Guidance Note: Paralegal Intervention in Defending Community Rights in Land Acquisition Cases

Prepared by NAMATI: Innovations in Legal Empowerment

August 2014

Table of Contents

Introduction 1

Overview of Sierra Leone Land Law and Policy 2

A) Introduction 2

B) Provinces Land Act, Cap. 122 3

C) Draft National Land Policy 4

Advocating for Land Rights of Communities 4

A) Pre-Land Lease: Advice for Communities Considering Leasing Land to a Foreign Company 4

B) Post-Land Lease: Working with Communities Who Are Already Subject to a Land Lease 6

C) Pre OR Post-Land Lease: Negotiating or Re-negotiating a Land Lease 7

# Introduction

NAMATI prepared this curriculum in response to a request for more guidance on the role that paralegals can play in defending and asserting the rights of communities in land acquisition cases, beyond the crucial task of fact-finding.

There is a great need for paralegal involvement in land acquisition cases in Sierra Leone. Nearly one-fifth of Sierra Leone’s arable land is now covered by or under negotiation for large-scale lease agreements, aiming to extract deposits of iron ore, platinum, gold, diamonds, bauxite, and rutile and to utilize the fertile land to produce ethanol, rubber, oil palm, and other agricultural products. The Government of Sierra Leone points to the burgeoning minerals and agribusiness industries as holding the potential to lift Sierra Leone to a middle-income country, in addition to bringing jobs, health clinics, and schools.

On the one hand, Sierra Leone boasted an economic growth of 20.1% last year; On the other hand, its Human Development Index remains one of the lowest in the world. This disparity shows that the growth in the economy is not actually benefiting many of the communities most affected by the large-scale land acquisitions. In fact, in Namati’s experience, many of the communities whose land has been acquired or who live next to a large-scale land acquisition by a mining or agribusiness company suffer negative impacts. To create more equitable land agreements that benefit holders of large-scale land licenses and communities in a “win-win” situation, paralegals can strive to preventatively meet with communities to inform them of their rights, work with the communities to decide the best option for them given a potential land lease, and work with communities already affected by a lease to advocate for better environmental policies or to renegotiate the contract.

# Overview of Sierra Leone Land Law and Policy

## A) Introduction[[1]](#footnote-1)

The current situation in the land sector is not only chaotic but also unsustainable. There is an urgent need to address issues relating to land tenure in Sierra Leone in order to meet the demands of citizens and to stimulate investment. In order to achieve this, paralegals can help ensure that the land tenure system is transparent, effective, and equitable.

Prior to the colonial era, the legal system throughout Sierra Leone was based on the customs and traditions of the people. While we often use the phrase “customary justice system” to describe these sets of laws, there are numerous customary laws based on traditions and cultures. For example, customary justice may be different among the Mende as compared to the Temne. Even within one group, there are local variations of customary law.

In general, under customary law, there are three types of land ownership:

* **Communal land:** The title to communal land vested in the Paramount Chief as representative for the benefit of the community as a whole.
* **Family land:** The title vested in the family as a unit, and the head of the family has rights of management, control, and supervision. This is the most common form of land tenure to be found throughout the provinces. In Sierra Leone customary law, the term “family” is generally defined as a group of persons tracing descent from a common ancestor, either patrilineally or matrilineally, and claiming title to lands within a particular chiefdom. It is generally agreed upon that the head of family cannot sell family lands without the authority of the family. The head of the family must in general consult with the family members. However, there are conflicting views as to when, how much and whom the authority needs to consult with when dealing with routine land matters.
* **Individual land:** Title vests in the individual. Traditionally, individual tenure was rare, although not unheard of, as land was fragmented. There is currently individual tenure in the provinces, often in urban areas, as a result of the introduction of the cash economy and English ideals.

Today, this customary law is what reigns in the provinces. There are several statutes, however, that also apply to the provinces. The main statute at issue in large-scale land acquisition cases is the Provinces Land Act, Cap. 122, discussed below.

## B) Provinces Land Act, Cap. 122

**Summary:** The Provinces Land Act, Cap. 122 gives powers to the Chiefdom Councils to make decisions on leasing land to strangers “for and on behalf of” the community. What this means is that if a “non-native,” or someone from outside the community wants to lease land, he or she must seek approval from the Chiefdom Council. The Chiefdom Council can allow for a maximum lease term of 50 years to a non-native, with options to renew for 21 years at a time. Critics of the law believe it undermines the traditional ability for families with family title and individuals with individual title to freely exercise their full rights to control their land, including leasing it.

