



ACCESS TO NON-JUDICIAL REMEDY FOR PALM OIL WORKERS

UNDER POOR WORKING CONDITIONS IN INDONESIA:

A study of the Role of NHRIs and MSIs.

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**To those workers at the palm oil plantations who keep seeking for justice;
this piece is written for you.**

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LIST OF ABBREVIATIONS

| | |
|----------|--|
| BHR | Business and Human Rights |
| ICCPR | United Nations International Covenant on Civil and Political Rights |
| ICESCR | United Nations International Covenant on Economic, Social, and Cultural Rights |
| ICC | International Coordinating Committee |
| IHRL | International Human Rights Law |
| ILO | International Labor Organization |
| ILRF | International Labor Rights Forum |
| MSIs | Multi-Stakeholder Initiatives |
| NCP | National Contact Point |
| NGO | Non-Governmental Organizations |
| NHRIs | National Human Rights Institutions |
| NJGM | Non-Judicial Grievance Mechanism |
| NSBGM | Non-State Based Grievance Mechanism |
| OPPUK | <i>Organisasi Penguatan dan Pengembangan Usaha-Usaha Kerakyatan (Indonesian Labour Rights Association)</i> |
| PP | The Paris Principles |
| P&C | RSPO Principles and Criteria |
| RAN | Rainforest Action Network |
| RSPO | Round Table on Sustainable Palm Oil |
| SERBUNDO | <i>Serikat Buruh Pertanian Indonesia</i> - Indonesian Plantation Trade Union |
| SMSG | Secretary-General's Special Representative |
| UN | United Nations |
| UNDP | United Nations Development Programmed |
| UNGPs | United Nations Guiding Principles |

ABSTRACT

Most palm oil workers in Indonesia are employed as temporary daily workers. Consisting mostly of women, they have to work under precarious working conditions, unequal treatment based on gender, excessive working hours, and earn less than the minimum wage. Moreover, they do not have adequate access to health and right to unionize with other workers. Their situations are prone to human rights violations ranging from the right to fair working conditions until the freedom of associations. Under international law, they should have the right to remedy as a result of those human rights violations. Unfortunately, those workers do not have adequate access to a judicial remedy in Indonesia. Alternatively, this thesis aims to study the possibility of non-judicial mechanisms for those workers, such as National Human Rights Institutions (NHRIs) and Multi-Stakeholder Initiatives (MSIs). This thesis will first discuss the workers' situation to grasp a better understanding of the palm oil workers in Indonesia. Subsequently, the author will provide a literature review on NHRIs and MSIs under the evolving business and human rights (BHR) framework. Lastly, the role of NHRIs and MSIs (Roundtable of Sustainable Palm Oil) in providing remedies for palm oil workers in Indonesia will further be analyzed. The author will use the effectiveness criteria in the UNGPs as a tool to analyze the mechanisms.

Chapter I

INTRODUCTION

A. Problem Statement

Indonesia has the largest tropical forest in the world.¹ According to UNDP, Indonesia is the world's largest palm oil producer.² It is estimated Indonesia produces 43,500,000 metric tons of palm oil in 2020 with 51.3% shares in the world market.³ Besides being the largest producer, Indonesia also serves as the biggest palm oil exporter in the world.⁴ The United States Development Agency estimated planted areas producing mature palm oil Indonesia had reached 11.75 million ha in 2019, which amount to 49.5% of the total world area of 23.74 ha.⁵ The expansion of palm oil in Indonesia plays an essential role in the country's economic development.⁶ Those expansions generate positive impacts on poverty reduction and job creation for the local communities.⁷ However, the expansion of palm oil plantations can result in negative

¹ Susanto, et al., "Driving Factors of Deforestation in Indonesia: A Case of Central Kalimantan", (2019), 9(4), Jurnal Studi Pemerintahan, <https://www.researchgate.net/publication/331742991> accessed 14 September 2020.

² United Nations Development Programme (UNDP), Country Fact Sheet, Indonesia Palm Oil, <https://www.undp.org/content/dam/gp-commodities/docs/Country%20Factsheets/INDONESIA%20PALM%20OIL.pdf> accessed 14 March 2020.

³ Index Mundi, Palm Oil Production by Country in 1000 MT, <https://www.indexmundi.com/agriculture/?commodity=palm-oil> accessed 23 July 2020. See Also: The Observatory of Economic Complexity, 2018, <https://oec.world/en/profile/hs92/31511/> accessed 24 July 2020.

⁴ Green Palm, Where is Palm Oil Grown, <https://greenpalm.org/about-palm-oil/where-is-palm-oil-grown-2#:~:text=Country%20facts,-Since%201980%2C%20palm&text=Indonesia%20is%20the%20largest%20producer,via%20Colombia%2C%20Ecuador%20and%20Guatemala.>

⁵ Gareth McDonald, et al, *USDA Foreign Agricultural Service, Indonesia Oilseeds and Products Annual 2019*, <https://apps.fas.usda.gov/newgainapi/api/report/downloadreportbyfilename?filename=Oilseeds%20and%20Products%20Annual%20Jakarta%20Indonesia%203-15-2019.pdf>, accessed 24 September 2020.

⁶ Ministry of Agriculture, Tree Crop Estate Statistics of Indonesia, 2018-2020, Secretariat of Directorate General of Estates, www.ditjenbun.pertanian.go.id. See Also: Faisal Kasryno, Consulting Study 15: The economic impacts of palm oil in Indonesia, The High Carbon Stock Science Study 2015, <http://www.simedarbyplantation.com/sites/default/files/sustainability/high-carbon-stock/consulting-reports/socio-economic/hcs-consulting-report-15-the-economic-impacts-of-palm-oil-in-indonesia.pdf> accessed 25 September 2020.

⁷ Tania Murray Li, *Social Impacts of Oil Palm in Indonesia (A gendered perspective from West Kalimantan)*, University of Toronto, 1.

impacts on the environment and society.⁸ This includes deforestation⁹, climate change¹⁰, habitat destruction¹¹, indigenous people's conflicts,¹² and employment issues.¹³

According to Li, there has been less attention given to the employment issues in the literature than other issues.¹⁴ Palm oil is a business sector which requires intensive labors.¹⁵ In 2002, the number of people employed within the palm oil industry only 2.1 million. According to the Directorate General of Plantation data, the number of workers in the palm oil sector in Indonesia in 2018 amounted to 7.1 million.¹⁶ This number had increased by 1.93 percent over the previous year.¹⁷ Since 2013, the number of people employed in the palm oil industry in Indonesia keeps growing.¹⁸ These data are served to illustrate that palm oil is a labor-intensive field.

In Indonesia, most palm oil plantations are located in the island of Sumatra and Kalimantan.¹⁹ Unfortunately, 70 percent of palm oil workers in those locations are employed as temporary daily workers or *buruh harian lepas* (BHL) in precarious employment status.²⁰ These precarious worker conditions are prone to poor working conditions such as lack of protection from termination of employment²¹, overtime work²², underpaid wages²³, inadequate health

⁸ Susanto, et al., "Driving Factors of Deforestation in Indonesia".

⁹ United Nations Development Programme (UNDP), Country Fact Sheet, Indonesia Palm Oil, <https://www.undp.org/content/dam/gp-commodities/docs/Country%20Factsheets/INDONESIA%20PALM%20OIL.pdf> accessed 14 March 2020.

¹⁰ Dauvergne Peter, "The Global Politics of the Business of "Sustainable" Palm Oil" Global Environment Politics", Massachusetts Institute of Technology, April 2018.

¹¹ Human Rights Watch, "Indonesia: Indigenous Peoples Losing Their Forests" <https://www.hrw.org/id/report/2019/09/22/333510> accessed on 11 March 2020.

¹² *Ibid.*

¹³ Hariati Sinaga, "Employment and Income of Workers on Indonesian Oil Palm Plantations: Food Crisis at Micro Level", Future of Food: Journal on Food, Agriculture, and Society, Vol 1 Number 2, Winter 2013, 64.

¹⁴ Tania Murray Li, "Social Impacts of Oil Palm in Indonesia (A gendered perspective from West Kalimantan)", University of Toronto, 5.

¹⁵ *Ibid.*

¹⁶ Lokadata 2018, <https://lokadata.id/artikel/sawit-dan-gerakan-boikot-benua-biru>, See Also: Andi Pratiwi, *Palm Oil Plantations' Casual Workers in South Kalimantan: Social Exclusion, Feminization of Poverty, and the Absence of Social Protection*, Trade Union Research Centre, 3.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ Tania Murray Li, "Social Impacts of Oil Palm in Indonesia", 2.

²⁰ *Ibid.* See Also: Warta Ekonomi News, 70 Percent of Workers in Palm Oil Plantation Are Daily Workers <https://www.wartaekonomi.co.id/read121311/70-persen-pekerja-di-perkebunan-sawit-buruh-harian-lepas.html> Accessed 30 June 2020.

²¹ David Kinley, "Palm Oil Industry and Human Rights: A Case Study on Oil Palm Corporations in Central Kalimantan.", *University of Sydney*, 2015.

²² Oeko Institute and Padjadjaran University, Schleicher, et al. "Production of Palm Oil in Indonesia. Country-Focused Commodity Analysis in the Context of the Bio-Macht Project," 64. <https://www.oeko.de/fileadmin/oekodoc/BioMacht-palm-oil-report.pdf> accessed 8 March 2020.

²³ Tania Murray Li, "Social Impacts of Oil Palm in Indonesia", 5.

protection²⁴, being denied from freedom of associations²⁵, and gender discrimination.²⁶ As a result, the workers in Indonesia's palm oil plantations are vulnerable to being exposed to poor working conditions.²⁷

These poor working conditions could amount to some labor and human rights violations.²⁸ The issues mentioned above serve as examples of rights violations as provided under International Labor Organization (ILO) core conventions and human rights violations as provided in the International Covenant on Civil and Political Rights (ICCPR)²⁹ and International Covenant on Economic, Social, and Cultural Rights (ICESCR).³⁰ As Indonesia is a ratifying party to those conventions, Indonesia has an obligation to implement the obligations stipulated.

According to the ICCPR, States have the duty to provide remedies to individuals or people who suffer harm due to human rights violations.³¹ Thus, when a business entity violates its workers' rights, the government has the duty to provide access to remedy to those workers. Indonesia is no exception to that rule. Remedies can be pursued through judicial and non-judicial means. Nonetheless, the judicial system in Indonesia in dealing with human rights issues against corporations is significantly impaired.³² The victims tend to have limited capacity to file lawsuits or to pursue other avenues.³³ Seeking justice through courts regarding human rights violations by the corporations remains difficult.³⁴ It is not uncommon that the claimants had to go through a long process with multiple challenges.³⁵ As a result, plaintiffs such as the palm oil workers encounter difficulties in finding adequate access to judicial remedies under Indonesian Law.

As an alternative, non-judicial remedies possibly play an important role in providing remediation.³⁶ Principle 27 of The UN Guiding Principles (UNGPs) stipulate States should provide

²⁴ David Kinley, "Palm Oil Industry and Human Rights: A Case Study on Oil Palm Corporations in Central Kalimantan", 2015.

²⁵ Tania Murray Li, "Social Impacts of Oil Palm in Indonesia", 46.

²⁶ *Ibid.*, 6.

²⁷ Hariati Sinaga, "Employment and Income of Workers on Indonesian Oil Palm Plantations", 64.

²⁸ Peter Dauvergne, "The Global Politics of the Business of "Sustainable" Palm Oil".

²⁹ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999 (ICCPR), <https://www.refworld.org/docid/3ae6b3aa0.html> accessed 14 July 2020). According to Indonesian Law No. 12 of 2005 regarding Ratification of International Covenant on Civil and Political Rights, Indonesia is a party to the ICCPR.

³⁰ According to Indonesian Law No. 11 of 2005 regarding Ratification of International Covenant on Civil and Political Rights, Indonesia is a party to the ICESCR.

³¹ United Nations, *International Covenant on Civil and Political Rights*, New York, 16 December 1966, <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> accessed 20 May 2020, Art. 2.

³² Iman Prihandono - *Litigating Economic, Social and Cultural Rights against Transnational Corporations in Indonesian Court*, Hasanuddin Law Review, 2017. See Also: Lapindo Mudflow Case and Freeport Contract of Work Case.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ UNGPs, Principle 25.

³⁶ United Nations Human Rights Office of the High Commissioner, ARP II Final Scoping Paper, 17 February 2017, ARP II A/HRC/32/19, OHCHR, An Interpretative Guide to The Corporate Responsibility to Respect Human Rights.

non-judicial grievance mechanism (NJGM) in obtaining “comprehensive access to remedy”.³⁷ NJGMs play an important role to complement and supplement judicial mechanisms.³⁸ Compared to the judicial remedies, NJGMs may be quicker, cheaper, and easier to access.³⁹

There are several NJGM remedies available to address labor issues in Indonesia.⁴⁰ Those remedies include mediation under the Industrial Relations Court, National Human Rights Institutions (NHRI), National Contact Point (NCP) of the Organization for Economic Co-operation and Development, Ombudsman Offices, and Multi-Stakeholder Initiatives (MSIs).⁴¹ This thesis focuses on National Human Rights Institutions (NHRIs) and Multi-Stakeholder Initiatives (MSIs) as non-judicial remedies because NHRIs are the most prominent state-based NJGM and MSIs are considered the most accessible non-state based grievance mechanism (NSBGM) in the palm oil industry by the participants using it.⁴²

MSIs are a public-private regulatory initiative to improve human rights in the business sector.⁴³ They are considered as an early warning system regarding grievances and providing a feedback loop for management to prevent future escalation.⁴⁴ Although the outcome is not binding like judicial decision, the outcome of MSIs has been proven effective and socially binding.⁴⁵ Within the palm oil industry, the MSIs have established an industry certification scheme, known as the Round Table on Sustainable Palm Oil (RSPO).⁴⁶ Indonesia has the most significant number of complaints registered in the RSPO.⁴⁷ Several parties considered the RSPO’s Complaints-System as a much more accessible mechanism rather than the judicial ones.⁴⁸

³⁷ *Ibid*, Principle 27.

³⁸ United Nations, Guiding Principles on Business and Human Rights Implementing the United Nations ‘Protect, Respect and Remedy’ Framework, 2011, https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf, accessed 20 May 2020, Principle 27.

³⁹ ARP III Scope and Programme of Work (1 November 2018) <https://www.ohchr.org/Documents/Issues/Business/ARP/ARPIII-PoW.pdf>

⁴⁰ Sector Study Part 1 How State-based NJMs respond to sectors with high risks of adverse human rights impacts: Sector Study – Part 1, May 2017, https://media.business-humanrights.org/media/documents/files/documents/ARPII_phase1_Sector_Study_Part_1.pdf

⁴¹ *Ibid*.

⁴² Holly C. Jonas, Final Report, *A Review of the Complaints System of the Roundtable on Sustainable Palm Oil: Final Report*, Natural Justice, <https://rspo.org/news-and-events/announcements/a-review-of-complaints-system-of-the-rspo-final-report> accessed 8 March 2020.

⁴³ *Ibid*.

⁴⁴ Manchester Study, “Non-state based non-judicial grievance mechanisms (NSBGM): An exploratory analysis A report prepared for the Office of the UN High Commissioner for Human Rights”, Manchester, 13 July 2018 - <https://www.ohchr.org/Documents/Issues/Business/ARP/ManchesterStudy.pdf> accessed 28 September 2020.

⁴⁵ Baumann-Pauly Dorothee, and Justine Nolan. *Business and Human Rights: from Principles to Practice*. (Abingdon, Oxon: Routledge, 2016), 344.

⁴⁶ RSPO Website, <https://rspo.org> accessed 1 July 2020.

⁴⁷ RSPO, Impact Report 2018, 43, <https://rspo.org/key-documents/impact-reports> accessed 1 July 2020.

⁴⁸ Holly C. Jonas, Final Report, *A Review of the Complaints System of the Roundtable on Sustainable Palm Oil*.

Thus, this research aims to map the possibility of access to non-judicial remedies for palm oil workers in Indonesia, specifically NHRI and MSIs. This thesis will analyze the advantages and disadvantages of these two mechanisms in general and discuss the implementation of these two mechanisms to the palm oil workers in Indonesia. The goal of this thesis is to make a contribution to the palm oil workers in Indonesia.

B. Research Questions and Objectives

To what extent do palm oil workers that suffer from poor working conditions in Indonesia have access to non-judicial remedies? A study into the effectiveness as understood in the UNGPs 31 of the Indonesian NHRI and the RSPO.

The following sub-questions based on the research question above are examined:

1. What is the situation of Indonesian workers in the palm oil industry?
2. To what extent are non-judicial remedies such as NHRIs and MSIs seen as providing an alternative to judicial means?
3. To what extent do the NHRI in Indonesia and the MSI RSPO provide access to effective remedy as understood by the UNGP 31 for palm oil workers suffering poor working conditions in Indonesia?

C. Research Methodology, Sources, Limitations, and Overview of Chapters

A desk study was conducted using primary and secondary legal materials such as books, academic journals, and other relevant documents to support the arguments. Qualitative data and Small-N case studies from National Human Rights Commission (Komnas HAM), RSPO, and NGOs reports are used to illustrate certain labor rights violations to palm oil workers in Indonesia to answer the first sub-question.⁴⁹ As this is a sensitive issue, several workers did not want to be interviewed because they are afraid of the intimidation from the employer. Literatures from scholars such as journals and books are applied to answer the second sub-question.

