This includes details of subscription to any certification schemes and other voluntary standards, copies of the assessment and audit reports, and copies of any complaints to certification bodies as well as copies of any HRIA or ESIA studies that the supplier or business partner may have undertaken or commissioned. Additional available information should also be assembled on human rights outcomes or problem areas (see i above).
- iii. The general political, security, socio-economic, and cultural context in the different countries and geographical locations and sub-national jurisdictions covered.
- iv. The human rights context, including a sectoral analysis and an applicable law assessment. A distinguishing feature of HRIAs is that the assessment criteria must be set with reference to provisions in international laws, norms and standards, and companies need to go beyond national legal requirements and local jurisdictional norms where these are less stringent than international requirements. An applicable law assessment sets out the relevant international requirements and identifies those that have been ratified by the country concerned, together with information on relevant national and subnational laws and policies and their implementation.<sup>445</sup> Particular attention should be given to gaps, shortcomings and contradictions in local legal frameworks and defects in enforcement practices in relation to respect for human rights.
- v. The rightsholders and relevant stakeholders who may be affected or involved. This applies to all stages of the chains. Rightsholders affected by upstream operations commonly include local people whose customary lands and resources may be impacted, including indigenous peoples. The rightsholders in downstream and midstream operations may be mostly company workers.
- vi. For complex supply chains it may not be practicable to assemble information on all companies, issues and locations in a single exercise, and therefore the UN Guiding Principles recognise that it may be necessary to prioritise and assess different aspects in turn. Some of the factors to consider in setting priorities are the severity of human rights impacts, their reversibility and how this is likely to change if there is a delay, the likelihood of further abuses and harmful impacts while they remain unaddressed, and the company's leverage over the actors who need to be involved in addressing them.<sup>446</sup> However, they emphasise that all impacts must be addressed within a reasonable timescale.

### ***8.1.3 Mapping supply and investment chains and assessing traceability***

Mapping the companies involved in supply and investment chains is not always straightforward, partly because of lack of transparency about corporate parent-subsidiary structures and the existence of ‘shadow companies’ (see section 2). Even when all companies have been successfully identified, traceability - the potential to trace palm oil along the chain to the site of production - is extremely challenging, in part because information on plantations is often not publicly available and many plantations have no legal permits in place (see section 2).<sup>447</sup> Mapping smallholder production is even more challenging. However, two useful sources of information that could be built upon in the future are the RSPO’s ‘identity preserved’ supply chain certification model (see section 2.8) and the Universal Mill List<sup>448</sup> (see section 2.4).

The identity preserved supply chain model is one of four models used by the RSPO for supply chain certification, and it is the only one that makes it possible to trace palm oil to the site of origin. Information can be accessed through the RSPO’s platform PalmTrace.<sup>449</sup> However, identity preserved certification is only effective if individual companies carry out reviews of their suppliers’ operations, engage with affected rightsholders and take adequate measures to remedy any human rights violations that surface from on-the-ground spot checks. It cannot be assumed that this is the case for RSPO-certified companies because of the structural flaws and conflicts of interest in the certification audit system. Addressing these flaws in certification systems would greatly simplify supply chain HRIA for certified companies.

The best option currently available for map production sites is to identify the mills and map the mill locations. Plantations are usually within 100 km of the mill they supply because of the need to process fresh fruit bunches without delay. The Universal Mill List (UML)<sup>450</sup> was created in 2018 by the World Resources Institute, Rainforest Alliance, Proforest and Daemeter to improve palm oil traceability and contains information on some 1,815 mills across 26 countries, each of which is assigned a unique identifier. The information, which is based on data from processor companies, traders and consumer goods manufacturers, the RSPO, FoodReg, and downstream companies such as Unilever and Mondelēz International, includes each mill’s name and precise location (verified by analysis of satellite imagery) along with the name of the corresponding company and palm oil group. Several large palm oil companies use the UML in their own reporting, which greatly simplifies mapping of their upstream supply chains. Clearly this database is very far from comprehensive in coverage as yet, but considerable progress has been made in the four years since its establishment and it has the potential to provide a much more comprehensive source of information.

### ***8.1.4 Assessing human rights-related policies and procedures***

Human rights-related policies and operational procedures should be assembled for all companies along the supply chain, and where the required policies and procedures are absent or inadequate, suppliers should be required to develop or revise them. Existing policies and procedures may reflect the requirements of any voluntary standards to which each company subscribes, in which case they will need to be evaluated against international human rights law and standards for relevance and coverage. The scoping exercise on the human rights context and the applicable law assessment provide a reference framework for this evaluation.

Where negative impacts on rightsholders are revealed during the next stage of the assessment, a more in-depth evaluation should be carried out of whether policies and procedures are effectively implemented by business partners, clients, suppliers and other connected supply chain actors. The assessment should be based on independent sources of information, including information obtained from rightsholders, as well as information provided by the company, and should include interviews with company management staff and workers. A breakdown of the issues that should be assessed for each area of human rights is set out in section 8.2.3.1. Carrying out this more detailed evaluation can help to generate recommendations on how to prevent rights violations from recurring. For example, DIHR’s assessment of Nestlé’s palm oil supply chain in Indonesia revealed that even for policies that were in place, the levels of awareness, training and resourcing among company staff were grossly inadequate.

## Case study: DIHR's labour rights assessment of Nestlé's palm oil supply chain in Indonesia<sup>451</sup>

DIHR assessed labour rights in the palm oil industry in Indonesia for several stages of the supply chain (palm oil refinery, processing mills and palm oil estates, collecting and sorting sites and smallholders). The study consisted of a desk review, observation and interviews with company management staff and workers, and with potentially affected communities and external stakeholders.

The assessment report presents findings for each stage of the supply chain in turn, through narrative reporting. For upstream operations (processing mills and palm oil estates) there are separate subsections on management systems. There were few written policies and procedures in place, they were inadequately communicated to workers, and there was insufficient resourcing and training for staff responsible for their implementation. Management staff at the estates were not aware of key Indonesian labour regulations, nor of the company's Social and Environmental Policy, and they did not act on known violations of labour policies.

### *8.1.5 Assessing impacts on rightsholders and making recommendations on how to address them*

A defining feature of HRIAs is that they must be based on direct consultation with rightsholders, and therefore they must also include planned and organised fieldwork. The scoping study should have gathered reports from any previous HRIAs or other field assessments, and where these exist, they should be evaluated against a set of clear criteria to determine whether they are sufficient or whether supplementary fieldwork is needed, and if so, where and why. Mei and Perram<sup>452</sup> give some useful pointers on what to look for when reviewing reports from pre-existing HRIAs, and these are also useful when designing a fresh HRIA. They include a list of potential red flags that could indicate either that the assessment methodology was not sufficiently robust or detailed (for example, if there was only one brief field visit or if written questionnaires were the sole method of consultation), or that the FPIC process was inadequate (for example if there is a lack of information about how rightsholders were identified and informed or about who exactly was consulted).

If no such reports are available, or none are considered to be of sufficient standard, a full field study or a set of studies must be commissioned. This is most urgent where there are allegations or other information suggesting that there may be potentially severe human rights impacts and risks of further harm. The first step is usually a supplementary desk study to gather more detailed information on the local and national context, including the following:

- Collection of basic government, scientific and other data on the study site;
- Assembly of a list of the local rightsholders who may potentially be affected, including any local communities who are present in the area and settlements of workers on plantation estates;
- A supplementary analysis of applicable national and subnational laws and their implementation.

The supplementary legal analysis should inform the framing of the assessment and is useful in the generation of recommendations, including by showing which problems result from inadequate laws and standards and which from lack of enforcement.

