

# Human rights-based analysis of the agricultural concession agreements between **Sime Darby** and **Golden Veroleum** and the **Government of Liberia**

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# Forest Peoples Programme

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# Contents

<b>Part 1: Analytical framework</b>	<b>4</b>
1. Overview	4
2. Summary of applicable international human rights law & RSPO standards	6
3. Summary of international recommendations and jurisprudence specific to Liberia	10
4. Analytic framework summary	14
<b>Part 2: Sime Darby &amp; Golden Veroleum contract analysis</b>	<b>15</b>
a. Background and introductory observations	15
b. Property rights, responsibilities and processes in respect of the concession area	17
c. Resettlement	21
d. Specific rights accorded to the companies within the concession areas	23
e. Added value and socio-economic development	25
f. Environmental protection	30
g. Governing laws	31
h. Periodic review	31
i. Conclusion	31

9.3 Security. Government, acting through the Ministry of Justice and by the lawful authority granted to the Ministry of Justice to act for and on behalf of Government, hereby authorizes Investor directly or under contract with other Persons of its choosing, to establish, manage and maintain its own asset and employee security protection services (a “*Concession Protection Department*”) in accordance with a written plan, which must be submitted to the Minister of Justice at least sixty (60) days prior to the activation of the *Concession Protection Department*. The purpose of the *Concession Protection Department* is to protect the Investor and its personnel, property and investments. The Investor has

## Part 1: Analytical framework

### 1. Overview

**1.1 Obligations of the State.** Under international human rights law, the duty-holders for respecting and protecting those human rights are states rather than companies. As such, looking at the Sime Darby Plantations Liberia (SDPL) and Golden Veroleum (GVL) concession contracts through a human rights lens, the principal question for this analysis is the following:

(1) *What has the government done or not done, through the terms of the contract or otherwise, to fulfil its duty to promote and protect the human rights promulgated by instruments to which Liberia is legally bound?*

**1.2** Human rights laws imply both *positive duties* (obligations to actively protect communities from breaches of protected rights) and *negatives duties* (obligations not to engage in acts or omissions that breach protected rights). In terms of the contract, this includes the following basic aspects of the contract: (a) what the government has committed to doing or not doing itself; and (b) what the government has permitted the company to do or not do.

**1.3** Both agreements create a lease between the Republic of Liberia and foreign-owned companies over areas of land which are currently also possessed, occupied and used by communities. When ratified by the legislature, these contracts became acts of law. The contracts bring about a train of events that will inevitably interfere with the lives and human rights of those communities. Some of these contractual consequences are defined, some are implied, while others are consequences (intended or otherwise) that are simply not excluded by the potential scope of the contract. These distinctions are important in defining the full range of human rights impacts of these consequences in terms of both the positive and negative duties of the state.

**1.4 Obligations of the companies.** In the UN Human Rights Council endorsed ‘*Protect, Respect and Remedy*’ Framework<sup>2</sup> and associated Guiding Principles<sup>3</sup> on Business and Human Rights, the UN Secretary General’s Special Representative on Business and Human Rights,

Professor John Ruggie, outlines the corporate *responsibility* to respect human rights. This is stated as being ‘a global standard of expected conduct for all business enterprises wherever they operate’ that ‘exists independently of States’ abilities and/or willingness to fulfil their own human rights obligations’.<sup>4</sup> This responsibility is elaborated as requiring adequate measures for prevention, mitigation and where appropriate, remediation.<sup>5</sup>

- 1.5** A key plank in the Guiding Principles is the operational principle that companies engage in human rights due diligence, to identify actual *or potential* human rights risks so as to be able to prevent, mitigate and account for how they address them.<sup>6</sup> Such due diligence processes should inter alia ‘seek to understand the concerns of potentially affected stakeholders by consulting them directly in a manner that takes into account language and other potential barriers to effective engagement’.<sup>7</sup> The commentary to Principle 17 states the following:

*‘Human rights due diligence should be initiated as early as possible in the development of a new activity or relationship, **given that human rights risks can be increased or mitigated already at the stage of structuring contracts or other agreements**, and may be inherited through mergers or acquisitions.*<sup>8</sup>

Furthermore, as set out in the commentary to Principle 18:

*‘Because human rights situations are dynamic, **assessments of human rights impacts should be undertaken at regular intervals**: prior to a new activity or relationship; prior to major decisions or changes in the operation (e.g. market entry, product launch, policy change, or wider changes to the business); in response to or anticipation of changes in the operating environment (e.g. rising social tensions); and periodically throughout the life of an activity or relationship.’*

- 1.6** The Guiding Principles also raise the issue of heightened human rights risks in circumstances which require the greatest possible levels of respect for internationally recognised human rights, as is found in conflict-affected countries.<sup>9</sup> Given the recent history of civil conflict in Liberia and the well-documented links between the conflict and food, land and natural resource governance, SDPL and GVL’s due diligence in respect of human rights should be of a proportionately high standard.

- 1.7** A further measure for analysis comes from the fact that both SDPL and GVL are members of the Round Table on Sustainable Palm Oil (RSPO), and have therefore voluntarily committed to complying with the RSPO Principles and Criteria, which place additional social and other obligations on the companies, and in so doing increase market access, provide a price premium and lead to general reputational and associated commercial benefits. Together with the corporate responsibility to respect, this adds a secondary question to this rights-based analysis:

(2) *What have the companies done or not done, through the terms of the contract or otherwise, to fulfil their compliance with the social standards contained in the RSPO principles and criteria and their corporate responsibility to respect human rights?*

- 1.8** A key challenge for SDPL and GVL arises where complying with Liberia’s national law may lead to (or be interpreted as leading to) a failure to respect international human rights law and to comply with RSPO standards. Customary land rights are currently inadequately protected

by Liberia's national law.<sup>10</sup> Although some progress has been made, the governance failures with respect to land and resources which led to the creation of Liberia's Land Commission have yet to be properly remedied via policy and legal reform. However those customary land rights have international law protection pursuant to a number of cross-cutting protected human rights, as highlighted in section (2) below.

**1.9** The Guiding Principles on Business and Human Rights state that all applicable laws should be complied with, including respect for internationally recognised human rights, but that where there is a contradiction between national and international law (apparent or otherwise), companies should '*seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements*' and to '*demonstrate their efforts in this regard*'.<sup>11</sup> It is therefore incumbent on both companies to respect this international protection as also afforded by the RSPO standards, through verifiable and transparent procedures and processes that improve on the domestic legal framework, central to which is observing the right to free, prior and informed consent (as outlined below). An example of this can be seen where national law standards are capable of being interpreted as minimum obligations which do not prevent the companies from exceeding those minimum obligations.<sup>12</sup>

## 2. Summary of applicable international human rights law & RSPO standards

**2.1** The international legal instruments below are applicable to Liberia and relevant to this analysis. Though at the time of writing only those with asterisks have been confirmed as formally incorporated into domestic law by an act of the legislature, they are nonetheless all binding on the state:

- Universal Declaration of Human Rights – UDHR (applies, voted in favour)
- \*African Charter on Human and Peoples Rights – ACHPR
- \*International Covenant on Economic, Social & Cultural Rights – CESCR (party, ratification 22/9/04)
- \*International Covenant on Civil & Political Rights and Optional Protocol – CCPR (party – ratification 22/9/04)
- International Convention on the Elimination of all forms of Racial Discrimination – CERD (party – accession 5/11/1976)
- United Nations Declaration on the Rights of Indigenous Peoples - UNDRIP (voted in favour)
- \*Convention on the Rights of the Child – CRC (party – ratification 4/6/1993)
- Convention on the Elimination of Discrimination against Women – CEDAW (party – accession 17/7/1984)
- Convention on Biological Diversity – CBD (party – ratification 8/11/2000)
- UN Declaration on the Right to Development, General Assembly resolution A/RES/41/128 of 1986



**2.2** The principal rights engaged in respect of land and resources by the concession contracts include the following internationally protected human rights:

- (1) right to property<sup>13</sup>
- (2) rights to adequate standards of living including adequate food,<sup>14</sup> adequate housing,<sup>15</sup> and health;<sup>16</sup> right to culture and religion<sup>17</sup>
- (3) right to non-discrimination in the enjoyment of all human rights (including in relation to both race and gender)<sup>18</sup>
- (4) right to self-determination<sup>19</sup>
- (5) right to development<sup>20</sup>
- (6) right to freely dispose of lands and natural resources and the right not to be deprived of the means of subsistence<sup>21</sup>
- (7) right to a satisfactory environment favourable to development<sup>22</sup>

**2.3** Although most or all of these rights are likely to be engaged in relation to concession agreements of this kind, the right to property is of course central. As these rights are cross-cutting, the same factual basis for a breach of the right to property is also likely to breach other rights if common features of these rights are not adequately protected, e.g. meaningful participation in development, self-determination of development priorities, and the protection of cultural and physical integrity inherent in strong customary connections to land and resources. Related negative socio-economic and cultural consequences will imply breaches of the social, economic and cultural rights listed at (2), notably the right to food and housing.

**2.4** Collective and long-standing possession and use of customary land by communities amounts to a collective property right under international human rights law which can only be interfered with under special conditions.<sup>23</sup> Any interference must be necessary and proportionate to a legitimate aim; and in accordance with applicable law, to avoid being a violation of this right.<sup>24</sup> To be proportionate, the interference must be the least restrictive means possible of achieving the legitimate aim, i.e. there must be no other less restrictive option available to reach that objective. In addition, the interference must not disproportionately discriminate against any particular section/s of society.<sup>25</sup> The threshold for justifying such an interference is higher when the severity of other rights is also engaged, for example the right to self-determination of 'peoples'. The threshold is also high in the case of forced eviction/removal of communities from traditional territory which is unlawful under international law except in the most exceptional circumstances.<sup>26</sup>

**2.5** In addition to the treatment of customary rights by international law, the right to free, prior and informed consent (*FPIC*) is engaged in respect of all the communities affected by the SPDL and GVL concessions by virtue of both companies being members of the Roundtable on Sustainable Palm Oil (RSPO). They have therefore both made voluntary commitments to meet higher social and environmental standards than required by national law by agreeing to be bound by the RSPO principles and criteria.

**2.6** Applying these international legal and voluntary standards to the Sime Darby and GVL concessions, there is a direct human rights consequence of granting a lease over land and natural resources which are subject to a prior customary claim: it fails to recognise or assumes

the extinguishability of any pre-existing proprietary rights to the land. There is therefore a prima facie breach of the human right to property and associated cross-cutting rights relating to land and natural resources. As stated above, respect for the right to property requires respect for adequate procedural safeguards. The question then becomes one of whether the terms of the contract are consistent with the necessary procedural safeguards, or if these terms are sufficiently implied by national law. If not, the single act of awarding the lease without sufficiently protective terms to ensure compliance with these procedural safeguards, is a breach of the communities' human rights, including their right to property.

These procedural safeguards come under the following basic heads, and are dealt with in turn below though they are of course linked (e.g. SEIA processes must in themselves be fully participatory):

- Rights to meaningful participation
- Social and Environmental Impact Assessment (SEIA)
- Benefit Sharing and compensation

## **Meaningful participation: rights to information, consultation and consent**

**2.7** As set out above, international human rights law gives the communities the right to be informed, consulted and involved in decision-making. It is settled law that traditional possession and use of customary land by indigenous and tribal peoples amount to a property right, which can only be breached under special conditions, including observing the right to free, prior and informed consent (FPIC).<sup>27</sup> However, the right to meaningful participation, consultation and, possibly, consent (FPIC), in decision-making processes concerning developments affecting customary lands can be argued for all communities with strong connections to their customary lands.<sup>28</sup> The State is legally obliged to take active steps to protect these rights and to not act in breach of them.

**2.8** There is also important constitutional support for community participation and FPIC in Article 7 of Liberia's constitution, which states that in its management of natural resources the Republic '*...shall ensure the maximum feasible participation of Liberian citizens...*'. It is hard to imagine a greater feasible participation in the management of natural resources than is guaranteed by the right to FPIC. Implementation of FPIC is explained fully in the following two paragraphs in the context of the RSPO standards.<sup>29</sup>

**2.9** The RSPO principles & criteria place a duty on member companies to respect customary rights to land and only use land with the free, prior and informed consent (FPIC) of all communities, through processes and agreements that are well-documented and transparent.<sup>30</sup> Communities must be compensated for rights lost, subject to their FPIC. The right to FPIC should be observed at the earliest stages possible, with the provision of all relevant information to all community members in a form that is appropriate to the customs and languages of all the communities. This information should objectively and transparently state all aspects of the project including all potential risks as well as potential benefits, including benefit sharing and compensation proposals. The information should not be in the form of propaganda, or present the project as a *fait accompli*, or otherwise aim at promoting acceptance of the project.