There is limited formal data and scholarly writing on the situations of palm oil workers in Indonesia.⁵⁰ Therefore, several interviews were conducted to illustrate the findings regarding the third sub-question. Interviews with several NGOs and several Indonesian trade unions were

⁴⁹ David Kinley, "Palm Oil Industry and Human Rights: A Case Study on Oil Palm Corporations in Central Kalimantan", 86-87.

⁵⁰ UNICEF, *Palm Oil and Children in Indonesia*. United Nations Children's Fund. 2016, <https://www.unicef.org/indonesia/media/1876/file/Palm%20oil%20and%20children%20in%20Indonesia.pdf> accessed 8 March 2020.

conducted to illustrate the workers' situations in practice. Moreover, interview with the Komnas HAM and RSPO were done to obtain information from the internal perspective. Lastly, the effectiveness criteria under Principle 31 of UNGPs will be used as a tool for assessing the effectiveness of the two remedy mechanisms (NHRI and RSPO) in chapter IV because it provides a framework to assess whether a non-judicial mechanism can be considered effective.

Chapter II describes palm oil workers' situations under poor working conditions in Indonesia and the human rights violations that occur. International conventions such as ICCPR, ICESCR, and ILO conventions are referred to in this chapter. Accordingly, facts about those workers' lack of access to judicial remedy are discussed in this chapter.

Chapter III focuses on access to non-judicial remedies as an alternative remedy. This chapter presents the remedies provided under NHRI and MSIs based on scholarly writing and reports. The advantages as well as critiques of these mechanisms are elaborated upon.

Chapter IV analyzes the remedy mechanisms provided by the Komnas HAM and MSIs (RSPO) for the palm oil workers under poor working conditions in Indonesia from the perspective of UNGP 31. The effectiveness criteria provided there such as legitimacy, accessibility, consistency, predictability, equitability, transparency, rights-compatibly, and source of continues learning are used in this chapter.

Chapter V presents the conclusions and recommendations drawn from the thesis.

Chapter II

SITUATIONS OF PALM OIL WORKERS IN INDONESIA

The allegations regarding human rights violations in palm oil industry are not novel.⁵¹ Palm oil conflicts in Indonesia have been taking place for more than a decade.⁵² The said allegations range from violations of the right to health as a result of deforestation⁵³ and climate change⁵⁴, violations of adequate standard of living as a result of habitat destruction⁵⁵, to labor rights violations as a result of workers exploitation.⁵⁶ These human rights allegations are increasing because the expansion of palm oil.

The expansion of palm oil industry can be found in 22 out of 33 provinces in Indonesia and the production is concentrated in the provinces of Sumatera and Kalimantan.⁵⁷ The total production of palm oil in Sumatera accounts for 70% while in Kalimantan comes up to 30%.⁵⁸ Unfortunately, the allegations of human rights violations have been occurring in Sumatera and Kalimantan for years.⁵⁹

According to several reports, palm oil workers in Sumatera and Kalimantan were facing poor working conditions.⁶⁰ No exact definition can be found in the literature or scholarly discourse regarding poor working conditions.⁶¹ Therefore, in this chapter, the author will describe the situations of palm oil workers in Sumatera and Kalimantan, which illustrate these poor working

⁵¹ RAN, OPPUK & ILRF, *The Human Cost of Conflict Palm Oil Revisited*, 2017. https://www.ran.org/wp-content/uploads/2018/06/Human_Cost_Revisited_vWEB.pdf accessed 30 September 2020.

⁵² Perjuangkan Tanah yang Diklaim Perusahaan Sawit, Tiga Warga Kotawaringin Timur Malah Ditahan <https://www.mongabay.co.id/2020/03/12/perjuangkan-tanah-yang-diklaim-perusahaan-sawit-tiga-warga-kotawaringin-timur-malah-ditahan/> See Also: ELSAM, Human Rights Violations, http://lama.elsam.or.id/downloads/1372924048_Human_Rights_Violation_PT_PP_Lonsum_Sumatera_Utara_-_ENGLISH_Version.pdf accessed 21 October 2020.

⁵³ Susanto, et al., "Driving Factors of Deforestation In Indonesia."

⁵⁴ Peter Dauvergne, "The Global Politics of the Business of "Sustainable" Palm Oil."

⁵⁵ Human Rights Watch, "Indonesia: Indigenous Peoples Losing Their Forests" <https://www.hrw.org/id/report/2019/09/22/333510> accessed on 11 March 2020.

⁵⁶ Hariati Sinaga, "Employment and Income of Workers on Indonesian Oil Palm Plantations", 64.

⁵⁷ The High Carbon Stock Science Study, 2015, Consulting Study 15: The economic impacts of palm oil in Indonesia, December 2015, <https://www.simedarbyplantation.com/sites/default/files/sustainability/high-carbon-stock/consulting-reports/socio-economic/hcs-consulting-report-15-the-economic-impacts-of-palm-oil-in-indonesia.pdf> See Also: <https://www.indonesia-investments.com/business/commodities/palm-oil/item166>.

⁵⁸ *Ibid.*

⁵⁹ Perjuangkan Tanah yang Diklaim Perusahaan Sawit, Tiga Warga Kotawaringin Timur Malah Ditahan <https://www.mongabay.co.id/2020/03/12/perjuangkan-tanah-yang-diklaim-perusahaan-sawit-tiga-warga-kotawaringin-timur-malah-ditahan/ELSAM,> Human Rights Violations, http://lama.elsam.or.id/downloads/1372924048_Human_Rights_Violation_PT_PP_Lonsum_Sumatera_Utara_-_ENGLISH_Version.pdf accessed 21 October 2020.

⁶⁰ RAN, OPPUK & ILRF, *The Human Cost of Conflict Palm Oil Revisited*. See Also: Schleicher, et al. "Production of Palm Oil in Indonesia", 64.

⁶¹ In this journal, the author uses the term "poor working conditions" but provide no exact definition.

conditions.⁶² To this end, the situation of two companies— One in Sumatera and the other in Kalimantan—shall be discussed, to illustrate the alleged human rights violations. The author has chosen these two cases since they are well documented and serve as the most illustrative cases of the said conditions. The author retrieved the data from published material such as news articles, NGO reports, scholarly writings, and the RSPO website.

The company in Sumatera, referred to as Company A, is a palm oil company located in the province of North Sumatra.⁶³ In 2016, Rainforest Action Network (RAN), Indonesian Labor Rights Association (OPPUK), and the International Labor Rights Forum (ILRF) made a report and filed a complaint to the RSPO concerning exploitation of labor against this company.⁶⁴ According to Dauvergne, this report describes modern-day slavery in palm oil plantation in Indonesia. The report was processed by the RSPO in 2018 and closed in 2019 and the information pertaining to this case has been presented on the RSPO website. The company in Central Kalimantan will be refer to as Company B.⁶⁵ This company is also a member of RSPO.⁶⁶ This company has polluted the environment and did not take responsibility for its workers. The company was allegedly violating ILO conventions and national law. Also, the company did not respect the right of the local citizen in that area. The author has taken this as the example case from Kalimantan as the NGO report for this case has been confirmed by a scholarly article.⁶⁷

A. Palm Oil Workers under Poor Working Conditions in Sumatera and Kalimantan

1. Precarious working conditions

There are three types of workers within the palm oil industry; temporary daily workers or *buruh harian lepas* (BHL), permanent daily workers, and permanent monthly workers (staff). The main subjects of these poor working conditions are BHL, considering their status as precarious workers.⁶⁸ The Cambridge Dictionary defines a precarious worker as someone who works under a temporary working agreement. According to the ILO, precarious work is

⁶³ RAN, OPPUK & ILRF, *The Human Cost of Conflict Palm Oil Revisited*.

⁶⁴ RSPO, Complaints Panel's Decision, <https://rspo.my.salesforce.com/sfc/p/#900000000YoJi/a/900000000PYaf/6mJ.T1HSMNHdkSdhiOT8z3IdAHk8eJ6fHGUelpz9jB0> accessed 20 May 2020.

⁶⁵ David Kinley, "Palm Oil Industry and Human Rights: A Case Study on Oil Palm Corporations in Central Kalimantan".

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ Dileep Kumar M et al., Way to Measure the Concept Precarious Working Conditions in Oil Palm Plantations, *Asian Social Science*; Vol. 10, No. 21, 2014 <https://core.ac.uk/download/pdf/42980143.pdf> accessed 8 October 2020.

defined as work that amounts to low wages, insufficient protection from employment termination, limited access to social protection, and lack of access to exercise their rights at work.⁶⁹

It is a common practice for palm oil companies in Indonesia to extend the duration of temporary workers indefinitely. In several Indonesian palm oil plantations, the workers are employed as temporary workers for years without any employment agreement. This situation of precarious workers can be illustrated with reference to the situation in the abovementioned Company A. The BHL did not get any permanent employment agreement after work for more than three months for Company A.⁷⁰ As BHL, their employment rights were not guaranteed due to the absence of an employment agreement.⁷¹

2. Unequal treatment based on gender

According to Li, the casual labor working in palm oil plantations tends to be made up of women.⁷² There is a trend to employ women as casual workers with low job quality.⁷³ These women workers are usually recruited as maintenance workers.⁷⁴ In most palm oil plantations, there is a gender-based division where most female maintenance workers are employed in seasonally, while most of the male laborers dominantly work in the mill as permanently.⁷⁵ Those women who work as seasonal workers are not entitled to paid maternity leaves and menstrual leaves despite having worked there for years.⁷⁶ According to Pye, the palm oil plantations workforce is highly gendered which cause women workers trapped in precarious

⁶⁹ ILO, Meeting Documents, https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/actrav/documents/meetingdocument/wcms_179787.pdf accessed 8 April 2020. See Also: Cambridge Dictionary, <https://dictionary-cambridge-org.tilburguniversity.idm.oclc.org/dictionary/english/precarious-employment> accessed June 2020.

⁷⁰ RSPO, Complaints Panel's Decision, <https://ap8.salesforce.com/sfc/p/#90000000YoJi/a/90000000PYaf/6mJ.T1HSMNHdkSdhiOT8z3ldAHk8eJ6fHGUelpz9jB0> accessed 20 May 2020.

⁷¹ *Ibid*

⁷² Tania Murray Li, "Social Impacts of Oil Palm in Indonesia", 6.

⁷³ Eco Business, *Palm oil giants unite to tackle human rights challenges in Indonesia* <https://www.eco-business.com/news/palm-oil-giants-unite-to-tackle-human-rights-challenges-in-indonesia/>

⁷⁴ Tania Murray Li, "Social Impacts of Oil Palm in Indonesia", 29.

⁷⁵ Vincent Kiezebrink (SOMO), *Palming Off Responsibility, Labor rights violations in the Indonesian palm oil sector*, April 2017, <https://www.cnvinternationaal.nl/Resources/Persistent/494a6d41ea4525468b46072a02e31f21e85a59c6/CNVI-0118%20Palmolie%20Indonesie-rapport-Low%20Res.pdf>, accessed 23 June 2020.

⁷⁶ *Ibid*. See Also: ILO, *Advancing Workers' Rights in Indonesia's Palm Oil Sector*, 2019 https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-jakarta/documents/genericdocument/wcms_734058.pdf accessed 30 September 2020.

and badly paid positions.⁷⁷ These situations of gender-based unequal treatment can also be found in Company A. Based on the findings stated above, it can be concluded that women are at risk of human rights violations in the palm oil industry.

3. Excessive working hours

It is reported that the workers in Indonesian palm oil plantations have to work longer the normal working hours stipulated under Indonesian Law.⁷⁸ This happens because instead of definitely being paid by hour, they are paid based on the daily target achievements.⁷⁹ If the workers have not met their target, they have to continue working.⁸⁰ Unfortunately, those workers did not receive any overtime pay.⁸¹ This situation of excessive working hours can be illustrated with reference to the situation in In Company A, and Company B. In Company A, the overtime reaches 3 hours a day or 14 hours per week during the peak crop season.⁸² Unfortunately, those workers did not receive any overtime pay.⁸³ In Company B, the workers had to work longer than the regular hours if the pickup truck transporting them was late or if they were unable to work due to heavy rain.⁸⁴ Those workers had to work overtime to compensate for their missed targets, and this practice can potentially lead to forced labor.⁸⁵

4. Underpaid wages

Casual workers in Indonesian palm oil plantations are mostly paid below the normal minimum wages because they are considered unskilled labor.⁸⁶ This situation can be

⁷⁷ Oliver Pye, “*A Plantation Precariat: Fragmentation and Organizing Potential in the Palm Oil Global Production Network*” Institute of Social Studies the Hague, 948.

⁷⁸ Indonesian Law No. 13 (2003) regarding Labor Law, Article 77. It is stipulated under Labor Law that the maximum working hours are 40 hours per week.

⁷⁹ Oeko Institute and Padjadjaran University, Schleicher, et al. “Production of Palm Oil in Indonesia. Country-Focused Commodity Analysis in the Context of the Bio-Macht Project,” 64.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² RSPO, Complaints Panel’s Decision, <https://ap8.salesforce.com/sfc/p/#90000000Yoj/a/90000000PYaf/6mJ.T1HSMNHdkSdhiOT8z3ldAHk8eJ6fHGUElpz9jB0> accessed 20 May 2020.

⁸³ *Ibid.*

⁸⁴ David Kinley, “Palm Oil Industry and Human Rights: A Case Study on Oil Palm Corporations in Central Kalimantan.”

⁸⁵ Fair Labor Association for The Consumer Goods Forum, *Assessing Forced Labor Risks in The Palm Oil Sector in Indonesia and Malaysia*, November 2018, https://www.theconsumergoodsforum.com/wp-content/uploads/2018/11/201811-CGF-FLA-Palm-Oil-Report-Malaysia-and-Indonesia_web.pdf accessed 8 March 2020.

⁸⁶ Tania Murray Li, “Centering labor in the land grab debate”, *The Journal of Peasant Studies*, 2011 38:2, 281-298, DOI: 10.1080/03066150.2011.559009.

illustrated with reference to the situations in Company A and Company B. Their average income is not sufficient to fulfill their daily needs.⁸⁷

5. Lack of access to health

As provided in ILO Convention No. 187, companies are responsible for giving health and safety protections to the workers. Unfortunately, palm oil workers in Indonesia lack sufficient health protection.⁸⁸ Some companies do not provide any healthcare facilities for the workers.⁸⁹ This situation of lack of access to health can be illustrated with reference to the situation in Company A and Company B. It is found in Company A that almost all casual daily workers did not receive health insurance from the company.⁹⁰ Similarly, Company B does not provide any healthcare facilities for the workers.⁹¹ Without proper protection, workers might develop Musculoskeletal Disorders and other infectious diseases.⁹² Thus, those companies have neglected their obligation to give health and safety protections to the workers under international law.⁹³

6. Denial of freedom of association

ILO Convention No. 87 regulates that employees have the right to form a union without the employer's organization. Since Indonesia is a party to ILO Convention No. 87, Indonesia has an obligation to protect the workers' right to organize or join a trade union.⁹⁴ Nevertheless, many cases in Indonesia have testified the fact that palm workers' freedom of associations are denied because their right to form a trade union is limited.⁹⁵ Some labor union leaders in

⁸⁷ *Ibid.*

⁸⁸ Sarah H. Wright, Poor Working Conditions Affect Long-Term Health, National Bureau of Economic Research, <https://www.nber.org/digest/sep09/w15121.html> accessed 2 October 2020.

⁸⁹ David Kinley, "Palm Oil Industry and Human Rights: A Case Study on Oil Palm Corporations in Central Kalimantan.", 93.

⁹⁰ RSPO, Complaints Panel's Decision, 2 November 2018, <https://ap8.salesforce.com/sfc/p/#90000000YoJi/a/90000000PYaf/6mJ.T1HSMNHdkSdhiOT8z3ldAHk8eJ6fHGUelpz9jB0> accessed 20 May 2020.

⁹¹ David Kinley, "Palm Oil Industry and Human Rights: A Case Study on Oil Palm Corporations in Central Kalimantan.", 93.

⁹² Nurully Myzabella, "Occupational Health and Safety in the Palm Oil Industry: A Systematic Review",

⁹³ ILO C187 - Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187).

⁹⁴ C087 - Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), Article 11.

⁹⁵ ILO, Advancing Workers' Rights In Indonesia's Palm Oil Sector Project Term of Reference National Consultant Action Research On Freedom Of Association And Collective Bargaining In Indonesia's Palm Oil Sector. https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-jakarta/documents/genericdocument/wcms_734058.pdf accessed 1 October 2020.

Indonesia were allegedly penalized because they joined the trade union.⁹⁶ Moreover, the workers are afraid of intimidation and employment termination.⁹⁷ This situation can be illustrated with reference to the situation in Company A and Company B. Hence, their freedom of association is denied.