During HRIA fieldwork, with adequate safeguards in place for human rights defenders and community members (Section 7 above and below), rightsholders in each potentially affected community or settlement should be consulted and ideally consultations should also be held with company staff and with other stakeholders. The conventional approach is to use qualitative, open-ended methods such as in-depth and semi-structured interviews, community meetings and workshops, and focus group discussions, and all the palm oil-related HRIAs examined in this report take this approach. The experiences and perspectives of rightsholders are collected in the form of testimonies. These can be cross-checked and supplemented through further interviews with other parties and other forms of data, such as maps of community lands, documentary evidence of inadequate consultation pro-

cesses, wage or payslips, police reports, and measurements of indicators of environmental pollution. These data can potentially be used as evidence in legal hearings. The insights generated from these qualitative methods also provide an evidence base for developing recommendations for remedial actions. Other methods that may be used include anonymous reporting systems such as suggestions boxes or, where appropriate, mobile phone apps and online portals, and structured questionnaire surveys, which can be used to explore what proportions and types of rightsholders hold different views or share different types of experience (but they do not produce the depth of insight that is generated by more qualitative methods). Each of these methods has strengths and weaknesses and it is often most effective to use a combination of methods. In practice, the details of the methodology need to be designed for each particular study, depending on the aims and scope, the characteristics of the study site, and the time and resources available. The box below gives an example.

### **Example of an HRIA field methodology: Human Rights Impact Assessment of Oil Palm Plantations in Kotawaringin Barat and Seruyan Districts Central Kalimantan Province, Indonesia<sup>453</sup>.**

This HRIA took a participatory approach to document positive and negative impacts of palm oil development in villages in Central Kalimantan, Indonesia. The fieldwork was informed by a detailed legal analysis and focused particularly on the human rights that are embedded in the RSPO Principles and Criteria, which are especially relevant for palm oil development. These were identified as the following types of rights:

- Procedural rights: consultation, participation, free, prior and informed consent
- Representational rights: rights to self-representation
- Property Rights: rights to lands and territories
- Labour Rights: core labour standards (inc. child labour, slavery-like practices etc)
- Rights to non-discrimination: gender justice
- Right to remedy: access to justice through both judicial and non-judicial procedures
- Freedom of movement: access to services (rights to health & education)
- Protection of Human Rights Defenders: criminalization and protection.

For each of these, a short guidance statement was prepared on the applicable international standards and lists of open-ended questions were prepared to guide consultations with companies, with workers and with communities. Basic information was compiled from government and NGO sources on each of the villages selected for the assessment. The methods used included community workshops, focus group discussions and individual interviews with community members, workers, and company staff, although only one out of five companies approached agreed to take part. The research team included local researchers, including a woman field worker who interviewed the women. Efforts were made to cross-check (triangulate) information, especially in cases of allegations of serious human rights abuses, and measures were taken to ensure anonymity of all interviewees that requested it, to protect them from repercussions.

Some challenges involved in assessing human rights impact on the ground (and generating recommendations to address them) that have been highlighted earlier in this report are related to accessing rightsholders and enabling them to speak freely (especially those living within the palm oil estates); making sure that they are not primed in advance by companies; ensuring their anonymity and protecting them from reprisals; enabling women to participate, and persuading companies and government officials to cooperate. These points lead to the following practical recommendations, most of which reaffirm the advice in existing HRIA guidance:

- Consultations with rightsholders must be gender inclusive and openly participatory, so that all rightsholders have an opportunity to be heard. Researchers have to make conscious efforts not to be exclusionary. Best practice requires that assessment teams should include local researchers, including woman field researchers.
- Consultations should be conducted in appropriate languages and information to

rightsholders explaining their rights and the purposes of the assessment should be culturally accessible. Use of translators must ensure prior checks to verify their independence and competence in local languages.

- Consultation with companies should be independent of consultation with rightsholders and specific provisions should be put in place to protect rightsholders from reprisals, including by protecting their identities and assuring anonymity of all interviewees that request it. The downside of this approach is that it can restrict interviewers from having access to plantation workers housed in estate cantonments under company supervision.
- Information must be cross-checked between different sources ('triangulated') to ensure accuracy and validity. Any information or allegations from the single sources should be clearly identified as uncorroborated.
- HRIsAs must be carried out independently of the company that is being assessed and assessors must have full editorial autonomy and transparency to share and publish findings. However, efforts should be made to interview company staff and government officials, although the reality is that many companies refuse to cooperate.
- Findings should be validated by sharing the drafts back with interviewees, and rightsholders should be consulted on the recommendations before finalisation and publication of the report.
- Where possible and appropriate, assessments should benchmark the pre-project situation and should look at both the positive and negative impacts of development.
- HRIsAs should also identify the relative severity of actual and potential violations and make recommendations on how impacts can be mitigated and harms remedied.

Once actual and potential rights impacts and the related local rightsholder concerns and grievances have been identified and recommendations have been made on measures to address them, businesses may need to set a list of priorities for actions, including immediate actions to address specific cases of rights violations and actions at a structural level to address systemic drivers of human rights impacts in the company's business models, strategies, relationships, policies, procedures and practices. It is useful to consider recommendations both in the short-term, to address the immediate impacts, and in the longer-term, to prevent impacts from recurring, and Mei and Perram give several examples of these two types of actions.<sup>454</sup> If a company continues to identify the same types of impacts repeatedly in spite of applying leverage to their suppliers to improve their human rights performance, then it may mean that they need to change suppliers. Alternatively, higher-level systemic changes may be needed in the way the company operates.<sup>455</sup>

### ***8.1.6 Reporting, addressing problem areas and setting up monitoring systems***

Reporting HRIA findings back to rightsholders in accessible formats and through appropriate channels (while taking care to ensure anonymity of individual informants) is an essential component of HRIA methodologies and can serve to open a dialogue for negotiations and lead to the development of collaborative approaches to monitoring and tracking change.

Publishing the findings is expected under both the UN Guiding Principles and the OECD Guidelines for Multinational Enterprises as an essential part of corporate accountability.<sup>456</sup> It is best practice to publish the full report, but if to do so would endanger some of the rightsholders, or if it would be counterproductive to negotiations to address rights abuses, a summary may be published as an intermediate step. However, its publication should not be delayed unreasonably.<sup>457</sup>

The HRIA report should include the following information:

- The rationale, aims and scope of the assessment, including the rights and thematic areas to be covered.
- The names of the authors and the source of funding.
- A description of the site or sites and the companies, communities and other stakeholders involved.
- A detailed applicable law assessment.
- Full details of the fieldwork methodology, including the duration and schedule of the

field visit or visits; the process of free, prior and informed consent, including measures taken to ensure inclusivity and gender balance; other ethics procedures, including to protect the identity of informants; the methods used, with appended details such as interview guides, questionnaires or workshop plans; sampling strategies and sizes; the final feedback and validation process; and a statement on the limitations of the study.

- The findings, which are typically reported in the form of narrative text interspersed with testaments (direct quotes) for each thematic area, framed by reference to international human rights laws and standards. The principal focus must be on (actual and potential) human rights outcomes but there may also be sections reporting on company policies and procedures, including those relating to ongoing corporate engagement with rightsholders and grievance procedures in place.
- A set of recommendations to address (prevent, mitigate, and remedy) problem areas and put measures in place for tracking their implementation and future changes in rights outcomes. Information should be included on how rightsholders were consulted about the recommendations and the views that they expressed, including areas where there was not a clear consensus. Monitoring should include both internal monitoring by the company concerned and periodic external evaluations.<sup>458</sup>

## 8.2 The use of human rights indicators and metrics

Environmental and social metrics (loosely defined as quantitative indicators) are commonly used in economic valuation and related techniques, including cost-benefit analyses and financial risk assessments. Their use is controversial for many environmental and social scientists because of the “radical simplification and brave assumptions”<sup>459</sup> that are involved and the potential for this to obscure or misrepresent the actual situation. On the other hand, decision-makers value metrics as a way of bringing priority environmental and social risks and impacts to their attention, and therefore metrics continue to be used widely.

