

DEVELOPMENTS IN THE FIELD

## Human Rights Violations Connected with Deforestation – Emerging and Diverging Approaches to Human Rights Due Diligence

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### I. Introduction

As the climate and biodiversity crises gain unprecedented attention, many governments across the global north are taking legislative steps to address deforestation in supply chains linked to their domestic consumption or commercial activities, among them, the United Kingdom (UK) and the European Union (EU).<sup>1</sup>

Yet deforestation does not only have environmental impacts – it is also highly correlated with human rights violations, notably the dispossession of indigenous peoples and local communities, and violations stemming from this.<sup>2</sup> Beyond the loss of land itself, impacts commonly experienced by indigenous peoples and local communities include loss of access to sources of food, water and livelihoods, negative impacts on health, as well as loss of culture, traditional medicines and knowledge, and spiritual values. Pollution and contamination of lands are common both during deforestation and resulting from business activities which follow on deforested lands (such as intensive agriculture). Many of these impacts are gendered and have particularly negative consequences for women and girls. In addition, when seeking to defend their rights, communities as well as human rights and environmental defenders supporting them are often subjected to multiple forms of violence, including intimidation, harassment, criminalization, physical and sexual violence, as well as killings.

Until recently, however, while some industry standards or corporate initiatives have included both environment and human rights,<sup>3</sup> these two components have been weakly integrated. Supply chain mapping and due diligence for environmental and human rights

<sup>1</sup> The US is also considering a product-based illegal deforestation bill, notably the Schatz Bill. It bears some similarities to the legislation discussed here, but this article will not describe it in detail for reasons of space.

<sup>2</sup> Although not the focus of this piece, labour rights violations in commodity production are also common – often linked for example to the use of vulnerable migrant workers, child labour, or the exploitation of communities who have been dispossessed of lands, resources and livelihoods: see, e.g., The Prakarsa, *Labour Rights Violations in Oil Palm Plantations: Case Study in West Kalimantan and Central Sulawesi* (Jakarta: The Prakarsa, 2021).

<sup>3</sup> For example, the Roundtable on Sustainable Palm Oil, the Forest Stewardship Council and the Accountability Framework Initiative.

impacts has in practice often remained quite siloed. There has been a strong push by civil society organizations to include a more holistic approach to deforestation impacts, which includes human rights, in the current deforestation legislation under development. This piece looks briefly at the approach taken by the UK and EU deforestation laws, discusses some tensions between the methods favoured to tackle deforestation and those to address human rights impacts, and then discusses a recent move in a different direction by the Forest Stewardship Council.

## II. UK Deforestation Law

On 9 November 2021, the Environment Act – a wide-ranging environmental law seeking to re-establish domestic standards for environmental protection following Brexit – received royal assent in the UK. Buried among its provisions, Section 16 and Schedule 17 set out new and potentially significant rules regulating the use of ‘deforestation-risk’ commodities in UK commercial activities. This section aims to prevent (some) products linked to illegal deforestation, whether produced in the UK or abroad, from being used by (some) companies in their UK commercial activities. The schedule also requires in-scope companies to conduct due diligence on their supply chains, to determine and address the risk that their supply chains contain products derived from illegal deforestation.

Schedule 17 contains only the bare bones: key elements of the proposal, including the scope of companies covered, the commodities included, details of due diligence requirements and the enforcement regime will be set out in secondary regulations that are expected soon.

In the lead up to the adoption of the law, many, including the multi-stakeholder group convened by the UK government to make recommendations on the approach to deforestation,<sup>4</sup> called for the integration of human rights in the requirements for due diligence. That call was largely rejected in the law as adopted, but there is nonetheless a hook for requiring companies to address land grabbing in their due diligence. Specifically, in-scope companies will not be able to use in-scope commodities in their UK commercial activities unless they have complied with ‘relevant local laws’ – national laws in the country where the commodity was grown, raised or cultivated – during their production. ‘Relevant local law’ is defined to include a law ‘(a) which relates to the ownership of the land on which the source organism was grown, raised or cultivated, [or] (b) which relates to the use of that land ...’<sup>5</sup>

This is not a panacea for omitting human rights as it will still leave many gaps,<sup>6</sup> but the requirement may nonetheless require companies to take into account *national* laws that protect indigenous peoples’ and/or local communities’ land rights, where they exist. Civil society groups are calling for these requirements to be made clearer in secondary legislation.