B. Access to Remedy Palm Oil Workers in Indonesia under International Law⁹⁸

The above-mentioned issues could possibly amount to several labor rights violations such as the right to fair working conditions and wages,⁹⁹ occupational safety and health,¹⁰⁰ and equal employment opportunities.¹⁰¹ Also, human rights violations as provided in ICCPR and ICESCR such as the right to favorable and just conditions of work¹⁰², the right to freedom of association¹⁰³, the right to health and safety¹⁰⁴, the right to be free from discrimination¹⁰⁵, and the right to be free from forced labor.¹⁰⁶

Under international law, any persons whose rights are being violated have the right to obtain a remedy. The obligation to provide remedy is found in several international law instruments.¹⁰⁷ ICCPR stipulates that any persons whose rights are being violated should have access to remedy.¹⁰⁸ Remedies can be found in a form of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.¹⁰⁹ Since Indonesia is a party to ICCPR, Indonesia must implement access to remedy into its national legislation and law.¹¹⁰ Further, the UNGPs also contend that corporations have the responsibility to provide access to the remedies for the violated

⁹⁶ *Cases of labor rights violations and harassment of labor leaders in Indonesia*, Asia Monitor Resource Centre, <https://amrc.org.hk/sites/default/files/Cases%20of%20labor%20rights%20violations%20in%20Indonesia.pdf> on 1 October 2020.

⁹⁷ Vincent Kiezebrink (SOMO), *Palming Off Responsibility*.

⁹⁸ International conventions which have been ratified by Indonesia such as ICCPR and ICESCR.

⁹⁹ UDHR Art. 23, 24, 25, International Labor Organization (ILO), ILO Constitution, https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO accessed 14 July 2020.

¹⁰⁰ UDHR, Art. 25, ILO C187 - Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187).

¹⁰¹ UDHR, Article 2.

¹⁰² *Ibid*, Article. 7.

¹⁰³ UDHR, Art. 20, ICCPR, Art. 22, ICESCR, Art. 8, C087 - Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87).

¹⁰⁴ ICESCR, Art. 7 (b)

¹⁰⁵ CEDAW, UDHR, Art. 2.

¹⁰⁶ ICCPR, Art. 8 (a), ILO C029 - Forced Labor Convention, 1930 (No. 29).

¹⁰⁷ Universal Declaration of Human Rights, United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation (UN Basic Principles), ICCPR, Ruggie's Protect, Respect and Remedy Framework, and the UN Guiding Principles.

¹⁰⁸ ICCPR, Art. 2.

¹⁰⁹ https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf accessed 13 May 2020.

¹¹⁰ United Nations Treaty Collection, Status of Treaties, International Covenant on Civil and Political Rights, https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=en&mtdsg_no=IV-4&src=IND accessed 24 June 2020.

parties.¹¹¹ In conclusion, those palm oil workers under poor working conditions should have access to remedy.

Under international human rights law (IHRL), States shall provide effective remedies through judicial, administrative, legislative authorities, or any other means. Under the ICCPR, when human rights violations occur within the jurisdiction of a State, that State should ensure the victims whose rights are being violated shall have an effective remedy by accessing judicial, administrative, legislative, or other competent authorities available in that State.¹¹² Although the obligation to provide remedy cannot be found explicitly in the ICESCR, the general comment explains that appropriate remedies shall be given to the aggrieved parties using legal, administrative, or other appropriate means.¹¹³

Judicial mechanisms are the core of accessing remedy.¹¹⁴ Unfortunately, judicial remedy in Indonesia suffers from several shortcomings.¹¹⁵ In a developing country like Indonesia, judicial remedies are costly, prolonged and complicated.¹¹⁶ The costs for bringing witness and the enforcement of the court's decision to get compensation are also costly.¹¹⁷ Although the legal fee for cases below IDR 150,000,000 is free in the Industrial Relations Court¹¹⁸, there are other essential fees for witness, seal, and administrative matters.¹¹⁹ Due to geographical limitation, there are enormous transportation expenses to reach the court which is located in the Capital Province.¹²⁰ Considering their underpaid wages and their difficulty to fulfil their daily needs, the plaintiffs do not have adequate financial resources. In a country with ineffective courts, the judicial cases are

¹¹¹ United Nations, Guiding Principles on Business and Human Rights.

¹¹² *Ibid.*

¹¹³ Committee on Economic, Social and Cultural Rights, General Comment 9: The domestic application of the Covenant, 3 December 1998, <https://www.refworld.org/docid/47a7079d6.html> accessed 10 July 2020.

¹¹⁴ ARP III Scope and Programme of Work (1 November 2018) <https://www.ohchr.org/Documents/Issues/Business/ARP/ARPIII-PoW.pdf>

¹¹⁵ Haris Azhar, The Human Rights Struggle in Indonesia: International Advances, Domestic Deadlocks, 228, <https://www.surjournal.org> accessed 2 October 2020.

¹¹⁶ Irene Hadiprayitno, "Defensive Enforcement: Human Rights in Indonesia. Human Rights Review", 2019, https://www.researchgate.net/publication/228128314_Defensive_Enforcement_Human_Rights_in_Indonesia accessed 10 September 2020.

¹¹⁷ Rudi M Rizki, *Tanggung Jawab Korporasi Transnasional dalam Pelanggaran Berat HAM*, (Jakarta: Fikahati Aneska, 2012), 220

¹¹⁸ Industrial Relations Law, Article 58.

¹¹⁹ Interview with Andriko Otang, Director of TURC, Tilburg, 5th of March 2020, (Online Interview).

¹²⁰ Interview with Herwin Nasution, Director of Indonesian Plantations Trade Union (SERBUNDO), Utrecht, 7th of March 2020.

unduly prolonged.¹²¹ In Indonesia, the legal enforcement mechanism is complex and significantly impaired.¹²²

Plantation fields are located far from the central government, which causes a lack of supervision from the government.¹²³ The President created the National Action Plan for Sustainable Oil Palm Plantation which instructed the Ministry of Labor to disseminate government's supervision in the plantations.¹²⁴ Yet, there is no significant role performed by the government to resolve this issue.¹²⁵

The lack of access to information also amplifies this situation. Living in remote areas, most workers do not have sufficient information regarding where to complain and how to restore their rights.¹²⁶ The government does not provide proper compensation for those palm oil workers,¹²⁷ and when they do have access to bring complaints to the government, they did not get adequate response.¹²⁸ In light of these shortcomings, it can be concluded that workers in palm oil plantations have difficulty in finding adequate access to judicial remedy.

¹²¹ Jennifer Zerk, "Corporate Liability for Gross Human Rights Abuses", 83.

¹²² INDONESIA: Weak Judicial System and Legal Aid Allow for Unfair Trials <http://www.humanrights.asia/news/ahrc-news/AHRC-ART-005-2018/> accessed 20 September 2020.S

¹²³ Sumondang, S.H.M.H, Disnaker Sumatera Utara (Regional Labor Office), Online Social Dialogue, *Palm Oil Workers Coalition in Sumatera Region, COVID-19 Impact to Palm Oil Workers*, OPPUK, SERBUNDO, Palm Oil Workers Coalition.

¹²⁴ President Decree No. 6 Year 2019 regarding National Action Plan for Sustainable Oil Palm Plantation 2019-2024.

¹²⁵ David Kinley, "Palm Oil Industry and Human Rights: A Case Study on Oil Palm Corporations in Central Kalimantan.", *University of Sydney*, 2015, 139.

¹²⁶ David Kinley, "Palm Oil Industry and Human Rights: A Case Study on Oil Palm Corporations in Central Kalimantan", 115.

¹²⁷ Human Rights Watch, "When We Lost the Forest, We Lost Everything, Oil Palm Plantations and Rights Violations in Indonesia" <https://www.hrw.org/id/report/> accessed on 11 September 2020.

¹²⁸ *Ibid.*

Sub-Conclusion

The palm oil workers in Indonesia suffer from poor working conditions since they work under the situations of precarious working conditions, risk of gender discrimination, overtime unpaid work, underpaid wages, inadequate health protection, and lack of freedom of association. These poor working conditions could possibly amount to several labor and human rights violations as provided under international conventions such as ICCPR, ICESCR and ILO Conventions.

Under international law, those workers should have access to judicial remedy. However, access to the judicial remedy in Indonesia is significantly impaired because it is costly, prolonged and having complex mechanism. The geographical condition of the palm oil workers which are located in the remote areas also worsens the situation. There is a lack of supervision from the government and lack of access to information which create obstacles for them to access judicial remedy. Thus, non-judicial remedies as alternative dispute resolution will be discussed in the next chapter.

Chapter III

The Role of NHRIs and MSIs in Providing Remedy

This chapter will discuss to what extent palm oil workers have effective access to NJGM by applying the effectiveness criteria laid down in UNGP 31. The chapter draws from a literature review of NHRIs and MSIs under the evolving body of scholarly work on business and human rights (BHR). NJGM play a vital role in providing remediation to the victims of business-related human rights abuses. UNGPs Principle 27 stipulates that “*non-judicial mechanisms play an essential role in complementing and supplementing judicial mechanisms.*”¹²⁹

Principle 27 suggests that judicial remedies are not always required. Even if they are effective, they are not always successful in solving most alleged abuses because they cannot carry the burden of addressing all alleged abuses. Also, judicial mechanisms are not always favored by the claimants because they are costly, prolonged, and inflexible.¹³⁰ Therefore, avenues to judicial enforcement are not always accessible for victims of human rights abuses done by the corporations in weak governance zones, making NJGM the only available option for them.¹³¹

In practice, NJGM may be considered as the attractive alternative to settling a dispute through judicial mechanism. Considering that there is a flexibility to design resolutions based on the parties’ needs, they prefer to file a claim through the NJGM. NJGM also offers a greater range of potential remedies.¹³² Unlike judicial remedy, NJGM aim to achieve a win-win solution for both parties. Although the outcome is not binding, naming and shaming the corporations can be effective in BHR cases.¹³³

¹²⁹ The Commentary of Principle 27 of UNGPs stipulates that “*Non-judicial mechanisms play an essential role in complementing and supplementing judicial mechanisms. Even where judicial systems are effective and well-resourced, they cannot carry the burden of addressing all alleged abuses; judicial remedy is not always required; nor is it always the favored approach for all claimants.*”

¹³⁰ Veronika Haász, “The Role of NHRI in the Implementation of the UN Guiding Principles”, Human Rights Review, September 2013, 170, <https://www.researchgate.net/publication/237840762> accessed 10 September 2020.

¹³¹ Mariëtte van Huijstee and Joseph Wilde-Ramsing, “Remedy is the reason: non-judicial grievance mechanisms and access to remedy”, Research Handbook on Human Rights and Business, Edward Elgar Publishing, 2020.

¹³² Humberto Cantú Rivera, “National human rights institutions and their (extended) role in the business and human rights”, Research Handbook on Human Rights and Business, Edward Elgar Publishing, 2020, 492.

¹³³ Veronika Haász, “The Role of NHRI in the Implementation of the UN Guiding Principles”, 170.

A. Access to NJGM Under NHRIs

1. NHRIs

An NHRI is defined as “an independent statutory body, established by a State to promote and protect human rights within its jurisdiction.”¹³⁴ NHRIs have characteristics similar to public authorities, national courts, and human rights NGOs but have a special status. The status and function of NHRIs are established in the Paris Principles (PP).¹³⁵

PP are a set of non-binding standards which provide minimum requirements that an NHRI must meet to receive “A” accreditation status.¹³⁶ Every five years, the International Coordinating Committee (ICC) performs a peer review of NHRIs, to see whether they meet PP’ minimum requirements.¹³⁷ Under PP, NHRIs are required to play a part in human rights protection, such as by receiving complaints, conducting investigation, mediating conflicts, and monitoring activities.¹³⁸ They also have to promote human rights through education and community outreach.¹³⁹ There are six main criteria that NHRIs should have under PP, including a broad and clear mandate, institutional independence, autonomy from the government, pluralistic staffs, sufficient resources, adequate powers of investigation.¹⁴⁰ There are also the Additional Principles concerning the quasi-jurisdictional competence of the NHRIs.¹⁴¹ This competence authorizes the NHRIs to hear individual complaints and petitions by providing amicable settlements through binding decision, informing the parties regarding access to remedies, receiving complaints, and making recommendations.¹⁴²

However, The PP are silent on which kinds of cases that can be reviewed through an NHRI’s complaint system.¹⁴³ They do not clearly stipulate that the institutions have to bear

¹³⁴ Meg Brodie, “Pushing the Boundaries: The Role of NHRIs in the Operationalizing the “Protect, Respect, and Remedy” Framework”, The UN Guiding Principles on Business and Human Rights edited by Radu Mares, Martinus Nijhoff Publishers, 248.

¹³⁵ The Paris Principles, Principles relating to the status and functioning of national institutions for protection and promotion of human rights, Adopted by General Assembly resolution 48/134 of 20 December 1993.

¹³⁶ *Ibid.*

¹³⁷ Veronika Haász, “The Role of NHRI in the Implementation of the UN Guiding Principles”, Human Rights Review, September 2013, 170, <https://www.researchgate.net/publication/237840762> accessed 10 September 2020, 171.

¹³⁸ The Paris Principles, Principles relating to the status and functioning of national institutions for protection and promotion of human rights, Adopted by General Assembly resolution 48/134 of 20 December 1993.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.* See Also: United Nations, Office of the High Commissioner for Human Rights. National Human Rights Institutions: History, Principles, Roles and Responsibilities, Vol. 4. United Nations, 2010.

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ Humberto Cantú Rivera, “National human rights institutions and their (extended) role in the business and human rights”, 497

the mandate whether NHRIs can deal with BHR violations.¹⁴⁴ If an NHRI has fulfilled PP requirements, there is no guarantee it can deal with such cases. Whether an NHRI has the mandate to deal with BHR cases or not depends on each countries' domestic laws.¹⁴⁵

2. The Role of NHRIs in Providing Remedy

NHRIs have an essential role in maintaining a State's human rights standards and complementing State efforts in implementing their international obligations because of NHRIs' independence from the government.¹⁴⁶ NHRIs' role in providing remedy is stressed under the UNGPs and the Edinburgh Declaration, which includes complaints handling, investigative, and mediation function.¹⁴⁷ The NHRIs' complaint system serves to facilitates amicable settlements, promotes access to remedy, and provides recommendations to relevant authorities.¹⁴⁸

The mandate of NHRIs should be broad and explicitly include the ability to address issue of possible violations committed by corporations.¹⁴⁹ Nevertheless, Rivera argues that NHRIs still have an essential role in promoting human rights in the private sphere, whether they have a specific mandate to deal with BHR abuses or not.¹⁵⁰ Because of their independence, NHRIs can still address a broad range of human rights violations, including BHR cases.¹⁵¹ PP also do not limit those cases which can be processed by the NHRIs.¹⁵² However, the SRSG contends that not all NHRIs are technically and financially capable doing so.¹⁵³ Hence, the ability to deal with BHR cases depends on whether the State provides that mandate or not.

Furthermore, the role of NHRIs in providing remediation is considered important, as they are often deemed as the primary state-based NJGM in BHR framework.¹⁵⁴ If the NHRIs are

¹⁴⁴ Meg Brodie, "Pushing the Boundaries: The Role of NHRIs in the Operationalizing the "Protect, Respect, and Remedy" Framework", 260.

¹⁴⁵ *Ibid.*

¹⁴⁶ United Nations, Office of the High Commissioner for Human Rights, *National Human Rights Institutions: History, Principles, Roles and Responsibilities*, Vol. 4. United Nations, 2010.

¹⁴⁷ International Coordinating Committee of National Institutions for The Promotion and Protection of Human Rights and Danish Institute for Human Rights, *Business and Human Rights - A Guidebook for National Human Rights Institutions*, November 2013.

¹⁴⁸ Humberto Cantú Rivera, "National human rights institutions and their (extended) role in the business and human rights", 492.

¹⁴⁹ Nora Gotzmann and Sebastien Lorion, "National Human Rights Institutions and Access to Remedy in Business and Human Rights", Executive Summary and Policy Recommendations, 2020, 10.

¹⁵⁰ Humberto Cantú Rivera, "National human rights institutions and their (extended) role in the business and human rights", 498.

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ Veronika Haász, "The Role of NHRI in the Implementation of the UN Guiding Principles", 169.

mandated by the state to deal with BHR cases, they can provide access to an effective remedy to victims of BHR violations.¹⁵⁵ As an NJGM, they have a role in complementing and supplementing judicial mechanisms such as courts and labor tribunals.¹⁵⁶ They are established to fill the governance gap to complement the other existing mechanism.¹⁵⁷ These institutions also have the authority to become a mediator for other State-based nonjudicial mechanisms, such as NCP, ombudsman offices, government complaints offices, NSBGM, and regional as well as international human rights bodies.¹⁵⁸ The following paragraphs will discuss some literature regarding NHRIs and draw some conclusions on their, advantages and challenges in providing remedy.

3. The Advantages of NHRIs in Providing Remedy

NHRIs play an essential role in providing remediation because NHRIs have many advantages. Indeed, Rivera contends that NHRIs can contribute to de-escalating human rights abuses.¹⁵⁹ If mandated to deal with BHR cases, they can provide remedies for victims of corporate human rights abuses in two ways: directly by providing recommendations and resolutions as the output of a complaint mechanism, and indirectly through adopting recommendations for the State to regulate, investigate, or give sanctions on corporations that perpetuate human rights violations.¹⁶⁰

Furthermore, Haász reports that NHRIs may provide an alternative dispute resolution (ADR) and human rights dialogue.¹⁶¹ By conducting ADR like mediation and conciliation, they can provide remediation to human rights abuse directly. They can establish human rights dialogue between civil society and public authorities and cooperate with international networks in contributing to the development of the evolving BHR framework.¹⁶² They can also contribute to the UNGPs' development by making several submissions and attending the

¹⁵⁵ Humberto Cantú Rivera, "National human rights institutions and their (extended) role in the business and human rights", 493.

¹⁵⁶ United Nations, Guiding Principles on Business and Human Rights.