**2.10** The negotiations need to be good faith, open-ended negotiations, without any coercion



or force. This means the project developer must therefore be open to the communities' ideas and proposals. Communities should also be given time and space to seek independent legal advice. All contact and negotiations with the communities should be via their self-chosen representative structures. Representative structures must be transparent and in open communication and consultation with all community members, including women. Communities must be allowed adequate time to consider all relevant information and come to their own decisions. The community may require time for an iterative decision-making process that is done in many stages, which will serve to build trust. Ultimately, with the right to consent, communities have the right to say 'no' to the project, in whole or in part.

## **Participatory Social and Environmental Impact Assessments (SEIAs)**

**2.11** International law also requires the completion of a prior and independent cultural, social and environmental impact assessment, for developments proposed on land used or occupied by indigenous peoples and local communities.<sup>31</sup> The RSPO principles and criteria also require a comprehensive and participatory social and environmental impact assessment (SEIA) to be undertaken by an accredited independent expert.<sup>32</sup> SEIAs should be incorporated into the process undertaken to satisfy the right to FPIC, including participatory negotiations that may lead to community agreements (including with regard to compensation and benefit-sharing).<sup>33</sup> This requires participation of the community in the design of the SEIA and full disclosure of the draft and final SEIAs. Resolution 224 of the African Commission on Human Rights calls on state parties to:

*'Ensure independent social and human rights impact assessments that guarantee free prior informed consent; effective remedies; fair compensation; women, indigenous and customary people's rights; environmental impact assessments; impact on community existence including livelihoods, local governance structures and culture, and ensuring public participation; protection of the individuals in the informal sector; and economic, cultural and social rights.'*<sup>34</sup>

**2.12** In addition, to comply with RSPO principles and criteria, Sime Darby and GVL must not use land containing primary forest, or high conservation values (HCVs).<sup>35</sup> Identifying these areas must be integrated into the SEIA process. Importantly for communities, HCV areas also include forest areas *fundamental to meeting basic needs of local communities* (e.g. subsistence, health etc.); and forest areas *critical to local communities' traditional cultural identity* (areas of cultural, ecological, economic or religious significance identified in cooperation with local communities). Local communities must therefore be consulted by the companies as part of the participatory SEIA in order to identify these HCV areas, through a participatory mapping process to determine the nature and extent of customary rights and uses of lands and resources. Again this requires community participation in the design of the mapping process, and may well significantly limit the size of the area available for planting.

## **Benefit sharing and compensation**

**2.13** Under international law, communities should receive a reasonable benefit or other suitable compensation for loss of traditional property and other rights in respect of customary land and resources.<sup>36</sup> This could be financial or by grant of alternative land and resources. Communities should be ensured effective participation (i.e. be fully informed and consulted) when agreeing

the nature and extent of benefit-sharing and compensation. Under the RSPO Principles & Criteria, all affected communities must be compensated in accordance with agreements reached during negotiations that adhere to the right to free, prior and informed consent.<sup>37</sup> This should be integrated into the SEIA process.

**2.14** In assessing whether the concession agreements' terms (implied or otherwise) are sufficiently protective of rights, a theoretical analysis of the degree to which those terms assure the protection can be backed up by empirical evidence of how the contracts have been implemented in practise in their initial phases, as well as generally observed current and previous practise in Liberia. Where these procedural safeguards are not spelled out in the contract and have not emerged in practice, the government is in default of its duty to respect and protect the human rights of affected communities, including their right to property.

## **3. Summary of international recommendations and jurisprudence specific to Liberia**

### **Observations and recommendations of the UN Panel of Experts on Liberia**

**3.1** A Panel of Experts continues to be mandated by the UN Security Council to investigate and report back to the Security Council on issues relevant to maintaining peace, security and development in Liberia, including natural resource governance, in light of the conflict and associated UN sanctions. The Panel has made a number of important findings and recommendations relevant to large-scale land acquisition such as the Sime Darby and Golden Veroleum agricultural concessions, including in relation to the governing concession contracts themselves and their implementation.

**3.2** Regarding concession allocation, in general the Panel of Experts highlighted in their final reports of 2010 and 2011 the underlying problems associated with the lack of clarification of land ownership, including land conflict.<sup>38</sup> This is noted as relevant to both new concession allocations and extensions of pre-existing concessions, such as Sime Darby's extension of the original BF Goodrich/Guthrie rubber plantation.<sup>39</sup> On this basis the Panel therefore recommended a moratorium on allocating further natural resource concessions pending the completion of the Land Commission's land tenure clarification process.<sup>40</sup> The Panel has also noted with concern the general apparent lack of compliance with the competitive bidding processes required by the Public Procurement and Concessions Commission and associated procurement law.<sup>41</sup>

**3.3** The Panel also observes that the agriculture sector has yet to undergo governance reform despite suffering from the same governance weaknesses as other sectors.<sup>42</sup> This appears to be reflected on the ground where current land disputes have been reported in association with Sime Darby in Grand Cape Mount county and Golden Veroleum in Sinoe county. These can be seen in the wider context of the historical problems of violence and human rights

abuse at the former Guthrie rubber plantation as identified in the Panel's report. Governance weaknesses highlighted by the Panel include a lack of transparency of even basic information on agricultural land planning and concession contracts.<sup>43</sup> To illustrate this fact the Panel even referred to the challenges it faced in locating copies of concession contracts. If a UN Security Council mandated Panel of Experts had such problems locating contracts, rural communities are even less likely to be able to gain access to such basic information with profound implications for their future food security, livelihoods and cultural way of life.

**3.4** The Panel has to date identified a number of further key problems associated with agricultural concession allocation processes and corresponding recommendations for addressing these, including the following:

- **Consultation and participation:** 'In allocating concession areas, there is no specific legal requirement for multi-stakeholder participation or community consultation with regard to landownership or ex ante social agreements'.<sup>44</sup> However, as stated by the Panel, public participation and consultation of communities and other stakeholders would help bring to light pre-existing land claims or disputes, and prevent land disputes and associated conflict.
- **Benefit sharing:** Despite various benefits being promised (for schools, health care and housing etc.) there is a lack of consistency in the benefits promised; those benefits are vaguely defined in the contracts in terms of time frame and standards; and they invariably apply only to employees as opposed to the whole affected community.<sup>45</sup> As the Panel notes, long-term stability and development objectives depend on the population benefiting at the community, regional and national levels.<sup>46</sup>
- **Monitoring:** Negotiation and compliance with contracts and social agreements is not currently overseen by any Government Ministry, leaving them subject to the goodwill of the company and the negotiating position of communities (which is comparatively weak) and the unions.<sup>47</sup> The Panel asserts that the 'ability to monitor concessions is crucial on a number of fronts, including ensuring that contracts are allocated and negotiated to the benefit of Liberia and its citizens; that required payments are made by companies; that social, health, education and employment provisions of contracts are met; and that environmental terms and conditions are met'.<sup>48</sup>
- **Regulating private security arrangements:** Finally, given the history of land conflict and potential for violence, the Panel notes with concern the implications of private security arrangements and a lack of transparency in those arrangements. It therefore recommends vetting procedures to exclude individuals from combatant chains of command and/or those involved in past human rights abuses, and internal codes of conduct relating to rules of engagement and human rights training.<sup>49</sup>

**3.5** Specific concerns are raised by the panel in respect of both Sime Darby and Golden Veroleum in particular. The Panel noted in its 2010 report that the Sime Darby and Golden Veroleum concession contracts only vaguely define the land area concerned, deferring demarcation until after the concession has been ratified by the Liberian legislature.<sup>50</sup> The Panel goes on to highlight the potential for tensions to arise from these types of problems as companies expand their concessions in a context where there is insufficient land for the concession due to pre-existing land uses and titles (as was reported by Sime Darby directly to the Panel).<sup>51</sup>



**3.6** These concerns are born out in the Panel's 2011 report which notes that 'land disputes stemming from a lack of community consultation have long plagued many of the rubber plantations, and have flared up, in particular in connection with the new expansions of the Guthrie plantation by the Malaysian multinational firm Sime Darby'.<sup>52</sup> The Panel notes that Sime Darby admit to 40 per cent of the land being subject to overlapping claims, and on informing the government of this, was told to 'sort it out themselves'. The Government therefore appears to have been relying entirely on Sime Darby to sort out complex problems that require far more sensitivity and attention by a number of stakeholders (including the company of course), being based on deep-rooted issues such as the lack of clarity on land ownership and the weak security of tenure position of customary communities. As the Panel states, 'natural resources can only help strengthen the post-war economy and contribute to economic recovery if they are managed well and in an accountable, transparent and sustainable manner'.<sup>53</sup>

**3.7** In relation to the Golden Veroleum concession, the Panel conducted an investigation into whether the company's concession allocation complied with the requirements of the Public Procurement and Concession Commission legislation.<sup>54</sup> The Panel report that they were 'unable to find any evidence of concession planning or competitive bidding for this concession'.<sup>55</sup> They further noted that officials in the Public Procurement and Concession Commission denied any knowledge of the concession or the process that led to its allocation. Furthermore, the Panel reports that '[o]fficials in the Ministry of Finance confirmed that the Public Procurement and Concession Commission was not reviewing concession processes and that the Golden Veroleum concession had not been subject to the regular process'.<sup>56</sup> The Panel's 2011 report notes that Sime Darby's acquisition of an additional 100,000ha was also not subject to competitive bidding as required by the Public Procurement and Concession Commission.

**3.8** The Panel also notes the contrast between the Government's reliance as an important factor that Golden Veroleum's parent company, Golden Agri-Resources (*GAR*), had a good track record, and the fact that another GAR subsidiary (PT SMART) had been subject to an RSPO complaint which was upheld by an RSPO grievance panel in relation to, inter alia, a failure to work towards implementation and certification of RSPO Principles and Criteria. The author notes that a further complaint to the RSPO dated 1 October 2012 has since been submitted in relation to complaints from communities from the Butaw Kru tribe from the Greenville, Butaw, and Kpanyan Districts of Sinoe County, in relation to Golden Veroleum's operations in that part of Liberia. The latter complaint alleges a failure to comply with social obligations under the RSPO standards such as the FPIC requirement, and a failure to comply with the RSPO New Plantings Procedure (under which specified information on proposed new plantings is required to be published thirty days prior to planting).<sup>57</sup> It should be noted that a complaint is also pending with the RSPO in respect of Sime Darby's operations in the county of Grand Cape Mount in north-west Liberia, including in relation to the FPIC requirements of the RSPO standards.<sup>58</sup>

## **Observations and recommendations of the principal UN human rights bodies**

**3.9** In accordance with the UN human rights framework and the international legal

instruments to which Liberia is a party, the associated UN treaty bodies and the now expired mandate of the UN Independent Expert on Technical Cooperation and Advisory Services in Liberia, have considered the human rights situation in Liberia, and provided relevant concluding observations and recommendations. Where these relate to international laws to which Liberia is a party (such as the UN's CRC and CEDAW conventions), they are an authoritative interpretation of those instruments, and are therefore legally binding on Liberia.