## III. EU Deforestation Law

In parallel with the UK, the EU has moved to adopt a regulation on deforestation-free products. The European Commission published a draft proposal in late 2021, and a final text was agreed in December 2022.

<sup>4</sup> Global Resource Initiative, *Final Recommendations Report*, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/881395/global-resource-initiative.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/881395/global-resource-initiative.pdf) (accessed 30 November 2022).

<sup>5</sup> Environment Act 2021 (UK), Schedule 17, paragraph 2(4)(a) and (b).

<sup>6</sup> A Perram, ‘Preventing human Rights Violations Associated with Deforestation: Why National Law is not Enough’ (Moreton-in-Marsh: Forest Peoples Programme, 2022).

The proposed EU regulation goes further than the UK law, as it prevents key commodities being commercialized in the EU if their production involved *any* deforestation – whether legal or illegal under the laws of the country of production. There had also been a strong push from the European Parliament to include a requirement for compliance with international human rights standards in the production of these commodities. However, the final text adopted in December 2022 does not require compliance with international human rights law standards, except to the extent these are incorporated in national law of the country of production. This is similar to the UK legislation, but slightly stronger in that it makes explicit reference to compliance with national laws that uphold international human rights law and free, prior and informed consent.

#### IV. Tensions Between Typical Human Rights and Deforestation Approaches

Most civil society organizations, whether human rights- or environmentally focused, agree that human rights and environmental issues should be addressed in an integrated fashion. Yet while both human rights and environmental approaches are based on supply chain due diligence, tensions sometimes arise in relation to how cases of non-compliance should be dealt with in regulation. In the case of both the EU and the UK deforestation laws, the approach proposed – strongly supported by most environmental advocates – effectively involves prohibiting market access for in-scope commodities if their production is linked to deforestation. In practice, this means that, once non-compliance by a supplier with the deforestation cut-off date is established, downstream companies selling principally to the EU or UK markets will have to cease purchasing commodities sourced from that location and may need (immediately) to end their business relationship with the supplier involved.

This contrasts with the approach in the United Nations Guiding Principles on Business and Human Rights (UNGPs), which prioritizes engagement by downstream companies with suppliers in order to prevent, mitigate or cease human rights impacts before companies consider ending a business relationship.<sup>7</sup> Indeed, engagement is critical to the concept of continuous improvement, and ceasing business relationships is also subject to considerations of responsible disengagement.<sup>8</sup>

Yet, as noted above, there is a strong correlation between deforestation and human rights violations. Requiring immediate disengagement from certain production sites due to deforestation may have negative impacts on human rights and/or preclude improvements or access to remedy for indigenous peoples, local communities or workers experiencing harms on the ground. It also may not accord with the wishes of those people affected. There is already some evidence of this in corporate practice.

There are already several cases of global companies or investors with no-deforestation policies disengaging or divesting from supply chains linked to deforestation.<sup>9</sup> Rarely have such steps been taken after also considering or investigating human rights impacts, and consultation with affected peoples locally. Often, following disengagement affected

<sup>7</sup> UNGPs Principle 19 and commentary.

<sup>8</sup> See, e.g., SOMO, *Should I Stay or Should I Go?: Exploring the Role of Disengagement in Human Rights Due Diligence* (Amsterdam: SOMO, 2016).

<sup>9</sup> See, e.g., Jenny Wiggins, 'Unilever Cuts Palm Oil Ties Over Environment Fears', *Financial Times* (11 December 2009), <https://www.ft.com/content/6e3bb462-e655-11de-bcbe-00144feab49a>; Fakhar Ali, 'Palm Oil Giant Wilmar Stops Buying From Suppliers Accused in Greenpeace Report', *S&P Global* (26 June 2018), [https://www.spglobal.com/marketintelligence/en/news-insights/trending/vtal\\_frbb8j6lv8slcsia2](https://www.spglobal.com/marketintelligence/en/news-insights/trending/vtal_frbb8j6lv8slcsia2); Michael Taylor, 'Norway's Wealth Fund Ditches 33 Palm Oil Firms Over Deforestation', *Reuters* (28 February 2019), <https://www.reuters.com/article/us-norway-pension-palmoil-idUSKCN1QH1MR>.

communities are left in a more vulnerable position, facing ongoing human rights impacts (e.g., continued dispossession, desecrated sacred sites, reprisals for whistleblowing and reduced operating standards) and environmental impacts of deforestation (e.g., increased drought and flood risk<sup>10</sup> and pollution). Affected communities are generally not offered any remedy or support by the downstream buyers who disengage or divest. Moreover, this type of behaviour may contribute to market segmentation and leakage, undermining the objective of eradicating deforestation. It also leaves widespread governance issues such as bribery and corruption in the allocation of land unchallenged. On the other hand, if there is no strict guidance on when and how companies *should* withdraw from business relationships, this also leaves much leeway for companies and investors to continue participating indefinitely in supply chains that are clearly linked to human rights violations and environmental destruction.