¹⁵⁷ Benjamin Thompson, *Impacts of businesses on human rights: Part one - knowing your rights*.

¹⁵⁸ Veronika Haász, "The Role of NHRI in the Implementation of the UN Guiding Principles", 177.

¹⁵⁹ Humberto Cantú Rivera, "National human rights institutions and their (extended) role in the business and human rights", 492.

¹⁶⁰ *Ibid.*

¹⁶¹ Veronika Haász, "The Role of NHRI in the Implementation of the UN Guiding Principles", 169.

¹⁶² *Ibid.*

presentations of the UN Working Group on the issue of BHR and the Human Rights Council reports to engage in the dialogue.¹⁶³

Through their monitoring and dissemination functions, NHRIs can examine other grievance mechanisms' and advise victims on accessing their remedy through awareness-raising activities.¹⁶⁴ Also, according to PP, NHRIs should have sufficient means to perform thematic inquiries and propose legal reforms to improve the national legal system.¹⁶⁵ Lastly, the NHRIs can help victims with their complaints and locally follow up locally on their cases.¹⁶⁶

4. Challenges Limiting NHRIs in Providing Remedy

This section addresses possible limitations for NHRIs in addressing both general and BHR cases. As a State-based mechanism, NHRIs face many challenges in providing remediation, in general. Firstly, the nature of certain NHRIs' recommendations are not binding. There are two types of NHRIs with complaints handling functions¹⁶⁷, namely those which can impose binding decision and those which have to refer the cases to a tribunal or court in order to obtain a binding decision, as applies to most NHRIs. Many NHRIs cannot provide legally binding decisions or have limited power to order binding remedies in providing remediation for human rights violations that have occurred.¹⁶⁸ When NHRIs' recommendations are not binding, they tend to result in low compliance and ignorance among the relevant stakeholders.¹⁶⁹ Thus, it arises a public perception that the recommendations are not effective.¹⁷⁰

Secondly, some NHRIs have weak enforcement capacity.¹⁷¹ In contrast with the other public institutions, NHRIs cannot take enforcement measures after an investigation.¹⁷² This

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*, 176.

¹⁶⁵ *Ibid.*

¹⁶⁶ Humberto Cantú Rivera, "National human rights institutions and their (extended) role in the business and human rights", 492.

¹⁶⁷ United Nations, Office of the High Commissioner for Human Rights. National Human Rights Institutions: History, Principles, Roles and Responsibilities, Vol. 4. United Nations, 2010.

¹⁶⁸ Meg Brodie, "Pushing the Boundaries: The Role of NHRIs in the Operationalizing the "Protect, Respect, and Remedy" Framework", 247.

¹⁶⁹ Veronika Haász, "The Role of NHRI in the Implementation of the UN Guiding Principles", 176173.

¹⁷⁰ Humberto Cantú Rivera, "National human rights institutions and their (extended) role in the business and human rights", 498.

¹⁷¹ Meg Brodie, "Pushing the Boundaries: The Role of NHRIs in the Operationalizing the "Protect, Respect, and Remedy" Framework", 267

¹⁷² Veronika Haász, "The Role of NHRI in the Implementation of the UN Guiding Principles", 172.

limited enforcement creates a problem because the victims of human rights abuses need an immediate measure from the NHRIs.

Thirdly, the diverse forms of NHRIs may take. PP do not provide requirements regarding the form of NHRIs.¹⁷³ There are three types of NHRIs: human rights commission, ombudsman, and hybrid institutions which with advisory and research functions. Some NHRIs have the mandate to handle individual complaints, but some do not.¹⁷⁴ This happens because the quasi-judicial competency to receive complaints is stipulated in the Additional Principles. If NHRIs do have complaint mechanisms, they might not have the mandate to deal with BHR cases because PP do not clearly stipulate that the institutions have to bear the mandate to handle BHR abuses.¹⁷⁵ Brodie argues that if an NHRI does not have the mandate to deal with BHR cases, it might not be able give remedy regarding a breach of that right.¹⁷⁶

Fourthly, financial and technical capacities can also be a challenge for NHRIs in addressing BHR issues.¹⁷⁷ The expansion of their mandates depends on the availability of the State's funding.¹⁷⁸ Subsequently, in some NHRIs, the internal staff expertise on BHR cases is lacking.¹⁷⁹ Without adequate technical and financial resources, NHRIs might have to face significant barriers in addressing BHR issues.¹⁸⁰ This lack of expertise can be addressed by conducting training regarding BHR to raise staff awareness.¹⁸¹

Lastly, maintaining their independence is a challenge NHRIs face in providing remediation. Brodie contends that the NHRIs have a dual position alongside the business actors. On the one hand, the NHRIs should cooperate with the corporate sector as “potential allies and partners”.¹⁸² On the other hand, these institutions play an essential role in holding business entities accountable for human rights violations.¹⁸³ Thus, balancing these dual positions could be a risk to the NHRIs' independence when providing remedy to BHR cases.

¹⁷³ *Ibid*, 261.

¹⁷⁴ Morten Kjaerum, “National Human Rights Institutions Implementing Human Rights”, Danish Institute for Human Rights, 2003, 6.

¹⁷⁵ *Ibid*.

¹⁷⁶ Meg Brodie, “Pushing the Boundaries: The Role of NHRIs in the Operationalizing the “Protect, Respect, and Remedy” Framework”, 260

¹⁷⁷ *Ibid*.

¹⁷⁸ Veronika Haász, “The Role of NHRI in the Implementation of the UN Guiding Principles”, 172

¹⁷⁹ *Ibid*.

¹⁸⁰ *Ibid*.

¹⁸¹ *Ibid*.

¹⁸² Meg Brodie, “Pushing the Boundaries: The Role of NHRIs in the Operationalizing the “Protect, Respect, and Remedy” Framework”, 249

¹⁸³ *Ibid*.

B. Access to NJGM under the MSIs

1. MSIs

The term MSIs tends to be used to define a voluntary initiative where several stakeholders cooperate in addressing sustainability, corporate social responsibility, and human rights problems.¹⁸⁴ These stakeholders include, but not limited to companies, NGOs, trade unions. These initiatives are usually set up by multiple corporations under the same industry to develop standards that the members should voluntarily respect.¹⁸⁵ Companies are involved in MSIs in order prevent and mitigate harm occurred by human rights violations in their supply chain, particularly labor issues.¹⁸⁶

2. The Role of MSIs in Providing Remedy

MSIs are considered the most popular NSBGM by the participants using it.¹⁸⁷ These initiatives usually have established their own complaint handling facility. Some MSIs have created grievance mechanisms for the affected stakeholders in said industry. For example, the communities affected by the business can file a complaint handling should there be any violations to the MSIs' standards.¹⁸⁸ However, these procedures can merely address complaints related to the actions of its members.

UNGPs Principle 28 provides that, alongside the State-based mechanism, States should provide access to effective NSBGM for victims of human rights violations by corporations. The commentary further stipulates that MSIs are considered an NJGM that can be created in the form of adjudicative, dialogue-based, or others.¹⁸⁹ This mechanism can offer faster and more affordable remediation than other mechanisms.¹⁹⁰ UNGPs Principle 30 stipulates MSIs and other collaborative initiatives that offer human rights-related standards should guarantee that effective remedy mechanisms are available.

¹⁸⁴ Baumann-Pauly Dorothée, and Justine Nolan. *Business and Human Rights: from Principles to Practice*, 381.

¹⁸⁵ *Ibid.*

¹⁸⁶ Benjamin Thompson, *Impacts of businesses on human rights: Part one - knowing your rights*.

¹⁸⁷ Baumann-Pauly Dorothée, and Justine Nolan. *Business and Human Rights: from Principles to Practice*, 381.

¹⁸⁸ *Ibid.*

¹⁸⁹ UNGPs, *Principle 28 Commentary*.

¹⁹⁰ *Ibid.*

3. The Advantages of MSIs in Providing Remedy

MSIs have several advantages in providing remediation since they are considered the most accessible avenue to remedy. According to Ruggie, MSIs are an emerging form of soft law, considering it is driven by social pressure.¹⁹¹ They aim to fill the regulatory gaps existed in BHR framework.¹⁹² Moreover, MSIs offer collaborations of host and home states, corporations, civil society actors, industry associations, international institutions, and investors group.¹⁹³

Similar to NHRIs, MSIs have the potential to de-escalate abuses. MSIs are considered as an early warning system to prevent future escalation.¹⁹⁴ As it is an NSBGM involving relevant stakeholders in a particular industry, it is seen as a method to prevent escalation to occur.¹⁹⁵ Once the problems have been resolved, the problems may not escalate into any of state-based mechanism.¹⁹⁶ As Ruggie said, MSIs have a central role in providing an effective remedy when the other systems fail to provide the remedy.¹⁹⁷

Another advantage is MSIs have a transformative role in dealing with business-related human rights cases.¹⁹⁸ MSIs have a significant role in having a dialogue with governments, individual companies, and national business associations to address the regulatory gaps in BHR framework.¹⁹⁹ When domestic law is absent in providing proper remediation for the affected communities, the governance gaps could be addressed by conducting the dialogue under the MSIs. MSIs' cooperation with influential international institutions, government, organizations and the inclusion of the UNGPs proves that MSIs have significant influence to the BHR field in solving the governance gaps that existed.²⁰⁰

¹⁹¹ United Nations Human Rights Council, Report of the Special Representative of the Secretary General (SRSG) on the issue of human rights and transnational corporations and other business enterprises, A/HRC/4/035, 9 February 2007, 53

¹⁹² *Ibid.*

¹⁹³ United Nations Human Rights Council, Report of the Special Representative of the Secretary General (SRSG) on the issue of human rights and transnational corporations and other business enterprises, A/HRC/4/035, 9 February 2007, 53.

¹⁹⁴ Manchester Study, "Non-state based non-judicial grievance mechanisms (NSBGM)", 35.

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*

¹⁹⁷ John Ruggie, *Just Business: Multinational Corporations and Human Rights*, New York: W.W. Norton Company, 2013.

¹⁹⁸ *Ibid.*

¹⁹⁹ United Nations General Assembly, A/71/291, Human rights and transnational corporations and other business enterprises, 4 August 2016.

²⁰⁰ Citation information: MSI Integrity, *Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance*, July 2020, 29

As argued by Scott, MSIs are considered as better alternatives avenue to remedy since they could invoke the gate-keeping capacity of clients, insurers, and other stakeholders to require compliance.²⁰¹ MSIs offer the opportunity for the affected communities or other critical stakeholders to engage in the regulation's preparation and enforcement.²⁰² It is expected there will be a sense of ownership of the policies, which could improve compliance.²⁰³

Similar to NHRIs, MSIs are considered as a complementary or supplementary means of state regulations. It is believed that MSIs could enforce their human rights standards better than state-regulations.²⁰⁴ The norms quality in MSIs standards is better since professionals from the particular sectors are involved in the making process.²⁰⁵ The professionals who act as private regulators offer great expertise and a greater possibility to adjust to the uncertain conditions.²⁰⁶

These initiatives are essential in providing a source of knowledge sharing, peer learning and peer pressure.²⁰⁷ If the stakeholders come from diverse countries, there will be a multicultural environment which can serve as a source of knowledge and peer learning between the stakeholders.²⁰⁸ Peer pressure in the MSIs serves as a great tool in holding the corporations to be accountable.²⁰⁹ Although MSIs' nature is voluntary, its compliance can be considered “more real than the non-voluntary ones because it allows greater leverage in enforcing corporate accountability”.²¹⁰ MSIs offer a fair-conduct in providing the remediation. The stakeholder groups have equal voting rights in the governing body, which ensures equal-decision making power.²¹¹ By involving all the stakeholders and giving them an equal power, some participants felt that MSIs allowed them to use their experiences directly into the market.²¹² In this sense, it is expected there will be no power imbalances between the parties.

²⁰¹ Nicola Jägers, “Will transnational private regulation close the governance gap?”, Cambridge University Press, 2013, [https://doi-org.tilburguniversity.idm.oclc.org/10.1017/CBO9781139568333.018](https://doi.org/tilburguniversity.idm.oclc.org/10.1017/CBO9781139568333.018) accessed 19 September 2020, 303. See Also: Colin Scott, *Regulating in Global Regimes.* Handbook on the Politics of Regulation, no. 25 (2011): 563–75. <https://doi.org/10.4337/9780857936110.00060>.

²⁰² *Ibid.*

²⁰³ *Ibid.*

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.*

²⁰⁷ Manchester Study, “Non-state based non-judicial grievance mechanisms (NSBGM)”, 35.

²⁰⁸ *Ibid.*

²⁰⁹ Baumann-Pauly Dorothée, and Justine Nolan, *Business and Human Rights: from Principles to Practice*, 186.

²¹⁰ Nicola Jägers, “Will transnational private regulation close the governance gap?”, Cambridge University Press, 2013, <https://doi-org.tilburguniversity.idm.oclc.org/10.1017/CBO9781139568333.018> accessed 19 September 2020, 303.

²¹¹ *Ibid.*

²¹² Radu Mares, *Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress*, Martinus Nijhoff Publishers, Leiden-Boston 2012, 30.

4. Critiques of MSIs

There are many critiques on MSIs in regard to its voluntary character.²¹³ Critics argue that voluntary participation and compliance will not create a lasting change.²¹⁴ If the companies do not comply with the standards, there is no serious enforcement that they have to bear.²¹⁵ Critiques often argue that there is a tendency that the parties will chose MSIs' voluntary standards to escape from the binding regulations.²¹⁶ This voluntary character creates a possibility for the companies to withdraw their membership if they are involved in a complaint.²¹⁷ Several NGOs have withdrawn from the MSIs because of their inaction, ineffectiveness, and lengthy procedure, which are not equitable compared to their advantages.²¹⁸ This weak enforcement has been caused by the voluntary nature of the MSIs, which do not have binding legal enforcement.²¹⁹ Although, as discussed before, MSIs' influence can be more apparent than the non-voluntary ones.

Subsequently, several MSIs' regulatory interfaces are much more complicated than the binding one.²²⁰ According to the Secretary-General's Special Representative (SRSG)²²¹, some people think that the aim of MSIs is integrating those stakeholders which do not have other incentives to join, while others think that the aim is to push the government to implement the regulations which have already existed, making this framework more complex than the state regulations.²²² These complexities make the grievance not equitable for both parties, which can hinder the complainant from filing a complaint. Therefore, these initiatives are considered unattractive by several people because of its complexities.

²¹³ Nicola Jägers, "Will transnational private regulation close the governance gap?", Cambridge University Press, 2013, <https://doi-org.tilburguniversity.idm.oclc.org/10.1017/CBO9781139568333.018> accessed 19 September 2020303

²¹⁴ *Ibid.*

²¹⁵ Baumann-Pauly Dorothée, and Justine Nolan, *Business and Human Rights: from Principles to Practice*, 186.

²¹⁶ Radu Mares, *Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress*, Martinus Nijhoff Publishers, Leiden-Boston 2012, 30.

²¹⁷ *Ibid.*, See Also: United Nations General Assembly, A/HRC/8/5/Add.1, Summary of five multi-stakeholder consultations, Addendum 1 to the Report, 23 April 2008, pp. 257–259.

²¹⁸ MSI Integrity, *Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance*, July 2020, 29

²¹⁹ *Ibid.*

²²⁰ *Ibid.*

²²¹ United Nations General Assembly, A/HRC/8/5/Add.1, Summary of five multi-stakeholder consultations, Addendum 1 to the Report, 23 April 2008, pp. 257–259. "Some seek eventual public policy integration as a way of achieving scale, bringing in smaller firms, producers of commodities and other unbranded products, and companies and Governments from emerging markets which do not have other incentives to join. For others, the whole point is to get Governments to implement regulation they already have on the books."

²²² United Nations General Assembly, A/HRC/8/5/Add.1, Summary of five multi-stakeholder consultations, Addendum 1 to the Report, 23 April 2008, pp. 257–259.

Furthermore, there is a possibility that power imbalances exist between the stakeholders. There is skepticism about the effectiveness of MSIs because they might allow corporations to dominate the field.²²³ Corporations that usually provide a large amount of funding in the MSIs have a greater engagement in designing the standard and monitoring mechanism.²²⁴ Meanwhile, the NGOs sometimes do not have the resources to participate fully in MSIs. As a result, the number of stakeholders representing the affected communities in the governing body is lacking in many MSIs; the affected communities are often only represented in the advisory body, or sometimes not represented at all.²²⁵

Critiques also often focus on MSIs' organizational capacity and resources. For example it is argued that MSIs' capability in addressing the complaints possess several shortcomings.²²⁶ Regarding its the monitoring mechanism, the fact that several MSIs have soft monitoring mechanisms makes its their credibility questionable and unreliable.²²⁷ Several MSIs' monitoring and compliance system do not have an adequate method to detect and provide remediation to the human rights abuses that existed.²²⁸ Their failures have been well-documented.²²⁹ One example is the documentation of their inability to audit several labor rights violations in farms or factories certified by MSIs.²³⁰ This failure has been caused by the fact that many monitoring systems only took a portrait of several situations at one location at a particular time.²³¹ The commercial auditor's rates are high and creates a pressure to complete the audit as soon as possible, with small number of people, it may set aside the in-depth audit technique such as interviews or repeated visits.²³² There are no independent on-site investigations done by the MSIs making that the investigations are presumably not reliable.²³³ For example, if a human rights violation occurred, at certain times the MSIs do not have the information regarding the incident because there is no such "on-site" investigation.²³⁴

²²³ MSI Integrity, *Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance*, July 2020, 29

²²⁴ Baumann-Pauly Dorothee, and Justine Nolan, *Business and Human Rights: from Principles to Practice*, 186

²²⁵ *Ibid.*

²²⁶ United Nations General Assembly, A/71/291, Human rights and transnational corporations and other business enterprises, 4 August 2016.