**3.10** To date, the principal relevant observations and recommendations emerging from the international jurisprudence specific to Liberia include the need to:

**a. address the problem of food security;**

The UN Independent Expert on Technical Cooperation and Advisory Services in Liberia has reported that while agricultural production for export is developed, production for food for domestic consumption is undeveloped. Referring to the October 2006 FAO Comprehensive Food Security and Nutrition Survey<sup>59</sup>, she states that *'Stunting affects 39 per cent of children under 5 years of age, 11 per cent of survey household are considered food insecure and 40 per cent highly vulnerable to food insecurity. Seen from a human rights perspective, a large proportion of the population is unable to enjoy its right to food.'*<sup>60</sup> Food security is further highlighted in her 2008 report, where she adds that *'[t]he current situation is being exacerbated by the global food security crisis and the rise in fuel prices.'*<sup>61</sup>

**b. address the human rights problems associated with plantations, and prioritise human rights as well as other factors when negotiating these and other concession contracts;**<sup>62</sup>

The independent expert makes particular reference to human rights violations on rubber plantations, in particular at Guthrie rubber plantation in Bomi (part of the site now included in SDPL's concession area), and the Cavalla rubber plantation, including housing, pay and sanitation conditions.<sup>63</sup>

**c. take steps, including legislation to ensure non-discrimination with regards to vulnerable groups, including rural children<sup>64</sup> and rural women, including steps to address the employment conditions of women working on rubber plantations<sup>65</sup> and the needs of rural women generally including the need to ensure their participation in decision-making processes and development planning;**<sup>66</sup>

**d. address the risks of ethnic polarisation, conflict and racial discrimination, including with respect to land and natural resources,**<sup>67</sup> noting the tensions between ethnic groups and communities over land or natural resources, including tension resulting from lack of security of tenure;<sup>68</sup> and,

**e. take necessary steps, including land reform, in relation to land rights and land-related conflict.**<sup>69</sup>

**3.11** Finally, the very recent concluding observations of the Committee on the Rights of the Child (CRC) make a number of important observations and recommendations in relation to the practices and legal framework regarding the operations of multinational companies in Liberia.<sup>70</sup> They express regret that multinational companies in the country *'are operating in the absence of clear regulatory frameworks to ensure that international human rights, labour, environment and other standards are adhered to in order to protect workers and families and*

*communities affected by their activities*.<sup>71</sup> The committee also expresses concern and makes a number of recommendations with regard to child labour in hazardous work.<sup>72</sup>

**3.12** In addition it notes with concern the issues relating to the affects of relocation on families and communities *‘such as compensation for private properties to be left behind, new lands for housing, farming, and settlements, and access to other natural resources for income and subsistence, are not discussed nor communicated with the persons concerned nor are they disclosed to the public’*.<sup>73</sup> Although these concerns regarding lack of information and consultation on the terms by which relocation takes place are directed at problems in mining areas, they would apply equally to relocation caused by agricultural concessions where these same issues arise.

**3.13** The recommendations made by the CRC include those below which are most relevant to this contract analysis. In these the CRC recommends that Liberia:<sup>74</sup>

- *‘establish and implement regulations to ensure that the national and transnational business sector complies with international and national human rights, labour, environment and other standards, particularly with regard to child rights’; and,*
- *‘[r]equire assessments, consultations and disclosure by companies on plans to address environmental and health pollution, as well as on the human rights impact of measures such as relocation of communities or establishment of production quotas’.*

## 4. Analytic framework summary

In summary, there is a significant body of international law on the various rights engaged by the GVL and SDPL concession contracts which are substantially reflected in RSPO standards, coupled with relevant observations and recommendations from a variety of authoritative international law bodies and other forums focused on Liberia. All of this is of significant relevance to the GVL and SDPL concession contracts themselves, since the contracts set the underlying terms and conditions for *how* the concession allocation and implementation will proceed. In addition, since both companies have begun operations there is an increasing amount of empirical evidence relating to the manner in which these contracts have been implemented and the social impacts that have resulted.<sup>75</sup> As a result, the rights-based analysis of the SDPL and GVL contracts set out below in Part 2 should be read in the context of this body of international law, authoritative recommendations and best practice standards, and emerging empirical data.



Investor shall permit independent farming activities within areas of the Concession Area which are not suitable for Production, provided that such independent farmers (i) limit farming activities to non-commercial food cultivation, (ii) had lived within the Concession Area before the Effective Date or before resettlement pursuant to Section 4.3, and (iii) seek the permission of

## Part 2: Sime Darby & Golden Veroleum contract analysis

### a. Background and introductory observations

#### *GVL's contract chronology and summary*<sup>76</sup>

- Entered into on 16 August 2010 by the Minister of Agriculture (Florence Chenoweth), the Minister of Finance (Augustine Ngafuan), and the Chairman of the National Investment Commission (Richard Tolbert) and attested to by the Minister of Justice (Christiana Tah).
- This concession agreement provides a lease for 220,000ha of land in the counties of Maryland, Grand Kru, Sinoe, River Cess and River Gee, plus a further 40,000ha for an out-grower scheme, and to construct a new port with 100ha of adjacent land.
- The term of the agreement is for a period of 65 years, with an optional extension of 33 years conditional on GVL having satisfied the required Key Performance Indicators at Appendix VII.

#### *SDPL's contract chronology and summary*<sup>77</sup>

- Entered into on 30 April 2009 by the acting Minister of Agriculture (Borkai Sirleaf), the Minister of Finance (Augustine Ngafuan) and attested to by the Minister of Justice.
- This 2009 concession agreement provides a lease for 220,000ha of land in the counties of Gbarpolu, Bomi, Grand Cape Mount and Bong (including the 120,000ha provided for by a previous concession agreement, and a further 100,000ha 'in consideration for' SDPL's commitment to construct and operate a vegetable oil refinery in Liberia) plus a further 44,000ha for an out-grower scheme.

- The term of the agreement is for an extendable period of 63 years.
- Highlighting the connections to the former BF Goodrich/Guthrie rubber concession, the concession is entitled 'Amended and Restated Concession Agreement between the Republic of Liberia and Sime Darby Plantations (Liberia) Inc.'
- Notes original rubber concession agreement dated 9 July 1954 with B.F. Goodrich, which was subsequently transferred to Guthrie Ltd UK, and then Guthrie Kumpulan Sendirian Berhad (parent company of Guthrie Ltd UK), subsequently known as Kumpulan Guthrie Berhad (*KGB*); original concession agreement amended on 22 November 1985 to reflect assignment of concession rights. The area planted by rubber amounted to 20,000 acres.
- On October 30 2001, KGB gave notice that it was temporarily suspending operations due to the security situation, whereupon government officials provided interim management. In November 2007, Sime Darby Berhad acquired KGB.

According to the author's understanding of Liberian law, leases of public land cannot exceed 50 years (see Section 70, *Public Lands Law*). As the SDPL and GVL concession contracts create leases of 63 and 65 years respectively, it is unclear what basis exists in national law for these concessions. It may be the case that the contracts should therefore be construed as 50 year leases according to the rules on severability, since any period longer than this is likely to be void, but this is uncertain and would depend on Liberian rules of contract law.

### **Human rights consequences of SDPL taking over historically problematic plantation**

As outlined in the contract recital, the SDPL concession builds on an old rubber concession of 120,000ha granted to BF Goodrich on 9 July 1954 (the original concession agreement) and since acquired by Sime Darby Berhad. This contract replaces this original agreement for the 120,000ha, and adds a further 100,000ha to this amount.

A number of contractual provisions make reference to claims in respect of the old plantation. In particular the government commits to indemnify the company from any adverse claims arising in respect of the original concession agreement due to actions of the government or interim management.<sup>78</sup> Both parties also agree to release the other and waive claims in respect of claims arising from the original concession agreement.<sup>79</sup>

A number of human rights consequences flow from this, including in relation to rights failures in the original contract and in its performance by the parties. Communities in the area still complain today about the loss of customary land to BF Goodrich and Guthrie, suggesting likely inadequate community consultation and participation in the creation of the original concession and continuing breaches of the rights referred to above, including property rights and other economic, social and cultural rights. Rights violations at the Guthrie plantation are raised by the UN independent expert on technical cooperation and advisory services in Liberia (see paragraph (3.2.5) above). Importantly, the contract does not exclude liability by the company or the government in respect of third parties, so both can still be held responsible for any rights violations by communities.<sup>80</sup>

From the company's perspective, and in terms of compliance with its RSPO commitments, the company should take action in response to the fact that it is acquiring a concession where continuing breaches of international human rights law have already taken place. From the state's perspective, these continuing breaches pose obligations to rectify those breaches, including *inter alia* through investigations into rights violations and redress. In particular, an independent reassessment of customary land claims engaged in by both parties will be essential, as is some kind of post-facto process for seeking the FPIC of displaced communities, restitution and/or compensation process. All historical land claims should be resolved before SDPL can assume commercial activities over those areas.

Furthermore, in taking over an existing or historical concession, SDPL should be aware of previous practices that could amount to implied, non-written contractual agreements with the state or ancillary contracts with customary communities themselves by way of compromises made with local communities. In the instant case, BF Goodrich set aside land areas for community use within the concession which are known as community reserves. At a minimum, these areas should be maintained, while the process referred to above is undertaken. In contrast, in Grand Cape Mount, the clearing of many of these community reserves has arguably been a principal cause of the recent dispute.

## **b. Property rights, responsibilities and processes in respect of the concession area**

In the definitions section of the SDPL and GVL contracts, 'Government land' is defined in both contracts as *'All land in Liberia...except Private land'*.<sup>81</sup> This definition is problematic, as it does not have a clear foundation in Liberian land law and contradicts international law and RSPO standards on recognition of the proprietary rights of peoples in possession of customary lands. The SDPL contract defines 'private land' as all land owned by persons or over which exist rights of possession recognised by law, but excluding the land which is the subject of this lease.<sup>82</sup> This is also inconsistent with international human rights law and RSPO standards as it necessarily excludes from consideration as private lands (and includes them as government lands), those customary lands which are included in the concession area. It also excludes from the definition any customary land rights or possession rights not recognised by the domestic law per se, but which are recognised by international law and should be respected under RSPO principles & criteria. Combined with other provisions, including the government warranty that the land is free of encumbrance,<sup>83</sup> the contract in essence does not require SDPL to find out or be concerned with what customary proprietary interests in land pre-exist over the concession area.

GVL's definition for private land is identical to that of SDPL's but includes in the definition 'land held by a tribe, community or traditional grouping'. This is a much improved definition, as this therefore excludes community held land from the definition of government land. However as seen below this seems to have little practical impact on the implications of the GVL contract for customary rights-holders.



The treatment of customary property rights by both contracts and in turn the impacts for rights-holders themselves is principally determined by the proprietary rights and responsibilities granted by the government to the company, and those reserved to the government. The most central of these include the following:

- Both companies are granted a leasehold of the surface of the land for the exclusive use for agricultural purposes by SDPL and GVL,<sup>84</sup> for which a surface rent is charged.<sup>85</sup>
- Both companies are also granted rights to carbon consisting in the land or its development that may become marketable credits or commodities.<sup>86</sup>
- Both contracts permit the Government to assume ownership of non-moveable assets in the concession area (including oil palm trees and rubber trees) on the expiry or termination of the agreements.<sup>87</sup>
- ‘*Use it or lose it*’ provisions provide for the government to repossess any land not used in accordance with the minimum development obligations.<sup>88</sup>
- The government contractually agrees to ensuring that the concession area is free from encumbrances at the date of handover of such lands and warranting the companies’ title to, possession and quiet enjoyment of the concession area.<sup>89</sup> The government indemnifies and holds investor harmless for any losses incurred in defending these rights, e.g. relating to ownership claims by third parties.<sup>90</sup>

These provisions clearly imply that the state considers that customary communities have no prior claim to the land and resources on the land, other than as permissive occupants or tolerated trespassers on government owned public land. Resources grown on the land revert to state ownership not to the community, and there are no provisions giving the community a reversionary interest over the land and resources on it. Extending the contracts is subject to agreement by the parties, without a requirement for consent of local communities.<sup>91</sup>

In addition, the permitted farming provisions allow local communities to farm on land within the concession providing they seek the companies’ permission before commencing farming, and only then use the land for non-commercial use.<sup>92</sup> This puts customary rights-holders in the ignominious position of having to ask the companies for a portion of land back for subsistence agriculture, effectively renouncing any claim over the land which they previously considered as theirs by right, and previously used for both subsistence and cash-crop purposes.

These provisions clearly imply an assumption on the part of the state and the companies that the land for the concession areas and the resources they contain belong to the state, or at least that it is perfectly within the state’s power to grant large-scale leases over this land to SDPL and GVL despite third party interests. In the absence of sufficiently large tracts of unused land in Liberia the contracts therefore imply that prior customary rights do not exist or that if they do, they can be necessarily extinguished by the state.

