



Human rights in the palm oil sector

The responsibility of purchasing companies:
Limits and potentials of certification

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**Deutsches Institut
für Menschenrechte**

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Foreword

Federal Ministry of Food and Agriculture

Human rights apply globally, even if they are not implemented to the same extent everywhere. Respecting human rights, such as the right to adequate food, is an essential basis for achieving the 2030 Agenda for Sustainable Development goals.

With the 2016 “National Action Plan on Business and Human Rights” (NAP), the German Federal Government is implementing the United Nations’ Guiding Principles on Business and Human Rights, which were unanimously adopted by the Human Rights Council in 2011. Through the NAP, the German government, anchors for the first time the responsibility of German companies to comply with human rights due diligence and human rights at large throughout their supply and value chains. At the same time, the German government assures companies that the government will support them in their implementation. Companies in the agricultural and food sector are also exposed to the risk that their activities - directly or indirectly - may have a negative impact on human rights. This is due, among other things, to the increasing interlocking of economic activities worldwide, and the fact that supply and value chains have become longer and more complex in recent decades. This also applies in particular to companies that use palm oil.

Seven years ago, the Federal Ministry of Food and Agriculture (BMEL) initiated the Forum for Sustainable Palm Oil (FONAP) as a multi-stakeholder platform. The members of the industry initiative are committed to increasing the use of certified palm oil to 100 percent. Members commit to using only sustainably certified palm oil setting an example by implementing sustainability standards along their supply chains.

The BMEL supports the sector initiative FONAP in its efforts to better understand and jointly address specific human rights risks associated with palm oil production. The study presented here and the resultant approaches for observing human rights due diligence requirements are an important building block in this process. Particularly through its clear reference to the NAP’s five core elements and the development of criteria for a human rights assessment of certification systems, the study contributes to building an understanding of companies’ human rights requirements.

The BMEL is particularly grateful for the great commitment shown by FONAP members, who were continuously available as partners in practice for this study and thus contributed to the development of the approaches. This study exemplifies how multi-stakeholder platforms can actively participate in the NAP’s implementation process.

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in the Federal Ministry of Food and Agriculture

Foreword

Forum for Sustainable Palm Oil

This study provides an important contribution to reflections and discussions in the field, not only for the Forum for Sustainable Palm Oil e. V. (FONAP), but also beyond. Grounded in a review of the literature and supported through interviews with actors in the sector, the authors address the important question of whether the market-leading Roundtable on Sustainable Palm Oil (RSPO) palm oil certification system comprehensively and effectively addresses human rights standards and conventions in accordance with the UN Guiding Principles. The authors clearly state that the study does not claim to be complete, nor given the commissioned remit and available resources can it be considered representative.

This study is a mainly qualitative analysis and evaluation of issues found along palm oil supply chains. In view of current literature and interviewee reports and statements the study's findings are significant: Not all challenges can be solved with certification alone. Human rights due diligence plays a central role and must be strongly anchored in supply chains and actively sustained in order to be effective. At the same time, it is not an easy task to fully implement the criteria and indicators as set out in standards, a rules or regulations, and to monitor them seamlessly all around the world.

Moreover, the social situations of some palm oil supplier countries are characterised by political instability and unrest, and in some cases are shaped by an entirely contrasting social system, in which discrimination is the status quo. Here, certification can fulfill an important function as a tool in international development discourse by bringing together and promoting greater sustainability among actors along global supply chains who voluntarily commit to ethical and moral standards. Wherever they operate, companies with high ethical standards would in any case always be able to meet the standard requirements in full; especially when it comes to human rights, which are of course non-negotiable.

The study concludes: "In summary, it can be said that all RSPO certification models can be usefully applied with regard to ecological, social or even development-related economic thresholds". The authors hold however that there remain issues to be addressed, namely particular shortcomings that FONAP members need to readdress. FONAP will examine carefully whether and how shortcomings outlined in this study can be remedied. This is by no means a trivial pursuit. It will be of particular challenge to small and medium-sized enterprises (SMEs), the heart of Germany's mid-tier. SMEs often have no direct access to original markets and are dependent on the often larger partners in the preliminary stages of the supply chains.

Joint action under the umbrella of a platform, such as the multi-stakeholder platform FONAP, remains therefore key. This is where interests can be pooled, coalitions formed, pilot projects tested under a neutral umbrella and further endeavours undertaken.

FONAP members have not only set ambitious and binding sustainability goals but have also dared to formulate additional criteria to supplement the RSPO standard. Additional criteria prohibit FONAP members from growing on peatlands since 2017, allows only goods from verifiable legal sources, demands measures that record and reduce greenhouse gas emissions etc. These additional criteria have now also been largely incorporated into the latest 2018 version of the RSPO Standard.

In line with the UN Guiding Principles for Business and Human Rights and the NAP, we will put the German Institute for Human Rights' recommendations for action on the FONAP agenda and will examine in our working groups how we can anchor concrete action. This may result in new additional criteria or further test and pilot projects in cooperation with producer countries. Recommendations focus on a "Smart Mix", which is increasingly being seen as an important part of sustainability efforts. While certification plays an important role, it remains just one tool in an entire orchestra of numerous complementary programs and measures.

The UN pillar of the state's duty to govern was not part of the study. Without governments, international treaties and intergovernmental agreements, it will however be near to impossible to make necessary and sustainable changes. Dialogue between governments is essential, both bilaterally and multilaterally. Where political systems are not set up in accordance with the UN Guiding Principles, the EU and the German government will be equally challenged to engage in dialogue with governments concerned in Asia, Africa and Latin America. This entails nothing less than democratically questioning and renewing social and value systems, and engaging producer market governments in fulfilling relevant duties, thereby setting them on route to a more sustainable future.

We would like to thank everyone who contributed constructively to this study, the participating FONAP members, the interview partners, our task force, the GIZ team, the FONAP board colleagues and especially the German Institute for Human Rights' authors: Sara Phung and Deniz Utlu.

Almut Feller
Chairperson of the Board of FONAP e.V.

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Foreword

German Institute for Human Rights

Since the unanimous adoption of the UN Guiding Principles on Business and Human Rights (UN Guiding Principles) by the Human Rights Council in 2011, an intensive global implementation process has been underway. Fifteen European Union states have already published a National Action Plan (NAP) to implement the UN Guiding Principles, including the German government at the end of 2016. The NAP formulates clear expectations that require German companies to fulfil their human rights due diligence. By specifying corporate due diligence in terms of human rights and describing the state's duty to protect which is binding under international law, the UN Guiding Principles clearly stipulate the various responsibilities of states and companies. Above all, they make it clear that human rights must be respected by companies even if they operate in states that do not, or only to a very limited extent, fulfil their protective duties.

These due diligence obligations apply to all companies, regardless of sector or size, along the entire value and supply chain; including those that buy and use palm oil or derivatives. The Forum for Sustainable Palm Oil (FONAP) has demonstrated its pro-activity and willingness to implement them, not least by requesting the German Institute for Human Rights (DIMR) to jointly reflect upon the human rights risks of companies purchasing palm oil. The voluntary commitment of FONAP member companies to only use 100 per cent certified palm oil shows their high level of commitment.

The study at hand is based, among other factors, on intensive consultations with FONAP member organisations, interviews with independent experts, and extensive exchange with the FONAP board. It identifies the human rights that are exposed to risk due to palm oil production. Through their supply chains, buying companies can be involved in, contribute to or possibly even cause negative impacts on human rights in these areas. Subsequently, we took a closer look at the role certification systems can play in implementing human rights due diligence. Since it is always an individual company that ultimately has to assume its own responsibility, we also asked whether companies have the opportunity to track the effectiveness of certification systems in regard to human rights.

It was found that while certification systems help companies to implement core elements of their human rights due diligence procedures, they do not release them from their responsibility to respect human rights within their own activities and business relationships. It is here, that FONAP has a prominent role to play in supporting its member companies - including in particular small and medium-sized enterprises (SMEs) and those that use only very small quantities of palm oil in their products - in the fulfilment of their human rights responsibilities. This offers an opportunity, for example, to hold workshops to jointly develop a human rights knowledge base that addresses the differences and similarities of sustainability commitments and companies' human rights due diligence.

Exchange with other sectors in similar implementation processes can also prove useful. In its NAP sector dialogue, for example, the German automobile industry is exploring what form a cross-company grievances mechanism should take to ensure it is accessible to people at the end of the supply chain in production countries. All in all, the implementation of human rights due diligence requires a combined in-depth human rights learning process, to which this study contributes.

Michael Windfuhr
Deputy Director of the German Institute for Human Rights

Executive Summary

Since the unanimous adoption of the UN Guiding Principles on Business and Human Rights (UN Guiding Principles) in 2011 and the adoption of Germany's National Action Plan on Business and Human Rights (NAP) in 2016, German companies have found themselves confronted with the question of how to adequately implement human rights due diligence processes. Human rights due diligence is a continuous process, and can constitute a real challenge, especially for small and medium sized enterprises (SMEs) or companies at the end of the supply chain.

Based on extensive desk research, qualitative interviews, and several rounds of consultation with FONAP members, this study presents the most prevalent human rights issues in the palm oil sector and sets out how buyers of palm oil, in particular FONAP members, can move towards addressing these issues. An analysis of whether a business enterprise causes, contributes or is directly linked to adverse human rights impacts requires meaningful consultation with potentially affected groups or other relevant stakeholders. As research on the ground was not possible for this analysis, we sought to find out if German buyers cause, contribute or are linked to negative human rights impacts in the palm oil value and supply chain by using literature based on field research and complaints by affected individuals and groups. While the normative and analytical results of this study remain valid despite this lacuna, the results of this study only mark the starting point for an in-depth analysis and are no substitute for companies' own human rights risk and impact assessment.

After a brief introduction, chapter 2 sets out the relevant data and outlines which human rights may be infringed upon by German buyers at the end of the supply chain. The authors identify four overarching human rights issue areas: working conditions, trade unions' freedom and access to grievance mechanisms, land issues, and environmental matters. Chapter 3 provides an analysis of measures adopted by companies processing palm oil and concludes that certification is their main tool to address potential and actual human rights impacts. As such, chapter 4 takes a look at certification systems as one of the main measures undertaken by FONAP members to address human rights issues. The study develops a human rights-based framework consisting of four criteria to assess whether and to what degree a certification system is apt in complying with a specific part of a company's human rights due diligence and applies it partly to the Roundtable on Sustainable Palm Oil (RSPO) as an illustrating example. The study concludes in chapter 5 that certification systems can assist companies in meeting human rights due diligence requirements, but they cannot entirely substitute it. After a short summary, the study ends with recommendations for buying and manufacturing companies and their networks on how to better conduct human rights due diligence (chapter 6). The first set of recommendations provides insights on how business networks can develop a common understanding of human rights to supplement existing sustainability and CSR knowledge, further research, information-sharing, joint learning and cross-sectoral exchange. Another set of recommendations relates to implementing the core elements of human rights due diligence, including improving the knowledge base with respect to palm oil purchasers' value and supply chain, using industry-wide systems and external expertise. A third set of recommendations suggests reviewing the certification systems used with regards to human rights aspects, and gradually moving to exclusively traceable supply chain certification systems. Last but not least, the study suggests areas of action for companies, their networks and multi-stakeholder initiatives (MSIs) to meet human rights due diligence requirements. These include striving to pay living wages, abolishing harvest and other labour quotas, and providing for the traceability of certified palm oil and palm kernel oil (including derivatives).

List of abbreviations

BMAS	Federal Ministry of Labour and Social Affairs
BMEL	Federal Ministry of Food and Agriculture
CEDAW	UN Convention on the Elimination of All Forms of Discrimination against Women
CSR	Corporate Social Responsibility
CRC	UN Convention on the Rights of the Child
DIMR	German Institute for Human Rights
ESIA	Environmental and Social Impact Assessments
EU	European Union
FAO	Food and Agriculture Organization of the United Nations
FONAP	Forum for Sustainable Palm Oil
GIZ	Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH
HRIA	Human Rights Impact Assessment
HRRA	Human Rights Risk Assessment
HRWG	Human Rights Working Group of the RSPO
ICCPR	UN International Covenant on Civil and Political Rights
ICESCR	UN International Covenant on Economic, Social and Cultural Rights
ICMW	UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ILO	International Labour Organization
SME	Small and medium-sized enterprises
MSI	Multi-Stakeholder Initiative
NAP	National Action Plan on Business and Human Rights Action Plan
NGO	Non-governmental organisation
NHRI	National Human Rights Institution
OECD	Organisation for Economic Co-operation and Development
RSPO	Roundtable on Sustainable Palm Oil
UN	United Nations
UNICEF	United Nations Children's Fund
UNGP	UN Guiding Principles on Business and Human Rights
VGGT	Voluntary Guidelines for the Responsible Regulation of Property, Ownership and Use of Land, Fishing Grounds, Soil and Forests in the Context of National Food Security

1. Introduction

How companies can fulfil their human rights due diligence throughout their own supply and value chains is a question that has preoccupied the economy, states and civil society for some time. It is in particular a question of how far corporate responsibility to respect human rights extends - or where exactly it ends. This question has become more pressing since the UN Human Rights Council's unanimous adoption of the UN Guiding Principles on Business and Human Rights (hereafter UN Guiding Principles)¹ in 2011 with implementation processes that have been underway in many countries as a result. The UN Guiding Principles, written by the then Deputy UN Secretary-General and UN Special Representative for Business and Human Rights, Professor John Gerard Ruggie, are the result of years of consultation with business, non-governmental organisations (NGOs), states and national human rights institutions (NHRIs) on the issue of corporate responsibility from a human rights perspective.

The UN Guiding Principles are divided into three pillars: pillar 1 describes the state's duty to protect human rights (state duty to protect), pillar 2, the responsibility of business enterprises to respect human rights (corporate responsibility to respect), pillar 3, access to remedy and compensation for those affected by adverse human rights impacts (access to remedy for victims). The first pillar summarises binding international law in force, and interprets and comments on it in relation to business and human rights. According to the UN Guiding Principles, the duty of states to protect human rights requires states to protect people within their territory and jurisdiction from human rights violations by third parties, including companies. Pillar 2 refers to the human rights due diligence of companies, for which Ruggie, in reference to corporate risk management and human rights due diligence, coined the term human rights due diligence (UNGP 17). To promote companies' human rights responsibility, a combination

of voluntary and binding measures (smart mix) is available to states (UNGP 3, Commentary). This mix of measures is designed to ensure that companies based in their own territory do not cause, are directly linked to or contribute to adverse human rights impacts in their activities outside their jurisdiction. Finally, pillar 3 of the UN Guiding Principles, is devoted to rights holders and their access to effective remedy, in the event that states have not sufficiently fulfilled their duty to protect, and companies have not sufficiently fulfilled their duty to respect.

The responsibility of companies to respect human rights applies irrespective of whether states meet their own obligations to protect and implement human rights. This duty can be well delineated using five core elements of human rights diligence. According to the German National Action Plan for Business and Human Rights (NAP), these core elements are as follows²:

1. Policy statement on human rights
2. Procedures for identifying actual and potential adverse human rights impacts
3. Measures to prevent potential negative effects, take corrective action and track the effectiveness of these measures
4. Reporting
5. Grievance Mechanism

The question of how companies can and should effectively implement these five core elements, has dominated the debate on corporate responsibility for human rights in recent years. Various surveys show that companies in Germany and around the world, are currently only complying with their due diligence to a limited extent, partly because they need time to develop a corresponding set of instruments for implementation³.

1 UN, Human Rights Council (2011).

2 German Federal Government (2017), p. 8.

3 According to the Corporate Human Rights Benchmark

1.1 Relevance of the study

One of the main difficulties for companies in buying industries such as Germany in implementing their human rights due diligence, is the complexity of supply chains that can appear non-transparent and make it difficult to have influence on suppliers. Many companies ask how far their responsibility can extend, given that they have neither leverage, nor access to the producers whose raw materials they process in their products. This also applies to companies that use palm and palm kernel oil in their products. Purchasing companies (in this study, this refers primarily to companies that do not purchase the product directly from a plantation or mill, but from a supplier) have been searching for many years for opportunities for more sustainable procurement. In 2004, the Roundtable for Sustainable Palm Oil (RSPO) was founded and has since become one of the most widely used certification systems in this field. Almost ten years later, the Forum for Sustainable Palm Oil (FONAP) was formed in Germany in 2013, with its registered office at the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH. In June 2019, the GIZ commissioned the German Institute for Human Rights (DIMR, hereafter “the Institute”) to analyse literature on human rights violations along the palm oil value and supply chain and, based on this, to generate recommendations for action on how FONAP member companies can fulfil their human rights due diligence obligations in accordance with the NAP.

The Institute is a state-funded National Human Rights Institution (NHRI), as defined by the United Nations Paris Principles; its independence from the state and other actors is regularly verified by a United Nations accreditation system⁴.

In the UN Guiding Principles, NHRIs are mandated to support the state in implementing the UN Guiding Principles and to provide guidance to companies and other non-state actors⁵. The implementation of these

guiding principles and the exercise of due diligence can be supported by certification systems in addition to the activities of joint networks or commissioned third parties. A certification system that takes human rights into account can provide an impetus to companies with low levels of palm oil and palm kernel oil processing who therefore focus on risks in other areas of their supply and value chain to give higher priority to the implementation of their human rights obligations - even if it does not free individual companies of their own responsibility to respect human rights.