Nonetheless, the use of human rights metrics is regarded by many human rights experts as problematic, for several reasons. First, while some aspects of rights impacts can be quantified and ‘measured’ against international standards<sup>460</sup> (such as the number of employees on different levels of pay or the hours that they are required to work), there is broad consensus that others cannot. Human rights impacts are fundamentally different from environmental impacts because they are grounded in the perspectives and subjective experiences of rightsholders,<sup>461</sup> and therefore they are not amenable to the same kind of standardisation and quantification. Second, summing rights impacts across individuals and groups, and across different types of rights contravenes the basic principles of international human rights law: that rights are indivisible and interdependent (they are all equally important and they cannot be separated) and that they are inalienable (they cannot be taken away). The latter means that every rightsholder who has suffered an abuse of a right has the right to remedy, regardless of whether they receive other types of benefits and independently of whether other rightsholders have also been affected, positively or negatively. The rights of one person cannot be offset against the rights of another and therefore it is difficult to justify quantifying rights outcomes and summing them.

There is widespread recognition of these issues, and the various guidance documents on human rights indicators call repeatedly for caution in applying metrics to human rights. Several sets of potential human rights indicators have been developed, but they are most often used for assessing managerial aspects (corporate policies and procedures) rather than outcomes.<sup>462</sup> One example where they are used in this way is SPOTT (originally named the Sustainable Palm Oil Transparency Toolkit), which reports on the transparency of companies about their policies and procedures on environmental, social and governance issues, but it lacks robustness because it relies solely on publicly available information (including self-reporting by companies).

## SPOTT<sup>463</sup>

SPOTT is an online platform assessing transparency of commodity producers, traders and processors (including of palm oil) based on their public disclosure. It covers organisational aspects, policies, and environmental, social, and governance issues. It has a set of 180 indicators for the palm oil industry, divided into three categories (organisational, policy and practice). Criteria 122 to 156 and 179 to 180 are directly concerned with rights and several other criteria are also relevant. Each indicator is rated on a 3- or 4-point scale.

### ***8.2.1 Terminology: qualitative and quantitative indicators and metrics***

There is considerable inconsistency in how ‘metrics’ and different types of indicators are defined, and this is a further obstacle to understanding the differences in the way they can be applied to human rights impacts compared to environmental and broader social impacts. The authoritative text on human rights indicators is the UN OHCHR guidance,<sup>464</sup> which defines indicators as:

*“Specific information on the state or condition of an object, event, activity or outcome that can be related to human rights norms and standards; that addresses and reflects human rights principles and concerns; and that can be used to assess and monitor the promotion and implementation of human rights.”*

This broad definition encompasses both numerical (quantitative) indicators and qualitative indicators. The OHCHR defines quantitative indicators and the data they generate as information in the form of ‘true’ numbers - counts, measurements along a numerical scale and percentages - and qualitative indicators and data as words, including named categories (including rating scales and rankings), which may then be assigned numbers for the purposes of analysis.<sup>465</sup> Other frameworks and methodologies classify all indicators that are reported as numbers as quantitative.<sup>466</sup> Moreover, the word ‘metric’ (or measurement) is sometimes used interchangeably with ‘indicator’ (including by the AFi) and sometimes more narrowly to refer only to quantitative indicators.

An additional source of confusion that can be particularly problematic in constructing unified frameworks for environmental and social indicators is the distinction between objective and subjective indicators. In environmental impact assessments, objective indicators refer to direct, usually quantitative measurements of environmental outcomes, such as species diversity, animal population size, or the concentration of chemical pollutants in groundwater. Subjective environmental indicators refer to indirect evidence of the state of the environment based on the opinions of respondents, are frequently equated with qualitative indicators, and are regarded as less robust. Thus objective, quantitative indicators are generally favoured over qualitative, subjective indicators. This makes sense for environmental impacts but these same criteria are commonly applied to social and human rights indicators, with the results that ‘objective’ quantitative indicators are prioritised. This is problematic, especially for human rights indicators, because rights outcomes and to a lesser extent wider social impacts are defined by the perceptions and experiences of the respondents, and therefore far from being inferior, ‘subjective’ indicators are critical.

### ***8.2.2 Criteria for quantitative and qualitative indicators: SMART, RIGHTS, CREAM and SPICED***

To address this problem, several sets of criteria for indicators have been developed as alternatives to the standard SMART criteria (Specific, measurable, attainable, relevant and time-bound), which do not easily apply to qualitative indicators because of the inclusion of a criterion for measurability. The alternatives include the OHCHR’s RIGHTS criteria,<sup>467</sup> CREAM criteria, which were developed for monitoring and evaluation of performance outcomes,<sup>468</sup> and SPICED criteria<sup>469</sup> (see box). The history of these different acronyms underlines the fact that the most appropriate approach depends partly on the nature, scope and priorities of the exercise. Where indicators are used for human rights, these alternative criteria are more appropriate than the standard SMART criteria.



## A world of acronyms: criteria for indicators

SMART: Specific, Measurable, Attainable, Relevant and Time-bound

RIGHTS: Relevant and reliable, Independent, Global and universally meaningful but also amenable to contextualisation and disaggregation; Human rights-centric, Transparent, timely and time-bound, and Simple and specific

CREAM: Clear and precise, Relevant, Economic, Adequate and Monitorable

SPICED: Subjective, Participatory, Interpretable and communicable, Cross-checked, Empowering and Diverse / disaggregated

### *8.2.3 Indicator frameworks*

Many HRIA toolkits and guides provide frameworks and guidance on how to develop a suitable set of indicators for a particular assessment, but few present lists of standardised off-the-shelf indicators. This reflects the requirements for human rights indicators to be adapted to the local context based on a prior applicable law assessment, and in best practice, on consultation with rightsholders. The frameworks divide human rights indicators into three groups:

- structural indicators relating to corporate policies about rights issues
- process indicators relating to operational procedures and their implementation
- outcome indicators relating to actual human rights impacts on rightsholders.<sup>470</sup>

Of these, structural and process indicators are relatively straightforward to define, whereas outcome indicators are more challenging and are more rarely used.<sup>471</sup>

#### **8.2.3.1 Structural and process indicators: corporate human rights policies and procedures**

Assessing structural and process aspects of human rights management systems is not essential to HRIA, which are concerned primarily with human rights impacts (outcomes). Moreover, it may not be possible to assess these aspects in any depth because, as was reported in section 7, many companies withhold cooperation in HRIAs. However, if it is done at all, it is essential to go beyond simply checking for the existence of different policies and procedures or the findings may be very misleading. The content of these documents and the level of implementation is also assessed. The table below presents a list of questions that can be used for this purpose, together with some notes on suitable methods and on the qualitative and quantitative reporting formats.<sup>472</sup> The table should be used for each right or group of rights in turn. Some aspects can be assessed directly by use of a simple checklist (indicators 1, 3, 5) whereas for others, qualitative data need to be collected and reported, which can then be summarised in numbers and categories if required. The list of questions may also be useful to companies simply as a checklist to identify actions that are needed in order to improve human rights-related management processes.

Draft list of questions, methods and indicators for use in assessing corporate human rights policies and procedures			
	Methods	Reporting in numbers or categories	Qualitative reporting categories
Is a policy in place?	Inspection of company documentation	Y/ N	Title of policy or policies
Does its content meet the requirements in international human rights law and good practice standards?	Inspection of company documentation and evaluation against applicable laws	Y/N	Textual summary
Are operational procedures in place for its implementation?	Inspection of company documentation	Y/N	Titles of operational procedures
Are the operational procedures adequate and appropriate?	Inspection of company documentation (evaluation of the written procedures against the policy) and interviews with staff	Y/N / partially / unclear	Textual summary
Have clear roles and responsibilities been assigned for their implementation?	Inspection of company documentation and interviews with staff	Y / N / partially / unknown	Textual summary
Are the company's staff aware of the policy and related procedure(s)?	Questionnaire survey of a representative sample of managerial staff and workers	Proportion of relevant staff who are aware of the policy and procedures (disaggregated into managers and workers)	
Do the company's staff fully understand what they need to do to implement the policy?	Qualitative interviews with a representative sample of managerial staff and workers	Proportion of relevant staff with different levels of understanding (expressed as rating scale)	Textual summary highlighting any aspects that are commonly not understood
Are policies and procedures being appropriately implemented?	Inspection of company records and targeted qualitative interviews	Y/N /partially / unclear	Textual summary, including accounts of specific cases and events
Are staff incentivised to implement procedures and report violations?	Review of company reporting systems, staff KPIs and incentive structures	Y/ N/ partially / unclear	Textual summary, including accounts of specific cases and events
Are actions taken when policies and procedures are violated?	Inspection of company records and targeted qualitative interviews	Y / N / Sometimes / unclear	Textual summary, including accounts of specific cases and events
Are procedures in place for monitoring effectiveness of the policy and related procedures?	Inspection of company records and qualitative interviews with managers	Y/N	Textual summary of procedures in place
Are mechanisms in place for monitoring outcomes to feed back into dynamic management systems?	Inspection of company records and qualitative interviews with managers	Y/N	Textual summary of procedures in place