²²⁷ *Ibid.*

²²⁸ MSI Integrity, *Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability*.

²²⁹ *Ibid.*, 126.

²³⁰ *Ibid.*, 134.

²³¹ *Ibid.*, 136.

²³² *Ibid.*

²³³ United Nations General Assembly, A/71/291, Human rights and transnational corporations and other business enterprises, 4 August 2016.

²³⁴ MSI Integrity, *Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability*.

Fortunately, the investigations are conducted by a professional team and the companies have hired accredited auditors which have a professional credibility.

Participants state three reasons why MSIs' social monitoring and auditing can at times be considered limited.²³⁵ First, they frequently fail to find the root problem that may cause human rights violations to occur and without knowing the grounds, it is unlikely for the complainants to receive adequate remedy.²³⁶ Second, the capacity building for change is lacking and without sufficient capacity and awareness, the workers will not be able to escalate the issues, and the managers will not be as responsive as they should be when problems occurred.²³⁷

In regards to financial resources, the MSIs highly rely on its members' funding. However, several companies do not have adequate financial resources to retain membership and achieve certification.²³⁸ The unavailability of funds of those companies results in not all the companies in the industry being certified by the MSIs, making them untouchable from complaints brought under said MSIs mechanism.

MSI Integrity conducted a study regarding the effectiveness of 40 MSIs through the lens of UNGPs Principle 31 and revealed those MSIs' general shortcomings. In terms of remediation, many MSIs do not offer the complainants access to an effective remedy, proven by the fact that nearly all of the 40 MSIs studied by the MSI Integrity fail to meet the effectiveness criteria provided by the UNGPs.²³⁹ Some MSIs do not provide a remedy mechanism, and if one exists, the grievance procedure does not meet the internationally accepted minimum practices which fail to deliver adequate remedies to the victims of human rights violations.²⁴⁰ Only 10 MSIs provide limited information in non-English language.²⁴¹ There are only a few MSIs which offer translation, making them inaccessible to all of the complainants.²⁴² Also, most MSIs do not provide a clear timeframe for the compliant process which makes them unpredictable.²⁴³ Subsequently, many grievance procedures are complex, which cannot easily be understood by the complainants which makes them not equitable.²⁴⁴

²³⁵ United Nations General Assembly, A/HRC/8/5/Add.1, Summary of five multi-stakeholder consultations, Addendum 1 to the Report, 23 April 2008, pp. 257–259.

²³⁶ *Ibid.*

²³⁷ *Ibid.*

²³⁸ *Ibid.*

²³⁹ MSI Integrity, *Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability*.

²⁴⁰ *Ibid.*

²⁴¹ *Ibid.*, 159.

²⁴² *Ibid.*

²⁴³ *Ibid.*

²⁴⁴ *Ibid.*

Some MSIs are also not transparent in handling the complaints they received.²⁴⁵ Lastly, only a few MSIs succeeded in providing adequate remedies directly to the rights holders and providing a report analysis of the MSIs, acknowledging the fact that not all MSIs are rights-compatible and serve as a source of continuous learning.²⁴⁶ In sum, the MSIs observed by the MSI Integrity do not comply with all the criteria provided by the UNGPs Principle 31.

²⁴⁵ *Ibid.*

²⁴⁶ *Ibid.*

Sub-Conclusion

It can be concluded that MSIs and NHRIs can play an important role in providing access to remedy in BHR cases. However, those remedy mechanisms have some advantages and shortcomings. NHRIs are independent from the state, pluralistic and they can contribute to de-escalating human rights abuses. They can have a complaint handling system which can provide a mediation for the complainants and give recommendations for the relevant stakeholders. Moreover, they can help establish a human rights dialogue, conduct thematic inquiries, and enact advance proposals for legal reform. Nevertheless, there are some challenges limiting the NHRIs and MSIs in providing remediation in BHR cases.

Both MSIs and NHRIs mechanisms are considered as complementary and supplementary means to the judicial mechanisms and they can de-escalate human rights abuses. Nonetheless, many NHRIs do not have the mandate to issue legally binding decisions as they only provide non-binding recommendations to the relevant stakeholders. This fact demonstrates the lack of NHRIs' enforcement capacity. Subsequently, not all of NHRIs are in compliance with PP which is a problem for addressing BHR cases because some do not have the capacity to handle complaints or some others do not refer to corporate related human rights abuses directly in their mandates. Subsequently, the technical and financial capacities can also be an obstacle for NHRIs in providing remedy for the complainants of business-related human rights abuses.

In providing remediation, many MSIs have a complaint system, yet they will only apply to the companies serve as the members of the MSIs. The advantages of MSIs in the context of BHR cases are these initiatives are often considered as an early system to prevent future escalation. The peer pressure that exists in MSIs can be a powerful urge that drive the corporations to comply with the standards provided by the MSIs. Critiques of MSIs usually focus on its voluntary membership, causing many companies choose to withdraw from the membership if they are entangled in a complaint. Not to mention their lack of organizational capacity and power imbalances between corporations and the complainants. The funding aspect of MSIs is also criticized given that being a member requires a financial capability. To what extent the Indonesian NHRIs and the MSI RSPO provide effective access to remedy in the sense of UNGP 31 for palm oil workers in Indonesia will be further discussed in the next chapter.

Chapter IV

ACCESS TO NON-JUDICIAL REMEDY FOR PALM OIL WORKERS IN INDONESIA

In this chapter, the author will provide an exploration of the degree of remedy provided by the Indonesian NHRI Komnas HAM and the MSI RSPO for the palm oil workers in Indonesia by analyzing to what extent these mechanisms comply with the criteria provided under UNGPs Principle 31.

A. Effectiveness Criteria of NJGM

Determining what constitutes an effective remedy depends on the subjective elements, including personal preferences, the victims' circumstances, and the local culture.²⁴⁷ A remedy should be considered effective if it is considered sufficient by those affected, and the outcome is agreed by both parties.²⁴⁸

UNGPs Principle 31 provides seven effectiveness criteria of NJGM, both State-based and non-State-based. These criteria will serve as a tool to analyze the effectiveness of NHRIs and MSIs (RSPO) in addressing human rights abuses inflicted upon palm oil workers conditions in Indonesia in the next chapter. The criteria provided are as follows:²⁴⁹

1. Legitimate

A legitimate NJGM means the mechanism is trusted and considered fair by the stakeholders.²⁵⁰ The stakeholder in this principle stands for the parties using that mechanism or the complainant. In order to be legitimate, an effective grievance mechanism should be able to gain trust from the stakeholder. Also, the mechanism should have the accountability to ensure the parties at stake do not interfere with the grievance procedure's fair conduct.²⁵¹ The grievance mechanism should be independent of the state or other bodies' influences.²⁵²

²⁴⁷ Benjamin Thompson, "Determining Criteria to Evaluate Outcomes of Businesses' Provision of Remedy: Applying a Human Rights-Based Approach", *Business and Human Rights Journal*, 2017, Cambridge University Press.

²⁴⁸ *Ibid.*

²⁴⁹ United Nations, *Guiding Principles on Business and Human Rights*. Principle 31.

²⁵⁰ Benjamin Thompson, *Impacts of businesses on human rights: Part one - knowing your rights*. (Biashara Na Haki), 2018, Amnesty International. https://www.amnesty.nl/content/uploads/2016/12/AMN_18_24_HANDBOEK_FINAL_web-004.pdf?x23423 accessed 20 October 2020.

²⁵¹ *Ibid.*

²⁵² United Nations Human Rights Office of the High Commissioner, ARP II Final Scoping Paper, 17 February 2017, ARP II A/HRC/32/19, OHCHR, *An Interpretative Guide to The Corporate Responsibility to Respect Human Rights*

2. Accessible

An effective NJGM should be easily accessed by the stakeholder. Being accessible means being known to all stakeholders and ensuring that all the barriers to remedy are tackled.²⁵³ These barriers include language, lack of literacy, expensive costs, remote physical location, and fear of reprisals.²⁵⁴ For instance, providing adequate legal assistance for the aggrieved parties, community outreach to raise people's awareness, and allowing collective redress.²⁵⁵

3. Predictable

Predictable means providing a clear type of procedure, timeline and outcome of the mechanism, to avoid unduly prolonged process.²⁵⁶ Also, the outcome has to be clear. There should be a monitoring procedure to ensure that the implementation of the outcome runs well. The procedure should be available as public information to be used as self-help guides for the complainants.²⁵⁷ Predictability shows that there is legal certainty in the due process of law.

4. Equitable

A grievance mechanism should ensure that equal access to information, advice and expertise are provided for both parties.²⁵⁸ It seems that being equitable with accessible require adequate legal assistance. The difference is, being equitable aims to create a fair, informed, and respectful grievance process for both parties. The complainants should also be provided with financial resources and more community outreach.²⁵⁹ In this manner, it is expected there will be no power imbalance between the aggrieved parties and the parties being complained.²⁶⁰

5. Transparent

Transparency includes keeping parties informed about the dispute's progress and the mechanism's performance online or offline.²⁶¹ The relevant information can be published using statistics and case studies with detailed information its handling process, yet the

²⁵³ United Nations, Guiding Principles on Business and Human Rights, Principle 31.

²⁵⁴ *Ibid.*

²⁵⁵ United Nations Human Rights Office of the High Commissioner, ARP II Final Scoping Paper.

²⁵⁶ *Ibid.*

²⁵⁷ *Ibid.*

²⁵⁸ United Nations, Guiding Principles on Business and Human Rights, Principle 31.

²⁵⁹ United Nations Human Rights Office of the High Commissioner, ARP II Final Scoping Paper.

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.* Online through the website and offline through the pamphlets form.

dialogue's confidentiality and anonymity should be offered to the persons at risk if considered necessary.²⁶²

6. Rights-compatible

A grievance that is providing rights compatible should provide the remedy outcomes that compatible with the existing national and IHRL.²⁶³

7. A Source of Continuous Learning

In order to prevent harms from occurring in the future, the grievance mechanism body or institution should provide a source of continuous learning to improve the mechanism itself.²⁶⁴

The institution should provide regular analysis on the grounds of the grievances to improve previous influence policies and procedures, and transform the existing practices.²⁶⁵

B. Access to Remedy: the Indonesian NHRI

In Indonesia, the NHRI is called Komnas HAM. Komnas HAM's head office is located in the capital city and the branches are located in Aceh, West Sumatera, West Kalimantan, Central Sulawesi, Maluku, and Papua. Until the end of 2019, there are 407 people employed at Komnas HAM, consisting seven commissioners. The statutory basis of Komnas HAM is regulated under Law No. 39 of 1999 regarding Human Rights (The Human Rights Act). Komnas HAM is an independent commission that monitors human rights implementation in Indonesia.²⁶⁶ It has several functions, ranging from research and development, observation, investigation, to mediation.²⁶⁷ The Human Rights Act also empowers the NHRI to receive complaints, conduct investigation, and provide recommendations.²⁶⁸ In the subsequent section, it will be examined to what extent the palm oil worker can access their remedy through Komnas HAM.

1. Remedy Mechanism Under Komnas HAM

Remedies for the palm oil workers can be obtained through the Komnas HAM. In complementing the judicial mechanism, Komnas HAM provides access to remedy for the palm oil workers. Komnas HAM does not only deal with cases of human rights abuses

²⁶² *Ibid.*

²⁶³ *Ibid.*

²⁶⁴ *Ibid.*

²⁶⁵ *Ibid.*

²⁶⁶ Patricia Waagstein, *Business and Human Rights in ASEAN: A Baseline Study*, Human Rights Resource Centre, 2013, 125.

²⁶⁷ Indonesian Law No. 39 of 1999 regarding Human, Article 89 (1) - Article 89(4.)

²⁶⁸ *Ibid.*, Article 90.

committed by individuals, but it also deals with human rights abuses committed by corporations.²⁶⁹ It handles the issue of BHR in two ways. First, through developing and creating discussions, such as seminars, and workshops between the relevant stakeholders, namely: the affected communities, NGOs and the corporations.²⁷⁰ Second, Komnas HAM has a role to observe and investigate human rights violations through its Complaint and Investigation Department. Complaints can be settled through monitoring, mediation or through the creation of *ad hoc* team.

Mediation is conducted to make peace between two parties.²⁷¹ Komnas HAM can act as a mediator or facilitate the mediation by conducting an observation.²⁷² Recently, Komnas HAM established a pre-mediation mechanism, which focuses on exploring the intention of the parties in order to better accommodate both parties.²⁷³ After the mediation is conducted, Komnas HAM can make a recommendation to the parties or the relevant stakeholder such as the government or corporations.²⁷⁴

In order to file a complaint through the Komnas HAM, a complainant can submit an oral or written complaint individually or collectively as a group. In response to the complaint, Komnas HAM can refer the parties to the court and make recommendations to the government or legislative bodies to follow up on the existing case.²⁷⁵

Every year, Komnas HAM handles more than 1,000 cases of business-related human rights abuses regarding land conflicts, labor and environmental cases.²⁷⁶ For instance, in 2018, the statistic shows there were 40 labor cases.²⁷⁷ In 2019, there were six palm oil workers cases which concern unilateral termination of employment, underpaid wages, union-busting, and lack of health protection tools.²⁷⁸

²⁶⁹ *Ibid*, 123.

²⁷⁰ Patricia Rinwigati Waagstein, *Business and Human Rights in Indonesia: From Principles to Practice*, Human Rights Resource Centre, British Embassy Jakarta, 47.

²⁷¹ Indonesian Law No. 39 of 1999 regarding Human, Article 89 (4).

²⁷² Patricia Rinwigati Waagstein, *Business and Human Rights in Indonesia: From Principles to Practice*, Human Rights Resource Centre, British Embassy Jakarta, 47.

²⁷³ *Ibid*, Article 76.

²⁷⁴ Article 89 of Indonesian Human Rights Law.

²⁷⁵ *Ibid*, Article 89.

²⁷⁶ *Ibid*.

²⁷⁷ KOMNAS HAM Annual Report 2019, released August 2019 [https://www.Komnasham.go.id/files/20190807-laporan-tahunan-Komnas-ham-2018-\\$1PC.pdf](https://www.Komnasham.go.id/files/20190807-laporan-tahunan-Komnas-ham-2018-$1PC.pdf) accessed 26 July 2020.

²⁷⁸ This data of palm oil workers cases was obtained formally from Human Rights Development Bureau, KOMNAS HAM. (See the Table in Appendix).

The complaints brought to Komnas HAM are made for human rights violations such as right to welfare, personal freedom, right to justice, and right to life. Referring to the Human Rights Act, right to welfare is related to right to work, right to have an adequate living, and right to health. The right to personal freedom is related to right to freedom of association or form a union, freedom of speech, etc. The complaints are made for poor working conditions such as union busting, unilateral termination of employment, underpaid wages, insufficient health protection tools. Complaints were made by individuals, trade unions NGOs, and legal aid organizations. In palm oil workers cases, the complaints are not only made to the corporations, both private or state-owned, but also made to the government and police. Detailed analysis concerning Komnas HAM's performance in providing access to remedy for the palm oil workers will be elaborated in the subsequent paragraphs.

2. A Review of Komnas HAM's Role in Providing Remedy to the Palm Oil Workers

In this chapter, the author will make a review of Komnas HAM's Role in providing remediation to the palm oil workers, using the effectiveness criteria as provided in UNGPs Principle 31.

a. Legitimacy of Komnas HAM

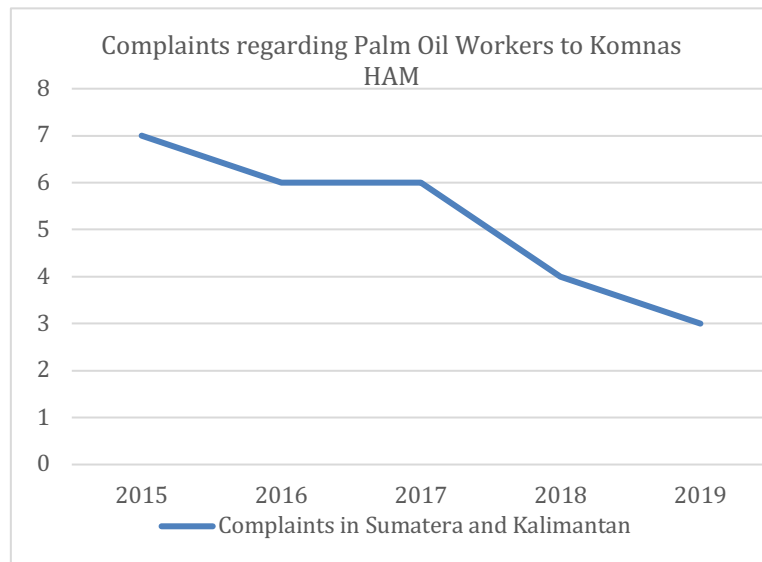
Legitimacy in NHRIs can be achieved if they can gain trust from the public and having an accountable fair conduct. They can be considered accountable because if they are established by law. Komnas HAM's establishment is provided under the Indonesian Human Rights Act.²⁷⁹ However, it still has difficulty gaining public trust since there is no strong enforcement. Komnas HAM's recommendation is not binding and the government has no obligation to follow up on the recommendation because there is no strong enforcement.²⁸⁰ In several cases, when Komnas HAM referred a case to the government, there was no follow up to the case, and the recommendation was being ignored.²⁸¹ Komnas HAM's commissioner confirmed that

²⁷⁹ Indonesian Human Rights Law.