Within this context, the present study has four objectives:

- Identification of human rights risks in the palm oil sector
- Concretisation of companies’ human rights due diligence (companies purchasing and processing palm oil)
- Development of a set of human rights criteria to assess certification systems with regard to human rights standards
- Identification and development of approaches for individual companies and their networks, especially FONAP

(2019), only 1 in every 200 companies evaluated was able to meet 80 to 90 percent of its due diligence obligations. The final survey monitoring German companies within the NAP implementation framework shows that less than 20 percent of companies in Germany fulfil their human rights due diligence obligations (Federal Foreign Office (2020), p. 5).

4 UN, General Assembly (1994).

5 „National human rights institutions that comply with the Paris Principles have an important role to play in hel-

ping States identify whether relevant laws are aligned with their human rights obligations and are being effectively enforced, and in providing guidance on human rights also to business enterprises and other non-State actors. (UNGP 3, commentary, p.6)

1.2 Methodological approach

The study is based on the content of relevant human rights standards, and on the understanding of the human rights responsibilities of companies, in accordance with the UN Guiding Principles on Business and Human Rights (2011, hereafter UN Guiding Principles). The human rights reference framework is thus formed in particular by the International Covenant on Economic, Social and Cultural Rights (1966, hereafter ICESCR), the International Covenant on Civil and Political Rights (1966, hereafter ICCPR), the UN Convention on the Elimination of All Forms of Discrimination against Women (1979, hereafter CEDAW), the UN Convention on the Rights of the Child (1989, hereafter CRC), the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990, hereafter ICMW), the International Labour Organization Core Labour Standards (1998, hereafter ILO) and the ILO Convention No. 169 on the rights of Indigenous and Tribal Peoples (1989).

In order to identify human rights risks in the palm oil sector, the Institute has drawn on reports from academia, non-governmental organisations (NGOs), companies and consultancies in the palm oil sector, as well as interviews with experts from industry, research and civil society, with regard to the human rights impacts described in this study. The collection of data through interviews allowed for qualitative results to be obtained. This study does not aim to obtain its own quantitative data or representative findings. The interview outcomes fulfil two functions:

- They serve as a triangulating lens with which to look at the most frequently discussed and most severe human rights issues found in the literature: Which potential human rights-related issues described in the literature, are also considered relevant by the experts interviewed?
- They serve as an additional source for analysis to identify human rights risks.

In view of the human rights issues identified in the literature, and with reference to the five core elements of companies' human rights due diligence, the Institute compiled set of guiding questions for interviewing companies and a second set of guiding questions for interviews with researchers and NGOs (see Annex 8.2). The semi-structured interviews

were conducted and anonymised in July and August 2019. This approach enabled a participatory as well as practice-oriented research process. Interviews were conducted with three researchers, two individuals from non-FONAP member NGOs, three representatives of FONAP member companies and one FONAP oriented company. The companies consisted of two retailers, one non-food company and one food company only distinguished, if necessary, in this study and otherwise referred to as "the companies". The interviews with companies were conducted following a FONAP call for voluntary participation on the basis of self-selection. This ensured along two axes that the interviewees were responsible for addressing human rights issues within the company: 1) through FONAP office verification and 2) through the initial question in the main questionnaires in which the experts were asked to describe their area of responsibility in detail. The interviewees self-identified as responsible for at least one of the following areas: sustainability analysis, quality management, CSR management or sustainability management. The selection of the five interview partners from research bodies and NGOs was made with a view to ensuring that the focus of their work corresponded, as far as possible, to the classification from the literature analysis. Experts from the following fields were therefore interviewed: Trade unions, right to food, working conditions, health and land issues. One of the interviewees also has experience in working on oil palm plantations. By including these different voices and expertise from companies, research, and civil society, it was possible to ensure that diverse and possibly contrasting perspectives were included in the study. All interviews were recorded and transcribed. For coding and analysis, the Institute used the software MAXQDA, which enables both the described human rights risks to be assigned to corresponding human rights norms (normative analysis), and for the interview contents to be assigned to the individual human rights due diligence core elements. The human rights-related problems, as outlined in literature and interviews, were related to the human rights norms of relevant human rights instruments mentioned at the beginning and summarised in a matrix using their official interpretations (so-called General Comments⁶)

6 General comments are available on all key UN human rights conventions. They contain the authoritative detailed interpretations of human rights by the relevant UN treaty bodies and serve as orientation for the implementation of human rights obligations.

(see Annex 8.3). Since the available literature focuses on plantations, mills and refineries, the challenges listed therein also concentrate on these parts of the value and supply chain, leaving aside other equally important areas, such as the transportation and storage of palm oil⁷. The human rights issues considered in the reports reviewed refer to both certified and non-certified plantations⁸. Differentiating the two for classification did not prove meaningful. A review of the source material on the extent to which, and under which conditions, certification systems are suitable for reducing the human rights risks associated with palm oil production, showed that regional differentiation is not necessary. The human rights issues described in the literature, and confirmed in the interviews, occur in all regions. Accordingly, the present study also largely refrains from making a regional distinction, although it should be noted that certain human rights violations may give way to regional specificities in some cases⁹.

In order to analyse whether a company causes or is involved in adverse human rights impacts, it is necessary to collect relevant data through direct consultation with affected persons at the site of a potential or actual human rights infringement (UNGP 18 (b), UNGP 20 (b)). Since neither on-site research, nor discussions with affected persons in the area of influence of the plantations and mills were possible within the scope of this research, special attention was given in the selection of relevant literature, to ensure that it was based on empirical on-site surveys¹⁰ or complaints by affected individuals¹¹. For this reason, the significance of the normative analysis is not limited by a lack of on-site surveys.

Risk prioritisation

On the contrary, the lack of access to companies' specific field of on-site activity makes it impossible to prioritise the specific actual and potential impacts. Such a prioritisation of risks would have to be based on the severity of human rights violations in accordance with the UN Guiding Principles (UNGP¹² 24). The commentary on UNGP 14 outlines that the severity of adverse impacts of corporate activities on human rights can be determined by evaluating the extent and scope of the impact, as well as the extent to which it is (or is not) remediable. To this end, individual companies must look at their own activities along their value and supply chain, taking into account the perspective of those affected by human rights infringements. The present study refers to those issues that appear frequently in the literature and are also considered by the experts interviewed as particularly severe (extent and scope).¹³

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- 7 A review of other stages of the value chain is not only urgently needed research, but also part of the human rights due diligence of companies using palm oil in their products. according to UNGP 18, the human rights responsibility of companies also applies to their business relations, including facilities within the value chain.
- 8 Two reports explicitly refer to negative impacts on human rights in the RSPO certified palm oil supply chain: 1) International Labor Rights Watch / Sawit Watch (2013) present three case studies of RSPO certified palm oil plantations. Severe human rights infringements were identified on all three plantations in 2012, which not only violate the ILO Core Labour Standards but also the RSPO standard, and 2) The Amnesty International report (2016) is based on a 2015 investigation of five additional palm oil plantations, including three RSPO-certified. Severe human rights breaches were found on all plantations: falling below the minimum wage, forced labour, child labour, labour exploitation and lack of safety at work, as well as causing damage to health.
- 9 In (post-)conflict countries such as Colombia, for example, there is a general risk of human rights violations, such as forced displacement or violence against trade unions, by armed groups (cf. Niebank / Utlu 2017: 15, 17). In contrast to reports on Southeast Asia, reports on Honduras, Guatemala and Nigeria, often document sexual violence in connection to palm oil plantations (cf. Verité 2013: 53, 63), which will be dealt with separately in this study (Chapter 2.2.1). Nonetheless, this observation does not correspond to the real risk on the ground. This difference in reporting could have resulted from increased stigmatisation or taboo.

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- 10 These include the reports of Boddenberg (2019); Brot für die Welt (2017); Danish Institute for Human Rights (2018); Elmhirst et al. (2017); Human Rights Watch (2019a, 2019b, 2020); Pye et al. (2016); Rainforest Action Network (2020); UNICEF Indonesia (2016); World Rainforest Movement (2019).
- 11 This includes the documentation of International Labor Rights Watch / Sawit Watch (2013) and Amnesty International (2016), which refers to RSPO certified plantations.
- 12 The acronym UNGP is used to refer to a specific UN Guiding Principle of the UN Guiding Principles on Business and Human Rights (whose abbreviation in this study remains UN Guiding Principles).
- 13 For severity see UNGP 24.

The central criterion of the feasibility of remediation requires, however, more precise knowledge of the concrete impact on individual rights holders, namely which rights holders potentially or actually experience an infringement of their rights.

The results presented in this study can, therefore, only serve as a starting point for a much needed own in-depth analysis of the impacts of individual palm oil purchasing companies. The study outcomes presented here are as such no substitute for a risk assessment in accordance with human rights due diligence as required by the UN Guiding Principles and the NAP. This is due to the fact that the UN Guiding Principles' requirements for a company's risk assessment cannot be general, but must examine specific impacts on specific people (Commentary on UNGP 18) as explained in detail in Chapter 3.1. This can be present a particular challenge for companies that use palm oil derivatives or whose products contain low levels of palm oil.¹⁴ In complex value and supply chains, it may be difficult to apply the same level of due diligence to all tiers in the chain. The UN Guiding Principles, therefore, recommend in the commentary to UNGP 17, that in such cases, "general areas" with a potentially high risk of adverse human rights impacts being "most significant" – e.g., due to local circumstances, the nature of suppliers' activities, etc. - should be identified. Accordingly, Chapter 2.2 delineates precisely these areas of risk called "general areas" by UNGP 17 (risk prioritisation according to UNGP 17). In order to take a look at the specific field of activity of individual companies and their supply and value chains, and to analyse possibilities for redress, the study recommends in Chapter 6 collaborative learning and exchange amongst companies that have access to operations on the ground and those that are too small or buy only small quantities of palm oil. However, it is important to note that prioritisation in line with the UN Guiding Principles does not mean that further adverse impacts do not need to be addressed (Commentary on UNGP 24): Prioritisation, if necessary, will only determine which impacts should be addressed first by companies in the absence of legal guidance (Commentary on UNGP 24).

14 Cf. chapter 4.2.1 as well as approaches for action in Chapter 6.

1.3 Structure of the study

Against this backdrop, the study in Chapter 2 first classifies issues found in the literature within a normative human rights context. Classification is formed in line with the specific issues described most frequently in the literature and considered and confirmed as most severe by the experts interviewed, and with which all companies operating in the sector are potentially confronted. Chapter 3 compares FONAP member companies' procedures and measures with the requirements of the UN Guiding Principles and NAPs and concretises these for companies purchasing or using palm oil and palm kernel oil. The exploration of the human rights-related activities of purchasing companies is based on the interviews with experts and a consultation workshop held for the purposes of this study with FONAP members, three other companies, a business association and the NAP Helpdesk Business and Human Rights in September 2019.¹⁵

Since FONAP companies rely on certification as the main measure for implementing corporate human rights due diligence, Chapter 4 analyses which areas of a company's human rights due diligence requirements can be fulfilled by certification. For this purpose, the Institute has developed a human rights criterion framework for certification systems, based on the UN Guiding Principles. The study thus offers a model as a basis for a more in-depth human rights-based comparison of human rights certification systems. This comparison is illustrated using the Roundtable for Sustainable Palm Oil (hereafter RSPO) and measuring its Principles and Criteria 2018 (RSPO P&C 2018) against two human rights issues, namely child labour and conflict-affected areas, to examine the for presumed gaps in the provision of protection.¹⁶

The study concludes with resulting approaches for action for companies buying and using palm oil at company and sector level (Chapter 6). In May 2020, the Institute and two FONAP members reviewed the

15 Further participants were three NGOs, a research institution for sustainability analyses and the Federal Ministry of Food and Agriculture.

16 A full application of the developed set of criteria of the RSPO Principles and Criteria in the 2018 revised version (RSPO P&C 2018) would exceed the scope of the present study. However, a comprehensive study is recommended (see Chapter 6 for Action Approaches).

practical applicability of the approaches developed and subsequently presented them to a wider circle of companies in a webinar for discussion.¹⁷ These approaches are intended to help companies and industry networks to build a common understanding of human rights and to develop a work plan for implementing human rights due diligence in accordance with the NAP and the UN Guiding Principles. Thus, this analysis contributes to offering at the very least FONAP members further approaches for the implementation of their human rights due diligence.

17 This is a company and an association of companies from the food sector that volunteered to take part in FONAP's call for proposals. No companies from the non-food sector could be won over for this study.

2. Human rights in the palm oil sector

2.1 Figures and data

Palm oil production has continuously grown in recent years and has almost tripled since 2002/03 from just under 27 million tonnes to around 75 million tonnes in 2018/19.¹⁸ Because of the many different uses of palm kernel and palm oil¹⁹, it is processed in around one in two supermarket products;²⁰ it is found in confectionery and manufactured goods, cosmetics, animal feed, chemicals, detergents and care products, as well as in energy production processes. One reason for the enormous intensification of production is the high rate of profitability of palm kernel oil.²¹

In 2019, around 535,000 tonnes of palm oil and 120,000 tonnes of palm kernel oil were consumed in Germany in the non-energy sector.^{22,23} Of this, 46 percent (248,650 tonnes) was used in the food industry,²⁴ followed by the animal feed sector (150,200 tonnes), the chemical/pharmaceutical sector (106,517 tonnes) and the detergents, cleaning agents and cosmetics sector (29,622 tonnes). In the palm kernel oil sector, the washing, care and cleaning agents, and cosmetics sector comes in first place with 74,458 tonnes. According to Meo Carbon Solutions, 90 percent of the food sector palm oil is certified, followed by the detergents, cleaning products and cosmetics sector (64 percent), the chemicals / pharmaceuticals sector (36 percent) and the animal feed sector (25 percent). Most certified palm oil is certified according to the RSPO Standard.²⁵

18 Statista (2019).

19 Palm oil is obtained from the pulp of the oil palm; palm kernel oil is obtained by pressing palm kernels.

20 WWF Germany (2019).

21 Knoke/ Inkermann (2015), p. 3.

22 Meo Carbon Solutions (to be published, 2020).

23 In 2017, the energy sector accounted for 580,000 tonnes, or more than half (approx. 52 per cent) of the imported palm oil (Meo Carbon Solutions (2018), p.3).

24 Meo Carbon Solutions (to be published, 2020).

25 Ibid.

87 percent of palm oil production takes place in Indonesia and Malaysia, the remaining 13 percent is distributed among Latin America (5 percent), sub-Saharan Africa (4 percent), Asia (3 percent) and Oceania (1 percent).²⁶ The following presentation is based on a total of 35 reports from the regions mentioned, most of which relates to palm oil production in Indonesia.

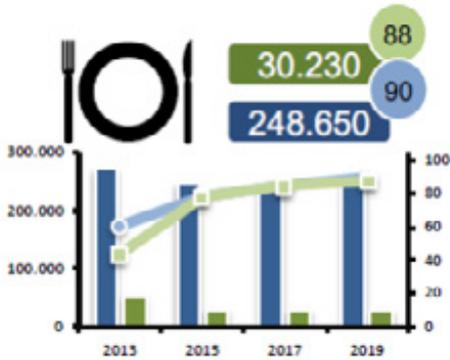
2.2 Human rights implications and risks

In the following, the study assigns the nature of potential and actual human rights impacts of palm oil production to the **four fields** mentioned most frequently in the literature and in the interviews: working conditions, trade union freedom and access to grievance mechanisms, land issues, and the environment.

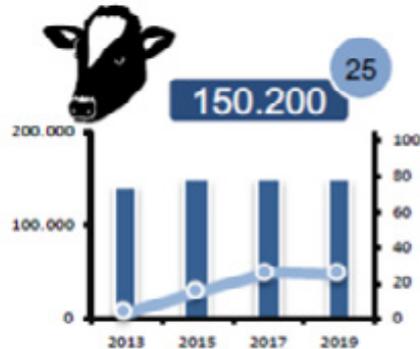
The above-mentioned problem areas are linked to **at least the following human rights**: the right to life; the right to liberty and security; the right to an adequate standard of living, including the right to food, the right to adequate housing, the right to safe drinking water and sanitation; the right to health; rights at work; the right to just and favourable working conditions; the right to form and join trade union; the right to social security; the right to education; the rights of women; the rights of all migrant workers and members of their families; the rights of children and the rights of indigenous peoples.