### 8.2.3.2 Outcome indicators

Human rights outcome indicators were used in only two of the eight palm oil-related HRIs outlined in Section 7 of this report, and in both cases, they were used simply to summarise findings reported in the text. Both took the form of colour-coded tables presenting ratings for each type of rights outcome assessed, in one case on the probability and likely severity of impacts, and in the other on levels of company compliance with and action related to specific legal requirements. The use of ratings in this way is very effective in communicating information at a glance and highlighting areas of concern. However, it does not in itself add rigour or objectivity to the findings; the ratings are only as robust as the underlying qualitative data. Therefore, if indicators of this kind are used in reporting, it is essential that there is a full explanation of how they have been derived and a presentation of the underlying qualitative evidence.

## Nomogaia's human rights risk assessment of Equatorial Palm Oil in Liberia<sup>473</sup>

In this human rights risk assessment, actual and potential adverse human rights impacts were assessed for labour standards, livelihoods and health and property rights, based on a document analysis and interviews with company staff and local people. Performance on each aspect was assessed qualitatively and reported through a one- to three-page narrative report. In addition, each section included a colour-coded table summarising the findings, based on four- and five-point rating scales for each of the two standard dimensions of risk: the probability of impacts and the likely severity of impacts respectively. An adapted example is shown below.

Right to safe working conditions, right to health (adapted from Nomogaia, 2017)			
Right	Probability of impact	Severity of Impact	Rightsholders
Safe working conditions, health	Highly likely		Employees and sub-contracts

Probability ratings were based on an assessment of qualitative and quantitative evidence of risk. Severity ratings considered the number of rightsholders at risk as well as the degree to which their rights might be negatively affected.

The tables from the different sections were combined in a single multi-row table at the start of the report, which provided a concise summary of all sections, illustrating which rights issues are problematic.

## Profundo’s study of labour compliance in four RSPO certified oil palm plantations in Indonesia

In this study, the labour and social practice in each of four companies was assessed based on four core labour issues (child labour, forced labour, lack of freedom of association and right to collective bargaining and discrimination) and five “labour and social issues” (living wage, ethical hiring, responsible targets and working hours, gender equality, health and safety), each of which was further divided into sub-issues that were identified from the RSPO Principles and Criteria, ILO standards and other international norms, as well as from Indonesian labour laws. Each main issue is reported principally in text-based narrative, typically in sections from two to four pages long.

In addition, four-point rating scales were used to evaluate the company’s level of compliance (from very low to high) and level of action (passive, aware, active or improving) on each issue and sub-issue. The anonymised results are presented in tables at the end of each narrative section, in the form of the example below. Each table contains a textual summary of a series of specific points that are compared with specific legal instruments. There is also colour-coding reflecting the ratings. The tables are typically one to two pages long.

Company	A	B	C	D
Rating				
	“Workers’ targets are too high to cover within a 7-hour day ... this is not in compliance with MANPOWER ACT No. 13 of 2003, ART. 78”	“Plantation workers often work long hours to meet their targets without overtime compensation. This is not compliant with MOMT Decree...”	“Mill workers made to work several nonstop shifts up to 12 hours is not in accordance with MOMT Degree...”	“Lack of overtime compensation ... is not in compliance with the RSPO P&C 6.5, the MANPOWER ACT...”

Again, a composite table is presented near the start of the document giving a concise, accessible overview of headline findings across all nine issues that were included in the study.

### 8.2.4 Concluding points

In conclusion, the use of indicators and metrics is relatively straightforward for assessing some kinds of human rights outcomes – particularly those related to labour rights and working conditions – and for assessing policies and procedural aspects. Indicators can also be valuable as a presentational tool to highlight problem areas and set priorities, as long as full information is provided on how they have been derived from the data. However, the documentation examined in the preparation of this report presented no evidence that metrics or indicators are necessary in HRIAs, for which more in-depth qualitative approaches are most effective. Moreover, there are fundamental conceptual, ethical, and practical problems in applying metrics to many aspects of human rights outcomes. Therefore, the TNFD will need to take a flexible approach to incorporating information on human rights outcomes into its methodology.

# 9. Recommendations

This report has identified key internationally-recognised human rights that are regularly violated upstream in palm oil supply chains and has provided specific examples of the impacts that these violations have on affected groups of rightsholders. Further, based on a review of existing approaches to HRIAs as well as a sample of HRIAs done in palm oil supply chains, the report has set out a best practice methodological framework for such assessments and suggested options for measuring and reporting on human rights impacts and performance. The below seeks to pull out specific recommendations from the report's findings for 1) companies and financial institutions in forest-risk commodity supply chains generally and then for palm oil supply chains specifically and 2) the TNFD framework.

## 9.1 Recommendations for companies and financial institutions

The report highlights that although the international obligations to respect, protect, and fulfil human rights (such as customary land rights and other rights discussed in previous sections), and to provide remedy for any violations lie with governments, companies and financial enterprises in commodity (e.g. palm oil) supply chains have a responsibility to respect rights, take measures to prevent and avoid contributing to rights abuses, and to provide or incentivise remedies in case of violations. This means that each actor along the value chain must have appropriate human rights due diligence policies and procedures in place. This responsibility is, increasingly, being codified into national legislation requiring companies to conduct human rights due diligence. From the perspective of downstream companies and investors, such policies and procedures must include checks on the accuracy and reliability of HRIAs or other processes on the identification and addressing of impacts that have already been carried out by their suppliers and investees and, where these are inadequate, to commission independent verification studies and new community-level HRIAs. The below recommendations seek to assist companies and financial institutions to meet their responsibilities to respect human rights by identifying and addressing (i.e., preventing, mitigating and remediating) actual and potential impacts.

### General recommendations for companies and financial institutions in forest-risk supply chains:

Companies and financial institutions should:

- Have clear internal policies on respect for human rights throughout their operations, supply chains and portfolios, as well as clear implementation procedures and associated staff capacity to implement those policies;
- Mainstream human rights policies across all teams, and include human rights staff in operational teams in order to avoid internal conflicts between company sustainability and operational staff;
- Have clearly communicated policies for their suppliers, investees and borrowers requiring them to respect human rights in their operations and supply chains and incorporate these requirements in supplier and investee contracts.<sup>474</sup> In addition, such contracts could, for example, contain provisions requiring suppliers, investees and borrowers to: Report on its human rights due diligence policies and practices, including HRIAs undertaken by them;
- Have specific policies and procedures in place to protect human rights defenders;
- Notify all buyers/investors/lenders in the event of any incident, grievance, or allegation of a human rights violation connected to its value chain.
- Publicly disclose all entities in their corporate group, as well as other companies or corporate groups sharing the same beneficial owner(s).