²⁸⁰ Iman Prihandono, *Litigating FDI-Induced Human Rights Violations by TNCs: Opportunities and Challenges For Indonesia*, Dissertation Thesis, McQuarie University, 2012.

²⁸¹ Komnas HAM Submits Report on Recommendations to the Government, 12 December 2018 <https://www.voaindonesia.com/a/Komnas-ham-serahkan-laporan-rekomendasi-pada-pemerintah/4697018.html> See also: Satu Harapan News, DPR Regrets Government Ignores Komnas HAM Recommendations, 18 April 2016, , KOMPAS News, Komnas HAM Will Surati Jokowi, Claims Clarity on Baswedan Novel Case, 9 December 2019 <https://nasional.kompas.com/read/2019/12/09/19425031/Komnas-ham-akan-surati-jokowi-tagih-kejelasan-kasus-novel-baswedan?page=all> accessed 20 June 2020.

many parties have neglected Komnas HAM's recommendation.²⁸² In one BHR related case, the government has ignored 18 points recommendations by Komnas HAM.²⁸³ Komnas HAM has no enforcement power makes its recommendations have a little impact in addressing human rights abuses.²⁸⁴ In the case of palm oil workers, some workers claimed that there is a slow response, or even worse, no response from Komnas HAM when they file a complaint.²⁸⁵ As a result of slow response and the unbinding recommendations, there might be a public distrust towards NHRIs.



The figure shows the number of complaints regarding palm oil workers conditions from 2015 to 2019. From the data above, it can be concluded that in the past five years, the complaints brought to Komnas HAM decreased significantly. The detail information can be found in the appendix.²⁸⁶ Since there are public distrust and a decreasing number of complaints, it can be argued that Komnas HAM's legitimacy is questionable.

²⁸²Gatra News, Often Ignored, Komnas HAM Requests Binding Recommendations, 9 December 2019 <https://www.gatra.com/detail/news/461014/hukum/sering-diabaikan-Komnas-ham-minta-rekomendasinya-mengikat> accessed 20 June 2020.

²⁸³ *Ibid.* In Lapindo Mudflow Disaster Case.

²⁸⁴ Iman Prihandono, *Litigating FDI-Induced Human Rights Violations by TNCs: Opportunities and Challenges For Indonesia*, Dissertation Thesis, McQuarie University, 2012.

²⁸⁵ Interview with Daniel Marbun, Metal Workers Trade Union Member which in charge with palm oil workers cases, Jakarta, 2 July 2020.

²⁸⁶ This data of palm oil workers cases was obtained formally from Human Rights Development Bureau, KOMNAS HAM. (See the Table in Appendix).

b. Accessibility of Komnas HAM

Accessibility means being known by the relevant stakeholders. An NHRI can be considered accessible if they have accessible geographical location, adequate awareness or access to information to the mechanism, sufficient legal assistance to file complaint and protection against intimidation.

1) Geographical Remoteness

Extraordinary attention must be given to vulnerable groups and other groups that experienced problems in accessing remedies because of their language abilities and geographical limitations, such as the workers in the palm oil plantations.²⁸⁷ The fact that palm oil plantations in Indonesia are located in distant areas serves as a barrier for the workers to readily access their remedy through Komnas HAM.

Filing a claim to Komnas HAM requires the workers to embark on a long journey with its related costs. Komnas HAM's head office is located in the capital city of Indonesia and the branches are located at six central districts, requiring the workers to prepare transportation costs to reach the office. The expensive costs involved may discourage the workers from filing a case because there is no guarantee that they will win the case.²⁸⁸ Consequently, they prefer to lose the opportunity to file a claim and settle for less in the bipartite mechanism. Thus, the accessibility of Komnas HAM with regards to remote geographical condition of these workers has hindered them in accessing their remedy.

2) Access to Information concerning Komnas HAM

According to the UNGPs, public awareness and citizens' understanding of grievance mechanisms should be facilitated by the State.²⁸⁹ Nonetheless, being located in the remote area also hinders the workers from access to information regarding remedy. Although the information regarding Komnas HAM's complaint mechanism is accessible using the internet, the poor internet connectivity in the remote areas exacerbates the problem.²⁹⁰ Furthermore, the palm oil workers do not have sufficient advocacy about the available

²⁸⁷ KOMNAS HAM & ELSAM, National Action Plan on Business and Human Rights, Indonesia, May 2017, 68

²⁸⁸ Interview with Hotler, Sawit Watch's Researcher, 28th February 2020 (Online Interview) Herwin Nasution, Director of Indonesian Plantations Trade Union (SERBUNDO), Utrecht, 7th of March 2020, and Interview with Andriko Otang, Director of TURC, Tilburg, 5th of March 2020, (Online Interview).

²⁸⁹ United Nations, Guiding Principles on Business and Human Rights.

²⁹⁰ Tirto News, Palm Oil Workers' Distress, <https://tirto.id/nelangsa-buruh-di-kebun-sawit-cJAR> accessed 29 October 2020.

complaint mechanism due to their lack of literacy.²⁹¹ Unlike the workers in manufacturing industries, the palm oil workers' literacy and levels of education level are low.²⁹² Considering the low level of education and literacy in legal knowledge, most workers do not have any comprehension concerning the official procedure to file a claim.²⁹³

The existence of trade union would be beneficial for the workers, because it may serve as the representative of the workers and provide advocacy concerning the workers' rights. Unfortunately, as provided in the first chapter, several palm oil workers' right to freedom of association has been denied. Accordingly, the communities do not have sufficient information regarding where to lodge complains about the human rights violations they faced and how to restore their rights.²⁹⁴ Consequently, they are forced to accept that their quality of life is declining.²⁹⁵

3) Legal Assistance for the Workers

Palm oil workers under poor working conditions do not have adequate financial support to hire legal assistance.²⁹⁶ Fortunately, the Legal Aid Law provides that legal aid should be given to the rightful recipient to face legal cases, both litigation and non-litigation.²⁹⁷ However, in practice, there have been difficulties in finding lawyers who are willing to represent them in human rights and business litigation in general.²⁹⁸ The availability of qualified and experienced lawyers is also limited.²⁹⁹

Finding attorneys who want to represent victims of human rights cases against big corporations is also difficult.³⁰⁰ Many attorneys are reluctant to take on human rights cases because there is no guarantee that they will win the case, and finding financial aid for covering costs is difficult.³⁰¹ This uncertainty makes lawyers tend to be reluctant of

²⁹¹Institute for ECOSOC Rights, *Palm Oil Industry and Human Rights, A Case Study on Oil Palm Corporations in Central Kalimantan*, 139.

²⁹² Warta Ekonomi News, 70 Percent Palm Oil Workers Are Temporary Daily Workers, <https://www.wartaekonomi.co.id/read121311/70-persen-pekerja-di-perkebunan-sawit-buruh-harian-lepas.html> accessed 29 October 2020.

²⁹³ Interview with Andriko Otang, Director of TURC, 5th of March 2020, (Online Interview).

²⁹⁴ *Ibid.*

²⁹⁵ *Ibid.*

²⁹⁶ Kaltim News, Ironic Palm Oil Workers Only Paid IDR 100 thousand per Month <https://www.korankaltim.com/index.php/kutai-kartanegara/read/1972/miris-buruh-sawit-hanya-digaji-rp100-ribu-per-bulan> accessed 2 July 2020.

²⁹⁷ Law No. 16 of 2011 regarding Legal Aid, Article 4.

²⁹⁸ Jennifer Zerk, "Corporate Liability for Gross Human Rights Abuses", 81

²⁹⁹

³⁰⁰ Mark B. Taylor et al., *Overcoming Obstacles to Justice*, FAFO Report, 2010, 18, http://www.fafono/media/com_netsukii/20165.pdf accessed 14 June 2020.

³⁰¹ Jennifer Zerk, "Corporate Liability for Gross Human Rights Abuses", 81

accepting this kind of case.³⁰² This could also happen in the case of palm oil workers because many of them are facing cases against big corporations.

There is a possibility to find a legal representation from the NGOs. Nevertheless, lawyers from the NGOs sometimes do not have sufficient funding to assist the workers.³⁰³ It is also challenging to find legal representation for the victims in the remote areas.³⁰⁴ Thus, the difficulties in terms of financial and finding legal representatives make the palm oil workers hesitant to bring their cases to Komnas HAM.

4) Intimidation to the Workers and Witnesses

Intimidation to the palm oil workers creates hesitation for them to file complaints to Komnas HAM. Some case studies demonstrate that the workers' freedom to speak is lacking because they have a fear of getting into trouble with the company.³⁰⁵ Also, it is difficult to find a witness for the palm oil workers in Indonesia because they are vulnerable to being intimidated by the employer and, perhaps, dismissed by the corporation.³⁰⁶ In some cases, witnesses and human rights defenders encounter intimidation and fear of reprisals.³⁰⁷ In the years 2012 to 2016, human rights defenders across Indonesia were under attack.³⁰⁸ In preventing intimidation, the Komnas HAM offers confidentiality for the complainants, witnesses, and other parties which relate to the case, if needed.³⁰⁹

c. Predictability of Komnas HAM

Predictability here implies that the NHRIs have a clear mandate, procedure, timeframe, and as well as monitoring system. Komnas HAM's mandate was established in accordance with

³⁰² *Ibid*, 82

³⁰³ *Ibid*, 81

³⁰⁴ Interview with Commissioner for Assessment and Research Assessment of KOMNAS HAM, Sandrayati Moniaga, Jakarta, 8th of June 2020, (Online Interview).

³⁰⁵ Institute for ECOSOC Rights, *Palm Oil Industry and Human Rights, A Case Study on Oil Palm Corporations in Central Kalimantan*, 86-87. See Also: Ratih Ananda Putri Goestoro, Dissertation Proposal

³⁰⁶ Liputan 6 News, Palm Oil Workers Confid, Oil Palm Workers Confide, Starting from Employer Intimidation to Low Wages <https://www.liputan6.com/bisnis/read/3493868/curhatan-buruh-sawit-mulai-dari-intimidasi-pengusaha-sampai-upah-murah> accessed 29 October 2020.

³⁰⁷ Axel Marx, et al. *Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries : Study*, European Parliament, 2019 [https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU\(2019\)603475_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf) accessed 8 March 2020.

³⁰⁸ KOMNAS HAM, Indonesia, 3rd UPR, https://www.upr-info.org/sites/default/files/document/indonesia/session_27_-_may_2017/komnas_ham_upr27_idn_e_main_rev.pdf accessed 8 March 2020.

³⁰⁹ Indonesian Law No. 39 of 1999 regarding Human Rights, Article 92.

PP; encouraging amicable settlement through mediation and conciliation, and providing complaint system and recommendation to the relevant stakeholders.³¹⁰

Komnas HAM's regulation provides a clear timeline regarding the mediation's timeframe and this reflects the predictability criterion. The regulation stipulates that mediation shall be settled not more than 120 working days since the first meeting between the parties or the time agreed by both parties.³¹¹ If there is a breach of peace settlement after the mediation was conducted, the defaulting parties has to carry out Komnas HAM's recommendation within 30 days after they received the letter from Komnas HAM.³¹²

It is difficult to obtain data regarding the mediation of palm oil workers because of its confidentiality. Nevertheless, several cases brought to Komnas HAM have remained unsettled, attesting to the fact that the consistency and predictability of Komnas HAM's timeline in providing remediation is questionable.³¹³ Fortunately, there is a positive development regarding Komnas HAM's cooperation with the civil society regarding its monitoring committee to resolve the unsettled cases.³¹⁴ A national conference was established to create a platform for Komnas HAM to cooperate with the civil society.³¹⁵ It is expected that Komnas HAM's networking with the civil society with regards to human rights issues will be more activated.³¹⁶ Also, during the 2017-2022 leadership, Komnas HAM has been more approachable in receiving inputs from civil society regarding the cases, especially the unsettled cases.³¹⁷

d. Equitability between Both Parties

Equitability means there is no power imbalance between the parties in accessing their remedy through Komnas HAM. To ensure that there is no power imbalance, the complainants need adequate access to source of information, advice and expertise. This can be achieved through the assistance of NGOs or legal representative. Nevertheless, as

³¹⁰ *Ibid*, Article 76.

³¹¹ Komnas HAM Regulation Number NOMOR 59 A/KOMNAS HAM/X/2008 regarding Guidelines on the Implementation of National Commission of Human Rights Mediation, <http://ditjenpp.kemenkumham.go.id/arsip/bn/2012/bn985-2012.pdf> accessed 29 October 2020.

³¹² Komnas HAM Regulation Number 001/KOMNAS HAM/IX/2010 regarding Standard Operational Human Rights Mediation Procedures, <http://ditjenpp.kemenkumham.go.id/arsip/bn/2012/bn986-2012.pdf> accessed 29 October 2020.

³¹³ The Asian NGO Network on Natinal Human Rights Institution, ANNI, Report, 2018.

³¹⁴ GANHRI Sub-Committee on Accreditation Report, March 2017, 25.

³¹⁵ *Ibid*.

³¹⁶ *Ibid*.

³¹⁷ *Ibid*.

discussed above, it is difficult to seek legal assistance in the remote areas. There is a need for adequate financial aid for the victims; yet, it is difficult to find the financial resources needed, especially for the vulnerable people like the palm oil workers living in the remote areas.

Equitability can also be ensured by gender equality represented in the NHRI's members. Paris Principle stipulates that the composition of NHRIs members should ensure pluralist representation of the society.³¹⁸ Haász conferred that NHRIs can be regarded equitable if they have pluralistic composition.³¹⁹ Subsequently, the Alliance of National Human Rights Institutions (GANHRI) in its Sub-Committee on Accreditation (SCA) report states that the institution shall ensure diversity in the context of gender, ethnicity, or minority status.³²⁰ This pluralistic composition means to avoid inequality as a result of nepotism or discrimination by political groups, race or any other interests. In 2014, the SCA distressed about the lack of pluralism in Komnas HAM because the representation of women was low.³²¹ Even though the members of Komnas HAM for 2017-2022 period come from different professional backgrounds, there is only one representative of women currently in office.³²²

e. Transparency of Komnas HAM

Transparency means keeping the complainants informed related to the mechanism, Komnas HAM is transparent regarding public information. In 2014, it issued a regulation regarding public information services within the Komnas HAM.³²³ This regulation aimed to increase public information service and reserve the citizens' rights to obtain public information in manifesting Public Information Disclosure.³²⁴ Nevertheless, to protect the victims from the risk of intimidations, confidentiality is needed.

Komnas HAM has the mandate to conduct investigations for gross human rights violations with *ad hoc pro justitia*³²⁵ investigation team.³²⁶ The public who wants the information

³¹⁸ GANHRI Sub-Committee on Accreditation Report, March 2017, 25.

³¹⁹ Veronika Haász, "The Role of NHRI in the Implementation of the UN Guiding Principles", 177.

³²⁰ *Ibid.*

³²¹ *Ibid.*

³²² The Asian NGO Network on National Human Rights Institution, ANNI, Report, 2018, 24.32.

³²³ National Human Rights Commission Regulation, Nomor: 001/Per.Komnas HAM/II/2014

³²⁴ Law No. 14 of 2008 regarding Public Information Disclosure

³²⁵ In ANNI Report, *pro justitia* is defined as the name given to reports coming out of investigations carried out by Komnas HAM. In Iman Prihandono's Dissertation, *pro-justitia* is a legal framework in which an institution that is mandated by Law with investigating powers can formally assert that a person has committed a violation.

³²⁶ Law No. 26/2000 regarding Human Rights Court.

regarding the progress of the investigations can access the executive summary in the Annual Report.³²⁷ Komnas HAM publishes its Annual Reports which should be launched annually every March or April.³²⁸ Yet, the reports have always been delayed until the end of the year, because of the lack of human resources who work on the report.³²⁹

The full report of investigation and monitoring are not made public due to confidentiality matters.³³⁰ Most of the case data and information can only be accessible through Komnas HAM's network.³³¹ Often, the monitoring and investigation outcomes are not released to the media since the cases that were handled by Komnas HAM could risk people's security.³³² Due to confidentiality reasons, the result of Komnas HAM's investigations may only be accessed by the Attorney General's Office.³³³

f. Rights Compatibility of Komnas HAM

Rights compatibly means ensuring that the outcomes and remedies are in accordance with IHRL. In 2017 SCA Report, GANHRI recommended Komnas HAM to be accredited with A status. Although Komnas HAM has a function in promoting human rights in accordance with international standards, Komnas HAM does not yet have a specific mandate to deal with human rights violations committed by the corporations. Komnas HAM's mandate is limited to gross violations of human rights cases.³³⁴ Cases other than these are expected to be referred to the police for advance investigation.³³⁵ As discussed in the previous chapter, this happened because PP do not explicitly oblige the NHRIs to have a mandate in dealing with business-related human rights cases.

As it is difficult to obtain the data regarding palm oil workers' mediation cases, it is difficult to determine whether the palm oil workers have received proper remedies or not. However, due to the fact that there is no binding enforcement to the parties, many parties may neglect the institutions' recommendation and as a result, there is no assurance that the rights-holder

³²⁷ The Asian NGO Network on National Human Rights Institutions (ANNI), Report on The Performance and Establishment of National Human Rights Institution in Asia, 2018, 32.