Another issue arising in legislative regulation of deforestation relates to the vexed question of ‘traceability’ – that is, whether companies are required to trace products back to their exact point of origin. Traceability is a contentious topic because it is often complex and costly to trace commodities to farm or plantation level. A requirement to do so may be particularly burdensome for smallholder production, potentially leading companies to leave them out of EU or UK supply chains.

In response to these concerns, some actors focused on deforestation have suggested that traceability need not always be required to the farm or plantation level. Instead, it may be sufficient to trace a commodity back to a particular region or jurisdiction where deforestation rates are sufficiently low that there is a negligible risk that the commodity was produced on deforested lands.<sup>11</sup> On the other hand, for indigenous peoples and local communities, farm or plantation level traceability is critical to seeking engagement or accountability from downstream actors.

## V. Recent Developments in the Forest Stewardship Council (FSC)

While the legislative approach to deforestation has been focused on developing strict rules prohibiting commercialization of commodities produced on deforested land, the FSC, in its recent board meeting, has taken steps in the opposite direction.

Through the adoption of Motion 37, the FSC has reversed a longstanding rule that prevented certification of plantations deforested after 1994, where these were still owned and operated by the business that had been engaged in the deforestation. Plantations which had subsequently been acquired by a third party could be certified. This rule is similar to (although not quite as strict as) the strict approach to zero deforestation championed under the proposed EU deforestation regulation. Under new rules adopted in 2022, whether subsequently acquired or not, certification of plantations deforested since 1994 will be possible, but only where companies restore forests of an equal size and provide remedy to affected communities, under the remedy framework adopted in the associated Motion 45.

This rule change was controversial. Supporters argued that existing strict rules left many communities harmed by companies outside the FSC with no remedy. Many communities supported the adoption of this resolution, in the hope that offering a way back in to the FSC for major companies who were the source of past deforestation, conditional on redress of

<sup>10</sup> Jennifer Merten et al, ‘Expanding Oil Palm Cultivation in Indonesia: Changing Local Water Cycles Raises Risks of Droughts and Floods’ (Bonn: German Development Institute: 2017).

<sup>11</sup> See, e.g., TRASE, ‘Strengthening the EU Regulation on Deforestation-Free Products’ (March 2022), <https://insights.trase.earth/insights/strengthening-the-eu-regulation-on-deforestation-free-products/> (accessed 2 December 2022).

past social harms, will create a possibility of redress for the first time.<sup>12</sup> Detractors, on the other hand, say that the FSC has a poor track record of enforcing compliance with remedy requirements from its members, especially where national certification schemes rely largely on weak legality verifications, and that the change may simply open up a loophole for greenwashing without bringing the proposed benefits for communities and for restoration.<sup>13</sup>

## VI. Conclusion

While the concept of human rights due diligence has now been around for over a decade, the practicalities of applying it as part of a legal framework are still being developed. Striking a balance between strict rules requiring unambiguous company compliance and a sufficiently flexible process that allows engagement and improvement (rather than supply chain segregation) remains complex, and would benefit from more empirical assessment and thought. Different approaches are also emerging in relation to environmental and human rights due diligence – in part because of the differing options for monitoring and enforcement – which creates continuing challenges for integrating these two key areas in practice. As due diligence legislation begins to come online in the global north, assessing how effectively these different approaches work in practice, and adjusting them accordingly, will be key to creating a strong framework for corporate accountability.

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<sup>12</sup> Grant Rosoman, 'Drive for Restoration and Remedy Behind Some NGOs' Cautious Support for FSC Changes', *Mongabay* (21 October 2022), <https://news.mongabay.com/2022/10/drive-for-restoration-and-remedy-behind-ngo-cautious-support-for-fsc-changes-commentary/> (accessed 1 December 2022).

<sup>13</sup> Gemma Tillack, 'The Forest Stewardship Council Risks its Reputation' (26 October 2022), <https://www.ran.org/the-understory/the-fsc-risks-its-reputation/> (accessed 1 December 2022).