As per the methodological framework presented in section 8.1, downstream companies and financial enterprises should take the following steps to carry out supply chain HRIAs:

- Establish a HRIA team with sufficient technical expertise, financial resources, and independence from the corporate structure and supply chain actors;
- Carry out a desk-based scoping of supply / investment chains; human rights policies and commitments of suppliers / investees; political, security, socio-economic, and cultural context, including any geographic differences relevant for rights impacts (see Section 6); possibly affected rightsholders; and human rights context;
- Map their supply and/or investment chains, potentially affected rightsholders and related traceability challenges;

- Critically assess human rights policies and procedures. This entails going beyond checking whether such exist, by evaluating their content, staff awareness, implementation, and whether clear responsibilities are assigned within companies for their oversight and follow-up;
- Assess impacts on rightsholders. Where robust community-level information is lacking, this step entails commissioning a fully independent community-level HRIA;
- Make recommendations for addressing rights violations, put protocols in place to ensure their implementation, and assess and track effectiveness of remedial measures and changes in rights impacts.

Disclosure and reporting on impacts and performance:

- There are fundamental conceptual, ethical, and practical problems in applying metrics to many aspects of human rights outcomes. Metrics or indicators are not necessary in HRIsAs, for which more in-depth qualitative approaches are most effective. Metrics should be used only where they provide clear add-on value to narrative reporting and monitoring – for example in flagging problem areas and setting priorities;
- Where metrics are used, the data on which they are based should be published in full, along with an explanation of how they were calculated;
- HRIsAs should disclose all companies in a given value chain. Where there are beneficial owners, these should also be disclosed. Full transparency is necessary to mitigate the problem of greenwashing, in which the same beneficial owners benefit from positive public images through their publicly-acknowledged corporate group(s) with a better human rights and environmental track record but commits numerous abuses through their shadow companies.

Companies and financial institutions should follow these key principles to guide best practice HRIsAs:

- Alignment with international human rights law: Assessment criteria must be set with reference to provisions in international laws, norms and standards;
- Independence: To produce robust, valid findings, HRIsAs must be carried out independently with editorial autonomy and transparency and with the resources and capacity to engage autonomously with rightsholders without company oversight.
- Verification: Companies may also seek independent third-party verification of the results of their HRIA findings;
- Inclusivity: Assessment teams should include local researchers, including women;
- Participation: HRIsAs should involve the effective participation of rightsholders. This includes consulting with rightsholders about the types of impacts to be assessed; obtaining data through face-to-face interviews and focus group discussions with rightsholders; validating the draft HRIA report with rightsholders before finalisation; and jointly making recommendations with rightsholders for addressing identified rights impacts.
- Triangulation of information: In order to ensure the accuracy and validity of findings they must be cross-checked with corroboratory information;
- Attention to security risks: Special provisions are needed to protect interviewees from reprisals, including protecting identities and assuring anonymity of all interviewees that request it;
- Mitigation and remediation: HRIsAs must set out clear recommendations developed together with, and validated by, affected communities for how to improve rights-situations; ensure non-repetition of rights-violations; and remediation of past rights-violations.

Recommendations specific to corporate and financial enterprises in palm oil supply chains:

“Downstream companies” can refer to companies at varying degrees of separation from upstream production processes and/or loan operations and investments. In the palm oil sector, vertical integration of production and marketing processes is common, and some companies control the production process at the plantation, mill, and refining stage. This means some of the same companies or corporate groups may be considered to be both upstream and midstream or even upstream and downstream companies. Financiers and investors are also commonly involved in upstream processes as financial capital is often required to fund operations such as plantations or mills.

In addition to the general recommendations above, which are relevant for the palm oil sector, the below sets out specific recommendations for companies and financial enterprises involved at different levels of, and in different capacities, in palm oil supply chains:

- All companies should disclose all suppliers (e.g., mills and plantations), buyers, and investors in their value chain.
- Downstream companies and financial institutions should require that the traceability of palm oil from the mill to the plantation is fully guaranteed. Care should be taken to ensure that this does not lead to shifts in demand that could harm smallholders. Downstream companies need to step up and share their efforts to identify the plantations and smallholder blocks supplying the mills from which they source palm oil.
- Where palm oil supply chains or investment portfolios are very diverse, companies and financial enterprises may need to prioritise their actions in the short-term to address the most serious human rights violations. HRRAs can be targeted to review the situations in problematic countries or regions or of upstream corporate groups with controversial reputations, as gleaned from media and NGO reports. However, companies need to be aware that reporting of violations is very uneven and depends on whether or not there is: freedom of speech and of the media; active and capable civil society organisations; rule of law and; safe spaces for rightsholders to speak out about violations.
- The process of identifying human rights impacts may entail providing funding for communities to enable community mapping of their lands to ensure clarity around land rights.
- Upstream plantation companies (with the support of downstreams and investors/lenders) should adopt policies to address underlying causes of exploitative labour conditions on plantations and mills. For example, they should abolish policies that tie payment of wages to unreasonable production targets, which contribute to child labour and other unpaid work.
- Upstream/downstream companies should establish inspection systems to monitor labour conditions on plantations and in mills, along with systems for enforcing the above-mentioned policies.
- Upstream/downstream companies should establish monitoring systems, including water quality monitoring, to track the environmental impacts of operations and set aside funding (e.g., environmental bonds) to remediate such impacts.
- Upstream/downstream companies and financial institutions should provide financial support to smallholders through subsidies or less onerous lending terms.
- Where violations and disputes are identified in their supply chains, downstream companies and financial institutions should first try to incentivise growers to address the violations and provide remedy. They may assist this by contributing to: independent HRRIAs; mediation efforts and; remedial action plans.
- Remediation for land rights violations can take different forms, including compensation and restitution of community lands by shutting down operations, but must always be agreed with affected communities.
- Downstream companies, investors and lenders should act together to exercise joint leverage over non-compliant suppliers, investees, borrowers or other clients.
- Downstream companies and investors should offer financial incentives to reward practices that respect human rights and penalize rights violations.
- Only where sustained efforts to address and remedy violations have failed, and following consultation with rightsholders, should downstream companies, investors or lenders resort to divestment and / or cutting sourcing from delinquent growers.

## 9.2 Recommendations for the TNFD

TNFD's efforts to date constitute one important step towards its aims of aligning economic activities with the SDGs and contributing to an integrated approach to sustainability reporting for market participants. That is, it has developed a framework to assist companies and financial institutions to take their impacts on nature into account when making business decisions. To fully achieve its aims, TNFD, however, must also contribute to the social dimension of sustainability, which is clearly captured in the SDGs' explicit grounding in the Universal

Declaration of Human Rights and international human rights treaties. As a next step, TNFD must therefore assist companies and financial institutions to address their human rights impacts by fulfilling their internationally-recognised responsibilities to uphold human rights. Failing to take an integrated approach to sustainability, and to environmental and social risks and impacts, would be a missed opportunity and grave mistake by this initiative, which already has extensive support, reach and credibility among financial market actors.

While TNFD aspires to align with the international human rights framework,<sup>475</sup> the TNFD framework beta v0.1 and v0.2 do not explicitly mention human rights. The degree to which people are considered in the framework is as dependants of nature and natural processes for specific benefits and their wellbeing. Further, in the TNFD framework beta v0.1 and v0.2, an 'organisation's'<sup>476</sup> impacts on nature are measured because of the potential risks and opportunities these impacts may entail for the organisation's financial stability and success in the short and long term, not primarily because these could directly negatively affect the lives, health and rights of communities and individuals. It is highly recommended that future elaborations of the TNFD framework goes beyond marginal references to 'social dimensions' and 'human wellbeing' by adopting a human rights-based approach at its core. To do so, TNFD should:

- Re-frame its overall aim: TNFD must shift from the current conceptualisation of business risks and impact, which takes the financial health of companies and financial institutions as a starting point and an end goal, to one that first and foremost concerns, and aims to eliminate, the risks and impacts to people and communities that experience them.
- Re-define the concepts of 'risk' and 'impacts': Flowing from the previous point, the definition of risk<sup>477</sup> must include an evaluation of the risk to people and communities from a company's and financial institution's operations, supply chains and portfolios, not solely risks to the corporate actors. The definition of impact<sup>478</sup> must similarly concern the impacts that a company's and financial institution's operations, supply chains and portfolios have on the human rights of people and communities.
- Integrate human rights in the LEAP (Locate, Evaluate, Assess, Prepare) approach: The responsibilities of companies and financial businesses to respect human rights should be explicitly incorporated into each step of the LEAP approach to understanding and responding to risks and impacts. E.g. this would entail integrating the organisations' human rights due diligence processes in LEAP by ensuring that they:
  - Locate their interface with communities as well as with nature (relating to L 1-4). For example, organisations must identify rightsholders in their operations and value chains.
  - Evaluate the risks and impacts for rightsholders as well as for nature from their operations and value chains (relating to E 1-4). This pillar of LEAP will benefit from the recommendations for HRIAs set out above. TNFD should make sure that indigenous communities and local communities play an important role assisting organisations to evaluate their impacts both on nature and human rights.
  - Assess existing and identify additional efforts to mitigate risks to and impacts on rightsholders in addition to their own organisation (relating to A 1-4).
  - Prepare to address the identified impacts on rightsholders and disclose steps taken towards this goal (relating to P 1-4).