26 Noleppa / Carlsburg (2016); cf. Brot für die Welt (2017), p. 3.

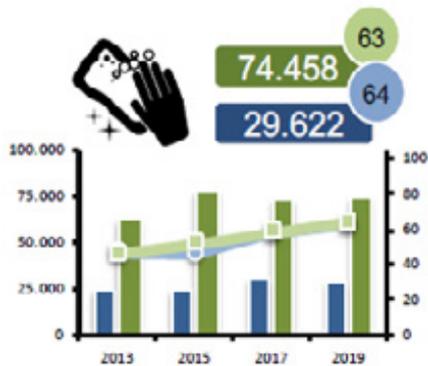
Consumption of sustainable palm (kern) oil in Germany in 2019 by sector



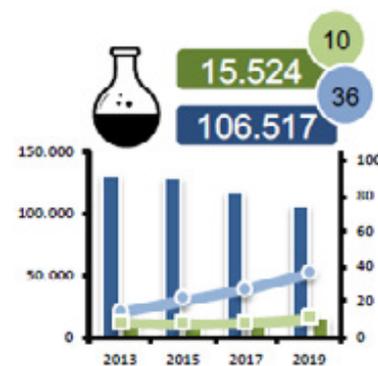
Food



Animal feed



Washing, care and cleaning agents



Chemical industry

Palm Kernel Oil (t)

Palm Oil (t)

%

Proportion of certified palm kernel oil

%

Proportion of certified palm oil

The reports mainly refer to issues in countries where palm oil is cultivated and produced.²⁷ Nevertheless, palm oil processing companies in Germany, for example, also bear responsibility for adverse impacts

²⁷ The present reports and statements by experts refer exclusively to the conditions in the country of production. For this reason, no statements can be made in this study about handling locations or the conditions in the processing companies in Germany.

on human rights. According to UNGP 17 and 19 (b) (i) there are three categories for the link between companies and human rights violations: 1) companies may cause adverse impacts themselves; 2) they may contribute to causing them; or 3) they may be directly linked to them through their operations, products or services or by their business relationships. In the case of companies that do not operate plantations or mills, but merely buy palm oil and process it for their products, it can be assumed that they either contribute to, or are

directly linked to the human rights impacts in question, since there are numerous other tiers in the supply chain between them and the plantations and mills. However, it is not possible to rule out the possibility that they are also involved in causing adverse impacts. „Cause“ means a direct impact of the company’s actions or omissions on rights holders’ human rights. A company „contributes“ to an adverse impact if its actions or omissions do not in themselves have a direct impact on human rights, but together with other actors, such as the entire industry, they nevertheless, have adverse human rights impacts. A company is „directly linked“ to human rights impacts if it is linked to them through its business activities at any point throughout the value and supply chain. The subsequent sub-chapter analyses which negative impacts on purchasing and processing companies may be directly linked to, contribute to, or even cause. The following chapters, in particular Chapter 6 on recommended approaches, explore ways in which companies can avoid such participation.

2.2.1 Working conditions

The literature reviewed for this study on the situation of workers on oil palm plantations, addresses problems related to recruitment to plantations, in particular wage levels and work intensity, health and safety at work, modern forced and compulsory labour, and discrimination; each of which has a particularly negative impact on the rights of national and international migrant workers, women and children.

Wage levels and labour intensity

Low wages are caused, among other factors, by salaries not being paid at the agreed level or unreasonable harvest quotas being set: if the quotas are not met, the plantation operators deduct the value of the missing harvest from wages.²⁸ In order to prevent this, unpaid wives and children help the fathers on the plantations, but also to help fathers to exceed the daily quota in order to receive possible bonuses (Interview W2, para. 15).²⁹ Even where statutory national minimum wages are paid, workers often fall below the poverty line,

²⁸ Danish Institute for Human Rights (2018), p. 36.

²⁹ See UNICEF Indonesia (2016), p. 12.

as the minimum wage is often below a living wage (Interview W3, para. 47).

For companies buying palm oil, this means that they run the risk of contributing or being linked to the infringement of the following human rights through their supply chain or business relationship: the right to just and favourable conditions of work (Article 7, UN International Covenant on Economic, Social and Cultural Rights, ICESCR), in particular the right to a just remuneration (Article 7 (a), ICESCR), which guarantees a decent living wage (Article 7 (a) (ii), ICESCR). Indirectly, low wages lead to a severe infringement of living conditions and thus impair the right to an adequate standard of living (Article 11 (1), ICESCR).

Health and safety at work

According to statements by experts (Interview W2),³⁰ the health of employees is impaired due to a lack of professional use of protective clothing and equipment (PPE, Personal Protective Equipment). This is partly due to a lack of training, and partly to a lack of monitoring participation in these training courses.³¹ The workers themselves tend to abandon their PPE: firstly, because workers often have to bear the costs of the equipment themselves, and secondly, because the equipment itself is often not suitable for the climate which makes it difficult for workers to achieve daily quotas (Interview W2 para. 15, 17, 22).³² Plantation operators hereby cause an infringement of the right to safe and healthy working conditions for workers (Article 7 (d), ICESCR).

For companies buying palm oil or using palm oil from these plantations, this means that their business activities are at least directly linked to. Depending on the buying company’s level of knowledge and its level of influence, they can also contribute to the

³⁰ Cf. Human Rights Watch (2019b); Oppuk / Rain Forest Action Network / International Labor Rights Forum (2017), p. 20, 23; Knoke / Inkermann (2015).

³¹ Danish Institute for Human Rights (2018), p. 38; Oppuk / Rain Forest Action Network / International Labor Rights Forum (2017), p. 20; Amnesty International (2016), p. 8; Knoke / Inkermann (2015), p. 15.

³² Cf. Oppuk / Rain Forest Action Network / International Labor Rights Forum (2017), p. 16; Danish Institute for Human Rights (2018), p. 37.

infringement of workers' rights themselves: If they have the opportunity to directly influence the size of the harvest, the availability of protective clothing and other circumstances surrounding production, it may even be possible to speak of the cause (UNGP 17 and 19).

Expert W2 further reports that plantation work causes physical ailments that lead to workers losing their jobs due to the resulting reduced work efficiency (Interview W2, para. 51).³³ Workers do not usually receive compensation payments (Interview W2, para. 51), and the necessary social security cover is often lacking. Even if guaranteeing social security is not the duty of (producing) companies but rather of the state, companies can still have a negative impact on the right to social security (Article 9, ICESCR), especially if they create jobs in the informal sector, employ day labourers through service contracts or support other non-regular forms of employment. By relying on precarious employment without social security models or by issuing social security documents to employees late or not at all, companies complicate or prevent workers' access to social security.³⁴

Three experts (Interview W1, para. 27; Interview N1, para. 49; Interview N2, para. 20) report that new plantations are often established around entire villages, sometimes extending beyond plantation concession boundaries and into the plantations of local residents. This occasionally leads to an inappropriate criminalisation of residents, who are accused of stealing company plantations' fruits (telephone call W1).³⁵

Physical or sexual violence by the plantation security authorities occur and are reported.³⁶ Human rights defenders and environmental activists are also exposed to criminalisation, and the threat and use of violence (telephone call, W1).³⁷ Because of the expansiveness of oil palm plantations, workers and residents of surrounding villages are exposed to an increased risk of sexual harassment and violence when they travel long distances, for example to their abode, or to the market.³⁸ The World Rainforest Movement documents the structural emergence of sexual violence against women – perpetrators are usually supervisors or security personnel.³⁹ Expert N1 confirms that women in particular are exposed to the risk of sexually exploitation if they want to be given a job, their legal wage or their salary (Interview N1, para. 49).⁴⁰

Companies that do not grow palm oil themselves but buy from plantation where such human rights infringements occur also contribute to adverse impacts on the right to safe and healthy working conditions (Article 7 (b), ICESCR); the right of women to protection of health and safety in working conditions (Article 11 (1) (f) UN Convention on the Elimination of All Forms of Discrimination against Women, hereafter CEDAW); the right to health (12, *ibid* ICESCR; Article 12 (1), CEDAW) as well as the prohibition of violence against women committed by public or private actors in different contexts (implicit in CEDAW)⁴¹

33 A frequently occurring health problem is early physical deterioration, especially back problems in harvesting men, which leads to infringement of their performance and to dismissal at an average age of 35 years (Interview W2, para. 51). Women are exposed to highly toxic pesticides, due to spraying activities – through leaks in tanks, for example, which lead to skin irritations or impaired vision (cf. Human Rights Watch 2019b). Women are mainly assigned the task of spreading fertilisers, which can lead to back, shoulder and hip problems, due to the daily working average of 17 bags of 50 kg per hectare (Interview W2, para. 57, 59; Danish Institute for Human Rights (2018), p. 38; cf. Oppuk / Rain Forest Action Network / International Labor Rights Forum (2017), p. 28).

34 Oppuk / Rain Forest Action Network / International Labor Rights Forum (2017), p. 20.

35 Cf. Save the Rainforest (2020); World Rainforest Movement (2019), p. 7; Human Rights Watch (2019a), pp.

50, 51.

36 World Rainforest Movement (2019), p. 3.

37 Cf. also Rettet den Regenwald (2020).

38 *Ebd.*, p. 3; vgl. Fern (2019); World Rainforest Movement u.a. (2018); UNICEF Indonesia (2016), p. 3.

39 Cf. World Rainforest Movement (2019), p. 4. This is one of the few current reports on sexual violence on and around palm oil plantations. Source N1 stated (para. 55) that even NGOs take a long time to hear about these human rights violations. One of the reasons for this is the lack of trust in the respective authorities by those affected. In some countries, rape is not only not punished or punishable, but the women concerned are even ostracised by their families (para. 47, 53).

40 World Rainforest Movement (2019), p. 4.

41 Cf. normative conceptualisation in General Recommendations No. 19 and 35 of the UN Committee on the Elimination of Discrimination Against Woman (1992, 2017)

Modern forced and compulsory labour

Many workers are national migrant workers who do not come from the growing region itself, or are international migrant workers, sometimes without residence or work permits. These groups of people are particularly at risk of becoming economically or legally dependent on their employers.⁴² They often incur debt in order to pay the costs incurred on the way from their employment agency to their arrival at the plantation (Interview W3, para. 27).^{43, 44} Workers enter a contractual agreement (Interview W3, para. 21, 27) that constitutes a form of modern slavery.⁴⁵ Because the granting of a work permit usually involves employees being bound to the employer for three years, it is difficult, or impossible for them to leave the employment contract.⁴⁶ There is a risk, that they will not be able to exercise their right to gain their living by work which they freely chose or accept (Article 6 (1) ICESCR) or even fall into a form of forced or compulsory labour, prohibited by the ICESCR (Article 6 (1), the ICCPR (Article 8 (1) and (3 a)) and the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Article 11 (1) (2), hereafter ICMW). These also include more subtle forms of forced and compulsory labour, such as the withholding of identification documents from workers,⁴⁷ which also affects their right to freedom of movement (Article 12, ICCPR).

42 Cf. International Labour Conference (2014), Article 2 (d): Persons, especially migrant workers, must be given special protection against abusive and corrupt practices during the recruitment and placement process.

43 International Labor Rights Watch / Sawit Watch (2013), p. 2-3.

44 The journey to the plantation holds numerous human rights risks. It is irrelevant whether recruitment takes place within the country or abroad: in both cases, a placement fee is charged, and the potential workers usually have to incur debts (Pye et al. 2016: 6). The costs of a necessary journey, such as visa fees, smuggling fees or a work permit, can lead to an increase in the employer's debt (Knoke / Inkermann 2015: 17; cf. The Guardian 2015).

45 Cf. indicators on forced labour of the International Labour Conference: https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_203832.pdf (accessed 27.05.2021); Saul, Ben/Kinley, David/ Mowbray, Jaqueline (2014), p. 329.

46 Pye et al. (2016), p. 6.

47 Cf. C.N. and V.v. France (Application No. 67724/09), European Court of Human Rights, 11 October 2012.

Companies buying palm oil through their supply chains, therefore, run the risk of negatively influencing at the very least the human rights described above; and of being directly linked to forced and compulsory labour through their business relationships by illegally withholding documents from employees (Interview W3, para. 27), employees being threatened with the loss of negotiated benefits and sanctions (including a reduction in wages if the harvest quota is not achieved), or the burden of the work is so disproportionate to the alleged benefits, that the continuation of the work can no longer be considered voluntary.⁴⁸

Discrimination

The available sources confirm that migrant women workers continue to be exposed to a particular risk of discrimination (Interview W3, para. 27; Interview W2, para. 89). The protection of women against discrimination is anchored in all UN human rights conventions and applies to all human rights. CEDAW has been ratified by 189 states – only three states worldwide have not signed it.

In Malaysia, migrant workers must undergo regular health checks to ensure they are not pregnant.⁴⁹ If they become pregnant, they are threatened with deportation, which can be used by companies as a means of pressure. At the same time, children born in Malaysia to migrant workers are not granted Malaysian citizenship⁵⁰ nor – if the legal form of citizenship in their parents' country of origin is based on the principle of place of birth (*ius soli*) – that of their parents.⁵¹ The Malaysian government denies non-Malaysian children access to state services, such as education.⁵² However, according to Article 24 (3) of ICCPR and Article 29 of ICMW every child has the right to a nationality and to enjoy civil, political, economic, social and cultural human rights irrespective of their national or ethnic origin, or that of their parents (including Article 2 (1), CRC; Article 2 (2), ICESCR; Article 2 (1), ICCPR).

48 Saul/ Kinley/ Mowbray (2014), p. 326

49 Pye et al. (2016), p. 6.

50 A prerequisite for such a permit is that one parent has Malaysian citizenship. Thus, the principle of descent (*ius sanguinis*) applies, according to which the citizenship of the children comes through that of the parents.

51 Under this principle, states grant citizenship to all children born on their territory.

52 Pye et al. (2016), p. 7.

All children must, therefore, be given, *inter alia*, non-discriminatory access to health services (Article 12 (1), ICESCR; Article 3 (4), Article 9, Article 23 (2), CRC; Article 3 Convention Relating to the Status of Stateless Persons) and education (Article 13, ICESCR; Article 28, CRC; Article 22 Convention Relating to the Status of Stateless Persons).

For all the countries listed, women are exposed to even worse working conditions than men. Women migrant workers are affected by intersectional vulnerability in several ways. Women tend to be employed as casual workers, tend not to have employment contracts and perform even poorer paid work than men (Interview W3, para. 48).⁵³ Therefore, women are hereby hindered in exercising their right to enjoy just and favourable conditions of work (Article 7 (a) (i), ICESCR; Article 11 (1) (b), CEDAW); their right to free choice of profession and employment (Article 11 (1) (c), CEDAW) and (women's) right to equal remuneration (Article 11 (1), (d) CEDAW).

These examples make it clear that many states are not implementing their obligations under UN human rights conventions. Although companies cannot be held responsible for this, they should take this fact into account when conducting their risk assessment.⁵⁴

This is of importance because purchasing companies can be directly linked to or contribute to the discrimination against women, as described above, via their supply chain. Under certain circumstances, it is even possible to speak of companies causing adverse impacts on human rights impacts, for example when companies systematically put suppliers under such pressure on prices, that they compensate for the cost pressure by paying lower wages to workers or migrants. A possible link between human rights infringements and the price mechanism should therefore be urgently investigated in more detail (see Chapter 6).

With regard to the following human rights, companies that purchase palm oil can be directly linked to, can contribute to or, in certain cases, even cause adverse impacts:

- Right to non-discrimination (Article 2 (2) and (3), ICESCR; Article 2 (1) ICCPR; Article 2 (1), CRC; Article 2, CEDAW; Article 18, ICMW)
- Right of the child to nationality and identity documents (Article 24 (3) ICCPR; Article 29, ICMW)
- Right to health (Article 12 (1) and (2) (d), ICESCR; Article 9, CRC; Article 12, CEDAW; Article 27, ICMW; Article 23, Convention Relating to the Status of Stateless Persons)
- Right to education (Article 13, ICESCR; Article 28, CRC; Article 22 Convention Relating to the Status of Stateless Persons)
- Prohibition of all sorts of violence, incl. gender-based violence against women (*inter alia* Article 1, 5, 11, 12, 14 CEDAW)
- Rights of women (Article 11, CEDAW) and migrant workers (Article 25, ICMW) in the field of employment
- Prohibition of slavery, servitude, forced or compulsory labour (Article 8 (1) and (3) (a), ICCPR; Article 6 (1), ICESCR; Article 11 (1) and (2), ICMW)
- Right to just and favourable conditions of work (Article 7, ICESCR), in particular the right to just pay and equal remuneration for work of equal value (Article 7 (a) (i), ICESCR) and the right to a decent standard of living for the worker and the family (Article 7 (a) (ii), ICESCR)
- Right to an adequate standard of living (Article 11 (1), ICESCR)
- Right to social security, incl. social insurance (Article 9, ICESCR)

⁵³ Li (2015), p. 23.

⁵⁴ More specifically on Malaysia, see the recommendations of the Special Rapporteur on the Right to Food of 2014: UN Doc. A/HRC/25/57/Add.2.

2.2.2 Trade union freedom and access to grievance mechanisms

According to statements from the interviews with experts and the reports on which this study is based, the repression of independent trade unions is one of the most common problems on the plantations.⁵⁵ Plantation operators threaten and sometimes use sanctions and violence (Interview W1, para. 71; Interview W3, para. 59).⁵⁶ Trade union members and workers who want to form trade unions lose their jobs (Interview W1, para. 21), are intimidated, humiliated (Interview W1, para. 33) or even murdered (Interview W1, para. 59). In this respect, companies buying palm oil may be involved in the infringement of the right to liberty and security (Article 9 (1), ICCPR) through their business relations. In Indonesia, although trade unions are permitted by law for each sector, there are reports of so-called „yellow“ trade unions, initiated and promoted by companies themselves, which represent company rather than worker interests (commentary W3, see Interview W3, para. 21, Interview W2, para. 147). In this respect, there is a risk that trade unions cannot exist or remain independent, as enshrined in the ICESCR (Article 8), the ICCPR (Article 22) and ILO Convention No. 87 (Article 2). Palm oil sourcing companies can therefore contribute to the infringement of rights holders' exercise of their right to freedom of expression (Article 19 (1) and (2) ICCPR), to freely form and join trade unions (Article 8 (1a) (1b), ICESCR; Article 22, ICCPR; Article 1, ILO Convention No. 87) and freedom of peaceful assembly and association (Article 21, ICCPR; Article 1, ILO Convention No. 87; Article 1 (1), ILO Convention No. 98, Article 26, ICMW).