**Key provisions** of the Provinces Land Act are:

* “[A]ll land in the Protectorate is vested in the Chiefdom Councils who hold such land for and on behalf of the native communities concerned;”
* “No land in the Protectorate shall be occupied by a non-native unless he has first obtained the consent of the Chiefdom Council to his occupation of such land;”
* “No non-native shall acquire a greater interest in land in the Protectorate than a tenancy for a term of fifty years . . . for a second or further terms not exceeding twenty-one years.”

Non-native is defined by the Act as a person not entitled by birth to rights in land in the Province. One objective of the Act when it was enacted in 1927 was to regulate the occupation of the Protectorate lands by settlers from the adjacent Colony (Creoles) and to safeguard the interest of the indigenous communities in their land. The statute was enacted at a time when the landowners would invariably have been in a weaker bargaining position because of their inability to match the superior economic and educational strength of the so-called “non-natives” from the Colony.

However, today, there are many problems with this law. One major issue is that it gives more authority to Chiefdom Councils than occurred under customary law, where land-owning families had authority to manage lands (see section above). Now *all* land to be occupied by a non-native has to be approved by Chiefdom Council, regardless of if the land is held under communal or family tenure. Under customary law, however, the head of the family that had title to land had a very prominent role to play. While the statute does say that Chiefdom Councils hold land “for and on behalf of” the communities concerned, the language is imprecise. The law does not further indicate what the relationship between the Chiefdom Councils and the native communities is to be.

## C) Draft National Land Policy

The Draft National Land Policy for Sierra Leone is a project by the Ministry of Lands, Country Planning, and the Environment and the United Nations Development Program, with a steering committee of representatives of Parliament, Law Reform Commission, Fourah Bay College, NGOs, and private sector officials.

Among its objectives are to promote a sustainable balance between accommodating investments while simultaneously safeguarding local interests, particularly relating to gender equality and rights of women.

It recommends amending the Provinces Land Act, Cap 122 to include precise language in statutes about duties to act for the benefit of communities concerned. It suggests the need to dispel the impression that state or governing bodies “own” the land.

It is important to know about the Draft National Land Policy to know the direction that the government claims it is going. Because the Provinces Land Act, Cap 122 is a weak law, advocates need other sources of law and policy to bolster their claim that communities have the right to approve land leases and to have leases benefit them.

# Advocating for Land Rights of Communities

This section has three sections, depending on what stage the community is in when the paralegal becomes involved in their case. The paralegal should review all sections to be aware of all issues that arise in land lease cases and that could arise later in the clients’ case.

## A) Pre-Land Lease: Advice for Communities Considering Leasing Land to a Foreign Company

A paralegal should consider conveying the below to the communities facing a large-scale land acquisition.

**1. You have the right to keep your land and say “no” to any land lease deal.**

Communities have the right to have their land held for and on their behalf by chiefdom authorities. For this reason, a community is **never obliged** to enter into a land negotiation or accept a land deal. They always have the right to say “no” to any land lease deal. The benefits of this decision are: it is a firm decision to continue to use your land to cultivate crops, it holds the land for use by future generations, you avoid the process of negotiating a land lease deal, and you avoid any risk of the company making commitments that it later does not uphold.

The drawback of this decision is that, if you receive competent legal assistance, you may be able to work out a deal with a foreign company that offers a ‘win-win’ situation to your community and the company. **However, a ‘win-win’ deal is only possible when the community has competent legal assistance in negotiating the lease, writing the lease, and enforcing the lease’s terms.**

**2. You have the right to enter into direct negotiations with the company and then refuse a deal.**

Communities also have the right to start direct negotiations with the company and to then decide that they are no longer interested in pursuing negotiations. Perhaps they are interested to see what the company will offer them. They may hear the offer and decide it is not enough, in which case they can walk away from the deal. Entering into negotiations **does not** mean you have to agree to any lease deal. You – and the company – can always walk away from a negotiation.

**3. You have the right to enter into negotiations with the company to lease parts of your lands.**

Your community may be interested in exploring the option to lease some parts of its land, but not all of it. In such a case, you can work amongst the community to designate which lands you would be interested in leasing and at what terms. If this is something the community is considering, you should meet to discuss and agree on the below questions. You may need to meet several times to think through all of the questions below. **Be sure to include all members of the community, including landowners, land-users, women, elders, youth, and activists to ensure unity in your collective decision. Communities are stronger in land negotiations when they are unified.**

* Which lands would the community be open to leasing?
* What is the annual benefit in the form of revenue that the community receives from this land? What is the annual revenue the community or designated landowners would demand of the company?
* What would the community like to see in exchange for this land lease? Ideas include:
	+ A certain amount of funds designated to assisting in the building of a school or training of teachers.
	+ Improved roads linking villages and towns.
	+ A certain number of employees from the community to be hired by the company at a full-time basis.
	+ A certain amount of funds to be designated to building a hospital, or purchasing equipment or medicine for a hospital already in existence.
	+ A certain percentage of the company’s annual profits to be provided into a community development fund.
* What are the environmental impacts you may anticipate from large-scale agricultural use of these lands? What are the measures that would need to be included in the land lease to help reduce the harm of these impacts?