In addition, the contracts assume that the customary rights-holders do not have the right to have their views on the development taken into account in decision-making processes affecting them, and could not conceivably say ‘no’ to the development, as required by the right to FPIC. In this respect the GVL contract is more problematic, in committing the government to providing an encumbrance-free parcel of at least 15,000ha within 18 months, indicating that the land will be available irrespective of any FPIC process which may take longer than 18 months.<sup>93</sup> These assumptions disregard the necessity to fulfil minimum procedural safeguards required by international law (i.e. information

sharing, consultation, FPIC etc.) or at the very least pre-empts the outcomes of any such safeguard processes. The contracts therefore fetter the discretion of the government to consider whether the interferences with the property and other relevant rights of communities in the concession area can be justified, and therefore be lawfully leased to a third party. In other words, the land and resources are deemed to be in the government's gift.

In return, the companies are recognising the government's rights over the land and resources it contains, and are the beneficiaries of indemnities and warranties on encumbrances and adverse claims. These provisions protect the companies from facing the legal consequences of customary land claims and assign this responsibility to the government. By agreeing to such terms, the companies are contractually positioned so as to be able to avoid taking responsibility to ensure respect for customary rights. Although the government is of course the primary duty-holder for respecting and protecting human rights, these contractual terms have the practical effect of shielding the companies from having to take active steps to ensure compliance with RSPO obligations and human rights responsibilities to respect customary lands and the right to FPIC in the case that the government fails to meet its duties.

This feature is exemplified by the protections the companies seek in terms of encumbrances and adverse claims. For example, the '*use it or lose it*' provisions are tempered by a clause permitting delays in companies meeting their planting obligations if these are caused by acts or omissions of the government such as the failure to ensure that the land is free of encumbrances.<sup>94</sup> In fact, under the current contracts as worded, both the government and companies may assume that the other will fulfil the necessary social safeguards (the companies by virtue of their responsibilities as members of the RSPO, and the state in its commitments to ensure the concession areas are free of encumbrances before the effective date and its international legal commitments), without either of the parties doing so in practice.

The only provisions relating to concession oversight are the common clauses creating a 'Coordination Committee'.<sup>95</sup> However, the purpose of these committees is very limited in that it is restricted to coordinating the needs and plans of the investor with the needs and plans of the government (with no reference to the needs and plans of communities). The Committees expressly have no managerial responsibility and nor are they empowered to take any action on behalf of the parties. They are therefore relatively toothless to act, for example in response to a community grievance. Crucially, there is no requirement for self-chosen community representatives and indeed all members are chosen by the government and companies, so that in the absence of any other measure, the contract fails to provide any mechanism for independent multi-stakeholder oversight within which communities could participate and determine the nature and implementation of the development of their lands in the concession area.

A stated objective of both contracts with regard to 'community resources' is that concession operation will be carried out in a way that is '*consistent with the continuing economic and social viability*' of the communities formed as a result of the companies' activities.<sup>96</sup> Pursuant to this, on written request from the government, the companies must consult with government on further government plans for implementing this objective. However, this fails to provide any obligations to consult with communities, and only applies to communities formed '*as a result of the concession*', not to pre-existing communities, whose continuing economic and social viability is excluded from the scope of this provision. It is also expressly stated that this provision does not imply any additional financial cost to the companies. As such it is unlikely to have any practical benefit for employee residential communities, and certainly none for pre-existing customary communities.

In terms of the communities' rights to information relating to developments concerning them, provisions in the contracts outlining the 'Conduct of operations' simply require the companies to act in accordance with generally accepted agricultural standards and consistent with good business practices, and to notify the government in case of business decisions with a substantial social or economic impact in Liberia.<sup>97</sup> Not only is this vague, but it is also limited to notifying the government, whereas there is no similar requirement for providing prior information to communities. Information and reporting on investor development and activities planning is therefore directed at informing the government only<sup>98</sup>, and contains no assurances that information (e.g. SEIA, Development Plans and other reports etc) will be provided to communities in advance of decisions being made that concern them, let alone in a language and form that is understood by local communities (as is required by international law and the RSPO principles and criteria).

No other procedural social safeguards are made clear in the contracts. Notably, the grant of rights in the concession agreements, which can be generically described as the 'government contract', is not conditional on completing any community-orientated and fully participatory information, consultation, negotiation, consent and compensation steps so as to fulfil a separate 'social contract' with customary land holders. As the UN Panel of Experts points out, the contracts only vaguely define the land area concerned, deferring demarcation until after the concession has been ratified by the Liberian legislature.<sup>99</sup> At this point the companies can proceed to identify, demarcate and develop land areas, and communities that are already legally (and economically) vulnerable are faced with a project that with the endorsement of the legislature has become a *fait accompli*, subject to fulfilling the environmental protection agency impact assessment requirements.

There is no incorporation or mention in the contracts of compliance with the key aspects of international human rights law or RSPO Principles and Criteria in respect of the treatment of customary rights. For example, there are no contractual provisions in either of the agreements that would guarantee a fully participatory SEIA process or Development Plan.<sup>100</sup> Nor are there any provisions requiring participatory mapping of existing customary lands, identification of land essential to community needs and sacred or otherwise culturally important areas.<sup>101</sup> Such processes would have needed to adequately take into account the collective nature of customary land ownership and management in many Liberian communities, overlaid by a clear set of customary rules on use of and access to land and resources by community members and customary decision-making structures. In the absence of such guarantees for meaningful and representative consultation and participation in the proposed development projects (including by women), the contract constitutes a failure on the part of the government to adequately protect the local communities' human rights, including *inter alia* their rights to property and development as well as their economic social and cultural rights.

As referred to above in paragraphs (2.12) and (2.13), where the rights to property and development are engaged, benefits must be shared (alongside the other requirements) and fair compensation agreed to avoid an unlawful violation of those rights. However, even with benefit sharing and compensation measures in place, a failure to observe the right to meaningful participation and FPIC in agreeing the terms of benefit sharing and compensation is contrary to international law and RSPO standards. The only mention of compensation in either contract is in the GVL contract in relation to community resettlement – see section (c) below. As a result, neither contract provides appropriate safeguards on the process of agreeing fair and equitable compensation with communities, including the issue of mechanisms for ensuring women are guaranteed equal access to and control over compensation payments.

Additional economic and other benefits provided for by the contracts are referred to in detail below – section (e) – however whatever other benefits the community receive, it is clear from the above provisions of the contract that these will not include deriving any long-term economic interest/social benefit from the investment in the concession land – any proprietary claim having been extinguished, potentially in perpetuity. This is particularly so in terms of the loss of non-moveable community assets such as orchards and other perennial cash crops.

Any such benefits must therefore refer to other positive outcomes (direct employment and associated benefits – schools, clinics etc). However, internal displacement to other areas risks land conflict elsewhere with an impact on the rights of other communities, which may also take an ethnic dimension along the lines described in paragraph (3.2.2). In addition, according to prevalent customary rules in Liberia, strangers (i.e. community outsiders) *may* be given land by other communities for temporary crops for subsistence use, but will not be allowed to grow permanent cash crops to replace those they have lost to the concession. The income from cash crops is a valuable economic benefit for communities, permitting for example the purchase of foods which they have not or cannot grow or hunt for themselves, payment of school or hospital fees, or zinc roofing and other consumables. Loss of this income is therefore likely to be inconsistent with the right to food and not to be deprived of the means of subsistence. In addition this is incompatible with the right to development and progressive realisation of a right to an adequate standard of living, and associated rights to health, education and adequate housing etc.

Internal displacement to cities combined with negligible employment prospects is likely to be even less consistent with community members' rights, carrying with it the loss of subsistence agriculture. Direct employment at the concession is likely to apply to a much smaller proportion of the population than previously subsisted from the land and natural resources. Despite this fact, there is no recognition or provision in the contracts for the gender-specific implications of the concession development, including the following foreseeable disproportionate impacts: on women's livelihoods from losing agricultural land; on men's livelihoods if they are forced into migrant labour elsewhere or in the cities (including the impact on quality of life resulting from dislocation from community, family and cultural ties); and associated impacts on children's well-being. In summary, the contractual provisions relating to rights over the land and resources in the concession area entail a breach of most if not all of the human rights relating to land and resources listed above at paragraph (2.2) for at least a large proportion of the local communities.

## **c. Resettlement<sup>102</sup>**

The SDPL and GVL contracts give both companies the right to request resettlement of existing communities, if they can demonstrate that they would 'impede development' of the concession and 'interfere with the activities' of the companies.

A key difference between SDPL and GVL contractual provisions on this point is that the latter allows for GVL's request for resettlement to be conclusively accepted if the government fails to respond to the request within 90 days. As highlighted in section (2.4) above, involuntary resettlement is considered a serious violation of international law except in the most exceptional circumstances. In light of this fact, allowing for the possibility of government agreement by default, the GVL contract fails to adequately protect the rights of the communities given the severity of the impact of involuntary resettlement on food, housing, property, development and other human rights. See section (e) below



for further discussion on food security implications and the right to food.

A further difference between the contracts is that in the SDPL contract both parties share the responsibility for resettlement, whereas in the GVL contract the government bears sole responsibility. The GVL contract also gives the government principal responsibility for determining rates of compensation and conducting resettlement negotiations with communities. By shedding responsibility for the consequences of its request for resettlement, GVL ties its own hands in being left unable to comply with its RSPO obligations and its responsibility to respect the human rights of the affected communities in the event that government does not do so on its behalf. This undermines the very basis of the corporate responsibility to respect human rights and voluntary standards such as RSPO, which exist to ensure that companies take steps to respect and protect human rights even where states fail to do so. Worryingly, the SDPL contract makes no mention of compensation at all, just mentioning ‘resettlement expenses’ which may or may not include community compensation depending on interpretation.

The principal oversight procedure for resettlement in both contracts is by means of a ‘resettlement committee’. In the case of SDPL, this would include two representatives from the community. One of these would be chosen by the investor, the other by the government. In the case of GVL, the committee is to be established by government, and must include leaders or their appointees from the settlers or local community. Under the contracts, SDPL and GVL are to share resettlement costs with the government<sup>103</sup>, and are given tax credits for resettlement expenses of 50 and 100 per cent respectively.

These provisions cement the assumption that the government is treating the land as its own, not subject to other community rights or interests, or certainly none that would restrict the government’s rights to grant exclusive leasehold rights over the land to the companies. This is most striking in GVL’s clear wish for a community-free concession ‘*to minimise operational, security and management difficulties*’. This is expressed in the provisions stating that as far as possible resettlement shall be effected ‘*in such a manner that eliminates or minimises the existence of enclaves between Developed Areas*’ and by ‘*minimising the number of enclaves within the Concession Area where inhabitants are permitted*’.<sup>104</sup>

These contracts contain no social safeguards on resettlement other than the resettlement committees, whose representatives are not self-chosen by the community but instead by the two parties. There is no provision in either contract guaranteeing representative participation by women from communities to be resettled. As a result there is no guarantee that the committee members will in fact be representative of the communities on whose behalf they would be speaking. GVL’s contractual provisions in this respect are only marginally improved by the requirement for community leaders or their appointees on the committee. However, there is no safeguard against co-option or corruption since representatives are chosen by community leaders and may not be representative of the whole community. Furthermore it is the government who has overall responsibility for establishing the committee, and the government not the community who will presumably also identify who these community leaders are. Both contracts therefore fail to make adequate provision for community participation, oversight or grievance mechanisms in respect of resettlement so as to comply with international law requirements and RSPO standards.

The contracts also contain cost and tax measures that if anything, incentivise resettlement (i.e. government subsidy and tax credit). Again, there is no mention of compliance with key aspects of international human rights standards (for example the UN Basic Principles and Guidelines on

Development-based Evictions and Displacement<sup>105</sup>) or the relevant RSPO principles & criteria in respect of resettlement. This is surprising given the seriousness with which international law views the issue of involuntary resettlement and forced eviction. In summary, these provisions fail to give sufficient weight to the human rights consequences of resettlement and neglect to make necessary steps to mitigate these impacts, such as participatory safeguards and grievance mechanisms, procedures concerning adequate prior information, benefit sharing and compensation and a guarantee that this measure be used only as a last resort when all other less oppressive avenues have been exhausted.