Trade unions also play an important role as a grievance mechanism to which those affected by actual or suspected breaches of the law can turn to in confidence and anonymously. However, this function is rarely exercised under the above-mentioned conditions. There are also reports of the general absence of grievance

mechanisms or difficult access to them, due to a lack of information about their existence or functioning or a lack of certainty that those affected are not threatened with negative consequences when using a grievance-mechanism, for example.⁵⁷ In some cases, those affected turn instead in the first instance to churches or, if they work abroad, to embassies (Interview W3, para. 61).⁵⁸

Human rights on which companies can have a negative impact through their activities or business relations:

- Right to liberty and security (Article 9 (1), ICCPR)
- Right to freedom of expression (Article 19 (1) and (2) of the ICCPR)
- Right to freedom of assembly and association (Article 21, ICCPR; Article 1, ILO Convention No. 87; Article 1 (1), ILO Convention No. 98)
- Right to freely form and join trade unions (Article 8 (1) (a), (b), ICESCR; Article 22, ICCPR; Article 1, ILO Convention No. 87, Article 26, ICMW)

55 Cf. Pye et al. (2016); Amnesty International (2016).

56 Pye et al. (2016), p. 9; Amnesty International (2016), p. 82.

57 Danish Institute for Human Rights (2018), p. 39.

58 Catholic workers from the region of Flores [Indonesia] in particular use the church as their first point of contact to make their voices heard (Interview W3, para. 61).

2.2.3 Land issues

Among the most frequently documented problems in the palm oil sector are conflicts over land and land use rights between the state, companies and local communities, smallholders and indigenous peoples (Interview N2, para. 5; Interview N1, para. 11 and 35).⁵⁹ Particularly indigenous peoples and smallholders are affected by de facto expropriation through land grabbing and violent or economic displacement. They are denied recognition of customary land use or lack official land titles (Interview N1, para. 11, 27).⁶⁰ In many cases, this deprives them of their most important source of food or income and thus their livelihood (Interview N1, para. 35, Interview N2, para. 5).⁶¹ This is a violation of the right to life (Article 6, ICCPR), especially if the people concerned have a close relationship with their ancestral land.⁶² In addition, the loss of living space also regularly leads to a restriction of the right to health and the right to an adequate standard of living, in particular the right to food, the right to housing and the right to water and sanitation (Article 11 (1), ICESCR, General Comment No. 15, ICESCR Committee).⁶³

Companies buying palm oil may be directly linked to a violation of the ILO Convention No. 169 (Article 16 (2)) through their business activities with members of indigenous groups. Reports document that during consultations or negotiations with landowners, there are threats and even the use of violence and, as a result, the involuntary sale of land.⁶⁴

Furthermore, it is reported on several occasions that landowners who lease or give their land to plantation

operators, are deliberately deceived and do not receive promised compensation payments.⁶⁵ Due to illiteracy and/or foreign and/or legal language, the true content of lease contracts is often not accessible to landowners.⁶⁶ Thus, with regard to indigenous peoples, not only is the right to ownership and possession (Article 14 (1), ILO Convention No. 169) infringed upon, but also the right to traditional land and nature use, and the right of access to natural resources (Article 14 and Article 15 (1), Article 23 (1), ILO Convention No. 169). In addition to ILO Convention No. 169, land-related human rights problems, are also addressed in the Food and Agriculture Organization of the United Nations' (hereafter FAO) „Voluntary Guidelines for the Responsible Regulation of Property, Ownership and Use of Land, Fishing Grounds, Soil and Forests in the Context of National Food Security“ (VGGT).⁶⁷ The VGGT also provide companies with guidelines for dealing with issues of land use, land transfer and land acquisition in a human rights-based manner.

- Right to life (Article 6, ICCPR)
- Right to health (Article 12, ICESCR)
- Right to an adequate standard of living, including the right to adequate food and housing, and the right to clean drinking water and sanitation as part of the right (Article 11 (1), ICESCR; General Comment No. 15, ICESCR Committee)

59 Cf. Human Rights Watch (2019a), p. 39; Brot für die Welt (2017), p. 3; Knoke / Inkermann (2015), p. 19, 20.

60 Ibid., pp. 20, 81; Federal Environment Agency (2019), p. 86; see Human Rights Watch (2020); Windfuhr (2017), pp. 28, 39, 44.

61 Human Rights Watch (2019a), pp. 6, 20.

62 See landmark decisions of the Inter-American Court of Human Rights on the displacement of indigenous groups in Paraguay: *Yakye Axa Indigenous Community v. Paraguay* (2005) IACHR Series C no 125; *Sawhoyamaya Indigenous Community v. Paraguay* [2006] IACHR Series C no 146; *Xákmok Kásek Indigenous Community v. Paraguay* [2010] IACHR Series C no 214(2005).

63 Ibid.

64 Human Rights Watch (2019a), p. 12; Delius et al. (2007); see *Aliansi Masyarakat Adat Nusantara / Asia Indigenous Peoples Pact* (2017), Annex 1.

65 Human Rights Watch (2019a), pp. 47-50.

66 Knoke / Inkermann (2015), pp. 14, 15.

67 The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forest in the Context of National Food Security were unanimously adopted by the UN Committee on World Food Security in May 2012: Available online at https://www.bmel.de/SharedDocs/Downloads/DE/Broschueren/FreiwilligeLeitlinienRegulierung.pdf;jsessionid=611728AD09F4E76643B1B27C-770959BA.internet2831?__blob=publicationFile&v=6 (accessed on 19.07.2020).

- Right to freedom of expression (Article 19 (1) and (2) ICCPR)
- Right to health (Article 12 (1), ICESCR)
- Right to liberty and security (Article 9 (1), ICCPR)
- Right to protection of property and possessions (Article 14 (1), ILO Convention No. 169 for indigenous peoples)
- Right to traditional land and nature use (Article 14, Article 23 (1) ILO Convention No. 169)
- Right of access to natural resources (Article 15 (1), ILO Convention No. 169)

Environment

Respecting, protecting and guaranteeing human rights is closely linked to a healthy environment and its protection.⁶⁸ Studies such as those by the Federal Environment Agency⁶⁹ or the European Union⁷⁰ report on the ecological impact of palm oil production, which in turn has negative impacts on the exercise of human rights. According to Interview W1 (para. 13), the quality of water sources in particular is deteriorating due to untreated mill effluents and pesticide-contaminated wastewater from plantations⁷¹, thereby affecting the right to water (Article 11, ICESCR; General Comment No. 15, ICESCR Committee). Access to food and clean drinking water is described by those affected as the biggest problem (Interview W1, para. 13).

Some of the work processes associated with palm oil production also have negative impacts on the climate and eco-balance: the first processing of the palm fruit produces a liquid waste product (palm oil mill effluent), which in turn produces methane gas that is released unhindered into the atmosphere (Interview W3, para. 75).⁷² The expansion of plantations continues to deforest large areas or convert moors, peatlands and wetlands.⁷³ Large amounts of greenhouse gas emissions are released as a result of the slash-and-burn practices still in use, but also as a result of the loss of rainforests and primary forests as carbon reservoirs.⁷⁴ These processes favour anthropogenic climate change, which has a negative impact on most human rights, including the right to an adequate standard of living (Article 11, ICESCR), the right to health (Article 12, ICESCR) and the right to life (Article 6, (1), ICCPR; para. 62 of the General Comment No. 35, ICCPR Committee).⁷⁵ In addition, the loss of rainforests and primary forests, but also of moors and wetlands, threatens biodiversity

68 Cf. German Institute for Human Rights (2020), p. 10; Federal Environment Agency (2019), p. 24.

69 Federal Environment Agency (2019), pp. 86, 87.

70 Barthel et al. (2018), p.48.

71 Cf. Human Rights Watch (2019b); Danish Institute for Human Rights (2018), p. 32, 33..

72 Cf. Barthel et al. (2018), p.18.

73 Barthel et al. (2018), p.54.

74 Human Rights Watch (2019a), p. 25, 26; Sheil, Douglas u.a. (2009), S.25; vgl. Human Rights Watch (2020).

75 See UN Human Rights Committee on climate-induced habitat loss: *Ioane Teitiota v. New Zealand* (2020) CCPR/C/127/D/2728/2016

and various ecosystem services (such as the landscape water balance) which secure food (e.g. through fishing) or income for many people and their overall survival. At the same time, this loss encroaches on traditionally nomadic and indigenous ways of life, with adverse impacts on the implementation of the right of access to natural resources (Article 15 (1), ILO Convention No 169) and the right to food (Article 11, ICESCR).

Human rights on which companies can have an adverse impact through their activities or as a result of their business relationships:

- Right to life (Article 6, ICCPR)
- Right to health (Article 12, ICESCR)
- Right to an adequate standard of living, including the right to adequate food and housing, and the right to clean drinking water and sanitation as part of the right (Article 11 (1), ICESCR; General Comment No. 15, ICESCR Committee)
- Right to freedom of expression (Article 19 (1) and (2) ICCPR)
- Right to health (Article 12 (1), ICESCR)
- Right to liberty and security (Article 9 (1), ICCPR)
- Right to protection of property and possessions (Article 14 (1), ILO Convention No. 169 for indigenous peoples)
- Right to traditional land and nature use (Article 14, Article 23 (1) ILO Convention No. 169)
- Right of access to natural resources (Article 15 (1), ILO Convention No. 169)

3. Human rights due diligence of companies in the palm oil sector

3.1 The international framework of human rights due diligence

Chapter 2 showed that many of the risks of palm oil production described in the literature and by the experts interviewed are at the same time infringements of human rights law. The United Nations Guiding Principles on Business and Human Rights (hereafter the UN Guiding Principles), unanimously adopted by the United Nations Human Rights Council in 2011, form a consensus between states, business and civil society on how to deal with the adverse human rights impacts of economic activities. UNGP 12 sets out the framework for implementation:

„The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, **at a minimum, as those** expressed in the **International Bill of Human Rights** and the principles concerning fundamental rights set out in the **International Labour Organization’s Declaration’s on Fundamental Principles and Rights at Work**. (UNGP 12, team of authors’ highlights)

The International Bill of Human Rights consists of the Universal Declaration of Human Rights, the ICCPR, including its First and Second Optional Protocols, and the ICESCR, including its Optional Protocol which Germany has not signed.⁷⁶

In order to respect and protect the norms enshrined in these treaties, and to ensure that rights holders are not adversely affected by third parties in the

exercise of these rights, the then United Nations Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, John Ruggie,⁷⁷ conducted a consultation process over several years involving states, international, national and local civil society actors, business enterprises and national human rights institutions.⁷⁸ Since their adoption in 2011, the UN Guiding Principles have been considered the universally agreed language for business and human rights, to which all relevant bodies, such as the Organisation for Economic Cooperation and Development (OECD) or the European Union (EU), refer. Consequently, business activities intended to contribute to the respect of human rights adhere to the UN Guiding Principles and be understood and assessed within its framework.

The 31 guiding principles are divided into three pillars and explain in this structure: 1) the state’s duty to protect human rights under international law; 2) the responsibility of companies to respect human rights; and 3) the access to effective remedy for affected persons. No new binding treaty has entered into force with this framework, but rather it relates to the protection of human rights binding international treaties that already exist. The task and duty to protect and promote human rights lies primarily with the state and must be implemented by it.

⁷⁶ Cf. <https://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf> (accessed on 27.10.2020).

⁷⁷ For more information on the mandate see <https://www.ohchr.org/en/issues/business/pages/srsgtranscorpindex.aspx> (accessed 30.05.2021)

⁷⁸ Cf. Ruggie (2013).

The three pillars of the UN Guiding Principles for business and human rights



In its National Action Plan on Business and Human Rights (NAP), the relevant implementation plan for Germany which was adopted in 2016, the Federal Government explains how it intends to fulfil its human rights protection obligations in the context of the UN Guiding Principles (Pillar 1). At the same time, it formulates expectations for companies (Pillar 2) on how they must meet their human rights responsibilities, i.e., their human rights due diligence. Pillar 3, access to effective remedy for those affected, is also depicted in some basic approaches, but is not given enough attention.⁷⁹

The NAP was written with the aim „to make the UN Guiding Principles on Business and Human Rights applicable in practice for all players“ and „to highlight duties and responsibilities of the state and business respectively.“⁸⁰ This is intended to achieve the goal of „improving the human rights situation worldwide and to giving globalisation a social dimension in accordance with the 2030 Agenda for Sustainable Development“ and „to contributing actively to the human rights situation throughout the supply and value chains in Germany and worldwide“.⁸¹ The basic principle is: „A common understanding by all players worldwide of due diligence as described [...] is an indispensable means to this end“.⁸² The Federal Government thus

clearly formulates the expectation that all companies based in Germany must fulfil the five core elements of human rights due diligence as described in the NAP.⁸³ The German government has had a monitoring procedure carried out to check whether companies based in Germany can meet this expectation. A representative survey was conducted among companies in Germany with more than 500 employees. If less than 50 percent of these companies do not comply with their due diligence voluntarily and independently, the Federal Government will introduce a legal regulation in accordance with the Coalition Agreement 2018.⁸⁴ The final report of the NAP monitoring shows that only 13 to 17 percent of the companies surveyed fulfil their human rights due diligence in accordance with the NAP requirements.⁸⁵ In order to implement the commitments of the Coalition Agreement 2018, the

⁷⁹ Ibid., pp. 7, 8, 9, 10.

⁸⁰ German Coalition Agreement (2018: lines 7,382 to 7,385): „If the effective and comprehensive review of the NAP 2020 comes to the conclusion that the voluntary commitment of companies is not sufficient, we will take legal action at national level and advocate EU-wide regulation“.

⁸¹ Federal Foreign Office (2020), p. 5. The final report of the NAP monitoring is available online in German at: <https://www.auswaertiges-amt.de/blob/2405080/23e-76da338f1a1c06b1306c8f5f74615/201013-nap-monitoring-abschlussbericht-data.pdf> (accessed on 27.05.2021). All monitoring reports are available in German at: <https://www.auswaertiges-amt.de/de/aussenpolitik/themen/aussenwirtschaft/wirtschaft-und-menschenrechte/monitoring-nap/2124010> (accessed 27.05.2021)

⁷⁹ German Institute for Human Rights (2016).

⁸⁰ German Federal Government (2017), p. 5.

⁸¹ Ibid.

⁸² Ibid.

Federal Ministry of Labour and Social Affairs (BMAS) has announced that it will present a draft law for a due diligence act and will strive for its adoption in the legislative period running until 2021.⁸⁶

The five core elements of human rights due diligence

In the most part, the core elements of the NAPs and UN Guiding Principles are essentially the same: core element 1 calls for a human rights policy statement based on international human rights instruments.⁸⁷ This policy statement should be adopted at the highest levels of the company and communicated within the company and to key stakeholders, including potentially affected rights holders. The 2nd core element relating to companies' human rights due diligence, requires for a procedure to identify actual and potential adverse human rights impacts of corporate activities, i.e., a risk assessment. This procedure is to be applied continuously and should include additional expertise from independent third parties.⁸⁸ The 3rd key element requires measures to avert potentially negative impacts and to mitigate and redress actual adverse impacts, and to verify the effectiveness of these measures.⁸⁹ Core element 4 requires companies to report both on the potential and actual adverse impacts that they have identified through their risk assessment, and on the measures they take to prevent potential impacts and mitigate actual adverse effects, or provide access to remedy or compensation.⁹⁰ The 5th core element, is an effective grievance mechanism to which those potentially affected have access, and which they can know and use.⁹¹

Particularly with regard to core elements 2 and 3, i.e., risk assessment and the development of measures, the focus of the UN Guiding Principles on a company's

own activities should be emphasised. This requirement for companies is to be described here as an activity approach (Tätigkeitsansatz), as opposed to analyses of risks in specific countries and regions (country approach, Länderansatz). Core element 2, thus, requires an activity approach as opposed to a country approach, which is the basis for many tools for risk analysis, such as the CSR Risk Check⁹². Even tools that focus on specific issues can only support, but not replace, a risk assessment, such as the Children's Rights Atlas.⁹³ Limiting the procedures to general human rights problems in the region in which the company operates would be insufficient, even though such country analyses can be initial indications for further analytical steps. In particular, the measures taken by the company must result from the analysis of the impact of its own activities and address precisely these (risk assessment). The distinction between an activity approach and a country approach is not always easy to make, especially when a large proportion of human rights risks is located tiers deeper within the supply chain. But the change of perspective from looking at the risks that exist in a country, for example due to governance problems, to looking at a company's own activities, underlines the importance of a company's own responsibility to respect human rights, which applies independently of the state's duty to protect. The risk assessment is intended to enable a company to identify its own involvement in human rights infringements: Does a company cause, contribute to or is directly linked to human rights breaches through its business relationships? For such an analysis, knowledge of the general human rights situation in the region to which the supply chain extends is useful: Are there conflicts over land use in this region? Is there a water shortage? Are people here poorly paid and exploited? Is there a high incidence of harmful child labour in this region? This knowledge only forms a basis upon which to help a company to understand the importance of its own activities in this context, and to identify the specific impacts of its own activities on specific people (UNGP 19). The implementation of the five core elements of human rights due diligence depends on the respective context and must be carried out by individual companies and sectors themselves.