³²⁸ *Ibid.*

³²⁹ *Ibid.*

³³⁰ The Asian NGO Network on National Human Rights Institutions (ANNI), Report on The Performance and Establishment of National Human Rights Institution in Asia, 2018, 32.

³³¹ *Ibid.*

³³² *Ibid.*

³³³ *Ibid.*

³³⁴ Indonesian Law No. 39 of 1999 regarding Human Rights, Article 104.

³³⁵ *Ibid.*

will get the compensation in accordance with the internationally recognized human rights. Even if they are entitled to obtain the remediation, there is no guarantee that the employer is willing to give the remediation to the palm oil workers.³³⁶

g. Komnas HAM as a Source of Continuous Learning

A source of continuous learning means an institution should recognize lessons-learned to improve the mechanism. According to Haász, an NHRI can be considered as a source of continuous learning if they offer preventative actions to prevent future grievances.³³⁷ By conducting human rights dissemination and education, Komnas HAM has proved to do so. Komnas HAM has a dissemination function which is carried out through: first, disseminating insights about human rights to the public, second, increasing public awareness of human rights education; third, cooperation with other organizations, both national and international.³³⁸

The function is formulated in four priority programs, namely Human Rights Friendly Schools, Human Right Cities, Human Rights-Based Police and Fulfillment of the Rights of Minority Groups.³³⁹ It is expected that these programs will contribute to policy changes and the changes of the policy-making officials' behaviors.³⁴⁰ Moreover, Komnas HAM also developed a National Action Plan on BHR.³⁴¹ In this way, Komnas HAM will provide long-term and appropriate preventive outcomes as a source of continuous learning.

Considering its A status accreditation, Komnas HAM has fulfilled PP's minimum requirements. It can be considered legitimate since it was established by law, but it still faces difficulty gaining public trust. Considering the palm oil workers' remote area, Komnas HAM is not yet accessible. Its predictability and equitability are still questionable because some cases are not resolved promptly and it is difficult to find the legal experts. Its transparency is good, to the extent that it still protects the complainant with anonymity. Its mandate has in accordance with IHRL, although it has not provided a specific obligation to deal with

³³⁶ Interview with Herwin Nasution, Director of Indonesian Plantations Trade Union (SERBUNDO), Utrecht, 7th of March 2020.

³³⁷ Veronika Haász, "The Role of NHRI in the Implementation of the UN Guiding Principles", 177.

³³⁸ Indonesian Law No. 39 of 1999 regarding Human Rights, Article 89 paragraph (2).

³³⁹ Komnas HAM Annual Report, 2018, 48-49.

³⁴⁰ *Ibid.*

³⁴¹ KOMNAS HAM & ELSAM, *National Action Plan on Business and Human Rights, Indonesia*, <https://globalnaps.org/wp-content/uploads/2017/11/nap-indonesia.pdf> accessed 20 June 2020.

BHR cases. Also, there is no guarantee that the complainants will get adequate remedies. Lastly, Komnas HAM can also be considered as a source of continuous learning.

C. Access to Remedy: Multi-Stakeholder Initiatives in Indonesia

In the field of palm oil, the MSIs is the RSPO. RSPO is a nonprofit association that unites stakeholders from seven sectors³⁴² to create a global standard for sustainable palm oil.³⁴³ In creating this global standard and ensuring the credibility of palm oil's sustainability, RSPO offers a certification. This certification serves a guarantee to the customers to ensure that the palm oil products are sustainable.³⁴⁴ Although many palm oil companies have already been certified by the RSPO, some are still committing human rights violations against workers.³⁴⁵ In this chapter, the author discusses the role of RSPO in providing the remedies for palm oil workers in Indonesia and a review of the RSPO complaint system in providing access to remedy. There are currently, 21 group companies, hundreds of NGOs, and smallholders have joined the RSPO from Indonesia.³⁴⁶ Moreover, there are over than 100 cases in the Indonesian palm oil industry have been discussed in the RSPO.³⁴⁷

1. Remedy Mechanism under the RSPO

The obligation to provide access to remedy to palm oil workers can be found in RSPO Principles and Criteria (P&C)³⁴⁸ and Indicators and Guidance.³⁴⁹ RSPO P&C applies to certified mills and their supply base.³⁵⁰ In providing access to remedy, it established a Complaints-System and Appeal (Complaints-System) that provides remediation for the complainants. Created in 2006, this grievance mechanism is aimed at addressing complaints

³⁴² Article 4(1) of the RSPO Statutes further presents that: “*The RSPO’s membership includes representatives from seven sectors of the palm oil industry: oil palm growers; palm oil processors or traders; consumer goods manufacturers; retailers; banks and investors; environmental or nature conservation NGOs; and social or developmental NGOs.*”

³⁴³ RSPO Website, Factsheet RSPO Overview, https://www.rspo.org/files/resource_centre/Factsheet-RSPO-Overview.pdf accessed 25 June 2020.

³⁴⁴ RSPO Website, RSPO Certification, <https://rspo.org/certification> accessed 25 June 2020.

³⁴⁵ Retno Kusumaningtyas, *External Concerns on the RSPO and ISPO Certification Schemes, Profundo*, 2018, https://www.foeeurope.org/sites/default/files/eu-us_trade_deal/2018/report_profundo_rspo_ispo_external_concerns_feb2018.pdf accessed 8 March 2020, 24.

³⁴⁶ RSPO Website, RSPO Members, <https://rspo.org/members/all> accessed 8 November 2020.

³⁴⁷ RSPO Website, RSPO Case Tracker

³⁴⁸ RSPO, RSPO Principles and Criteria for Production of Sustainable Palm Oil, 2018, Revised Version February 2020, <https://rspo.org/principles-and-criteria-review> accessed 26 June 2020.

³⁴⁹ *Ibid.*

³⁵⁰ *Ibid.*

against RSPO members.³⁵¹ The Complaints Panel's tasks include: conducting an informal dialogue to create a mutual agreement between the parties, and investigating and determining the course of actions, such as termination of membership. RSPO is also considered to be more accessible alternative mechanism by the participants using it.³⁵² However, there are also critiques towards its grievance effectiveness which will be further discussed in the next subsection.

2. A Review of RSPO's Complaints-System

a. Legitimacy of RSPO

Legitimacy means having trust from the relevant stakeholder to use the mechanism as an avenue to remedy. These subsequent paragraphs will explain whether the RSPO has legitimacy as required in the UNGPs by discussing its voluntary nature, organizational capacity, financial and human resources, monitoring system, and independence.

1) Voluntary Nature of the RSPO

Considering a lot of critiques in regards to the MSI's voluntary character, the nature of RSPO's membership is voluntary, causing the RSPO's members' compliance also voluntary.³⁵³ The RSPO cannot provide a binding sanction and therefore there is no strong enforcement if non-compliance occurs.³⁵⁴ Several sanctions such as termination of membership, stop-work orders and suspension of certification are available.³⁵⁵ According to Radu Mares, this voluntary nature creates a concern that the members may choose to leave the RSPO if complaints are made towards them.³⁵⁶ This is illustrated by the case of Company A, when the RSPO suspended its certification as a result of non-compliance of RSPO's standard, the company withdrew its membership.³⁵⁷ Although

³⁵¹ Kate Macdonald and Samantha Balaton-Chrimes, "A Review of the Complaints System of the Roundtable on Sustainable Palm Oil.", Corporate Accountability Research, 2016, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2880049 accessed 8 March 2020, 16.

³⁵² *Ibid.*

³⁵³ *Ibid.*, 36.

³⁵⁴ *Ibid.*

³⁵⁵ *Ibid.*

³⁵⁶ Radu Mares, *Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress*, Martinus Nijhoff Publishers, Leiden-Boston 2012, 30.

³⁵⁷ RSPO Secretariat's Statement on Complaints Panel Decision Regarding PT Salim Ivomas Pratama Tbk <https://rspo.org/news-and-events/news/rspo-secretariats-statement-on-complaints-panel-decision-regarding-pt-salim-ivomas-pratama-tbk> See Also: Mongabay News, Lonsum Sustainability Certificate Suspended, Salim Ivomas Withdraws from RSPO, <https://www.mongabay.co.id/2019/02/13/sertifikat-sawit-lonsum-ditangguhkan-salim-ivomas-cabut-dari-rspo/> accessed 30 October 2020.

the RSPO can suspend their members, this initiative cannot force its members to give compensation to the complainants.³⁵⁸ There is a concern that if the RSPO terminates a company from its membership, it will generate a loss of influence towards them.³⁵⁹ Moreover, since the RSPO's funding rely on its members, there is a concern that the members would not get any severe sanction if they conduct violations, in order to maintain their RSPO membership.³⁶⁰ This fear has created hesitations for the civil society to bring their cases to the RSPO.

2) Organizational Capacity of the RSPO

There is a concern that the RSPO's personnel and capacity are insufficient for dealing with the complaints received.³⁶¹ Critiques argue that the Secretariat has failed to exhibit professionalism in their manner of handling complaints, and their response has been slow.³⁶² It can also be indicated that there is a lack of proactivity and insufficient communication from the Complaints Coordinator.³⁶³ Some parties that have the experience of filing a complaint explained that the RSPO is unresponsive and defensive of the corporations.³⁶⁴ The heavy workload of the Complaints Coordinator, due to the high volume of cases and their level of complexities, might cause the RSPO Secretariat to be unresponsive and defensive in dealing with the cases.

There have been criticisms stating that the RSPO's Complaints-System is not effective in handling resolutions due to the huge backlog of cases, very low success rate, and undue delays.³⁶⁵ The RSPO complaint procedure constitutes a prolong process.³⁶⁶ This backlog of unresolved complaints cause the long-standing cases in the RSPO Secretariat.³⁶⁷ One of the reasons for this is inefficient response of the RSPO Secretariat in resolving the complaints received. Additionally, the existence of the backlog of cases

³⁵⁸ Interview with Andriko Otang, Director of TURC, 5th of March 2020, (Online Interview) and Interview with Hotler Parsaoran, Sawit Watch's Labor Specialist, 28th February 2020 (Online Interview).

³⁵⁹ Kate Macdonald and Samantha Balaton-Chrimes, "A Review of the Complaints System of the Roundtable on Sustainable Palm Oil."

³⁶⁰ *Ibid.*

³⁶¹ Holly C. Jonas, Final Report, *A Review of the Complaints System of the Roundtable on Sustainable Palm Oil*, 28.

³⁶² *Ibid.*

³⁶³ *Ibid.*

³⁶⁴ *Ibid.*

³⁶⁵ Grassroots, *Beyond Certification: Reforming RSPO Complaints System to Meet Stakeholder Expectation*, 2013.

³⁶⁶ Interview with Andriko Otang, Director of TURC, 5th of March 2020, (Online Interview) and Interview with Herwin Nasution, Director of Indonesian Plantations Trade Union (SERBUNDO), Utrecht, 7th of March 2020.

³⁶⁷ Holly C. Jonas, Final Report, *A Review of the Complaints System of the Roundtable on Sustainable Palm Oil*, 28.

in the RSPO's Complaint System has resulted in low trust and confidence among the community.³⁶⁸

3) Financial and Human Resources of the RSPO

The Complaints Panel also lacks financial resources.³⁶⁹ The RSPO is funded by international governmental organizations, governmental and NGOs, and its membership funds.³⁷⁰ The nature of employment in RSPO is voluntary, and the funding is limited since it is gathered from RSPO's members. It is challenging to provide full-time jobs for all of the employees.³⁷¹ As a result, the number of Complaints Panel members depend on the voluntariness of the members' organizations.³⁷² Thus, human resources and capacity in the RSPO's Secretariat and Complaints Panel is also considered as RSPO's weakness.

Moreover, considering the fact that the RSPO require funding from its members, not all the companies have financial resources to retain membership and achieve the RSPO's certification.³⁷³ Therefore, there will only be a limited number of companies against which a complaint can be lodged because they are not certified under the RSPO.

4) RSPO's Investigation and Monitoring System

Critiques argue that the MSIs often have soft monitoring mechanism, and this happened to the RSPO.³⁷⁴ There has been criticism towards the RSPO's past performance in relation to prevention, regular monitoring, and due diligence mechanism.³⁷⁵ The RSPO's monitoring activities for mediation or dispute resolution or post-settlement processes are considered passive and weak.³⁷⁶ This passiveness occurred since the RSPO did not have the resources to conduct "on-site investigations" which makes the role of RSPO in conducting independent investigation activities is relatively

³⁶⁸ Kate Macdonald and Samantha Balaton-Chrimes, "A Review of the Complaints System of the Roundtable on Sustainable Palm Oil."

³⁶⁹ *Ibid.*

³⁷⁰ *Ibid.*, 15.

³⁷¹ *Ibid.*

³⁷² *Ibid.*

³⁷³ *Ibid.*

³⁷⁴ *Ibid.*

³⁷⁵ Kate Macdonald and Samantha Balaton-Chrimes, "A Review of the Complaints System of the Roundtable on Sustainable Palm Oil."

³⁷⁶ Retno Kusumaningtyas, *External Concerns on the RSPO and ISPO Certification Schemes, Profundo*, 2018, https://www.foeeurope.org/sites/default/files/eu-us_trade_deal/2018/report_profundo_rspo_ispo_external_concerns_feb2018.pdf accessed 8 March 2020, 12.

small.³⁷⁷ A group of labor and environmental rights coalition doubted whether the RSPO audit system was appropriate in finding out the occurrence of forced labor practice in some companies.³⁷⁸

In 2018, RSPO Investigation and Monitoring Unit which aims to conduct investigation and facilitate risk mitigation was established.³⁷⁹ In accommodating the previous criticism towards RSPO's past performance, this unit has implemented post-investigation and post-complaint monitoring mechanisms. Furthermore, the RSPO is currently developing an innovative "workers voice" technology, a mobile-based communication with the workers, to monitor labor conditions in companies and their supply chains.³⁸⁰

5) The Complaints-System and RSPO Auditor's Independence

By having an independent mechanism, an MSI can gain trust from the relevant stakeholders and considered to be legitimate. Nevertheless, the independence of RSPO's complaint system is criticized. Kusumaningtyas argues that there is no separation between the Board of Governors and the Complaints Panel of the RSPO, which creates a possibility for the people who lead the RSPO to deal with complaints.³⁸¹ For example, when a big company buyer is sitting on the Board while also dealing with complaints, it can undermine the impartiality of the Complaints Panel.³⁸² Moreover, there is a possibility of a conflict of interest in the composition of the Complaints Panel which applies in circumstances where the producer companies is the defendant and the retailer is the panelist.³⁸³ This position could cause prejudice that the panelist will not be impartial to the defendant.³⁸⁴

The RSPO has hired professional auditors that were paid by the companies. However, critiques argue independence of auditors and assessors was weak since the certification of a company might be assessed by the certification body that is paid by

³⁷⁷ *Ibid.*

³⁷⁸ *Ibid.*

³⁷⁹ RSPO Website, Investigation and Monitoring Unit, <https://rspo.org/imu> accessed 29 June 2020

³⁸⁰ Roundtable on Sustainable Palm Oil, Impact Report 2019, 34, <https://rspo.org/key-documents/impact-reports> accessed 1 July 2020. In 2019, RSPO then collaborated with Ulula and Wilmar International Limited (Wilmar) to initiate a pilot programmed using this technology.

³⁸¹ *Ibid.*

³⁸² *Ibid.*

³⁸³ *Ibid.*

³⁸⁴ *Ibid.*

the company itself.³⁸⁵ For instance, a Singaporean palm oil company was audited by the PT. TUV Rheinland, which the latter was paid by the former.³⁸⁶ In fact, although were paid by the companies, the auditors' credibility has been examined because they have professional certification.³⁸⁷

b. Accessibility of RSPO

1) Access to Information regarding RSPO

A grievance mechanism is only effective to the extent that its intended users know of its existence.³⁸⁸ Nevertheless, the palm oil workers' understanding of the RSPO's Complaints-System is lacking. Some trade unions explained that they did not understand about the RSPO complaint and grievance mechanism because the procedures are too complicated for them to comprehend.³⁸⁹ There was a lack of socialization from RSPO's Secretariat regarding the complaint system because of the limited RSPO's capacity in providing community outreach and capacity building.³⁹⁰

Since palm oil plantations are located in remote areas, the workers have limited access to information regarding the complaint mechanism under the RSPO except for the fact that they have friendly relations with NGOs.³⁹¹ The workers claimed that there were only few NGOs such that were able to assist them in filing complaints to the RSPO.³⁹² Although the relationship with NGOs is beneficial for the workers or the affected communities, the communities have to confirm whether the organization has their own agenda or not considering that sometimes NGOs also have different expectations and perceptions towards the cases.³⁹³ In raising the workers' awareness, the RSPO has made a Community Outreach Program.

³⁸⁵ Kate Macdonald and Samantha Balaton-Chrimes, "A Review of the Complaints System of the Roundtable on Sustainable Palm Oil."

³⁸⁶ *Ibid.*

³⁸⁷ For example, see TUV Rheinland website: <https://www.tuv.com/indonesia/en/accredited-personnel-certification.html> They are Certified qualification according to ISO/IEC 17024 which confirms that they have been examined by a personnel certification body accredited in line with this standard.

³⁸⁸ MSI Integrity, *Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance*, July 2020.