## **d. Specific rights accorded to the companies within the concession areas**

### ***Infrastructure***<sup>106</sup>

The contracts grant both companies the right to construct infrastructure within the concession area at their own expense. Measures to preserve existing user rights are restricted to ensuring that roads including those *‘used immemorially by the population’*, shall be open and free to use by the public, providing this does not *‘unreasonably interfere with Investor activities’*. GVL’s contract differs from SDPL’s in limiting this already small concession to customary rights, by adding additional provisions that even these roads can be closed or tolls imposed (for heavy commercial use) by mutual consent of the parties without the need for community consultation. In any case both companies may deny access to ‘private areas’, and with prior notice to government may impose ‘reasonable restrictions’ (including security gates) on roads and trails in the interests of the security of its assets, safety of employees and dependants. In an ‘emergency’ (left undefined) these roads or trails can be closed without notice, providing that the Investor notifies the Ministry of Agriculture immediately after closure.

These provisions fail to respect the customary rights of the communities, since there is no contractual obligation to consult or seek the FPIC of existing communities before constructing new infrastructure on customary lands, and developing and using procedures to control or prevent access to roads and trails. In addition, the provision includes only vague grounds on which access can be restricted, which are therefore open to abuse. There are no notice requirements to communities for restrictions on access or exclusion, and if these powers were to be abused, there is no procedural safeguard such as a grievance procedure through which customary communities could challenge those abuses. The provisions therefore fall well short of international human rights law and RSPO standards.

### ***Right to use timber***<sup>107</sup>

The concession agreement grants the companies the right to plant, cut and use timber (and rubber wood in the case of SDPL, and ‘vegetation’ generally in the case of GVL) for construction and infrastructure or *‘other Investor activities’*. GVL is given the additional right to sell timber to third parties, with net proceeds shared between the government and GVL.<sup>108</sup> Again, there is no requirement to consult and come to an agreement with communities on forest resource use or other social safeguards with respect to customary forest areas. There are no contractual protections for sacred forest areas, with obvious implications for cultural and religious rights and the HCVA requirements of the RSPO principles and criteria. In addition there is no requirement to conserve certain forest or vegetation areas for

community use. These provisions clearly impact on community rights to property, to food and means of subsistence, and to adequate housing, as communities hunt and gather foods from the natural resources on their customary lands, as well as building materials for houses and fuel from fire-wood and charcoal.

### ***Rights to extract water, stones, rocks, sand clay and gravel***<sup>109</sup>

This right is permitted by both contracts, though in the case of SDPL subject to the condition that this is not for sale and that this right cannot be exercised where it interferes with rights of third parties or with use by the government. GVL's contract permits sale of stones, rocks, sand clay and gravel,<sup>110</sup> but not water, with proceeds shared between the parties, but not with communities.

In terms of social safeguards for water use, SDPL '*may not dam any streams or use amounts of water that could materially interfere with the activities of farmers or residents being conducted*'. In addition to this provision, GVL's express permission to use water resources, sink bore holes and dam streams etc. is subject to the condition that they '*shall not materially deprive any tribes, villages, towns, houses, or watering places for animals of a reasonable supply of water insofar as such water has customarily been utilized by such tribes, villages [etc.]*'. Permission from government must be sought before damming any streams or other bodies of water, though this will be deemed as approved if government does not indicate a decision to withhold approval after the expiry of 60 days.

Water security is clearly a key component of interrelated 'adequate standard of living rights', including food (both as in the availability of water for irrigation, but also as sources of food – fish, crayfish and seasonal crops grown in swamp-lands such as rice etc.) and health (use of fresh, clean running water for hygiene and preventing spread of water-borne diseases). In the case of SDPL these provisions go some way to respecting the rights of farmers/residents if they qualify as having 'third party rights', however, since the thrust of the contract is to disregard non-registered customary property rights, it is not at all certain that these would qualify as third party rights. The provisions in the GVL contract are an improvement since they prohibit water use if they interfere with customary use, however given the extensive rights to resettle communities these provisions could be rendered academic if the customary users themselves are evicted from their customary lands, including wet-lands and other water sources. There are still no requirements to consult and come to an agreement with communities on the use of these resources or other social safeguards with respect to these areas, including grievance procedures. The approval for damming for instance is to be sought from government not communities, and again, approval is deemed granted if the government does not respond to the request within 60 days, further minimising the contractual protections afforded by the contract.

It is also unclear to what extent these provisions would apply to swamp areas and draining swamps, and other indirect hydrological impacts on swamps and other such wet-lands from new roads and other earth-works. Swamps are important areas for communities, including for food security (crayfish and rice production) and building materials (roofing thatch), with obvious implications for the right to food and adequate housing if thatch cannot be replaced and food sources are lost. If swamps are lost by draining, it is far from clear that this circumstance comes under the provisions of these sections of the contracts since the water is just being drained away. Draining from swamps has been a key cause for dispute by communities in SDPL affected areas of Grand Cape Mount because of the impact on food and housing.<sup>111</sup>

## **Security**<sup>112</sup>

Both contracts give the companies broad mandates to maintain their own ‘asset and employee’ security, for the purposes of maintaining law, order and security in the concession area. Although providing that there must be compliance with national laws and human rights, the companies are given the power to ‘*apprehend and detain*’, and ‘*search and exclude or evict unauthorised Persons from the Concession Area, and from such other areas as may be properly restricted for economic, operational or security reasons*’. There are some limited safeguards whereby the companies must notify the police of any detention as soon as practicable and no later than 24 hours, and *upon request* of the police, turn over the detainee/s to the police. However, the powers are in the whole extraordinarily broad and with inadequate safeguards to prevent abuse of rights to liberty and other civil rights, as well as the range of rights outlined at paragraph (2.2) relating to restrictions and exclusions from customary lands and forced eviction.

Concerns about the nature and transparency of private security arrangements for agricultural concessions are raised by the UN Panel of Experts, who recommend excluding individuals from combatant chains of command and/or involved in past human rights abuses, and internal codes of conduct relating to rules of engagement and human rights training.<sup>113</sup> None of these safeguards are provided for in the SDPL and GVL concession contracts.

## **e. Added value and socio-economic development**

Concession contracts could foreseeably attempt to mitigate some of the likely negative socio-economic impacts referred to so far in this analysis by a satisfactory degree of benefit-sharing. This would of course need to be in addition to (and not as a substitute for) the other rights protections listed above to ensure human rights and RSPO compliance, such as ensuring the right to meaningful participation and consent. The following features in the SDPL and GVL contracts negate any such social mitigation or related cost-benefit arguments.

## **Local monopoly**<sup>114</sup>

The contracts contains provision whereby the government promises to maintain the investor’s monopoly within the concession area and a buffer outside the concession area extending from 10 to 60 kilometres depending on the excluded activities. These excluded activities include licences to operate rubber and/or oil palm buying stations and processing plants. On an even greater scale, GVL’s contract excludes the government from providing new licenses to operate upstream oil palm processing facilities anywhere within the borders of Liberia, unless the facilities have sufficient surrounding land to satisfy their own processing capacity. These provisions create local monopolies and give a balance of power to the company in several key respects, not least in its relations with employees for whom it will be the principal employer over a very large area, but also in relation to the local rubber and palm oil market for which there will be no local competition. Poor labour practices and a downward pressure on prices for local small-holder or community produced rubber and palm oil are foreseeable consequences, with associated impoverishing impacts and consequences for related



social and economic rights. These provisions therefore serve the interests of the companies at the expense of the local community.

### *The ‘Out-growers program’ & benefits to local farmers*

A principle social development aspect of the contracts are the out-growers schemes, however the terms of the contracts suggest that this is not a priority to the companies or government. In the lists of warranties and representations, the companies explicitly exclude any commitment to holding the financial resources necessary to fund their respective out-growers programmes.<sup>115</sup> The terms of the contractual provisions on the out-growers programme also suggest that meaningful small-holder agricultural development is not the intention of these provisions. The contracts provide for the purchase price for palm products bought by the company from out-growers and local farmers to be reduced by the companies’ costs and ‘a reasonable mark-up’, so there is no price protection to compensate for the companies’ comparative local monopoly and no mechanism or grievance procedure for disagreements on pricing or other aspects of management or sale.<sup>116</sup> Furthermore, the companies are to *‘develop and exercise exclusive management of the land on a cost recovery basis, for the benefit of out-growers as shareholders in organised cooperatives’*, and has exclusive rights to the harvest.<sup>117</sup> Out-growers therefore have no management control over the land, and can only sell the harvest to the company, so their proprietary stake as cooperative shareholders gives them little practical bargaining power.

The land needed for the scheme (44,000ha and 40,000ha in the SPDL and GVL contracts respectively) is to be provided by the government *in addition* to the concession area, but within the gross concession area, and shall be provided by the government free of encumbrances. In addition, in both contracts the government undertakes to establish procedures for alleviating environmental and social impacts that may arise under the out-growers programs. In so doing the government therefore commits to overriding the human rights of communities already using land areas earmarked for the out-grower scheme, and the company takes no responsibility for the social and environmental consequences.

Under the terms of the programmes, the government is given the responsibility for selecting the out-growers (together with the company in GVL’s case). However, there is no requirement that the programmes will be participatory in any way (either in their design or implementation); no requirement for consent/consultation for the use of customary land for this purpose or open negotiations as to where this land will be or what the conditions will be for set-up and implementation etc.; and no guarantee that it will be limited to or preference given to local communities. In addition, there are also no specific provisions for ensuring the full participation of women in the scheme. Local communities are not even given a role in selecting the out-growers.<sup>118</sup> Furthermore, involvement of community representatives in establishing GVL’s out-grower scheme is expressly stated as ‘optional’.<sup>119</sup>

Ultimately, since the companies are not obliged to provide any financing for the out-growers schemes (which is the responsibility of the government), if no funding can be found the contracts allow the scheme to not take place at all. It is therefore perfectly foreseeable that the concession will be set up and operate for the lifetime of the contract without there ever having been an out-growers programme. The GVL contract has an additional provision giving the company the option of providing advisory support and farm supplies to ‘qualified’ Liberian farmers at cost, as well as palm oil research or training centres.<sup>120</sup> Again these activities are entirely discretionary and could remain on paper and left entirely unimplemented.

In essence, whether the out-grower and related contractual provisions are a progressive and beneficial form of small-holder development or not depends entirely on implementation by the company and the government, over which the local communities have no say. The out-grower schemes may take place on customary land, without the consultation or FPIC of communities and for the benefit of individuals outside those communities. If so it would be a further breach of the property, development and other human rights of those communities whose land it takes place on, to the benefit of only those who are selected for the programmes by the government. If the out-grower schemes are meant to compensate the local communities for loss of farmland, there are no interim measures for how they are to survive until the schemes are up and running (for which the companies are given three years, subject to funding), with obviously harmful implications on the right to food, health and education, and risks of internal displacement and land-related conflict.

### *Food security*

The contract commits the companies to selling a minimum local sales amount of palm oil, subject to there being sufficient domestic demand. SDPL is to sell at least 25% of the palm oil (by volume) on the domestic market, though only a fifth of this (5% of the total output) is at local market rates, and the remaining four fifths (20% of the total output) is at international rates.<sup>121</sup> Similar provisions are set out in the GVL contract. If there is insufficient domestic demand, both companies may export 100%. In any event the price provisions make it very easy for the companies to export at least 95% of their palm oil, since only 5% is to be sold at an affordable local market rate.

The contracts also allow for both companies to plant food on the concession areas (with the GVL contract also allowing employees, their dependants or associations/cooperatives to use concession area land for food), providing this is on areas not suitable for palm oil or rubber production, and providing (in SDPL's case) that it does not exceed 5% of the concession area.<sup>122</sup> The companies are both given a tax deduction for losses made in food production, presumably by way of an incentive to take up the option. However, it is hard to imagine the companies willingly taking up this option given the profitability of palm oil.

Finally, the contracts provide for some limited 'permitted farming', under which the companies must permit independent farming activities within the concession area in areas unsuitable to palm oil and rubber production by local communities who live in the concession area, or did so until resettlement.<sup>123</sup> Permitted farming is to be granted on a number of conditions, including that it is done on a non-commercial (i.e. subsistence) basis, and the farmer obtains the approval of the companies, which can be refused if they reasonably believe permission would pose a security risk.