86 See press conference on supply chains and human rights (14.07.2020): <https://www.bmas.de/SharedDocs/Videos/DE/Artikel/Arbeitsschutz/2020-07-14-pk-lieferketten-menschenrechte.html> (accessed 27.05.2021).

87 German Federal Government (2017), p. 8; cf. UNGP 12.

88 Ibid., p. 8; cf. UNGP 17 (c): Human rights due diligence "[...] should be ongoing, recognizing that human rights risks may change over time as a business enterprise's operations and operating context evolve". Cf. also Human Rights Watch (2019a), p. 81.

89 German Federal Government (2017), p. 8.

90 Ibid., p. 9.

91 Ibid.

92 CSR Risk Check tool: <https://www.mvorisicochecker.nl/en> (accessed 27.05.2021)

93 See <https://www.childrensrighsatlas.org/country-data/workplace/> (accessed 27.10.2020).

3.2 Activities of palm oil purchasers in Germany

Following the normative classifications of human rights issues in the palm oil sector as described in literature and interviews, this sub-chapter deals with the measures that FONAP member companies are already implementing to counter these risks. The analysis of measures is based on four interviews conducted in July and August 2019 with four companies (three of which are FONAP members, one of which is oriented towards FONAP), as well as the results of a consultation workshop in September 2019, in which three other FONAP member companies (in addition to those interviewed), an industry association and the NAP-Helpdesk participated. Three NGOs, a research institute for sustainability analyses, and the Federal Ministry of Food and Agriculture (BMEL) also participated.

The semi-structured interviews were conducted by telephone on the basis of previously distributed guidance sheets with questions (see Annex 8.2). In this way, additionally to triangulating the problem descriptions found in the literature, it was possible to

gain qualitative insights into the procedures used by German palm oil processing companies in dealing with human rights risks. Prior to publication, the study was proofread by all interviewees and the points concerned were confirmed to be correct.

Analysis of the company interviews

Three of the interviewed companies acquire their palm oil exclusively through purchasing, one has direct access to plantations through its partner, but considers these plantations as part of the supply chain. The interview participants were asked about their understanding of sustainable palm oil, their knowledge of the requirements of the NAP and the UN Guiding Principles, as well as the structural conditions and activities in the company to meet these requirements. They were specifically asked at which level of the company, by which department and with what scope within the company human rights issues and challenges are processed. With regard to the activities of the companies, the survey focused on questions regarding a procedure for risk identification (core element 2)⁹⁴ and

94 Cf. UNGP 17; German Federal Government (2017), pp. 8, 9.

Type / designation	Procedure
„Hotspot Analysis“	For main raw materials, including palm oil as part of a master's thesis in 2018 (Interview U2, para. 25, 52)
Raw material analysis	3 to 4 years ago, without the intention of repeating (Interview U3, para. 54)
Risk Analyses	“A few years ago,” with a focus on deforestation (Interview U1, para. 37)
Newly developed Self-Assessment Tool	The tool also includes „no-exploitation“ criteria: it will gradually be extended to over 1,000 mills and should enable mills to identify their own gaps in corporate policy (Interview U1, para. 37)
Analysis with country approach	Analysis with a country approach, in which regular repetition in the company has not yet been determined (Interview U4, para. 38, 40)

the development of measures (core element 3).⁹⁵ The aim was also to find out what connection companies make between identified risks and measures taken.⁹⁶ Furthermore, the discussions also touched upon the inclusion of the perspective of those affected,⁹⁷ communication about the risks identified and measures taken,⁹⁸ as well as the establishment and functioning of grievance mechanisms.⁹⁹

All four interviewees stated that their palm oil supply and value chain could have a negative impact on human rights. They all have a policy statement (core element 1)¹⁰⁰, which commits them to respecting human rights; and all have carried out general risk analyses in the palm oil sector in various forms, some of which also covered human rights issues:

To address the risks identified by these analyses, all interviewed companies relied on certification systems, and some also relied on sector initiatives, in particular FONAP (Interview U2 para.30, 36; U3 para. 63, 68; U4 para. 45, 55). Only one company mentioned additional measures, including courses, workshops and training „according to need“ (interview U1 para. 35, 37); or the development of programmes - some of which are set up in cooperation with consultancies specialising in environmental and social issues - to address an identified risk (interview U1 para. 68). An example: to address the issue of the retention of workers' identity documents, company U1 introduced lockable lockers in cooperation with an NGO (interview U1 para. 108). Certification is also company U1's main measure, although it is not directly drawn on the risk analysis and its purpose is not primarily the implementation of human rights due diligence. However, U1 is the only company that takes further measures. In this regard, the company also requires suppliers of palm oil not certified as sustainable, who are part of the company's supply chain, to provide evidence of compliance with minimum sustainability criteria (para. 9), which also include human rights (para. 58).

Companies also rely on certification systems for the effectiveness tracking required by the UN Guiding Principles and NAP.¹⁰¹ One company stated that it can only check whether its suppliers are certified, but not whether they cause adverse human rights impacts. In this respect, it could only react to negative reports as soon as one of the suppliers came under criticism (Interview U4, para. 73). „We must rely on RSPO to work“ (Interview U4, para 73). Two of the four interviewed companies do not have their own grievance mechanism (Interview U3, para. 86; U4, para. 77), another company mentions a complaints system available in German and English in the form of a contact form on the company website, but this is primarily aimed at company employees and direct business partners and does only include the tier 1 of their supply chain (Interview U2, para. 44, comment U2). Company U1 has an internal complaint handling process, which is coordinated by one person in charge (para. 82, 92). In the event of a complaint, the coordinator, in close cooperation with colleagues on site, contacts the person reporting the complaint or the stakeholder and carries out further investigations, if necessary (para. 92).¹⁰² If a reported infringement is confirmed, the company will make this known on its website by publishing the report (para. 82, 88). Overall, the companies surveyed welcome the NAP and the process of implementing the UN Guiding Principles. Two companies, however, stated that the NAP was not relevant to them, in that they had already fulfilled their human rights due diligence before its publication (Interview U1, para. 43) and that the NAP rather aims at ensuring that human rights are respected in the production countries (Interview U3, para. 52). The other two interviewees rated the NAP as relevant for their company, but in one case with the remark that the NAP was not yet „lived“ (Interview U2, para. 40). When asked, one company supports a due diligence act (Interview U1, para. 54).

95 Cf. UNGP 17; German Federal Government (2017), p. 9.

96 Cf. UNGP 17, 19.

97 Cf. UNGP 20.

98 Cf. UNGP 21.

99 Cf. UNGP 29, 31.

100 Cf. UNGP 16; German Federal Government (2017), p. 8.

101 Cf. UNGP 20; German Federal Government (2017), p. 9.

102 In most cases, NGOs operating in the field submit complaints that investigate alleged human rights infringements and report on them if confirmed (Interview U1 para. 82, 84).

Evaluation of the company interviews

Companies often address human rights issues as part of their sustainability work, which is also shown by the fact that in some companies' human rights issues are the responsibility of the sustainability analysts (U1) and sustainability managers (U3). In the other companies, the quality managers (U2) and CSR managers (U4) are responsible for human rights issues.

Risk analyses are not conducted on a regular basis at any of the companies surveyed. The analyses carried out vary in the methodology applied (hotspot analysis, desk research for a master's thesis, etc.), but are all without on-site investigation and without the involvement of potentially affected rights holders. In order to counter identified human rights risks, the purchasing companies rely above all on certification, which the survey revealed to be the most important measure for the companies interviewed. Certification is not directly linked to the risk analyses but was initiated before the risk analysis was conducted or introduced in response to media reporting of the negative impacts of corporate practices. The interviewed companies also rely exclusively on the certification system to verify the effectiveness of the measures taken - in this case the certification itself. Only one of the companies surveyed has a grievance mechanism that also covers human rights concerns.¹⁰³ The establishment of an effective grievance mechanism is seen by companies as the greatest challenge. This is confirmed by the statements made by companies in a joint consultation workshop in September 2019.

Based on the business procedures of risk analysis, it seems important to determine the scope of application of this 2nd core element (risk assessment) in particular. The commentary on the UN Guiding Principle 11 firstly states: „Business enterprises may undertake other commitments or activities to support and promote human rights, which may contribute to the enjoyment of rights. But this does not offset for a failure to respect human rights throughout their operations.“ UNGP 11 states that „they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved“. The responsibility of companies to respect human rights

thus relates to their own activities („with which they are involved“). Adverse human rights impacts cannot be offset by any other charitable engagement, nor can they be offset by corporate social responsibility (CSR) or sustainability measures.

It is therefore essential that companies adopt a methodology for identifying risks that can examine and record the adverse human rights impact of their own business activities, including business relationships throughout their entire value and supply chain. This activity approach, as described in the previous section (Chapter 3.1), is a specific feature within human rights due diligence in the space of corporate responsibility. In the almost ten years since the adoption of the UN Guiding Principles, human rights requirements for corporate responsibility have developed in ways that both overlap with, and deviate from, sustainability criteria. Some companies that have been active in the field of sustainability for a long time tend to assume that they are already sufficiently fulfilling their human rights due diligence in line with the UN Guiding Principles. But commitment and sustainability successes are not necessarily synonymous with the fulfilment of corporate responsibility to respect human rights.

The interviewed companies, all of whom already show a high level of commitment to sustainability, tended to assume in the interviews that they already meet, or even exceed, the human rights requirements as formulated in the NAP. An instructive example of this can be found in the section of an interview with Company U1 in which the NAP, monitoring and human rights due diligence is discussed: „[W]e feel very well positioned with our sustainability programme. And we are, I think, very far ahead in the palm oil sector and in the food sector in general, as far as agricultural raw materials are concerned. And we will continue to do so“ (Interview U1, para. 48). The interviewee responds to human rights requirements with achievements from its sustainability programme. This implies the basic assumption that a commitment to sustainability will automatically meet human rights requirements. The perception „we are very far ahead [in this respect]“ is derived from sustainability work but applied to human rights. The statement „And we will continue to do so“ underlines the conviction that the path chosen is the right one. In this context - at least at this stage of the interview - this ignores the fact, that human rights due diligence requires different methods and processes of implementation than general company sustainability

103 Cf. UNGP 20, 22; German Federal Government (2017), p. 9.

strategies, even if these strategies do in principle include human rights. For example, it can occur that a company takes sustainability measures but does not yet implement the UN Guiding Principles, e.g., does not carry out regular risk assessments. The U1 cited here, for example, has carried out a “risk assessment”, but only once („three to four years ago“, para.37) and only in relation to „deforestation“ and not, for example, in relation to human rights risks on the plantations and in the mills. Even the newly developed „self-assessment tool“, which according to U1 (para.37) is to be extended to 1,000 mills, is not an adequate substitute for the measures the company has to take to counter its human rights risks, nor for effectiveness controls and corresponding reports on them, even though it may well be suitable to adequately flank such measures. It should be noted that U1 takes more measures than the other companies interviewed, such as on-site training in addition to certification. Nevertheless, the five core elements are not (yet) being implemented, so that the self-assessment „we are very far ahead“ may apply with regard to more general measures and in comparison with the peer group itself, but not with regard to the specific implementation of the human rights due diligence in accordance with the UN Guiding Principles and NAP. In behavioural economics, the systematic adherence to one’s own assessments despite deviating evidence is referred to as overconfidence bias – a systematic overestimation of one’s own capabilities, and can lead to distorted and thus, erroneous decisions – here: in supply chain relationships.¹⁰⁴ Whether or not there is an empirical overconfidence bias with regard to human rights in companies that already deal with sustainability and take measures such as certification and network building, would have to be checked using behavioural economics and social psychology methods.¹⁰⁵ Given that studies are not yet available, only the interviews and the 2019 consultation workshop can be used to speak of the possibility of an overconfidence bias, combined with a recommendation to companies to counteract it. Companies should not assume that their previous sustainability commitment can always be transferred to the fulfilment of human rights due diligence.

104 Doyle and others (2020).

105 Camerlar / Lovallo (1999).

4. Palm oil purchasing companies, certification systems and human rights responsibilities

In Chapter 2, issues in the palm oil sector were classified in normative, institutional and procedural terms. It became clear that purchasing companies are also directly linked in adverse human rights impacts through their business relationships, can contribute to and under certain conditions may even cause them themselves. In Section 3.1, the UN Guiding Principles, the most important international framework for dealing with human rights risks, and its instrument for national implementation, the NAP, were presented and placed in relation to the activities of palm oil processors. It transpired that companies that are members of FONAP or are guided by the FONAP criteria primarily rely on certification systems to counter human rights risks.¹⁰⁶

In order to assess to what extent a sustainability certification also meets the requirements of a measure to fulfil human rights due diligence requirements in adherence with the UN Guiding Principles and NAP, and which tasks cannot be delegated by companies to fulfil the human rights due diligence, this chapter proposes four criteria for the human rights assessment of certification systems. This is not a comprehensive evaluation of certification systems, for example on environmental issues, but rather an assessment of their possible contribution to the fulfilment of the individual human rights due diligence of companies. These criteria, in the form of four guiding questions, were developed by the German Institute for Human Rights (DIMR) on the basis of the UN Guiding Principles and are to be developed further beyond the present study and applied to other certification systems.

4.1 Criteria for the human rights assessment of certification systems

All four company representatives questioned in the interviews as well as the three companies involved in the consultation workshop and the company association state that they use certification systems to counteract human rights and environmental risks identified or already known through NGO reports. This (non-representative) survey shows that the certification of the Roundtable on Sustainable Palm Oil (RSPO), especially in its 2018 reformed version, is widely known. Since RSPO certification is the most widely used system worldwide and all FONAP member companies are RSPO-certified, the following section will answer the question of whether RSPO certification is a sufficient measure to comply with the human rights due diligence requirements of the NAP.

What does a certification system have to achieve to be sufficient and NAP-compliant from a human rights perspective?

The question is, therefore, whether the RSPO certification system meets the requirements of the NAP (or the UN Guiding Principles) in terms of content, and whether it is procedurally a human rights-based approach. A human rights-based approach is an approach based on international human rights norms, principles and standards. It ensures that rights holders can claim their rights and places responsibilities on duty bearers (governments and their agents).¹⁰⁷ Where the activities of companies have a negative impact on human rights, this always manifests itself as an infringement of the rights of specific people, the rights holders. Under international law, it is the state, as the duty bearer, which must protect human rights within its jurisdiction and

¹⁰⁶ Only one company, which owns plantations itself, also mentioned workshops and training courses.

¹⁰⁷ Cf. e.g., Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH (2019); European Network of National Human Rights Institutions (2017).

territory. If companies cause (or contribute to or are directly linked to) adverse impacts, they constitute responsible third parties. It is the duty of the state to protect rights holders from negative impacts by third parties. Under international law, companies themselves do not have a duty to protect, but are responsible for respecting human rights by implementing human rights due diligence. This distinction is important in clarifying the distribution of duties (states) and responsibilities (third parties) necessary to ensure that rights holders can exercise their rights.

The principles in terms of the human rights-based approach are 1) participation and empowerment, 2) accountability and transparency, 3) non-discrimination and equal opportunities. In the context of corporate responsibility, participation entails both the risk assessment and the effectiveness of the measures taken by a company to counter human rights risks, and must be carried out from the perspective and by involving the rights holders' point of view (UNGP 18).¹⁰⁸ This can prove to be a challenge for companies that are not operationally active on the ground. If it is not possible to involve rights holders directly, their perspective can be incorporated in other ways into the risk assessment, for example, through contact with civil society or a national human rights institution (NHRI), who in turn maintain contact with rights holders, or with other companies that purchase palm oil and have already established contacts on the ground. According to the human rights principle of empowerment, those rights holders affected must be informed about their rights so that they can, for example, seek access to law and justice in the first place. Accountability and transparency require the reduction of information asymmetries by communicating risks and measures to rights holders so that they can claim their rights if necessary. The principle of non-discrimination and equal opportunities means that marginalised groups and „individuals belonging to specific groups or populations that require particular attention“ are given special consideration in the implementation of human rights due diligence, in light of the fact that they are often particularly affected by negative impacts (Commentary on UNGP 12).

108 Cf. Utlu (2019).

The four criteria for the human rights assessment of certification systems:

All procedures should be lawful, i.e., covered by international human rights. In view of this last requirement, the present study proposes a first standardised criterion for a human rights assessment of certification systems, which can be formulated as the following question:

1) Completeness of the certification criteria

Do the certification criteria cover all relevant human rights risks in the sector as identified through risk assessments?

Through this question, a shift in perspective takes place: attention is no longer drawn to the possible achievable positive achievements of an activity – such as reduced emissions of pollutants into the air – but shifts to the protection and respect of human rights. A general assessment of prioritisation according to UNGP 17 (cf. Chapter 2.2) would therefore require an examination of whether at the very least all possible human rights breaches identified in Chapter 2 can be detected with the 2018 RSPO Principles and Criteria (P&C), along with the indicators upon which they are based. In addition, each company would also have to independently compare the certification system's principles, criteria and indicators with the results of its own risk assessments.