³⁸⁹ Kate Macdonald and Samantha Balaton-Chrimes, "A Review of the Complaints System of the Roundtable on Sustainable Palm Oil".

³⁹⁰ *Ibid.*

³⁹¹ *Ibid.*

³⁹² *Ibid.*

³⁹³ *Ibid.*

2) Costs for Handling the Dispute

Similar to the other remedy mechanisms, a dispute needs a huge amount of funds for doing the research, making proper documentation, and managing of the process.³⁹⁴ Since the palm oil workers are suffering for poor working conditions, they do not have adequate funding, and they need assistance from the NGOs. Nevertheless, NGOs also need funding to conduct international campaigns to get the RSPO's attention, and NGO's funding depends on the donors.³⁹⁵ The RSPO has already established a Trust Fund committee to provide financial assistance, yet there is a requirement that the NGOs should be registered under the law.³⁹⁶ Hence, if the NGO is not registered—for example, if the NGO is new and small—it could not receive fund assistance from the RSPO.

3) Language Barriers for the Workers

Language barriers may hamper access to remedy because they may create an informal obstacle for Indonesian palm oil workers to access the remedy.³⁹⁷ The RSPO website is only available in English and Chinese while the correspondence with the Secretariat should be in English, with only some complaints-related documents being available in Indonesian version.³⁹⁸ This situation creates challenges for the workers to be informed about the complaints mechanism or the ongoing complaints and the complaints decisions.³⁹⁹ One of the complainants admitted that the English materials provided in the website undermined the active participation of the complainants in the RSPO.⁴⁰⁰ Fortunately, the RSPO offers a translation service for the complainants who need it.⁴⁰¹

³⁹⁴ *Ibid.*

³⁹⁵ *Ibid.*

³⁹⁶ RSPO Website, Trust Fund Framework, https://www.rspo.org/library/lib_files/download/893, accessed 28 June 2020.

³⁹⁷ Kate Macdonald and Samantha Balaton-Chrimes, “A Review of the Complaints System of the Roundtable on Sustainable Palm Oil”, 34. See Also: the UN Guiding Principles on Business and Human Rights.

³⁹⁸ Holly C. Jonas, Final Report, *A Review of the Complaints System of the Roundtable on Sustainable Palm Oil*.

³⁹⁹ *Ibid.*, 36.

⁴⁰⁰ Kate Macdonald and Samantha Balaton-Chrimes, “A Review of the Complaints System of the Roundtable on Sustainable Palm Oil.” 34.

⁴⁰¹ *Ibid.*

4) Intimidation and Retaliation to the Complainants

As provided previously, threats, violence, and fear of reprisals to the complainants serve as a barrier when they intend to file a complaint through a grievance mechanism, including through RSPO.⁴⁰² Many workers have to face the risk of employment termination, especially because they work under precarious working conditions.⁴⁰³ The fear of intimidation and retaliation have impaired their accessibility to file a complaint to the RSPO's grievance mechanism.⁴⁰⁴ In preventing this issue, the RSPO has provided the guarantee of anonymity to the complainant explicitly through its policy, to protect the complainants against the risk of intimidation and retaliation.⁴⁰⁵

c. Predictability of the RSPO

Predictability of MSIs is often impaired when there is a lack of procedures setting forth specific steps, timeframes, and the available possible outcomes.⁴⁰⁶ Most MSIs do not provide a clear timeframe for the complaint process which makes them unpredictable.⁴⁰⁷ In RSPO, the timeline for the cases should to be resolved is clearly stipulated in the regulation.⁴⁰⁸ However, some complaints that were made to the RSPO several years ago still remained unresolved.⁴⁰⁹ Several cases have been postponed for years without any decision being reached.⁴¹⁰ Subsequently, there is a lack of consistency and predictability in RSPO's treatment within different cases and issues.⁴¹¹ In some cases where the RSPO choose to address only a few issues from the complaints, the RSPO provided no clear justification on such decision.⁴¹² There has been inconsistencies on

⁴⁰² *Ibid.*, 170.

⁴⁰³ *Ibid.*

⁴⁰⁴ *Ibid.*

⁴⁰⁵ RSPO Policy on Human Rights Defenders, Whistleblowers, Complainants and Community Spokespersons

⁴⁰⁶ *Ibid.*

⁴⁰⁷ MSI Integrity, *Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance*, July 2020, 174.

⁴⁰⁸ RSPO Complaints and Appeal Procedure, Article 12.3.

⁴⁰⁹ Retno Kusumaningtyas, *External Concerns on the RSPO and ISPO Certification Schemes, Profundo*, 2018, https://www.foeeurope.org/sites/default/files/eu-us_trade_deal/2018/report_profundo_rsपो_ispo_external_concerns_feb2018.pdf accessed 8 March 2020, 21. See Also: Mongabay News, Wilmar appeals RSPO ruling that it grabbed indigenous lands in Sumatra, <https://news.mongabay.com/2017/05/wilmar-appeals-rsपो-ruling-that-it-grabbed-indigenous-lands-in-sumatra/> accessed 30 October 2020.

⁴¹⁰ Holly C. Jonas, Final Report, *A Review of the Complaints System of the Roundtable on Sustainable Palm Oil: Final Report*, 28.

⁴¹¹ Kate Macdonald and Samantha Balaton-Chrimes, "A Review of the Complaints System of the Roundtable on Sustainable Palm Oil", 36.

⁴¹² *Ibid.*

RSPO's decisions with similar complaints, in one case, the RSPO expelled the company from the membership, but in another case, the RSPO did not give the same sanctions.⁴¹³

d. Equitability between Complainants and Corporations

Equitability means ensuring that power imbalances existed between the parties and the complainants. Many MSIs grievance procedures are not equitable because they are confusing, vague and complex. Yet, they offer little attention on access to information, advice and expertise.⁴¹⁴ This phenomenon also happens in the RSPO's complaint system.⁴¹⁵ Considering the workers' lack of literacy, it is difficult for them to understand about the complaint system through its website. Without a legal assistance, the complainant might be discouraged to file a complaint to the MSIs because is not easy for them to understand the guidance on how to file a complaint and represent their allegations.⁴¹⁶ They have to know exactly which of the standards they violated, yet these standards are long and complex, which cannot be easily understood by the complainant.⁴¹⁷

e. Transparency in the RSPO

In order to be legitimate, an MSI's grievance mechanism should be transparent.⁴¹⁸ Transparency aims to give the right holders the information on how to use the mechanism, handle the complaints, and receive the outcomes of the complaints.⁴¹⁹ RSPO's level of transparency is relatively high in comparison to the other MSIs since it has provided lists of the cases' background information and the decisions of over 100 cases.⁴²⁰ The RSPO publishes the number of complaints filed and the number of complaints that have been resolved. Nevertheless, the RSPO has not provided information on whether the remedy has sufficiently been received by the complainants or not.⁴²¹ To determine whether the

⁴¹³ *Ibid.*

⁴¹⁴ *Ibid.*

⁴¹⁵ Kate Macdonald and Samantha Balaton-Chrimes, "A Review of the Complaints System of the Roundtable on Sustainable Palm Oil".

⁴¹⁶ *Ibid.*

⁴¹⁷ *Ibid.*

⁴¹⁸ *Ibid.*, 28.

⁴¹⁹ MSI Integrity, *Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance*, July 2020, 159. According to the UNGPs, transparency is required to build confidence on the effectiveness of a grievance mechanism.

⁴²⁰ MSI Integrity, *Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance*, July 2020, 175.

⁴²¹ *Ibid*

remedy has been sufficiently provided to the rights-holder or not is difficult because it every individual case has to be read.⁴²²

f. Rights-compatibility of the RSPO

In order to fulfil the requirement of “rights-compatibility”, all the complaints shall be addressed by respecting the right to effective remedy.⁴²³ The RSPO’s standards are in accordance with international conventions such as ILO conventions. This means, the grievances shall provide the procedures that ensure that all the complaints have received adequate remedies.⁴²⁴ However, since the enforcement mechanism of the RSPO is weak and the information on whether the remedy has been sufficiently received by the rights-holder or not is absent, it is difficult to guarantee that all the rights holder are provided with sufficient remedy. In several cases, the workers did not get adequate remedies.⁴²⁵ Referring to MSI Integrity Report, only a few MSIs succeeded in providing adequate remedies directly to the rights holders and provide a report analysis as a source of continuous learning that will be discussed in the subsequent argument.⁴²⁶

g. RSPO as a Source of Continuous Learning

As a source of continuous learning, a grievance mechanism should provide a procedure that requires analysis of complaints by identifying lessons to improve the mechanism.⁴²⁷ According to McDonald, the RSPO has taken some concrete measures to in providing a source of continuous learning.⁴²⁸ In preventing a future harm from occurring, the RSPO obliges the Impacts and Evaluation Division in cooperation with the Complaints Panel to create the RSPO Impact Reports.⁴²⁹ These documents are created to put lessons learned concerning dispute handling in a record and to prevent the occurrence of harms in the future.⁴³⁰

⁴²² *Ibid.*

⁴²³ *Ibid.*

⁴²⁴ *Ibid.*

⁴²⁵ David Kinley, “Palm Oil Industry and Human Rights: A Case Study on Oil Palm Corporations in Central Kalimantan”, 2015.

⁴²⁶ MSI Integrity, *Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance*, July 2020, 177.

⁴²⁷ *Ibid.*

⁴²⁸ Kate Macdonald and Samantha Balaton-Chrimes, “A Review of the Complaints System of the Roundtable on Sustainable Palm Oil”, 59.

⁴²⁹ *Ibid.*

⁴³⁰ *Ibid.*

Sub-Conclusion

In providing remediation, Komnas HAM as NHRIs can receive complaints from the affected communities, including the palm oil workers. In terms of independency and its establishment by law, they can be considered as legitimate to a large extent. However, considering there is no strong enforcement by the institution, its recommendations are often being ignored. The geographically remote areas of those workers make their accessibility is limited. Their access to information is also inadequate because of the lack of literacy and legal assistance. There are also risks of termination of employment. Fortunately, Komnas HAM has stipulated a clear timeline for mediation. Nevertheless, the practice shows that some cases remained unsettled which makes its predictability is questionable. Considering its pluralistic composition, Komnas HAM can be considered equitable. However, it is difficult to find legal experts for the workers which creates power imbalance. Komnas HAM is transparent enough, to the extent that it still keeps the victims' confidentiality to protect them, if needed. It has a mandate to promote human rights in accordance with international standards which shows rights-compatibility. Still, it does not have an explicit mandate to deal with corporate-related abuses yet. Subsequently, their unbinding recommendations makes it difficult to guarantee the remedies for the victims. Lastly, the institution can be considered as a source of continuous learning because they have dissemination and education functions. In sum, in light of the effectiveness criteria under UNGPs 31, it can be concluded that Komnas HAM's legitimacy, accessibility, predictability, and equitability are still questionable, but its transparency is good. Its mandate is rights-compatible, although there is no guarantee that the remedies outcome is rights-compatible. It can be considered a source of continuous learning.

The RSPO has a Complaints-System and Appeal to provide remedy for the workers. However, its legitimacy is questionable because critiques are often made to its voluntary nature, creating trust issues in the affected communities. Critiques are also directed to its investigation and monitoring system. The independence of Complaints-System and the auditor are also doubted by the labor coalition. Considering their remote location, their accessibility to the RSPO is deemed as difficult. Lack of literacy, inadequate financial resources, and intimidation also hinder them in accessing the remedy. In addition, although there is a clear time-frame in the RSPO complaint system, the complaints can be processed for years. Equitability is difficult to reach because of their lack of literacy and difficulty in finding legal experts. The RSPO's transparency is relatively high

that everything can be accessed online, yet there is no documentation on whether the remedy has been sufficiently received or not. The RSPO standards are rights compatible, but it is difficult to guarantee that the victims will get adequate remedy. Lastly, the RSPO provides an Annual Report and Impact report in providing a source of continuous learning. In sum, in light of the effectiveness criteria under UNGPs 31, it can be concluded that RSPO's legitimacy, accessibility, predictability, and equitability are questionable, but its level of transparency is high. The RSPO's P&C is rights-compatible with ILO conventions, yet there is no guarantee that complainants will get sufficient remedy. Lastly, the RSPO can be considered as a source of continuous learning.

Chapter V

Conclusion

Many palm oil workers in Indonesia are working under poor working conditions which have made them prone to experience labor and human rights violations. Under international law, these palm oil workers under poor working conditions shall have access to remedy. However, the judicial remedies in Indonesia have several shortcomings because they are expensive, prolonged, and having complex mechanisms. Thus, those workers experience difficulty in finding sufficient access to judicial remedy. As an alternative, non-judicial remedies, especially NHRIs and MSIs are considered as the most accessible grievance mechanism in the palm oil industry by the participants using it. In assessing whether or not those mechanisms are providing sufficient remedy for the palm oil workers, the author used the effectiveness criteria under the UNGPs Principle 31.

According to several articles and reports, NHRIs and MSIs play an essential role in providing remediation to the victims of business-related human rights abuses. Both of these mechanisms play an important role in supplementing and complementing the judicial mechanism. They have several advantages and disadvantages. NHRIs are independent institutions that contain pluralistic composition. In providing remediation, they offer a complaint system that can provide mediation for both parties under a dispute and provide recommendations to the stakeholders. NHRIs can contribute in de-escalating human rights abuses. However, there are some challenges that limit NHRI in providing the remedy. These challenges include weak enforcement mechanism and proliferation of institutions that do not comply with PP.

MSIs are considered the most accessible NSBGM because they create social pressure on the stakeholders. Furthermore, they have a significant role in filling the governance gaps that exist in the domestic law. Nevertheless, there are many criticisms in regards to its voluntary character. Similar to NHRIs, they also do not have binding legal enforcement. In addition, their Complaints-System mechanism is considered complicated and there is a skepticism that it will create a power imbalance between the corporations and the affected communities. Critiques also come to MSIs' organizational capacity and financial resources.

Komnas HAM provides access to remedy for palm oil workers through its complaint system. It is legitimate because it is independent and established by law. Nevertheless, its recommendations are not binding and often being ignored by the parties receiving it. The number

of palm oil workers bringing their case to Komnas HAM are decreasing within the past five years. Considering the remote area of the palm oil workers, their accessibility to Komnas HAM is limited since their access to information is also limited. Moreover, there are risks of contracts being terminated by the corporations. Komnas HAM provides a clear timeline for mediation, yet practice shows that many cases remain unsettled for years. Komnas HAM's composition is equitable, but there might be power imbalance between the parties considering its difficulty in finding legal assistance. Komnas HAM's transparency is good, yet they still keep the victims' anonymity to protect them. Its mandate is in accordance with PP, but there is no explicit mandate to deal with corporate abuses. Komnas HAM offers a source of continuous learning through its dissemination and education function.

The RSPO also offers a Complaint-System to provide remedy to the palm oil workers. Nevertheless, the RSPO's legitimacy is often criticized because of its voluntary membership's nature. Critiques also made to its organizational capacity because of the prolonged process due to the backlog of cases. Many parties doubt the independence of its complaint system and auditor. Complainants' accessibility is difficult because the procedure is complicated and requires legal assistance. There is a clear timeline regarding the dispute which shows its predictability, but its equitability still difficult to reach. The RSPO's transparency is high compared to other MSIs. Moreover, their standards are compatible with ILO conventions and the UNGPs but there is no guarantee that it provides rights-compatibility to the complainants. They also provide an annual and impact reports as a source of continuous learning.

As a recommendation, Indonesian government should entrust Komnas HAM more power in providing access to remedy for victims of corporate abuses such as the palm oil workers. For example, Indonesian government could amend the current Human Rights Act and offer Komnas HAM the mandate to deal with corporate-related abuses and the capability to give binding recommendations to the parties. The RSPO should review its complaint system so there will be no backlog of cases and trust issues towards its independency. The government should also encourage corporations, government, NGOs and the RSPO to conduct periodical meeting to exchange information regarding the current obstacles for the victims in accessing remedy and how to overcome those obstacles. Lastly, capacity building and awareness raising should be given to the palm oil workers in the remote areas so they can have adequate access to information to remedy.

APPENDIX

PALM OIL WORKERS CASES 2015-2019

HUMAN RIGHTS DEVELOPMENT BUREAU, KOMNAS HAM

| No. | Year | Total Complaints in Indonesia | Complaints in Sumatera and Kalimantan | Complainants | | | | Parties Reported | | |
|-----|------|-------------------------------|---------------------------------------|--------------|---------------|-----------|------------------------------|--|------------|--------|
| | | | | NGOs | Organizations | Legal Aid | Individuals/ Trade Unions | Corporation (Private/State- Owned) | Government | Police |
| 1 | 2015 | 10 | 7 | 5 | 3 | - | 2 | 7 | 1 | 2 |
| 2 | 2016 | 9 | 6 | 1 | 6 | - | 2 | 6 | 2 | 1 |
| 3 | 2017 | 6 | 6 | 2 | - | 2 | 2 | 3 | - | 3 |
| 4 | 2018 | 5 | 4 | - | 3 | 1 | 1 | 5 | - | - |
| 5 | 2019 | 6 | 3 | 2 | 1 | 2 | 3 | 6 | - | - |

Notes:
 Complaints made for human rights violations such as right to welfare, right to personal freedom, right to justice, and right to life.
 Complaints are made for acts such as union busting, unilateral termination of employment, underpaid wages, lack of health tools protection, criminalizations, intimidation, violence.

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