As outlined above, communities use land both for subsistence food crops and to gain an income from cash crops. Notwithstanding the issues of participation and consent, to reduce community land use to subsistence use only reduces the socio-economic benefits gained from the land, and is inconsistent with communities' social and economic rights in the absence of any guarantee that this income be at least matched by that earned from formal employment at the concession. The provisions are vaguely defined and do not contain any procedural safeguards. For example, the companies have the discretion to decide what land is suitable for palm oil/rubber. This could feasibly extend to most or all of the plantation since the companies are likely to want only land that is suitable for palm oil, thus leaving little or no land for farming. The clause gives the government the power to review and dispute this determination, but the communities themselves have no access to any grievance procedure in respect of the operation of this provision. The right to refuse on grounds of 'interference with investor

activities' or 'security risks' is far too vague and open to abuse. Similarly, there is no grievance procedure open to the communities excluded on this basis, who are in effect seeking permission to farm on land that they have already used for generations.

In summary, none of the above provisions are likely to compensate to any significant degree for the problems of loss of land to grow, hunt and gather food, as caused by the presence of the concessions. This is particularly significant since very few people are likely to obtain permanent employment from the company compared to the number of people dependent on the concession area for their livelihood prior to its creation. Due to the loss of local food production, local food prices are likely to increase as food has to be transported from outside the immediate area. This has been born out in Grand Cape Mount where reports of food price rises are in the order of 100-500%. Those living in these communities fortunate to have family elsewhere survive on hand-outs from their relatives, and those without such family support are forced to leave their villages to find land elsewhere or search for work in cities where there are very poor employment prospects.<sup>124</sup> In conclusion, the concession contracts imply significant negative impacts on the local communities' right to food with associated impacts on the right to health. This is particularly worrying in a country already experiencing food insecurity and child stunting caused by malnourishment, and faced with the impacts and risks associated with global food market volatility and rises in fuel prices, as identified by the UN Independent Expert.<sup>125</sup>

### ***Formal Employment conditions***

The contracts makes a number of social provisions, the language of which implies provision for employees and their immediate dependants (spouse and unmarried minor children only) and in some cases government officials and their immediate dependants, rather than pre-existing local communities, as noted by the UN Panel of Experts<sup>126</sup>, with some exceptions. These provisions include the following:

- Health and sanitation in employee housing, mills and the estate compound.<sup>127</sup>
- Clean water and wells for employee residential communities.<sup>128</sup>
- Employee housing conforming to standards set out in appendices.<sup>129</sup>
- Medical care and treatment, with services and medicines free of charge to employees and dependants.<sup>130</sup> Both companies are committed to constructing and operating one hospital with basic facilities, but are given up to 10 years to do this, and presumably will not be free at point of use for community members who are not company employees or their immediate dependants. The GVL contract goes further than SDPL by requiring the company to provide reasonable access to healthcare facilities to local communities for ambulatory or emergency care, with fees reasonable to the economic level of local communities even if this means they are unlikely to the cover costs of the service.
- Free primary and high school education to employee dependants and investment of USD 25,000 per year for employee vocational and adult literacy training.<sup>131</sup> The GVL contract again goes further than SDPL in setting out a contractual commitment to spend a defined minimum funding amount on agricultural training for individuals originating from the concession area.<sup>132</sup>
- Both companies make a number of labour-related commitments in the contract, including employing only Liberians for unskilled labour positions, giving preference to qualified Liberian nationals where possible, and sets targets for a proportion of management positions, which it can fail to meet if it can show it has used all reasonable efforts.<sup>133</sup>

These benefits go to employees and their dependants under the SPDL contract, with some limited additional benefits going to local community members under the GVL contract. In addition, in some cases the benefits are provided to government officials working in the developed areas for prolonged periods. As highlighted above, since the plantation is unlikely to employ nearly as many members from the local community as previously subsisted on customary land, these benefits will go to a limited number of people, and a large remainder will be deprived of customary land, livelihoods and a means to feed themselves, in breach of the cross-cutting human rights already mentioned.

Furthermore, in the absence of safeguards in place to ensure that jobs go to those whose customary lands have been lost, the company is free to employ people from outside the community. This has been born out in Grand Cape Mount, where many permanent employees are 'outsiders', and many locals complain of only being given casual/day labour.<sup>134</sup> This gives rise to a risk of ethnic tension and conflict (e.g. directed at the Mandingo community used by SDPL for much of the transport/truck work or other migrant labourers) which is particularly dangerous in the context of Liberia's recent civil conflict and the occurrence of disputes with an ethnic dimension, as referred to by the authorities quoted at paragraph 3.10(d) above.

### *Other economic benefits*

The contract stipulates that SDPL is to give preference to Liberian goods and services where they are at least equal to comparable goods and services from outside Liberia.<sup>135</sup> However, this provision would easily be circumvented by asserting that domestic goods and services are unequal to their foreign counterparts.

With respect to value addition, great store is placed in SDPL's commitment to build a vegetable oil refinery, as evidenced by this being the condition for the grant of a further 100,000ha of land.<sup>136</sup> The GVL contract places less emphasis on this, providing an option to develop a refinery or other downstream activities if conditions are commercially viable.<sup>137</sup> However, both companies are given a maximum 10 years to conduct even a mandatory viability assessment, and 15 years to construct the refinery *if* the refinery is commercially viable.<sup>138</sup> These wider economic benefits are clearly both distant and not guaranteed.

The contracts oblige the companies to contribute to several social and commercial development funds, including a *Community Development Fund*<sup>139</sup>, an *Oil Palm Development Fund*<sup>140</sup> and in the case of SDPL only, a *Rubber Development Fund*<sup>141</sup>. The former, to be established 'for development purposes', is the one and only direct benefit for local communities set out in the SDPL contract, and one of only a few direct local community benefits in the GVL contract.<sup>142</sup> The contracts provides for fund management team being selected by the surrounding community, government and the companies. There are no provisions for ensuring adequate representation of women from the community on the management teams. Furthermore, decisions on management of the fund need to be by consent and the companies have the right to select half the representatives on the committee, so the companies have a very strong influence on how the funds are managed.<sup>143</sup> Furthermore, such a fund is unlikely to compensate for the immediate loss of land, food and livelihoods entailed by the creation of the concession.

The purpose of the latter two funds is unclear, but presumably they are generally intended for developing palm and rubber farming in Liberia. GVL's contribution to this fund, at 0.5 per cent of annual gross sales is half that of SDPL's, which is 1 per cent. The SDPL contract makes provision for



the management team being selected by the surrounding community, government and SDPL, whereas the GVL contract leaves this to a procedure ‘specified in the Law establishing the fund’. However, without a clear mandate, it would be easy for these funds to be misappropriated and have little discernible socio-economic impact. In addition to which the fund is conditional on the government constituting it within the Law of Liberia, which it is not obliged to do.

The contract also provides for a number of tax breaks, credits, deductions and notably, an export tax exemption<sup>144</sup> for exports of processed oil palm and rubber products.<sup>145</sup> Although an economic and fiscal analysis would be required to assess the likely economic and fiscal benefits of the contract as a whole, there is a *prima facie* case for considering the fiscal benefits from the contract to be less than optimum from a government revenue perspective.

The government may wish to cite the benefits of a wage economy to the local area of the concessions in response to this analysis, but this needs to be juxtaposed with the reality that the concession areas’ food production capacity will be decimated by the clearing of farm-land and forest and disruption to hydrological resources entailed by the concession. The result of this will be that the areas become net food importers as opposed to the net food exporters that they are likely to have been, with local food prices rising accordingly as set out above. Those with a wage will have to meet these heightened prices, while those without a wage will be internally displaced. As previously underlined, this puts many community members in a much worse position than prior to the development of the concession, which is inconsistent with their social and economic rights.

In summary, the socio-economic benefits entailed by the contracts are too small; cover too narrow a part of the community (mainly those with permanent employment); are ill-defined; and in some cases may not happen at all under the terms and conditions of the contracts. The ‘costs’ associated with the concessions to the local communities are therefore disproportionate to the corresponding benefits, and cannot therefore lawfully justify an interference with the many human rights that are engaged, including rights to property, development and food. It seems highly unlikely that they can justifiably be said to compensate for the contracts’ harmful consequences for local communities’ human rights.

## **f. Environmental protection<sup>146</sup>**

With respect to the environment, both contracts refer to compliance with national environmental protection law and the RSPO principles & criteria, which is the only reference to the company’s RSPO obligations in the contracts. Although this provision is progressive in and of itself, this fact rather suggests that the RSPO principles and criteria are viewed by the parties as primarily an environmental sustainability standard, and by implication appears to disregard its strong social standards, such as the requirement for observing the right to FPIC and not clearing HCVA land areas such as those essential to communities or sacred sites. This underplays the role of the social standards of the RSPO in the implementation of the contract by the companies, and misses an opportunity to harmonise the contracts with those standards (not to mention international standards generally, including human rights law) in guiding the terms and performance of the contracts on the part of both the companies and the government.

Both contracts provide for immediate reporting of ‘environmental incidents’ to the government, though what constitutes such an incident is left undefined, rendering it difficult to hold the

companies accountable for failures to report.<sup>147</sup> For example, it seems reasonable that this reporting requirement should include health emergencies among the local community and downstream that may be caused by concession activities relating to the environment, e.g. water-borne infections or contamination caused by water management, but this is not made clear. The GVL contract provides an additional provision giving the EPA the power to request further studies or an updated or amended Environmental Management Plan, which is a potentially useful procedural step were the EPA to identify environmental problems requiring further action.

## **g. Governing laws**<sup>148</sup>

The contract obliges the companies to comply with national laws (except where specifically excluded) and to *'conduct itself in a manner consistent with Liberia's obligations under international treaties and agreements insofar as those have the effect of law in Liberia'*. In theory this would incorporate all human rights laws to which Liberia is legally committed, and is again progressive on its face. However, without spelling out the key relevant aspects of international law that should determine the behaviour of the company, it is likely to remain a paper tiger. This is further underscored by the fact that the principal terms of the contract and associated underlying assumptions by both parties are *already* inconsistent with Liberia's international human rights law obligations as set out in this analysis.<sup>149</sup>

## **h. Periodic review**<sup>150</sup>

Both contracts make provision for review and renegotiation of the contracts where there is a *'profound change in circumstances'* from those existing at the commencement of the contracts. *'Profound change in circumstances'* is defined in the contract as any condition/s anywhere that *'result in a material and fundamental alteration of the conditions, assumptions and bases relied upon by the parties'* at the time the contract was formed such that the *'overall balance of equities and benefits reasonably anticipated by them will no longer as a practicable matter, be achievable'*.<sup>151</sup> It could be argued that the existence and extent of customary community rights to land (however foreseeable) is capable of coming under this definition. As such, this provision could be used as a target for strategies by communities and their civil society representatives or legal counsel to seek a periodic review of the contracts, with the aim of achieving contractual changes that would better promote and protect the affected communities' human rights.

## **i. Conclusion**

The analytical framework in Section 1 of this analysis set out two fundamental questions to be answered in this rights-based analysis of the concession contracts:

- (1) *What has the government done or not done, through the terms of the contract or otherwise, to fulfil its duty to promote and protect the human rights promulgated by instruments to which Liberia is legally bound?*

(2) *What have the companies done or not done, through the terms of the contract or otherwise, to fulfil their compliance with the social standards contained in the RSPO principles and criteria and their corporate responsibility to respect human rights?*

From the discussions above it is clear that the Government of Liberia has failed in both its obligation to ensure the contract does not create conditions in which the human rights of communities are put at risk, and in its obligation to ensure that the contractual terms sufficiently protect the human rights of communities likely to be affected by the concessions. This places the government in violation of its legally binding international commitments as set out in Section 2 above. In the same way, the companies have failed to ensure compliance with their corporate responsibility to respect human rights and their RSPO commitments.

The principal critique is a failure to adequately respond to the protection required by those international standards providing protection to communities' rights in respect of customary lands and natural resources. This includes the lack of provisions providing for adequate information, participation and consent at every stage of the development process, from preliminary mapping and surveying, SEIA, development planning and implementation – in essence the need for a fully participatory and legitimate 'social agreement' to complement the 'government agreement'. This is most marked in the provisions relating to resettlement whose seriousness deserves much greater protection for customary communities faced with forced eviction. Without these essential conditions, in addition to the harm experienced by communities in breach of their rights (loss of land, homes and livelihoods and food insecurity), the concessions are likely to increase the potential for dispute and conflict (as already seen in Grand Cape Mount), and lead to legal, commercial and reputational risks for both the government of Liberia and Sime Darby, Golden Veroleum and their respective investors.