2) Fulfilment of procedural human rights due diligence requirements

Some human rights-based approach principles are procedural maxims, such as transparency and participation, that place certain demands on the procedure.¹⁰⁹ These demands are also found in the UN Guiding Principles, for example, that risk assessment should include „meaningful consultations with potentially affected groups“.¹¹⁰ To this end, the present study

109 Global Compact Network Germany/German Institute for Human Rights (ed.) (2019), p. 13.

110 UNGP 18 (b), p. 23 The UNGP 18 Commentary further states: „To enable business enterprises to assess their human rights impacts accurately, they should seek to understand the concerns of potentially affected stakeholders by consulting them directly in a manner that takes into account language and other potential barriers to effective engagement. In situations where such consultation is not possible, business enterprises should consider reasonable alternatives such as consulting credible, independent expert resources,

proposes the second procedural criterion for a human rights assessment of certification systems. The criterion can be formulated as the following question:

Do the certification criteria lead to the company's verifiable fulfilment of procedural human rights due diligence?

This is based on the requirement that in order to obtain certification, the company, plantation or mill operator must not only comply with the system's criteria, but also establish procedures to involve and account for the rights holders affected and where appropriate to enable them to take legal action against the company.

3) Review procedure (established by the certification system): Monitoring of human rights impacts

Eventually, there must be an independent monitoring procedure as part of the certification system to ensure that certified palm oil producers do not cause adverse human rights impacts:

Does the certification system have procedures in place to ensure that (palm oil) producers do not cause adverse human rights impacts?

This third criterion requires that the certification system monitors criteria 1 and 2 for companies whose products are to be certified.

4) Review procedures (established by purchasing companies): Tracking of effectiveness

All three criteria for the human rights assessment of certification systems should also be tracked by the processing companies themselves. The companies must guarantee that the certification is effective in terms of human rights compliance, as they are ultimately responsible for processes initiated to comply with their human rights due diligence – even if, for example, partial outsourcing to a certification system occurs:¹¹¹

Does the purchasing company have procedures in place to continuously track the certification system's human rights effectiveness? Does the certification system provide all necessary information to enable monitoring?

In any case it is always the responsibility of the company to ensure that the measure it chooses to address human rights risks is effective. The fourth criterion is therefore necessary to ensure companies have procedures in place to continuously track the human rights effectiveness of the certification system, and that the certification system itself must provide the necessary transparency to allow verification.

Type / Table:

Four criteria for the human rights assessment of certification systems Procedure

Do the certification criteria cover all relevant human rights risks in the sector as identified through risk assessments?

Do the certification criteria lead to an ongoing and continuous fulfilment of (palm oil) producers' human rights due diligence requirements?

Does the certification system have procedures in place to ensure that (palm oil) producers do not cause adverse human rights impacts?

Does the purchasing company have procedures in place to continuously track the certification system's human rights effectiveness? Does the certification system provide all necessary information to enable monitoring?

including human rights defenders and others from civil society".

¹¹¹ Wahab (2019), p. 17.

4.2 Applying the criteria to assess certification systems with regard to human rights: the RSPO case study

In the following, all four criteria will be applied for the first time, albeit not exhaustively, to the certification system primarily used by FONAP members: The Principles and Criteria of the Roundtable on Sustainable Palm Oil (RSPO) as amended in 2018.

4.2.1 Criterion 1: Completeness of certification criteria

The RSPO Principles and Criteria 2018 (RSPO P&C 2018) comprise seven principles. The first three define the basis for prosperity from a business perspective (impact objective: prosperity); principles four to six are intended to lead to the well-being of the people involved (impact objective: people); and principle seven prescribes environmental protection and the preservation of ecosystems (impact objective: planet).¹¹² From a human rights perspective, all three target levels are interlinked: ethical behaviour (principle 1) and legal conformity (principle 2) are prerequisites for the observance of human rights. Equally important from a human rights perspective is a clean environment (principle 7), since otherwise, as stated above, important determinants of the right to health and the right to life may be impaired. However, the RSPO principles are also potentially in conflict with human rights principles and standards: optimised productivity and efficiency (principle 3) can be at the expense of human rights, for example through increased exploitation or monitoring in the workplace or through compliance with only a minimum level of environmental protection. The fact that there are also efficiency enhancing measures, which at the same time reduce (at least environmental) risks,¹¹³ does not rule out the possibility that striving for increased productivity may also have adverse impacts. Whether this is the case in practice within an RSPO P&C framework requires separate investigation.

In 2014, the RSPO set up a Human Rights Working

¹¹² Roundtable on Sustainable Palm Oil (2020), p. 12.

¹¹³ Mafira / Rakhmadi / Novianti (2018).

Group (HRWG) and entrusted it with the task of identifying human rights risks in the industry, in line with the UN Guiding Principles. The HRWG identifies the following human rights problems as relevant in the palm oil sector: land rights, consultation rights, rights of migrant workers, deception in recruitment or placement, freedom of association, discrimination against women, unpaid, undocumented work by women, child labour.¹¹⁴

With regard to human rights criteria, the P&C principles 4¹¹⁵ and 6¹¹⁶ are particularly relevant.

It appears that the RSPO human rights criteria address many of the human rights risks identified by the HRWG. In the 2018 version, the rights of migrant workers, which have not yet been taken into account, are listed in the annex under the newly added additional criteria.¹¹⁷ Human rights related to the environment, such as the right to water, are partly covered by the criteria of principle 7 (protect, conserve and enhance ecosystems and the environment). The 2018 principles and criteria of the RSPO therefore, largely take into account the human rights problem areas of palm oil production, as presented in the relevant literature and summarised in Chapter 2 above. A detailed analysis of the RSPO P&C 2018 using the human rights matrix (Chapter 8.3) can reveal which human rights are not, or not sufficiently, taken into account. Two illustrative examples are given here: (post) conflict regions and children's rights.

The RSPO P&C 2018 hardly, or only indirectly (with regard to conflicts over land use rights and the protection of human rights defenders), address palm oil cultivation in (post) conflict regions – which could be an indication of a normative protection gap. In any case, the RSPO P&C 2018 do not go into the fundamental problems of production in regions controlled by non-state armed groups. Although the literature on the palm oil sector provides little information on conflict financing, it is difficult to rule out that illegal armed groups also benefit from palm oil production in

¹¹⁴ See <https://rspo.org/human-rights-and-social-standards> (accessed on 28.07.2020).

¹¹⁵ Roundtable on Sustainable Palm Oil (2020), pp. 34–41.

¹¹⁶ Roundtable on Sustainable Palm Oil (2020), pp. 45–51.

¹¹⁷ Roundtable on Sustainable Palm Oil (2020), pp. 103–108.

Principle 4 (Respect community and human rights and deliver benefits)

Respecting human rights, including the rights of human rights defenders	Criterion 1
Mutually agreed and documented system for dealing with complaints and grievances, which is implemented and accepted by all affected parties.	Criterion 2
Contribution to sustainable regional development as agreed by local communities	Criterion 3
Legal, customary and usage rights remain valid despite land use for oil palm plantations; Consultation rights, in particular of local groups under free prior informed consent (FPIC)	Criterion 4, Criterion 5
Compensation system for violations of legal, customary and usage rights (indigenous groups, local communities and other stakeholders)	Criterion 6, Criterion 7
Compensation system related to land use and land use rights	Criterion 8

Principle 6 (Respect workers' rights and conditions)

Non-discrimination	Criterion 1
Decent living wage	Criterion 2
Right to freedom of association and collective bargaining	Criterion 3
No child labour and exploitation	Criterion 4
No harassment and abuse in the workplace, Protection of reproductive rights	Criterion 5
No forms of forced or trafficked labour	Criterion 6
Workplace Health and Safety	Criterion 7

some cases, given the general findings on the subject. Some palm oil plantations are located in former conflict areas of Colombia, where paramilitary groups have driven mainly indigenous and Afro-Colombian

population groups off their land. As explained in Chapter 2.2.2, trade union members are also often at increased risk of being laid off in such (post) conflict

regions.¹¹⁸ One of the companies questioned, a purchaser of palm oil from Colombia, pointed out that it had close links with its suppliers, in particular through a local contact person in a local company. The contact person kept the company continuously informed about the situation in the region (Interview U1, para. 66). The company thus goes beyond RSPO P&C 2018 requirements. In view of the human rights risks identified in Chapter 2, the RSPO P&C 2018 has a potential protection gap as regards conflict financing. In order to close the protection gap, new criteria and principles including associated indicators, would have to be introduced into the RSPO system that address conflict financing. These indicators should enable RSPO or the companies themselves to check whether illegally armed groups benefit from transactions. To this end, buying companies that source their products from these regions should also establish contacts and maintain constant communication with civil society and human rights institutions in the producing regions.

A further example of a possible gap in addressing human rights issues uncovered through a comparison of the RSPO P&C with the relevant human rights identified in Chapter 2, concerns the respect and protection of children's rights: In the literature, it is reported that harmful child labour occurs on plantations, for example when children support their parents on the plantations to enable them to reach the harvest quotas.¹¹⁹ This leads to a breach of the right to protection from economic exploitation, and from harmful and hazardous work in accordance with Article 32 of the UN Convention on the Rights of the Child. The RSPO P&C 2018 addresses this human rights risk only partially with Principle 6, Criterion 4: „Children are not employed or exploited.”¹²⁰ This principle is to be checked against the RSPO indicators 6.4.1 (formalised company policy for the protection of children), 6.4.2 (minimum age and personnel records), 6.4.3 (non-damaging work for young workers) and 6.4.4 (communication on company policy). However, it should be borne in mind that children who help their parents to meet the harvest quota on the plantations, are not in official employment, i.e., are not recorded by the system. If it can be assumed that children who help their parents to harvest, to meet the quota, are

118 Cf. Boddenberg (2019).

119 Cf. UNICEF Indonesia (2016).

120 Roundtable on Sustainable Palm Oil (2020), pp. 48–49.

informally employed on the plantations, the protection provided by the RSPO P&C 2018 does not go far enough. Companies would be required, therefore, to take additional measures in order to comply with human rights due diligence requirements. Companies can, for example, form additional agreements with suppliers if they have a direct relationship with them. If there is no direct relationship with suppliers, for example when purchasing palm oil derivatives, the companies concerned should join forces with other palm oil users to look for ways to reach joint suppliers and persuade them to abolish harvest quotas. In this way, it could be ensured that the suppliers do not officially employ children in the fields and thus prevent informal child labour. As a matter of principle, companies should join forces – in accordance with pre-cartel law – and replace suppliers who assess remuneration systems according to harvest quotas with those who pay their employees a living wage without any harvest quotas.

Conclusion on Criterion 1: The RSPO P&C 2018 are normatively very far-reaching, but a first illustrative comparison using the example of conflict financing and child labour indicates that the certification system contains gaps in human rights protection.¹²¹

A complete comparison of the RSPO P&C 2018 with human rights law and corporate human rights due diligence requirements is not possible within the scope of this study. It should be commissioned by industry networks or multi-stakeholder initiatives (MSIs), such as FONAP, and should be carried out by the individual companies concerned with focus on their own human rights risks.

121 Using two examples – conflict financing and child labour – this paper introduces how human rights standards can be compared against certification criteria to assess if all human rights are fully taken into account. This study does not assume that these two examples represent the most severe human rights risks in the sector (see Chapter 2 on human rights risks in palm oil production).

4.2.2 Criterion 2: Certification criteria and fulfilment of procedural human rights due diligence requirements

As described in Chapter 3, companies' human rights risks must be addressed in accordance with the UN Guiding Principles through an individual company activity approach. Although general assessments of the human rights situation in certain regions or industries can serve as a guide for individual companies, they cannot relieve them of their responsibility to respect human rights within their own activities and relationships. This is particularly true because the political and human rights situation in the countries where the crop is grown can change at any time. For this reason, the second pillar of the UN Guiding Principles, which is aimed at companies, describes the human rights due diligence of companies as a continuous process: a human rights risk assessment (HRRRA) of their own company activities and business relationships is followed by measures; the identified risks as well as the measures taken and their effectiveness must be tracked and communicated so that those affected and independent third parties can assess the situation and development. The cycle then begins anew. An effective grievance mechanism is also part of this process.

Some parts of the RSPO P&C 2018 have a procedural character, such as criterion 4.2, which requires an agreed documentation system for complaints. High demands are also made of a risk management system, such as criteria 2.1 and 2.2 of principle 2 (operate legally and respect rights), which require provisions on respect for local rights, especially in supply contracts.

Nevertheless, a clear implementation of the five core elements of the UN Guiding Principles is not a prerequisite for RSPO certification. The current RSPO P&C 2018 do not contradict an implementation of the second pillar of the UN Guiding Principles, but they do not explicitly demand it either. A RSPO-certified company may or may not therefore have processes of human rights due diligence in line with the UN Guiding Principles in place.

Conclusion on Criterion 2: Whether the certified plantations and mills comply with the procedural human rights due diligence in practice, is not apparent from the system's specifications. In this case, the industry is recommended to include procedural

elements in line with the UN Guiding Principles in the catalogue of criteria for RSPO certification. In this way, companies could work towards ensuring that the RSPO is officially based on the UN Guiding Principles.

4.2.3 Criterion 3: Review procedures (established by the certification system)

In order to be able to make a valid statement, as to whether companies that buy certified palm oil have fewer negative impacts on human rights than those that do not, the RSPO would have to have monitoring procedures in place that track the effectiveness of measures adopted and are in line with the UN Guiding Principles and the NAP. In other words, measures adopted by certified plantation operators and mills in response to identified human rights risks would have to be regularly reviewed by the RSPO with regard to their effectiveness and the results published. According to the RSPO representative interviewed, impact assessments are carried out. However, it is not clear whether these are human rights impact assessments (HRIA) or other impact assessments, such as environmental and social impact assessments (ESIAs), which pursue different objectives. According to the RSPO, results are still to be seen (interview RSPO). Furthermore, such impact assessments would have to ensure that the specific effectiveness requirements resulting from the UN Guiding Principles for HRIA are met: better understanding (understanding dimension), adequate allocation of resources for measures at the appropriate corporate level (management dimension), measures that are suitable to prevent or reverse the effects (response dimension).¹²²

Conclusion on Criterion 3: Whether the HRIA meet human rights requirements, such as whether they are based on established standards and the UN Guiding Principles, cannot be determined at the present.¹²³

¹²² Utlu (2019), pp. 360-363.

¹²³ Cf. the Danish Institute for Human Rights' Human Rights Impact Assessment Guidance and Toolbox (2020).

4.2.4 Criterion 4: Review procedures (established by purchasing companies)

The fourth criterion exceeds the scope of what a certification system can achieve on its own and concerns companies' self-responsibility. The responsibility of companies to respect human rights, as formulated in the UN Guiding Principles, includes that every company must ensure that it is aware of the risks and impacts of its own activities, and that it takes steps to counteract them. Accordingly, a company is ultimately also responsible for (non-) measures taken, including partial outsourcing to an external system, such as a certification system – which in turn is naturally responsible for ensuring transparency vis-à-vis (palm oil processing) companies, in order to give them the opportunity to assess the effectiveness of the system appropriately and effectively. The German NAP defines core element 3 of the human rights due diligence as: „measures to ward off potentially negative effects and review of the effectiveness of these measures“.¹²⁴ The explanation of this core element further states: „With the aid of effectiveness tracking, the enterprise should regularly review the efficacy of the measures it has taken and, to this end, engage in dialogue with affected stakeholders“.¹²⁵

If the measure is based on the risks identified in a risk assessment, i.e., the measure that only certified palm oil may be purchased, there must be a „regular“ review procedure to enable the purchasing company, to check whether the measure has proved to be effective. The company cannot pass on this effectiveness control completely to the certification system, because otherwise the measure and the effectiveness control would be identical, and the independence required for control would not be given. Third party reviews must also be verified by the company. In addition to audits, external experts, such as (environment and social) consultants (who also examine human rights), could be sent from time to time, to carry out such reviews in order to establish an additional control loop to check the auditors. Since – according to FONAP member companies at the consultation workshop for the present study – if it is quite possible that a plantation

supplies more than one purchasing company, a review procedure at industry level would also be conceivable in this context (FONAP Consultation Workshop Protocol 2019).

Conclusion on Criterion 4: A review of the certification system by individual companies is necessary, otherwise verifier and verified are one and the same. A third-party review is possible, provided that it is also regularly reviewed by external experts and consultants. Where different companies purchase palm oil from one and the same plantation or mill, a joint inspection is conceivable, for which several companies join forces. From the individual interviews conducted for this study and a consultation with FONAP members, there are indications that none of these review mechanisms have been introduced in the companies so far.

4.3 Supply chain models and human rights due diligence

If a certification system under consideration meets all four criteria proposed here, it can be assumed that the human rights due diligence for the certified products, as well as for the considered area of the value and supply chain, has been fulfilled: for all other areas, the companies must set up special human rights due diligence processes, i.e., take further measures.