Ensure effective participation of indigenous peoples and local communities (through women, men and youth representatives selected by the rightsholder groups themselves): It is key that TNFD respects, includes and listens to the voices and priorities of these rightsholders who, as seen in this report, frequently face negative impacts in commodity production and value chains. Particular attention must be paid to the security risks of human rights defenders, both in their ongoing defence of rights and nature on the ground and through their potential participation in international fora like TNFD.

Work towards the integration of qualitative methodologies in metrics/measurement: A future reorientation of TNFD towards a human rights-based approach will require that data and indicators used by organisations to measure and report on their risks and impacts are equipped to measure impacts on human rights. This means it will be important for TNFD to balance the need for overall methodological integrity against the need for flexibility in the use of indicators and metrics. To do this, it may be useful to introduce alternatives to SMART criteria that more easily span the divide between metrics and more qualitative approaches.



Broaden disclosure recommendations: Since TNFD seeks to respond to calls from market participants of a need for “a globally consistent baseline of sustainability disclosure requirements”,<sup>479</sup> it is important to include human rights reporting, which is already expected from companies and financial businesses as part of their human rights due diligence (e.g. in the UNGPs) and set out, for example, in the UNGP Reporting Framework and the AFI reporting and disclosure guidance.<sup>480</sup> Some initial considerations for how to integrate human rights in TNFD’s four pillar disclosure framework (see page 47 of the TNFD framework beta v0.1) are set out here:

- Governance: Organisations should disclose their operational policies and procedures for HRIAs and where the responsibilities lie within the organisation. This can include policies for non-compliance action protocols, setting out what a company or financier will do in practice on detecting non-compliance in their supply chain or portfolio.
- Strategy: Organisations should disclose the potential and actual human rights impacts identified in its operations and value chains.
- Risk management: Organisations should disclose what actions they are taking to manage (e.g. prevent, mitigate, and ensure remedy for victims of) the identified potential and actual human rights violations and report on the level of progress on the ground. This could include disclosure of engagement with suppliers/investees to address human rights impacts in their operations and/or supply chains.
- Metrics and targets: Organisations should disclose how they have measured their potential and actual human rights impacts.

Use its leverage to improve the implementation of commodity certification standards: While the TNFD framework is under development and before companies are able to fully implement all its guidance and recommendations, companies that are members of commodity certification schemes with relatively strong human rights principles and criteria (e.g. RSPO) would benefit in their HRIA efforts if well-documented structural flaws and conflicts of interest in such schemes were successfully addressed. TNFD should therefore use its leverage to push for this, e.g. by calling for fully independent quality assurance and audit systems and processes where payments are made into an ESCROW account and an auditor allocated by the certification Secretariat rather than payments being made directly to individual assessors by a company.



New oil palm being planted in Santa Clara de Uchunya, Ucayali, Peru, 2021.

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# Endnotes

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- 2 TNFD 2021:4.
- 3 TNFD 2021:3.
- 4 There is no widely accepted definition or understanding of the term ‘nature-related human rights impact’. The authors consider that all the specific rights impacts addressed in this report are ‘nature-related’ either because underlying factors contributing to the rights impact also contribute to impacts on nature or because the result of the rights impact will affect nature. More broadly, this report aligns itself with international standards and guidance on the human rights responsibilities of corporations and financial institutions (e.g., UNGP and OECD Guidelines for Multinational Enterprises), which require that business enterprises cover all human rights in their due diligence efforts.
- 5 Throughout this report the terms ‘financial institution’ and ‘financial enterprise’ are used interchangeably to refer to all enterprises in the finance sector that are expected to respect human rights according to the UNGP. (The UNGP state that the “responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure,” see principle 14). In some parts of the report specific focus is given to entities that invest and lend money, but recommendations made in relation to these are often also valid for other financial enterprises.
- 6 UNGP para 15(b)
- 7 See for example OECD 2011; OECD 2017; and OECD-FAO 2016.
- 8 See CESCR 2011, para 1 (emphasising the “obligation of States Parties to ensure that all economic, social and cultural rights laid down in the Covenant are fully respected and rights holders adequately protected in the context of corporate activities”).
- 9 Countries with legal proposals underway that may contain corporate human rights diligence requirements include the EU, the UK, Germany and Norway. A number of countries also already have such legislation (see box 1 in Mei and Perram 2021).
- 10 See adoption by the Human Rights Council of this right in October 2021, <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G21/270/15/PDF/G2127015.pdf?OpenElement>.
- 11 See FPP, Pusaka and Pokker SHK 2014; FPP 2018.
- 12 See for example Veit 2021; WRI 2016; IPCC 2019; Diaz et al 2019.
- 13 See for example FPP et al 2020:234-235.
- 14 See <https://hcvnetwork.org/hcv-approach/>, <https://highcarbonstock.org/the-high-carbon-stock-approach/>, and <https://accountability-framework.org/>
- 15 Alforte et al 2014; The Munden Project 2012.
- 16 Global Witness 2019; 2020.
- 17 Hadiguna and Tjahjono 2017.
- 18 Olsen and Borit 2013.
- 19 See for example The Sustainable Trade Initiative 2016; Van Duijn 2013.
- 20 European Commission 2018.
- 21 Trase 2020.
- 22 Jong 2021.
- 23 FPP and SDI 2016.
- 24 Jacobsen 2016.
- 25 WWF International 2008.
- 26 Pacheco et Al 2017.
- 27 Schuster Institute for Investigative Journalism 2017.
- 28 China Dialogue 2022.
- 29 Rosenbarger and Hartog 2018.
- 30 Nestle 2022; AAK 2022; ADM 2022.
- 31 Sargent et al 2020.
- 32 ADM 2022; AAK 2022.
- 33 Pacheco et al 2020.
- 34 Pacheco et al 2020.
- 35 There is no publicly available data on the on the proportion of palm oil coming out of the refinery which is sustainably certified. Requests for this information were denied on “commercially sensitive” grounds. See China Dialogue 2022.
- 36 The ‘second tier’ market or ‘leakage market’ refers to palm oil growers, refiners, and retailers actively working to avoid compliance with internationally accepted performance standards. See Chain Reaction Research 2021.

37 Kaynar et al 2021.

38 Vermeulen and Goad 2006.

39 China Dialogue 2022.

40 RSPO 2016.

41 Bakhtary et al 2020.

42 Smallholders typically receive upfront contracts and technical support from companies in exchange for selling their product to them.

43 Palm Oil Agribusiness Strategic Policy Institute 2017; Bakhtary et al 2021.

44 RSPO commissioned independent study on medium growers (2020).

45 Pacheco et Al 2017.

46 Colchester et al 2014.

47 Pacheco et Al 2017.

48 United Nations 2021.

49 Unilever (2008) consumes 4 percent of the world's supply of palm oil.

50 Kusumaningtyas and van Gelder 2017.

51 WWF 2021.

52 Global Witness 2021; Griffiths and Jiwan 2021.

53 Such as data providers; environmental, social and governance (ESG) risk firms; interested parties (including social auditors) and certification bodies.