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## Endnotes

- 1 Tom Lomax is a lawyer in the Legal & Human Rights team of the Forest Peoples Programme.
- 2 Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Prof. John Ruggie. Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, *'Protect, Respect and Remedy: a Framework for Business and Human Rights'*, Human Rights Council, 7 April 2009 (UN Doc. A/HRC/8/5).
- 3 Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Prof. John Ruggie, *'Guiding Principles on Business and human Rights: Implementing the United Nation's "Protect, Respect and Remedy" Framework'*, Human Rights Council, 21 March 2011 (UN Doc. A/HRC/17/31).
- 4 *Ibid*, see Foundational principles, page 13.
- 5 *Ibid*, and as set out in Principles 11 to 23.
- 6 *Ibid*, see in particular Principles 17 to 21.
- 7 *Ibid*, Principle 18.
- 8 Author's emphasis. The issue of inheriting human rights risks through mergers and acquisitions is particularly salient for the SDPL concession with its complex history of mergers and acquisitions dating back to the 1954 rubber concession agreement with BF Goodrich.

9 *Ibid*, see Principle 23.

10 For a detailed explanation of the lack of appropriate protection afforded by Liberian national law to customary land and resource rights, see Liz Alden Wily 'So, Who owns the forest?' (FERN, 2009) and Bruce, JW. & Kanneh, BN. 'Reform of Liberia's Civil Law Concerning Land: A Proposed Strategy' (Report to the Land Commission of Liberia, 2011).

11 Principle 23 and associated commentary (page 21) of Ruggie (2008) 'Guiding Principles', *supra* at note 2.

12 An example of this would be unfair compensation rates for loss of community land and resources that are leased to a concessionaire, as expressed in a document released by a government department. While on the face of it the company may look at these rates as mandatory, in actual fact a correct interpretation may be that the company can improve on these rates without being in breach of national law. This example relates to the experiences of communities in SDPL-affected Grand Cape Mount where SDPL used clearly inadequate one-off compensation rates as specified in a list produced by the Ministry of Agriculture, without consulting and negotiating rates with communities first.

13 African Convention on Human & Peoples Rights (ACHPR), Art. 14 (right to property) & 21(2) (right to recovery of property and compensation in circumstances of dispossession); UN International Convention on the Elimination of all forms of Racial Discrimination (ICERD), see in particular Art. 5(d) (v) (right to not to be subjected to racial discrimination in the right to property); UN Declaration on the Right of Indigenous Peoples (UNDRIP), Art. 10 (right not to be forcibly removed from lands without FPIC), Art. 25 (right to maintain spiritual relationship with traditionally owned/occupied land and resources), Art. 26 (right to lands and resources they use and occupy), Art. 29 (right to conservation and protection of the environment of their lands and resources); Convention on Biological Diversity (CBD), Arts. 8(j) (right to respect for traditional knowledge and lifestyles of indigenous and local communities) & 10(c) (duty on states to protect and encourage customary use and culture with respect to biological resources).

14 International Covenant on Economic Social & Cultural Rights (ICESCR), Art. 11 (right to a adequate standard of living, including adequate food and continuous improvement of living conditions); ICESCR & International Covenant on Civil & Political Rights (ICCPR) Arts. 1 (right of people to not be deprived of own means of subsistence).

15 ICESCR Art. 11 (right to an adequate standard of living, including housing and continuous improvement of living conditions); ICERD, Art. 5(e)(iii) (right to not to be subject to racial discrimination in the right to housing).

16 ACHPR, 16 (health); ICESCR, Art. 12 (highest attainable standard of physical and mental health); UNDRIP, Art. 24 (right of indigenous peoples to health and traditional medicines).

17 ACHPR, Art. 17 (rights to take part in cultural life) & Art. 8 (freedom of religion); CBD, Art. 8(j) (right to respect for traditional knowledge and lifestyles of indigenous and local communities); ICESCR, Art. 15 (right to take part in cultural life); ICCPR, Art. 27 (right of minorities to their culture); UNDRIP, Art. 11 (right to redress and restitution for impacts on indigenous peoples' cultural traditions and customs without FPIC).

18 Non-discrimination generally: ACHPR, Arts. 2; Art. 2 (non-discrimination); Racial discrimination in the enjoyment of political, civil, economic and social rights: ICERD; UNDRIP, Art. 2 (Non-discrimination of indigenous peoples); UN Convention on the Rights of the Child (CRC), Art. 30 (non-discrimination of indigenous children); Gender equality: UN Convention on the Elimination of ad Discrimination against Women (CEDAW); ACHPR, Art. 18(3); ICESCR & ICCPR, Arts. 3.

19 ACHPR, Art. 20 (right of peoples to self-determination); ICESCR & ICCPR, Arts. 1 (peoples' right to self determination); UNDRIP, Art. 4 (self-determination of indigenous peoples).

20 ACHPR, Art. 22 (right of peoples to development); UN Declaration on the Right to Development (UNDRD), General Assembly resolution A/RES/41/128 of 1986; UNDRIP, Art. 32 (right of indigenous peoples to determine their own development priorities).

21 ACHPR, Art. 21 (right of peoples to freely dispose of wealth and natural resources); ICESCR & ICCPR, Arts. 1 (peoples' right to freely dispose of natural resources and not be deprived of own means of subsistence); CBD, Art. 10(c) (duty on states to protect and encourage customary use and culture with respect to biological resources).

22 ACHPR, Art. 24 (right of peoples to satisfactory environment favourable to development); UNDRD, in particular Art. 1 (right of peoples to participation and enjoyment of development), Art. 2 & 8 (right to active, free and meaningful participation in development and in the fair distribution of the benefits



resulting therefrom).

23 See footnotes 26, 27 and 28 for further details. There is domestic support for this principle in Liberia's national laws (see for example Article 66 of the *Revised Laws and Regulations of the Hinterland* 1949) which provided for property rights to tribal lands, irrespective of whether they had an official deed, with the tribes' interest held on trust by the chief as trustee. There is some confusion as to whether the Hinterlands Law retains some legal force in a reissued form, or whether the Aborigines Law (which preceded it and only provided for 'use and possession') has itself lapsed. It is therefore unclear what the status of these laws is today, which creates a vacuum on the issue of the legal status of customary rights to land. See Wiley (2007), *supra*, at note 9, pages 130-134 for details.

24 Article 14 of the ACHPR provides a two-pronged test, such that lawful interference with the right to property may take place only "*in the interest of the public need or in the general interest of the community*" and "*in accordance with appropriate laws*" (which includes both national and international law).

25 If the contracts discriminate directly or indirectly against one or more particular ethnic groups, for example the Vai people in Grand Cape Mount or the Kru in Sinoe County, this would be an additional argument for the contracts being unlawful in human rights terms.

26 Committee on Economic, Social and Cultural Rights, General Comment 4, *The right to adequate housing* (Sixth session, 1991), para. 18, 1991, (UN Doc. E/1992/23), annex III at 114; Commission on Human Rights resolution 1993/77, 1993, (UN Doc. E/C.4/RES/1993/77); Commission on Human Rights Resolution 2004/28, 2004, (UN Doc. E/C.4/RES/2004/28); Committee on Economic, Social and Cultural Rights, General Comment 7, *Forced evictions, and the right to adequate housing* (Sixteenth session, 1997), para. 14, (UN Doc. E/1998/22), annex IV at 113 (1998); and See also paragraph 200 of the African Commission on Human Peoples Rights decision in the *Endorois Welfare Council v Kenya* (276/2003) – the "Endorois Case".

27 See *inter alia*, see the *Endorois Case* (2003) e.g. at para 209, in particular with regard to the ACHPR right to property (Art. 14), as well as the right to development (Art. 22); UNDRIP Art 19 (indigenous peoples' right to be consulted through their own representative institutions and to obtain FPIC before taking administrative measures affecting them), plus Arts. 8, 10, 19, 28 and 32, as well as numerous other jurisprudence under ICERD, ICESCR, and ICCPR.

28 Whereas for indigenous peoples, the right to FPIC is a function of their right to self-determination, the right to FPIC of non-indigenous groups can also be argued on the basis of the cross-cutting rights impacting on land, outlined at para (2.2). For example, in the African regional human rights jurisdiction, the ACHPR recognises 'peoples' rights on which the right to lands and resources can be founded in Arts. 20 (right to self-determination), 21 (right to dispose of wealth and natural resources, and right to recovery of property and compensation in circumstances of a peoples' dispossession), 22 (right to development) and 24 (right to an environment favourable to development) whether that people self-identifies as indigenous, tribal or otherwise. In addition, individual rights to property can be aggregated if exercised in concert with others, e.g. as a community, and thereby seek collective protection under the Art. 14 ACHPR right to property. Finally, exercising minority rights to culture under Art. 27 ICCPR where culture is inextricably linked to land can also be used to protect rights to land and resources – see for example the decision of the UN Human Rights Committee in *Angela Poma Poma v. Peru* (UN Doc. CCPR/C/95/D/1457/2006) para 7.6: '*the admissibility of measures which substantially compromise or interfere with the culturally significant economic activities of a minority or indigenous community depends on whether the members of the community in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy. The Committee considers that participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community*'. Finally, exercised separately or in conjunction with the above, the right not to be racially discriminated against in the ownership of property alone or in association with others (see Art. 5(d)(v) of ICERD) could be relied on by any group or community employing a land tenure system that is customary and collective, and which is not recognised by the state or otherwise under-protected, and to require protection for these collectively owned customary lands using ICERD.

In addition, ACHPR Resolution 224 on a Human Rights-Based Approach to Natural Resources Governance (2012) has recently called on State parties to confirm 'that all necessary measures must be taken by the State to ensure participation, including the free, prior and informed consent of communities, in decision making related to natural resources governance'. For further details see Special Rapporteur on Food, Olivier de Schutter's '*Large-scale land acquisitions and leases: A set of core principles and measures to address the human rights challenge*' (2009), in particular principal (2), page 13 & '*The emerging right to land*' (2010) 12 *International Community Law Review* p. 319.

29 For further guidance on the procedural requirements relating to the right to FPIC, see the *Endorois*

case (2003), including paras. 280-283, 291 and 292.

30 *RSPO Principles & Criteria*, in particular criteria 2.2, 2.3, 7.5 and 7.6 and associated Guidance Document. Criterion 2.3 states that ‘Use of land for oil palm does not diminish the legal rights or customary rights, of other users, without their free prior and informed consent’.

31 This is based on various human rights, including those relating to property, land and natural resources, and the right to development. See for example Resolution 224 of the ACHPR (supra, note 26) and CBD Articles 8(j) and 10(c), including *The Akwé: Kon Guidelines* on impact assessments at [www.cbd.int/doc/publications/akwe-brochure-en.pdf](http://www.cbd.int/doc/publications/akwe-brochure-en.pdf) and the Recommendations from *CBD Decision VII/10 of COP 6* for the conduct of cultural, environmental and social impact assessment regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities. Under the indigenous peoples international law framework see jurisprudence on the requirements of prior social, cultural and environmental impact assessments in the *Endorois case* (2003), paras 227 and 228.

32 *RSPO Principles & Criteria*, in particular criterion 7.1 as well as criteria 7.5 and 7.6, plus associated guidance and indicators at pages 37-39 of the *Guidance Document* on the RSPO Principles and Criteria for Sustainable Palm Oil Production, March 2006.

33 *RSPO Principles & Criteria*, in particular criterion 7.6.

34 *Supra*, at note 26.

35 *RSPO Principles & Criteria*, criterion 7.3, plus pages 40 & 41 of the 2006 *Guidance Document*.

36 See for example: UNDRD Art. 1 (right of peoples to enjoyment of development), Art. 2 & 8 (right to active, free and meaningful participation in distribution of the benefits resulting from development). See also the *Endorois case* (2003), paras 227 & 228, 294-298, and UNDRIP, including Art. 10: “*Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.*”.

37 *RSPO Principles & Criteria*, in particular criterion 7.6.

38 Final report of the UN Panel of Experts on Liberia submitted pursuant to paragraph 6(f) of Security Council resolution 1961, 7 December 2011 (UN Doc. S/2011/757) & Final report of the Panel of Experts on Liberia submitted pursuant to paragraph 9 of Security Council resolution 1903, 17 December 2010 (UN Doc. S/2010/609).