The exemplary application of the four criteria for the human rights assessment of certification systems to the RSPO P&C 2018 in the previous section has already revealed two possible gaps in the fulfilment of criterion 1: conflict financing and child labour. A complete review of the system requires, as already noted, a separate study based on the analysis carried out in Chapter 2.2 (see Appendix, summarised in a matrix there). The reformed RSPO P&C 2018 normatively covers a large part, but not all of the essential human rights risks. Nevertheless, it remains part of companies' due diligence to conduct an assessment of all potentially and actually impaired human rights.

In the following, it is assumed that purchasing companies can basically fulfil their human rights due diligence in line with the UN Guiding Principles by purchasing RSPO-certified palm oil. Which RSPO supply chain model - by today's standards - would they have to use?

¹²⁴ German Federal Government (2017), p. 8.

¹²⁵ Ibid., p. 9.

RSPO has a total of four supply chain models: Identity Preserved (IP), Segregated (SG), Mass Balanced (MB) and Book & Claim (B&C).¹²⁶ The IP model requires that all palm oil comes from a single certified mill and its certified supply base, so that its entire route from the mill to the certified plantations supplying can be transparently tracked.¹²⁷ In the SG model, all the palm oil used is also certified, but comes from different plantations and mills; accurate traceability to the palm oil's plantation of origin is not a prerequisite for certification. The MB model mixes certified and uncertified palm oil, so traceability is impossible. The B&C model corresponds to a trade in certificates, which allows plantation operators and mills to offer their certified palm oil fruits and oil from their own production, at a lower price without a certificate, and to sell the certificates to other companies in the form of so-called RSPO credits. Product and certificate are thus, traded independently of each other on the world market. A company that acquires such credits can advertise its products as sustainable within the framework of these credits, even without having the physical goods, i.e., certified palm or palm kernel oil, at its disposal. Since sustainable palm oil is produced and certified, but not physically traded on the world market as a certified commodity, the total amount of certified palm oil and palm kernel oil remains the same. Nevertheless, the B&C model can help to promote the cultivation of sustainable palm oil plantations: since it offers a lower effort for companies to participate in the RSPO process compared to the other models, and the inhibition threshold for certification may be lowered, it is conceivable that more companies (via B&C) will demand certified palm oil, and the global total amount of certified palm oil will increase - even if it is no longer visible, whether individual products contain sustainably cultivated or conventional palm oil.

All the models mentioned have the potential to have a positive impact in terms of sustainability, even if it is just - as in the B&C model - because they help to increase the globally (physically) available quantity of certified palm oil, or because they trigger a gradual development towards more sophisticated models among

the participating companies. From a global perspective, therein also lies the opportunity for a concomitant reduction in adverse human rights impacts, provided that the social dimension of sustainability is addressed in a human rights-effective manner.

But do these models also have the potential to reduce a negative human rights impact that either results directly from, or is linked to a company's activities? Palm oil buying companies, such as FONAP companies, are generally more likely to be directly linked to adverse impacts than to cause them themselves through their own activities.¹²⁸ A distinction must therefore be made between the goal of 1) achieving a positive effect for sustainability and development; and 2) the human rights goal of preventing negative impacts and, if they occur, enabling legal protection and remediation for those affected. HRIA differ from social or ecological impact analyses in particular with regard to their more difficult measurability and evaluation. In contrast to social and ecological impacts for which threshold values can be calculated, human rights are not scalable. The HRIA, the recording of adverse impacts on human rights, always involves a legal assessment, i.e., it checks whether the constituent elements of legal norms are fulfilled. Compared to pollutants (for whose emission a threshold value can be set which should not be exceeded, but where a falling below it is possible and ultimately necessary for production) human rights are hardly quantifiable, and their violation is not permissible in any form or to any extent.

Furthermore, it is crucial in a legal assessment that the impacts of a course of action on specific people are analysed. From a human rights point of view, an impact or risk assessment, is therefore, not only about determining whether certain rights are restricted in general, but also whether activities have a concrete impact on the human rights of specific people or groups of people. This is reflected in the commentary to UNGP 18, where the objectives of the implementation of human rights due diligence are discussed: „The purpose is to understand the specific impacts on specific people, given a specific context of operations.“ According to the

126 See <https://rspo.org/certification/supply-chains> (accessed 20.07.2020).

127 The certified supply base may consist of several certified plantations. However, traceability from the mill to each individual plantation must be guaranteed (RSPO telephone interview 2).

128 This is the case from a legal point of view. From an economic point of view, it can be said that purchasing companies also cause adverse impacts if they make local conditions more difficult through price competition. This was identified as a problem by a FONAP company in the consultation workshop.

UN Guiding Principles, the effectiveness of a risk assessment, and of measures taken, is as such established through an analysis of the specific impact on specific people in a given context of corporate action.

This leads to the question of which RSPO supply chain models potentially fulfil this human rights claim to effectiveness - always provided that the four criteria for the human rights assessment of certification systems proposed in this study, contribute to the fulfilment of due diligence in accordance with the UN Guiding Principles.

4.3.1 Identity Preserved (IP)

The IP model is proving to be potentially a suitable means for companies to achieve a human rights-based claim to effectiveness (criteria 1, 2 and 3) and is considered sufficient to conduct human rights due diligence – provided that the individual companies are able to carry out effectiveness checks in accordance with criterion 4. It meets the following conditions: The path palm oil takes from the plantations through the mill and refinery to the product can be traced transparently. The context of the company's activities is specific, consisting in the activities of the plantation or mill operators concerned. The circle of those affected is equally specific: persons and their relatives, possibly children, who work on this plantation or in this mill, or live in their area of influence. The human rights impacts at the plantations or mills under consideration are also specifically examined; it tends to be possible to identify rights holders who may be affected by infringements. This fulfils the prerequisite that adequate measures can be taken to remedy the situation.

4.3.2 Segregated (SG)

The SG model enables a palm oil importing company to exercise parts of its human rights due diligence. As with the assessment of the other models, this only applies on the condition that the model meets the first three criteria developed by the Institute and that the individual companies that rely on RSPO certification meet the fourth criterion, namely to track the effectiveness of the certification system.

In order to implement its human rights due diligence, the purchasing company would have to check all plantations and mills used for SG-certified palm oil – which would correspond to an inspection in line with the IP model, but would require more effort. Provided the RSPO ensures that it effectively monitors compliance with P&C 2018 on all certified plantations and mills, particularly where they affect human rights, the SG model would potentially be sufficient to enable importing companies to fulfil their responsibility to respect human rights.

If a certification system under consideration meets all four criteria proposed here, it can be assumed that the human rights due diligence requirements relating to certified products as well as the analysed areas in the value and supply chain, have been fulfilled. It is nonetheless particularly important that companies are able to track effectiveness of the certification system (criterion 4).

4.3.3 Mass Balanced (MB)

In the MB model, only the RSPO-certified amount of palm oil, not the conventional amount added, can potentially fulfil due diligence in accordance with the UN Guiding Principles. Although the importing company can indicate that a certain proportion of the palm oil purchased is sustainable, it can no longer make statements about the specific impact on specific people. The necessary development of effective case-specific measures is also not possible, as the company can no longer distinguish between certified and non-certified palm oil and traceability is therefore excluded. Consequently, the MB model cannot cover the human rights due diligence of companies, even if this model meets the RSPO P&C 2018 Criterion 1, i.e., it comprehensively includes human rights.

4.3.4 Book & Claim (B&C)

According to the B&C model, companies can certify conventionally produced palm oil or palm kernel oil as sustainable by purchasing „RSPO credits“ through a bidding process from certified mills and plantations. Palm oil currently accredited with such credits as sustainable, may have involved the use of illegal

pesticides for conventionally produced palm oil has not had to meet any such certification requirements. At the same time, there are corresponding amounts of sustainably produced palm oil on the market, which is no longer traded as certified and for which such pesticides have not been used: palm oil produced by plantations that have sold their RSPO credits. It is hypothetically conceivable that this certification model will, nonetheless, have a positive impact in terms of environmental sustainability, as such trading can promote the cultivation of palm oil certified as sustainable.

To a certain extent, this logic can also be applied to human rights issues. If, for example, harmful child labour on plantations is reduced in principle through certification, the increase in the quantity of certified palm oil through the B&C mechanism means that less child labour will be used in the palm oil sector worldwide.¹²⁹ However, this would not yet fulfil the company's human rights due diligence in accordance with the UN Guiding Principles. As stated above, such due diligence does not require the company to contribute to a general positive impact - although this is welcome - but rather requires companies to prevent their own adverse impacts in a specific context on specific people. This is precisely what the B&C model does not allow.

From a human rights perspective, it is not only relevant that less child labour is generated worldwide, but also that a distinction is made between rights holders, duty bearers and responsible third parties, so that those affected can claim their rights. The B&C model, in contrast, leads in the best case to less child labour being generated in any given place in the world. On the other hand, it does not make it possible to identify which children are affected by child labour, and against whom they can assert their rights, nor which companies have contributed to, or been directly linked to; nor does it say whether there have been any negative impacts on

human rights in the production of palm oil designated as sustainable through certificate trading. With regard to human rights due diligence, it is not only relevant whether there are breaches, but also who is (partly) responsible for them.

4.3.5 Conclusion

In summary, it can be said that all RSPO supply chain models can be usefully applied in terms of ecological, social or even developmental-economical thresholds. However, the B&C and MB models cannot be used as instruments for companies to fulfil their human rights due diligence in accordance with the UN Guiding Principles and the NAP because, among other things, they do not allow for information on the „specific context of operations“, or on the „specific impacts on specific people“ (Commentary to UNGP 18, see above). The SG and IP models, on the other hand, can contribute to the fulfilment of human rights due diligence, provided that traceability can be guaranteed in the event of adverse impacts on human rights.

¹²⁹ Certificate trading results in the quantity of palm oil produced with child labour, but is declared as free of child labour, is equal to the quantity of palm oil on the world market that was produced without child labour but is not declared as such.
An open question is what happens if companies that have had their palm oil certified up until now no longer see any added value in certification, if, for example, the cultivation of conventional palm oil is less complex and cheaper and the necessary demand for sustainably certified palm oil does not materialise.

5. Conclusion

The focus of the present study is on the human rights responsibility of companies that purchase and process palm oil, not on the protection duty of states in the palm oil extraction regions. The study shows potential and actual adverse human rights impacts throughout the palm oil supply chain, caused by these companies, to which they are directly linked or to which they contribute. Due to the structure of the supply chain, purchasing and processing companies do not usually „cause“ the impacts themselves, but are „directly linked“ or „contribute“ to them. On the basis of reports in literature, interviews with experts and the results of a consultation workshop, the study identifies the relevant human rights issues in this sector, classifies them and subjects them to a human rights analysis.

The most frequently documented human rights issues considered to be most severe, can be divided into four thematic areas: working conditions, trade union freedom and access to grievance mechanisms, land issues and the environment. They are linked to at least the following human rights: the right to just and favourable working conditions, the right to life, the right to social security, the right to education, the right to freedom of expression and assembly, the right to freely form and join trade unions, the right to an adequate housing, the right to access to natural resources, the right to health and the right to traditional land and nature use. The actual and potential infringements of human rights analysed in this study occur mainly in growing countries. Throughout the entire supply and value chain, human rights responsibility also applies to companies that neither have their own plantations or mills, nor operate directly in the growing countries, but use palm oil in their end products. The present study substantiates the human rights responsibility for these purchasing and processing companies on the basis of the human rights infringements analysed.

In order to comply with their human rights due diligence as defined in the UN Guiding Principles, companies should carry out regular HRRAs, i.e., risk

assessments that accompany their activities on an ongoing basis and report the results for example in annual reports. It is a cyclical process: risk assessment – development and implementation of measures – effectiveness tracking – reporting, and then returning to the risk assessment once again. Human rights are characterised by non-quantifiable scale because, unlike environmental damage, they cannot be measured, and no thresholds can be set for them. Furthermore, human rights due diligence requires companies to identify the actual and potential adverse impacts of their own actions on specific people (the activity approach). Based on the results of the HRRAs, companies should derive and implement the measures to be taken. These are to be designed in such a way that they actually counter the human rights risks arising from their own corporate activity. The effectiveness of these measures must then be examined - especially from the perspective of those affected by negative impacts. In the interviews and the consultation workshop, companies mainly referred to certification when asked about the implementation of their human rights due diligence. In order to examine to what extent certification systems are suitable instruments for the fulfilment of companies' human rights due diligence in accordance with the UN Guiding Principles and NAP, four criteria for the human rights assessment of certification systems have been developed and proposed here. Three of these criteria check whether a certification system comprehensively and effectively addresses human rights standards and procedures, while the fourth criterion relates to the individual responsibility of companies for the implementation of their human rights due diligence which cannot be outsourced to a certification system, and which involves carrying out effectiveness tracking. This means that companies themselves must track that the certification they use actually prevents the potential and actual human rights infringements revealed by the risk assessment. If this tracking is carried out by means of third-party audits, the company in turn has to check these regularly. In addition to audits, external and independent experts can also be used for this purpose.

The four criteria for the human rights assessment of certification systems are applied in an exemplary manner to the Principles & Criteria 2018 (P&C 2018) of the Roundtable on Sustainable Palm Oil (RSPO), the system most frequently used by the companies surveyed. Despite all its qualities, a comparison with the human rights criteria, reveals possible gaps in protection. In order to illustrate such a comparison of the criteria of the certification system with the human rights criteria presented here, the study asked RSPO P&C 2018 about the two issues of conflict financing and child labour. It was shown that these areas are not sufficiently covered by the system (criterion 1). The examples are not intended to signal that the greatest problems lie in these areas; rather the study recommends applying the method proposed here, to all human rights risks listed in Chapter 2. Also, with regard to criterion 4, which asks for the company's own tracking of the effectiveness of their measures taken, the results of this study indicate a potential gap in the fulfilment of corporate human rights due diligence requirements. Whether or not the procedural human rights due diligence is in practice implemented by the certified plantations and mills (criterion 2) is not apparent from the comparison of criteria because the required information is lacking. Similarly, due to the lack of disclosure of the methods and results of RSPO's impact assessments, it is not possible to see whether these themselves meet human rights requirements, i.e., whether they fall in accordance with established standards and the UN Guiding Principles. Of the four RSPO supply chain models, only two – SG and IP – offer the potential to be used for parts of human rights due diligence elements, namely the risk assessment of palm oil procurement and the derivation of measures. Only these models ensure that the entire quantity of palm oil used is certified.

This model analysis, which was only carried out in part, is not able to reach a final conclusion. Based on the current state of knowledge, it cannot be concluded that the RSPO P&C 2018 certification system meets human rights criteria, but neither can it be concluded that it does not make a positive contribution to the implementation of human rights due diligence processes. There are only indications that the RSPO certification system for palm oil purchasing and processing companies cannot be a sufficient instrument to fully address their human rights risks. In order to fulfil their human rights due diligence requirements, companies must take additional measures. These include, for example, a complete comparison of the certification system's

principles against human rights standards, using the method presented in this study; a method specifically aimed at closing gaps in addressing human rights issues in the certification system and to ensure that procedural standards are raised. In addition, companies - individually or jointly - should develop effectiveness tracking procedures, both with regard to their own activities and as relates to the certification systems in operation.

In order to develop adequate measures, palm oil purchasing and processing companies should both consult potentially affected rights holders and exchange information with each other, using their networks, such as FONAP, for this purpose. Subject to compliance with antitrust regulations, companies can also use their combined leverage to raise the standard of the certification system in use and in this way work towards, for example, living wages or the abolition of harvest quotas and push the certification systems to become more transparent.

The development of effective grievance mechanisms for those affected in remote regions is a challenge for purchasing companies and should be developed by the companies themselves together with experts and local knowledge. If there are conflicts over land use in a region, companies (networks) should demand reliable land governance from the government of the country concerned. In particular, they should not use weak land governance to their own advantage and ignore, for example, expulsions.

The exchange in networks also enables small and medium-sized enterprises (SMEs), and those companies that buy only very small quantities of palm oil, to be informed by larger or locally operating companies about existing human rights risks, and to learn from them how these risks can be countered. Networks of palm oil purchasing companies have a high potential to reduce adverse human rights impacts. They allow for the joint development of methods for the implementation of the human rights due diligence elements, as set out in the NAP and in accordance with the UN Guiding Principles. This is especially the case with regard to effectiveness tracking and grievance mechanisms. Combined leverage can also be used to raise standards, both in certification systems and in the political and legal framework. Last but not least, a common learning process can be initiated through networks which will contribute to a higher awareness of human rights issues of companies purchasing and processing palm oil.

6. Recommended approaches for palm oil purchasing and processing companies and their networks

6.1 Human rights understanding and joint activities

1. Developing and strengthening a common understanding of human rights

Business networks can develop a common understanding of human rights in addition to existing sustainability and CSR knowledge through workshops. Such exchange appears to be necessary in view of the discussions on human rights due diligence. Corporate networks at industry level can form associations of members using palm oil. However, it is also important that networks in which companies from different sectors have come together with regard to palm oil raise awareness and activate various sectors. FONAP can become a pioneer in this regard. FONAP can clarify fundamental questions, standardise knowledge, and discuss challenges through workshops with human rights experts and member companies: the differences between sustainability and human rights (in terms of companies' human rights due diligence), the non-scalability of human rights, preventive strategies against systematic overconfidence bias, and the identification of needs for action could form a starting point.