54 E.g. Forest 500; WWF Palm Oil Buyers Scorecard; Oxfam's Behind the Brands; and Sustainability Policy Transparency Toolkit (SPOTT).

55 FPP 2020.

56 FPP 2020.

57 Unilever 2022.

58 Others include, the Forest Stewardship Council (timber, pulp and paper), Bonsucro (sugar), UTZ (coffee) and IFOAM (organic certification).

59 ISEAL 2018.

60 MacInnes 2017.

61 Colchester 2016; 2021; Greenpeace 2021.

62 These were in part developed by the RSPO's Human Rights Working Group but crucially not the rights-holders themselves. It was only at the public consultation and pilot testing stage that rightsholders were invited to feed into the development process. RSPO 2022.

63 EIA and Grassroots 2019.

64 Unilever 2020.

65 Unilever 2022.

66 China Dialogue 2022.

67 In 2014, FPP filed a complaint against Golden Agri Resources subsidiary PT Kartika Prima Cipta and 17 other GAR subsidiaries detailing systemic violations of the RSPO Standard, including failure to carry out proper FPIC protocols with impacted indigenous Dayak Mayan and Melayu peoples. The case remains unresolved, and the remediation process is stalled. Colchester, Kleden and Jiwan 2014; Colchester 2016; 2021.

68 RSPO 2022.

69 RSPO 2017.

70 EIA and Grassroots 2015; EIA and Grassroots 2019.

71 Whitmore 2021.

72 Morgans et al 2018.

73 EIA 2020; MacInnes 2017.

74 MSI Integrity 2020; Wilson 2020; and MacInnes 2017.

75 Different family members may be the ultimate shareholders in different companies, or parts of the group may be held offshore in secrecy jurisdictions, rendering the ultimate owner unknowable. In other cases, named legal shareholders may be nominees – i.e. trusted people who have arrangements in place with other (actual) beneficial owners whose identity is not publicly disclosed.

76 MacInnes 2021.

77 The Arunachal Times 2016.

78 FPP 2018.

79 AFi 2019.

80 Greenpeace 2022 (publication forthcoming).

81 Wilmar's NDPE policy, for example, applies to "all Wilmar operations worldwide, including those of our subsidiaries, any refinery, mill or plantation that we own, manage, or invest in regardless of its stake [and] all third party suppliers (at a group level)." See [https://www.wilmar-international.com/docs/default-source/default-document-library/sustainability/policies/wilmar-ndpe-policy---2019.pdf?sfvrsn=7870af13\\_2](https://www.wilmar-international.com/docs/default-source/default-document-library/sustainability/policies/wilmar-ndpe-policy---2019.pdf?sfvrsn=7870af13_2)

82 Rainforest Action Network 2020.

83 Some companies do disclose some information on their human rights due diligence methods. See Mars 2020.

84 This includes suppliers, buyers, investors (including lenders) and other financial service providers, other entities in its supply chain, and any other non-State or State entity directly linked to its operations, products, or services.

85 This may entail reviewing reports from suppliers/investees to help identify and track impacts; independent verification of supplier/investee reports; and using their leverage to push human rights commitments and best practices up the supply chain.

86 The Sustainable Trade Initiative 2018.

87 Investment can also be used to acquire new lands, to finance company mergers and acquisitions, to restructure company debt or to construct mills and refineries to process CPO to feed global supply chains.

88 Barriero et al 2016

89 Chain Reaction Research 2021; Rainforest Action Network 2019; Pramudya et al 2017.

90 TNFD's preparatory Informal Working Group comprises of 49 financial institutions and corporates (<https://tnfd.global/about/>).

91 Chain Reaction Research 2021.

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105 Colchester, Wee, Wong and Jalong 2007.

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107 Important legal instruments and jurisprudence defining and elaborating upon these rights include but are not limited to: ILO Convention 169 Arts. 13-19, UNDRIP Arts. 10, 26-28, 32, American Convention Art. 21, African Charter Arts. 14, 21, ADRIP Arts. VI, XXV, CERD General Recommendation 23, various reports of the UN Special Rapporteur on the Rights of Indigenous Peoples, report of the Expert Mechanism on the Rights of Indigenous Peoples on land rights, report by the IACHR on the right to self-determination of indigenous and tribal peoples (2021), Inter-American Court Yakye Axa, Sawhoyamaxa, Saramaka, and Lhaka Honhat judgments, African Commission Endorois decision, and African Court Ogiek judgement.

108 See, e.g., UNDRIP, Arts. 8, 26; CERD 1997, General Recommendation 23 on the rights of indigenous peoples, para. 5; CDESCR, General Comment 21 on the Right of everyone to take part in cultural life, U.N. Doc. E/C.12/GC/21, para. 3.

109 For example, the rights defined in ILO Convention No. 169 apply to indigenous as well as tribal peoples. Certain rights such as collective rights to traditional territories defined in the Inter-American Human Rights system apply to tribal peoples and traditional communities (including for example some Afro-descendant peoples) as well as indigenous peoples. See, e.g., Inter-American Court of Human Rights, Case of the Moiwana Community v Suriname, Judgment of June 15, 2005 (Preliminary Objections, Merits, Reparations, and Costs), para 133; IACtHR, Saramaka Peoples v. Suriname, Ser. C No. 172, 28 November 2007, Part VII. The Inter-American Commission has similarly noted that a "traditional community" living in a defined territory with "a traditional way of farming, working and living to ensure its physical, social and cultural survival," may have communal property and associated rights. Inter-American Commission of Human Rights, Traditional Farmers' and Artisanal Fishermen's Community of Areais Da Ribanceira v. Brazil, Report No. 131/20: Petition 90-11: Report on Admissibility, paras. 2, 15. Several rights in the African Charter are collective rights of all peoples, and the African Commission and Court have both suggested that the right to property protects all customary communal tenure rights (not limited to indigenous peoples). See, e.g., AfCHPR, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, 276/2003, 4 February 2010, para 238; AfCtHPR, African Commission on Human and Peoples' Rights v. Republic of Kenya, Application No 006/2012, Judgment of 26 May 2017, para 123.

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112 UN Declaration on the Rights of Peasants.



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- 169 HRW and AMAN 2019: 70.
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319 Colchester and Jiwan 2006: 5-6.

320 Colchester and Jiwan 2006: 5-6.

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322 Colchester and Jiwan 2006; Ichsan et al. 2021.

323 Colchester and Jiwan 2006: 8.

324 Colchester and Jiwan 2006: 8.

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327 Colchester and Jiwan 2006: 7.

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332 Colchester and Jiwan 2006: 8.

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357 Colchester and Chao 2013 Chp 1.