39 See Panel of Experts (2010) *supra* at note 46, para 130, where the Panel notes the dispute and protest precipitated by expanding existing concessions, as well as Panel of Experts (2011) *supra* at note 46, para 222, for details of the problematic history relating to the Guthrie/BF Goodrich plantation itself which now forms part of the wider Sime Darby concession.

40 Panel of Experts (2011), 251, plus see also 172 to 174.

41 Panel of Experts (2010), paras 99 and 100; Panel of Experts (2011), at para 215. Concerns in this respect are raised by the panel in respect of both the Sime Darby and Golden Veroleum palm concessions.

42 Panel of Experts (2011).

43 Panel of Experts (2011), para 215.

44 *Ibid*, para 216.

45 *Ibid*.

46 Panel of Experts (2010), para 119.

47 Panel of Experts (2011), para 216.

48 Panel of Experts (2010), para 129.

49 Panel of Experts (2011), paras 224 & 71.

50 Panel of Experts (2010), para 126.

51 *Ibid*.

52 Panel of Experts (2011), para 217.

53 Panel of Experts (2010), para 59.

54 *Ibid*, para 99.

- 55 *Ibid.*
- 56 *Ibid.*
- 57 See RSPO complaint letter at: [http://www.forestpeoples.org/sites/fpp/files/news/2012/10/Final%20complaint%20to%20%20RSPO%20on%20Golden%20Veroleum-%20Butaw-sinoc%20county%20\(2\).pdf](http://www.forestpeoples.org/sites/fpp/files/news/2012/10/Final%20complaint%20to%20%20RSPO%20on%20Golden%20Veroleum-%20Butaw-sinoc%20county%20(2).pdf)
- 58 See RSPO complaint letters at: <http://www.forestpeoples.org/sites/fpp/files/publication/2011/10/sime-darby-complaint-liberia-affected-communities-oct-2011.pdf> and, <http://www.forestpeoples.org/sites/fpp/files/publication/2011/10/fppletter-rspo-about-npp-violation-liberia-sept-2011.pdf>.
- 59 Available from [www.fao.org/SPFS/pdf/CFSNS\\_report\\_final.pdf](http://www.fao.org/SPFS/pdf/CFSNS_report_final.pdf).
- 60 Report of the independent expert on technical cooperation and advisory services in Liberia, Charlotte Abaka, 14 February 2008 (UN Doc. A/HRC/7/67), para 47.
- 61 Report of the independent expert on technical cooperation and advisory services in Liberia, Charlotte Abaka, 15 August 2008 (UN Doc. A/HRC/9/15), para 38. Endorsed by Human Rights Council Resolution 9/16.
- 62 Abaka (August 2008), *supra* at note 60, para 40. Endorsed by Human Rights Council Resolution 9/16; Report of the independent expert on technical cooperation and advisory services in Liberia, Charlotte Abaka, 6 February 2006 (UN Doc. E/CN.4/2006/114), para 28, and 29: 'The major human rights concern in the plantation is the blurred line between State and corporate responsibility and the consequent reluctance of either side to take the initiative to protect human rights'; OHCHR Summary of stakeholder submissions to the first UPR, 15 July 2010, para 41; Report of the independent expert on technical cooperation and advisory services in Liberia, Charlotte Abaka, 28 February 2007 (UN Doc. A/HRC/4/6), para 2, 19 and 20.
- 63 Abaka (February 2008), *supra* at note 59, paras 28-32.
- 64 UN Committee on the Rights of the Child, Concluding Observations, 36<sup>th</sup> Session, 1 July 2004 (UN Doc. CRC/C/15/Add.236), para 23 & 24.
- 65 UN Committee on the Elimination of Discrimination Against Women, Concluding Observations, 44<sup>th</sup> session, 7 August 2009 (UN Doc. CEDAW /C/LBR/CO/6), para 34. See also paras 32/33 and 36/37 regarding education and health of rural women respectively.
- 66 *Ibid*, para 39: 'The Committee urges the State party to pay special attention to the needs of rural women and ensure that they participate in decision-making processes, including community decision-making processes and development planning'.
- 67 UN Committee on the Elimination of all forms of Racial Discrimination, concerns and recommendations from the report of its Fifty-ninth session, 30 July-17 August 2001 (UN Doc. A/56/18), para 434-436; Abaka (February 2008), *supra*, para 7; and as observed in the OHCHR compilation of reports on Liberia, 20 August 2010, paras 20, 21, 41, 47.
- 68 OHCHR, Technical Assistance and Capacity Building, Report of the Office of the United Nations High Commissioner for Human Rights on the progress made in the situation of human rights in Liberia and activities undertaken in the country, 27 August 2009 (UN Doc. A/HRC/12/42), para 4.
- 69 Report of the Working Group on the Universal Periodic Review (UPR), 4 January 2011, para 32: Liberia stated that 'In all cases in which alleged land disputes had led to social unrest, Liberia was encouraging social dialogue to resolve issues; was conducting widespread public awareness campaigns on land rights; and was addressing broader, unresolved underlying factors, such as authority and legitimacy, that had fuelled land and property disputes'. The independent expert on technical cooperation and advisory services in Liberia notes the recent occurrence of land/property related violence and killings, referring to it as a 'worrisome trend' and 'a conflict resolution area deserving of attention' (Abaka, (August 2008), *supra* at para 3. Endorsed by Human Rights Council Resolution 9/16. See also Abaka, 6 February 2006 (UN Doc. E/CN.4/2006/114); para 23 in relation to steps needed with regard to returning refugees and internally displaced persons.
- 70 CRC Concluding Observations, 61<sup>st</sup> Session, 5 October 2012 (UN Doc. CRC/C/LBR/CO/2-4), paras 29 & 30.
- 71 *Ibid*, para 29.
- 72 See note 72.
- 73 *Ibid*.
- 74 *Ibid*, para 30. Other recommendations including that Liberia: 'Expedite the revision of the Labour Act with a view to fully incorporate ILO Convention 182 into national law regarding the prohibition of hazardous work

by children and regulating child labour in compliance with the Convention’;

‘Collect data on children engaged in hazardous work in private companies, disaggregated by age, sex, geographic location, ethnicity, socio-economic background and type of work and analysed for policy formulation to prevent the occurrence of violations and provide effective remedies when they occur’ and ‘Take into account the United Nations Business and Human Rights Framework adopted unanimously in 2008 by the Human Rights Council in promoting child rights in the context of business.’

75 See for example: Lanier, Mukpo, & Wilhelmsen “Smell-no-taste” *The Social Impact of Foreign Direct Investment in Liberia* (2011, Columbia University: New York); Siakor, ‘*Uncertain Futures: The impacts of Sime Darby on communities in Liberia*’ (2012, WRI/SDI: Montevideo/Monrovia); and Lomax, Kenrick & Brownell, ‘*Sime Darby oil palm and rubber plantation in Grand Cape Mount county, Liberia*’ (forthcoming 2012, Forest Peoples Programme: Moreton in Marsh).

76 As per 16 August 2010 concession agreement between the Government of Liberia and Golden Veroleum (Liberia) Inc., contract recital and Articles 3 and 4.

77 As per 30 April 2009 concession agreement between the Government of Liberia and Sime Darby Plantation (Liberia) Inc., contract recital and Articles 3 and 4.

78 SDPL 2009 concession, Article 5.5. For ease of reference, articles from either contracts will simply be referred to by their initials and the article number, e.g. Article 5.5 from the SDPL contract will be referred to in the footnote simply as ‘SDPL 5.5’. The same shorthand will be used for GVL, though in cases where the article is the same in both contracts, the footnote will simply mention the article number in common, e.g. common article 20 from both SDPL and GVL contracts will be footnoted simply as ‘5.5’.

79 SDPL 33.9.

80 *Ibid.*

81 SDPL 1.37; GVL 1.

82 SDPL 1.69; GVL 1.

83 See note 61.

84 SDPL 1.69, 4.1(a),(b) & 4.9; GVL 1, 4.1(a),(c) & 4.9.

85 20.

86 21.12.

87 3.3 & 27.1.

88 SDPL 8.5 & 8.6; GVL 8.2, 8.6 & 8.7.

89 SDPL 4.1(c) & 5.6; GVL 4.1(d), 5.1 & 8.6.

90 5.1.

91 3.2.

92 SDPL 8.10; GVL 8.11.

93 GVL 8.6(a).

94 SDPL 8.6. See also GVL 3.2(d) which provides for remedial extension of the period of the contract on certain conditions where delays are not primarily the fault of GVL (e.g. delays in resettlement), with all other deadlines and periods for performance extended accordingly.

95 17.

96 15.1.

97 8.1.

98 23.

99 *Supra*, at note 49.

100 See common Art. 23.2 for contractual provisions on preparation of the Development Plan.

101 SDPL 4.1(c) and GVL 4.1(d) sets out the process of identifying and mapping concession land. This GVL contract provision states that GVL’s initial survey would include a title search at the land registry. Since customary lands are likely to be unregistered, this is an inadequate due diligence step for identifying customary land interests.



- 102 4.3.
- 103 However there are cost limits with companies only having to pay up to a specified cost limit per hectare, above which the government must subsidise the resettlement.
- 104 GVL 4.3(a) & (c).
- 105 See Annex 1 of the report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, 11 June 2007 (UN Doc. A/HRC/4/18).
- 106 4.4.
- 107 4.4(d).
- 108 GVL 4.4(f).
- 109 4.4(e).
- 110 GVL 4.4(f).
- 111 See Lomax, Kenrick & Brownell (2012), *supra*, at note 74.
- 112 9.3.
- 113 *Supra*, at note 48.
- 114 5.4.
- 115 6.4.
- 116 SDPL 8.9; GVL 8.10.
- 117 SDPL 15.2; GVL 15.3.
- 118 In both contracts at Appendix V, the reporting requirements are that the companies will report the out-grower/small-holder planted acreage to government, however there are no requirements to report on what proportion of the out-growers are from previously resident local communities or disaggregated data on participation by women, and no transparency or public availability of information about the scheme and its operation.
- 119 GVL 15.3.
- 120 GVL 15.2. Qualifying conditions to be set by the company.
- 121 SDPL 8.7; GVL 8.8.
- 122 SDPL 8.8; GVL 8.9.
- 123 SDPL 8.10; GVL 8.11.
- 124 This was observed and reported to the author by communities during field-research carried out by the author and colleagues for the purposes of the publication, Lomax, Kenrick & Brownell (2012) *supra*, at note 103.
- 125 *Supra*, at notes 58, 49 and 60.
- 126 *Supra*, at note 44.
- 127 9.1.
- 128 9.4.
- 129 9.5.
- 130 10.
- 131 11 & 12.2
- 132 This includes a minimum 50,000USD on a school of agriculture at a Liberian national university, and a further 50,000USD on scholarships to study agriculture outside Liberia.
- 133 12.1.
- 134 See Lomax, Kenrick & Brownell (2012), *supra*, at note 74.
- 135 13.
- 136 SDPL 14.2.
- 137 GVL 14.2.

138 14.2.

139 SDPL 19.5; GVL 19.7.

140 SDPL 19.6; GVL 19.8.

141 19.7.

142 For ease of reference, the other direct benefits to local communities in the GVL contract include access to emergency medical services and a contribution to some agricultural scholarships.

143 The provisions for this Committee in the GVL are an improvement on those in the SDPL contract. See Article 19.8 for details, including a specification that the fund not be used for the general work programs of the administrative offices and officials, and that the fund be used 'for the benefit of Liberian communities in the affected counties'. This provision also provides for making the information relating to the Committee's financial arrangements publicly available, with some additional information being made available on GVL's website, namely the programs being funded and the amount of the funding.

144 SDPL 21.9; GVL 21.8.

145 21.

146 16.

147 Appendix V.

148 31.

149 The GVL contract states that where the contract conflicts with new laws passed by the Liberian legislature (except for the Liberian constitution), the contract will take precedence. Subject to the rules of Liberian contract law it seems likely that this is an invalid and unenforceable provision since it is unlikely to be acceptable 'to contract out' of future laws in view of the law-making supremacy of the legislature.

150 32.

151 SDPL 1.75; GVL 1.