2. Generate through further research more in-depth knowledge of human rights in the value and supply chain

At sector level, through FONAP for example, further research can be commissioned to investigate in detail those questions that have to date not been sufficiently investigated. Possible topics include: 1) impacts of the traceability of raw materials on end consumer prices; traceability can be achieved by separating the routes of different goods; 2) human rights impacts within transport and logistics (thus far poorly documented); 3) an investigation into factors leading to inhumane or degrading work; 4) How to increase the supply of certified palm oil on the global market which meets human rights criteria. Traceability is a key issue here,

with a view to RSPO certification, namely how can the use of SG and IP certification models be increased to meet the needs of purchasing companies, including the demand for derivatives? 5) The situation of smallholders should be examined with regard to human rights requirements, including the Do No Harm (DNH) principle. One research question here could be: How can the supply of palm oil be increased without adverse human rights impacts whilst (economically, legally and actually) empowering smallholders?

3. Learning together through information exchange

Sector networks and multi-stakeholder initiatives (MSIs) should develop trust among member companies to allow for a more in-depth pre-competitive exchange of information. Conditions of the antitrust law should be clear and taken into account. Confidential exchange is particularly important for small and medium-sized enterprises (SMEs) who benefit from learning from larger companies with contacts to crop cultivating countries. Such information exchange may include: 1) access to complaints; 2) results of own risk assessment; 3) minimum criteria when a business relationship is suspended or terminated. These issues can be addressed uniformly at sector level. Nevertheless, such "red flags" in human rights issues are dependent on the stance of individual companies (structures), so that companies can be supported by the industry in developing their own red flags. Ultimately, responsibility remains with each company alone.

4. Use cross-sector exchange

A structured exchange with other sectors, such as the cocoa sector; but also with other less related sectors, such as the automotive or tourism sectors, can offer learning from experiences already made there. The Partnership for Sustainable Textile (a German MSI) in particular has already generated a great deal of knowledge on how purchasing companies can address

local conditions. Such an exchange can also be helpful in view of possible due diligence act. Possible topics for exchange might include: 1) dealing with increased vulnerability by disclosing one's own risks and measures; 2) using measures additionally to certification; 3) establishing traceability throughout the supply chain; 4) setting up grievance mechanisms (see also recommendation 12).

5. EU-Regulation

Networks of palm oil processing and purchasing companies, such as FONAP, can support an EU-regulation that raises standards in the palm oil sector and, where appropriate, impose disclosure requirements as is the case, for example, with the EU Timber Regulation (EUTR). EU Regulation on human rights due diligence, as requested by a growing number of stakeholders and announced by European Commissioner for Justice Didier Reynders for early 2021, would also raise general standards. FONAP can use its members' leverage to work towards such a raising of standards through EU-regulation. Such leverage around policy frameworks remains outside the scope of human rights due diligence but can still facilitate compliance.

6.2 Elements of the human rights due diligence

6. Traceability through successive development of knowledge access

Purchasing companies can strive to gradually build up knowledge access in relation to their value and supply chains. This knowledge can help them carry out appropriate human rights risk assessment (HRRA) and prioritise risks according to severity in lieu of deriving appropriate measures. Palm oil purchasing companies that are dependent on mixed goods should at least first check whether their supplier has carried out an adequate HRRA in accordance with the UN Guiding Principles. Such information should be requested explicitly through enquiry interviews. Contractual arrangements should thus go beyond tier 1. In the long term, companies purchasing and processing palm oil should work towards separate goods channels. What this might mean for competitors and consumers should be addressed at sector level (see recommendation 2). Business networks should, where they have to rely primarily on the risk assessment of certification systems, use the combined leverage of sector networks to obtain information from certification systems about mills and plantations, or to oblige the certification system to provide such information.

7. Non-outsourcing of own human rights risk assessment (HRRA), sharing of structures

Companies must carry out and document their own HRRA, including the steps they take in cooperation with others. Therefore, they cannot completely outsource the risk assessment to a sector initiative. However, individual risks or steps in the analysis can and should certainly be addressed and reviewed together. It can be beneficial for companies to combine efforts so that systems of larger companies can be used. This is especially beneficial for SMEs and companies whose palm oil only accounts for a small proportion of their processed raw materials.

8. Successively integrating third-party expertise and control loops

When dealing with human rights, companies should turn to the expertise of third parties. For this purpose, companies can also consult the respective National Human Rights Institution (NHRI) in their home

country as well as in the country of purchase or production. Local or country-specific expertise should be meaningfully included.

The resources required to regularly involve third party expertise may initially be challenging or not affordable for SMEs. However, in the medium to long term, companies could and should take into account the costs of implementing human rights due diligence in their planning. At sector level, companies should build up a pool of local human rights experts, through FONAP for example. NHRIs can also be included in this process. Since companies often have to rely on the statements of suppliers, they can consider setting up a (partially) anonymised procedure to check responses at sector level.

9. Continuity and Prioritisation

Corporate risk assessment must be carried out continuously throughout the entire value and supply chain. Such assessments can act as a regular risk radar and are not interchangeable with isolated hotspot analyses. In dialogue processes that involve civil society, companies purchasing palm oil can jointly formulate guidelines for management approaches to risk assessment (likewise for other core elements). SMEs that do not have contact with plantations and mills should first concentrate on those raw materials in their products that make up the bulk of their purchases. For the other relevant raw materials companies should simultaneously use the certification systems considered by industry and NGOs to be comparatively effective in terms of human rights. Companies should be open to constructive criticism relating to certification systems and include such feedback in their risk assessment.

10. Focus on activity approach with country information supporting

Business enterprises should systematically survey their own activities for potential adverse human rights impacts. Information on the human rights situation in countries from which they buy or in which they produce is helpful in this respect, but is only part of the analysis of the specific risks and impacts of their own actions.

11. Tracking the effectiveness of measures taken and adapt them if necessary

The effectiveness of the measures taken depend upon whether the potential or actual adverse impact identified in the risk assessment has been reduced, particularly from the point of view of those affected by human rights infringements.

Business enterprises should monitor the effectiveness tracking of certification systems. To this end, companies should, if necessary, include the expertise of third parties, including affected rights holders (cf. human rights criterion 4 for certification systems). Since certification is one of the most important measures for companies purchasing palm oil, the criteria of the certification systems used should be regularly reviewed regarding their implementation. At sector level, companies can consider what possible further measures beyond certification can be implemented. For example, companies could also look for ways to improve local production conditions by alleviating price pressure, taking into account antitrust law and current research.

12. Development of a grievance mechanism at sector level

Companies purchasing palm oil should jointly develop a common grievance mechanism with other stakeholders; one that takes into account the perspective of those affected by human rights infringements and fulfils the effectiveness criteria of UN Guiding Principle 31. Important questions to be clarified are: 1) Who is the contact person in the event of human rights infringements throughout the value or supply chain, so that those affected can also complain to purchasing companies or their associations? 2) How can the protection of the complainants be guaranteed? 3) How can accessibility be ensured for potentially affected rights holders? In addition, the exchange of experience with other less related sectors such as the automotive, mining, or the textile sector could prove useful (cf. recommendation 4). Ensuring access to grievance mechanisms (including those of the state) sometimes proves to be very difficult, particularly in remote rural areas. Conducting local research could be useful here which would include an investigation of local barriers and grievance mechanisms that not only already exist but are also locally effective, i.e., are actually used by those affected.

6.3 Certification

13. Review of certification systems used with regard to human rights issues

Under certain conditions, certification systems can usefully cover a part of companies' human rights due diligence, particularly for those parts of the supply chain where companies have little knowledge or influence. To this end, however, companies should check whether the certification system used meets necessary human rights criteria. For this purpose, FONAP can carry (or have it carried) out a comprehensive comparison of the criteria on which the certification systems are based and human rights, using the method presented in this study (with reference to criteria 1 to 3).

14. Integrating human rights expertise into review processes, continuously improving standards

FONAP can combine the leverage of its members and other networks to ensure that: 1) the human rights expertise of third parties is included in review processes of the certification standards used by FONAP members; 2) the standards are continuously improved. For this purpose, FONAP can use the German Institute for Human Rights' human rights criteria. FONAP should also use RSPO human rights impact assessment methods and outcomes as well as the network's leverage to gain insight into these impact assessments.

15. Gradually shift to traceable supply chain certification standards

Companies have a human rights responsibility to know where their palm oil comes from. At the very least they should ensure, i.e., be able to monitor that suppliers' human rights due diligence processes are effectively in place. Companies that would like to rely on, for example, RSPO certification for implementing human rights due diligence should limit themselves to Identity Preserved (IP) or Segregated (SG) RSPO supply chain models, provided that traceability to individual plantations can be guaranteed, if necessary, through further action. The other RSPO supply chain models should be considered separately from the implementation of human rights due diligence. If IP and SG are not applicable by certain companies, they should in turn look for traceability possibilities beyond the certification system in use.

6.4 Recommendations for areas of action in the palm oil value chain

16. Adopt human rights due diligence

Business enterprises, including their MSIs and networks, should develop requirements that also address companies' human rights due diligence. One requirement might be that companies take steps to comply with the National Action Plan on Business and Human Rights' (NAP) five core elements or the forthcoming due diligence act. The implementation of the five core elements in concrete management processes should be planned and could be jointly supported sector wide.

17. 17. Living wages

Corporate networks and MSIs should work towards paying living wages, paid regardless of whether workers reach daily quotas or not. For this it is necessary to develop a basis for calculating the amount of living wages and a strategy to achieve them in the long term. To this end, national regulations and legislation will need to be adapted accordingly. While it is the state's and not the company's duty to protect, companies should not, however, use the situation to their advantage if states fail to protect human rights.

18. Harvest quotas

Business networks and MSIs should advocate for the abolition of harvest and labour quotas in order to prevent the value of the missing harvest being deducted from wages or compensated with the unpaid work of women and children.

19. Members of business networks / multi-stakeholder initiatives (MSI) continue to promote traceability of certified palm oil and palm kernel oil (including derivatives)

From a human rights perspective, companies should require that the traceability of palm oil from the mill and plantation is fully guaranteed. Care should be taken to ensure that this does not lead to shifts in demand that could harm rights holders, such as smallholders. Traceability is necessary in order to prevent „specific impacts on specific people“ or, if necessary, remedy the impact.

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8. Annex

8.1 Interviews conducted

Date	Interview	Abbreviation
Data collection		
16.07.2019	Research	W1
16.07.2019	Non-Governmental Organisation	N1
17.07.2019	Research	W2
18.07.2019	Non-Governmental Organisation	N2
18.07.2019	Research	W3
23.07.2019	Company ¹³⁰	U1
06.08.2019	Company	U2
07.08.2019	Company	U3
07.08.2019	Company	U4
03.09.2019	RSP0	RSP0
10.09.2019	Consultation workshop with FONAP members in Berlin	
May 2020	Comments on the evaluated interview results of all interviews (e-mail or telephone call)	
25.05.2020	Practical trial 1 of the recommended approaches for action with a trade association representing medium-sized companies, FONAP member	
25.05.2020	Practical trial 2 of recommended approaches for action with SME, FONAP member	
15.06. + 07.08.2020	Exchange with RSP0	

¹³⁰ We will refrain from a more differentiated description here in order to guarantee the anonymity of the companies interviewed.

8.2 Interview questionnaires

8.2.1 Interview questions for NGOs and Research

The German Institute for Human Rights is Germany's independent national human rights institution established in accordance with the UN Paris Principles and the DIMR Act. Since 2012 the Institute has been working on the topic of business and human rights. On behalf of the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, the Institute analyses human rights violations in the palm oil value chain and compiles a report on human rights in the palm oil sector.

On the basis of this report, the Institute draws up recommendations to the Forum for Sustainable Palm Oil (FONAP) and its member companies on how they should implement their human rights due diligence to be in line with Germany's National Action Plan on Business and Human Rights (NAP) 2016-2020 and the UN Guiding Principles on Business and Human Rights.

[Introduction/ profile of organisation]

Definition of sustainable palm oil

- Which **criteria** must „sustainable palm oil“ meet? Is sustainable cultivation possible? What does it look like?
- Is a **shift** to alternative oils possible and sensible? What consequences would such a change have for communities in the plantations' area of influence?

Human rights risks

- **Which human rights risks and violations occur** in the palm oil sector and which are particularly relevant?
 - ▷ Country specific: expulsion, land grabbing... (are VGGT used as a tool?)
 - ▷ Work-related: protective clothing, use of pesticides, wages, hours
 - ▷ Gender-related: what is the impact on female workers and women in general in the

- plantation's area of influence?
 - ▷ Environmental: soil quality, water pollution, air, ...
 - ▷ Corruption/ Governance: deals? lobby?
- Identification of **particularly vulnerable groups** and countries (deviations?)
 - ▷ To what extent are the rights of indigenous people affected?
 - ▷ What **opportunities** for participation are there for affected communities? (Are they interviewed to generate information? Can the process also empower them?)
- Are there (state) **grievance mechanisms**? How does the state/ NGO/ representatives deal with complaints? How is the voice of those affected heard?
- What state shortcomings are there at local and national level that result in people not being adequately protected?
- What are the practices of business enterprises in particular that put human rights at risk?
- Role clarification: state - private (infrastructure, health, ...)
- Are there **industries** that have a higher risk of violating human rights?
- **What** can business enterprises concretely do to avoid and reduce human rights violations?

Certification systems

- Evaluation of certification systems (RSPO, ISCC, RSB, RA) - where are shortcomings, strengths; what should be improved to be effective? Is effective protection of rights holders even possible through certification? Are there alternatives?
- Assessment of FONAP's add-on criteria: What needs for improvement are there/ what is missing?

8.2.2 Interview questions for companies

The German Institute for Human Rights is Germany's independent national human rights institution established in accordance with the UN Paris Principles and the DIMR Act. Since 2012 the Institute has been working on the topic of business and human rights. On behalf of the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, the Institute analyses human rights violations in the palm oil value chain.

Based on this report, the Institute draws up recommendations to the Forum for Sustainable Palm Oil (FONAP) and its member companies on how they should implement their human rights due diligence to be in line with Germany's National Action Plan on Business and Human Rights (NAP) 2016-2020 and the UN Guiding Principles on Business and Human Rights.

[Introduction/ profile of company] Processing or distribution of palm oil products

- State of knowledge on/ use of human rights standards, guidelines, practical guides, certification systems, NAP

Palm oil

- How does the company **define** „sustainable palm oil“?
- What is the company's relationship with palm oil (position in the **value and supply chain**)
- Is it processed or distributed?
 - ▷ What is it used for? What contains palm oil?
 - ▷ Where the company offers several products – even without palm oil – what percentage of the total product range are palm oil products?
- **From which countries/** plantations is used palm oil sourced?
- How many of these plantations are RSPO certified? ISPO certified (Indonesian Sustainable Palm Oil Standard)?
- How many tonnes of palm oil does the company buy each year?
- Have you considered changing oil? Is a shift possible and realistic? What consequences would such a shift have for the company?
- How does the company use RSPO (RSPO, RSPO

RED, RSPO Next?)? Which of the certification models are used and to what extent? What is the relationship between them?

Core elements of human rights diligence

- Does the company have a **policy statement** on its responsibility to respect human rights?
 - ▷ Adopted by the highest management company?
 - ▷ Human rights-related requirements of employees, business partners and other parties?
 - ▷ Publicly accessible?
 - ▷ Is it reflected in operational policies and procedures? How?
- Which **department** within the company deals with human rights? Is there a department for business and human rights? or CSR/ sustainability?
- What are the company's human rights-related challenges?
- How were they **identified**?
 - ▷ Is there a **procedure for identifying** potential and actual human rights impacts of the company's own business activities and through business relationships?
 - ▷ What does this look like in **detail**?
 - ▷ Is the procedure based on internal and/ or independent human rights **expertise**?
 - ▷ Is the **perspective of affected rights holders**, especially the most vulnerable, taken into account? If so, how? (Consultations, including with other relevant stakeholders?)
- **Differentiation** according to severity, regional distribution and position in the value chain (production, transport, processing, trade)?
- How does the company deal with **findings**?
 - ▷ How does the company process findings?
 - ▷ How are the findings integrated into relevant internal business units and processes?
 - ▷ Is the company already taking appropriate measures in this respect?
 - ▷ How does it deal with what it learns from those affected? Is development visible here or does it have to be started from scratch every time?

- How will the effectiveness of **the measures taken be tracked and monitored?** How often?
 - ▷ Qualitative and quantitative indicators?
 - ▷ Use feedback from internal and external sources, including relevant stakeholders?
- How are the results **communicated** internally and externally?
- Is there an internal company **grievance mechanism?** How does the company ensure that those affected have access to remedy?

Further information

- Identification of companies' **potential needs**
- Best practice examples
- **Certification:** the majority of NGO reports point out that certification systems cannot guarantee that palm oil as certified as sustainable is truly sustainable. What importance does your company attach to e.g., RSPO: Where do you see advantages and disadvantages? What (further) measures does the company take to promote sustainability in the palm oil sector?
- **FONAP add on criteria:** How is it ensured that the raw material is actually „legal“?
- **Fair wages (FONAP condition):** How is this identified? „Legal minimum wages“ (as prescribed by RSPO etc.) are often not sufficient to secure the livelihood of a person and their family)
- Particularly problematic: **tracing from mill to individual plantations**
- Other and **under-researched risk sectors:**
Transport (port, ships)



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