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373 HRW and AMAN, 2019: 71-72.  
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375 Colchester, Wee, Wong and Jalong, 2007.  
376 Marti 2008: 2.  
377 Griffiths and Jiwan 2021.  
378 Chain Reaction Research 2021c; 2022.  
379 Colchester and Chao 2013, Chp. 14.  
380 Vermeulen and Goad 2006; Colchester and Jiwan 2006.  
381 Rahman 2020; Vermeulen and Goad 2006.  
382 Ordway et al 2019.  
383 Ordway et al 2019.  
384 Bennett et al. 2018.  
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388 Hans Nicholas Jong, “For Indonesian MPs, Indigenous rights may be bad for business, report says”, Mongabay, 17 September 2021, <https://news.mongabay.com/2021/09/for-indonesian-member-parliament-indigenous-rights-may-be-bad-for-business-report-says/>.  
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393 HRW and AMAN 2019: 33-36.  
394 Law of Environmental Protection and Management, No. 32 of 2009, art. 22.  
395 See AMAN et al., “Request for consideration of the Situation of Indigenous Peoples in Indonesia under the United Nations Committee of the Elimination of Racial Discrimination’s Urgent Action and Early Warning Procedure”, 2020, <https://www.forestpeoples.org/sites/default/files/documents/Early%20Warning%20Urgent%20Action%20Procedure%20Submission%20Indonesia%20%5B04102020%5D%5B2%5D.pdf>  
396 B. McKenzie, “Indonesia: What to expect after constitutional court decision on the Omnibus Law (2021)”, <https://www.lexology.com/library/detail.aspx?g=fc57dc1b-ed36-4470-bc90-a41331e06875>.  
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398 Land Rights Law of 2018 (Liberia), Art. 48.  
399 UN 2003.  
400 UNGP 2011.  
401 Cited in Kemp and Vanclay 2013:90 (emphasis added).  
402 Sources consulted include guidance developed by the UN Special Representative on Business and Human Rights (A/HRC/4/74 2007); the UN Office of the High Commissioner on Human Rights (OCHCR, 2012); the World Bank (2013); the International Finance Corporation (2010); Rights and Democracy (2008); Oxfam and Rights and Democracy (2012); Business for Social Responsibility (BSR, 2013); the Institute for Development and Peace (INEF: Hamm and Scheper 2012); the Danish Institute for Human Rights (Gotzmann et al, 2016); and FPP (Mei and Perram, 2021); as well the HRIA handbook (Gotzmann, 2019); the Guide to Human Rights Impact Assessment and Management (HRIAM: Abrahams and Wyss, 2010); the UN Guiding Principles Reporting Framework UNGP nd.); and the human rights-related criteria and guidance of the Accountability Framework Initiative (Afi: nd. <https://accountability-framework.org/operational-guidance/supply-chain-management/>). Other sources on impact assessment and value chain due diligence relevant to the finance sector, include Equator Principles Association (2020); IAHR (2020); Global Witness (2020b); Muños-Quick et al (2020); OECD (2017); and OECD (2018).  
403 RSPO 2018.

404 We do not include here the multiplicity of focused investigations by NGOs of the performance of specific companies, which have already been summarised in Section 4 above.

405 Palupi 2014.

406 CNV 2017.

407 Nomogaia 2017.

408 DIHR 2018.

409 Profundo 2018.

410 HRW and AMAN 2019.

411 HRW 2021.

412 Pasaribu and Vanclay 2021.

413 Firdaus et al. 2021.

414 Colchester et al 2020a, 2020b.

415 Meanwhile, the German development cooperation agency, GIZ (2020), published a complementary review of the human rights responsibilities of palm oil purchasing companies.

416 Palupi 2014.

417 Firdaus et al 2021.

418 Colchester et al 2020a, 2020b.

419 HRW and AMAN 2019:4-5.

420 HRW 2021. See also Colchester and Jiwan 2021.

421 Nomogaia 2017.

422 Nomogaia 2017.

423 Palupi 2014.

424 CNV 2017:30.

425 CNV 2017.

426 DIHR 2018.

427 ProFundo 2018:7.

428 Profundo 2017.

429 DIHR 2018.

430 FPP 2021; Nomogaia 2017; HRW and AMAN 2019 ; Palupi 2014.

431 CNV 2018; FPP 2021.

432 Palupi 2014:10.

433 Firdaus et al 2021.

434 Firdaus et al 2022 (forthcoming).

435 Firdaus et al 2021.

436 See list of references in footnote 415 above.

437 Mei and Perram 2021; OCHCR 2012.

438 UNGP para. 17.

439 OHCHR. Nd. <https://www.ohchr.org/EN/Issues/Business/Pages/CorporateHRDueDiligence.aspx>

440 Ibid.

441 Nomogaia 2017.

442 TNFD. Nd.

443 Mei and Perram 2021: 33.

444 For additional details see DIHR HRIA Toolbox: Phase 1 and Scoping Practitioner Supplement, and Mei and Perram (2019) for further guidance on assessing impacts on indigenous peoples.

445 For further guidance on applicable law assessments see <https://accountability-framework.org/operational-guidance/voluntary-commitments-and-applicable-law/>. For an example on treatment of subnational (provincial and district) laws, see Firdaus et al 2022 (forthcoming).

446 Mei and Perram 2019: 27 and 35.

447 See, for example, Griffiths and Jiwan 2021.

448 <https://www.arcgis.com/home/item.html?id=ca22b7af8c694d94b970026347a62bbe>

449 <https://rspo.org/palmtrace>

450 <https://www.arcgis.com/home/item.html?id=ca22b7af8c694d94b970026347a62bbe>

451 DIHR 2018.

452 Mei and Perram 2021: 44 and Annex 3.

453 Firdaus et al 2022.

454 Mei and Perram 2019: 29.



455 Mei and Perram 2019: 28.  
456 DIHR 2020: 107.  
457 For further discussion of this point see DIHR 2020: 109-110.  
458 DIHR 2020: 115.  
459 Stuit et al 2022.  
460 Bloch Veiberg et al 2019.  
461 Bloch Veiberg et al 2019; DIHR 2020; Gotzmann 2019; Mei and Perram 2021; OCHCR 2012; and UNGP Principle 20.  
462 Bloch Veiberg et al 2019.  
463 SPOTT nd.  
464 OHCHR 2012: 16  
465 In statistics, these are known as interval or ratio data, nominal data and ordinal data respectively. There are important differences in what forms of analysis are valid for these different types of data. For a fuller explanation, see Eagle 2011.  
466 AFi 2019.  
467 OHCHR 2012.  
468 Schiavo-Campo 1999.  
469 SPICED criteria for indicators are set out in Roche 1999; See also Civicus nd.  
470 OHCHR 2012: 39.  
471 For example, see Bloch Veiberg et al 2019.  
472 The framework has been adapted from unpublished evaluation methodologies that have been developed by the authors for assessment of compliance by palm oil companies with the HCSA Social Requirements.  
473 Nomogaia, 2017.  
474 See Mei and Perram 2021: 71 for more details.  
475 As referenced in TNFD 2021: 3.  
476 The TNFD (2021: 37) uses ‘organisation’ to mean “non-financial companies and financial institutions”.  
477 The current definition of risk reads: “the potential threats posed to an organisation linked to its, and other organisations’, dependencies on nature and nature impacts. These can derive from physical, transition and systemic risks.” See page 34 of the TNFD framework beta v0.1.  
478 The current definition of impact reads: “a change in the state (quality or quantity) of natural capital, which may result in changes to the capacity of nature to provide social and economic functions. Impacts can be positive or negative. A single impact driver may be associated with multiple impacts.” See page 31 of the TNFD framework beta v0.1.  
479 The TNFD framework beta v0.1, p. 42  
480 See UNGP Report Framework <https://www.ungpreporting.org/framework-guidance/> and AFi guidance on reporting, disclosure and claims <https://accountability-framework.org/operational-guidance/reporting-disclosure-and-claims/>  
481 Triponel Consulting, Ltd. 2017.  
482 Ibid, pp. 19-20.  
483 Ibid, p. 22.  
484 Nomogaia 2016: 16-17; Traidcraft Exchange 2020: 6.  
485 FPP and Sustainable Development Institute 2016: 11, 16.  
486 FPP and Sustainable Development Institute 2016.  
487 Nomogaia 2016: 17.  
488 Traidcraft Exchange 2020: 8.  
489 Letter from RSPO to Equatorial Palm Oil dated 14 June 2015 on the decision of the Complaints Panel, available at [https://ap8.salesforce.com/sfc/p/#90000000YoJi/a/90000000PZPi/ENbSgjRDC4EPJ.S5VvpaN0\\_w6VnJSjQLBCnvnsRRgD4](https://ap8.salesforce.com/sfc/p/#90000000YoJi/a/90000000PZPi/ENbSgjRDC4EPJ.S5VvpaN0_w6VnJSjQLBCnvnsRRgD4).  
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491 <https://askrspo.force.com/Complaint/s/case/50090000028Es0OAAS/detail>.  
492 <https://frontpageafricaonline.com/news/liberia-farmers-demand-balance-payment-in-land-deal-with-equatorial-palm-oil-in-grand-bassa-county/>; <https://www.theguardian.com/global-development/2020/jan/03/liberia-palm-oil-miracle-farmers-empty-promises>.  
493 Traidcraft Exchange 2020: 6-7.