The drawback of this option is that it will require constant monitoring to ensure the company is consistently meeting its obligations. Continuing to work with legal empowerment organizations will be essential.

## B) Post-Land Lease: Working with Communities Who Are Already Subject to a Land Lease

Many communities in Sierra Leone feel they are locked into an agreement that their Paramount Chief made without their consent, with inadequate consultation with the community, or with intimidation and pressure for the community to sign without full information as to the negative consequences of the land deal.

In such a situation, there are several steps a paralegal can undertake to support the community in achieving a result that is in their best interest. These steps are outlined below:

1. **Obtain a copy of the lease agreement.** The lease agreement has information on the payment, number of acres, and investor activities. The lease agreements for African Minerals, London Mining, Octea Mining, Sierra Rutile, and Vimetco are available online at <http://www.nma.gov.sl>. Education yourself and the community about the lease: Get as many details as you can about the plan, including what the agreed-price was, the number of acres, and potential future impacts and benefits on your community.

2. **Obtain a copy of the Environmental, Social, and Health Impact Assessment (ESHIA) from the company or the Environmental Protection Agency.** You may need to firmly remind authorities that holders of large-scale land licenses are required to conduct ESHIAs and that ESHIAs are, by law, “non-confidential.” (*See* the Mines and Minerals Act Article 133(3) for further language to bolster your claim).

3. **Encourage the community to form a temporary committee of landowners, land users, women and traditional authorities to discuss what harms they are facing and what they would like to see done**. Remember, the community has the right to assert interests in owning, managing and using the land.

4. **Do everything out in the open as much as possible** and involve the whole community to discuss the investor’s plans, grievances, and what the community would like to see change.

5. **Encourage the community to develop rules for how this temporary committee will operate and make decisions**. For example, the rules could emphasize that major decisions are to be made together.

6. **Discuss the value of long-term peace and stability and honestly discuss protocol about being offered one-off compensation to appease concerns.** Discuss the protocol of the committee. Encourage everyone to be honest about what individuals want so that everyone is on the same page and can speak with a unified voice. Remind the community of the value of long-term peace, stability, and land access for their children.

7. **Encourage the community to remain calm and peaceful as they work through the problem together.** Tell them to stay away from harming company vehicles or blocking the roads. The community cannot afford to become embroiled in criminal suits when the emphasis should be on fighting the land deal through legal channels.

8. **When possible,** **engage traditional authorities to ask them to communicate the community’s concerns with the investor’s “point person**.” Work with the community to explain the grievances and what the community would like to see done. Encourage the traditional authorities to communicate these concerns with the investor’s point person.

9. **Identify the harmful impacts & mitigation measures the Environmental, Health, and Social Impact Assessment (EHSIA) states that the company will bring.** The EHSIA states the harmful impacts of their activity and their proposed mitigation measures. For example, a company may state that one harmful impact will be increased air pollution due to drilling and truck traffic. It may state that its mitigation measure will be to soak worksite area with water to reduce air pollution. Make a list of the mitigation measures that the company has not yet done.

10. **Ask and negotiate for what you want.** Using these lists, remind the tribal authorities that the company has made a commitment and the company has a duty to follow through on the terms of that commitment. This includes their promises for benefits to the community (for example, schools, clinics, roads, and jobs) *and* mitigation measures (for example, soaking cleared areas with water).

## C) Pre OR Post-Land Lease: Negotiating or Re-negotiating a Land Lease

At any stage in the land lease process, the community may require your assistance in advocating for them in a potential negotiation, either preliminary negotiations, or with a draft lease, or with a finalized lease that requires renegotiation of its terms.

In such a situation, look out for one-sided lease terms that will hurt community rights to manage land. For example, watch out for provisions that indicate the company has exclusive possession over all villages, rivers, and forests of the leased land, with the ability to remove any buildings or structures. Any mention of relocation should emphasize that the company will pay for the relocation on land that is suitable for the community.

Also watch out for terms that say the company shall “endeavor” to train employees, assist in primary and secondary education, provide health care, or ensure that the project is environmentally sound. Instead, advocate for result-oriented obligations toward the community. For example, strike out a clause that says the company will “endeavor” to train employees and indicate that the community wants a clause that says the company will train and employ for the duration of the contract 200 employees from the village.

Make sure that there is adequate crop compensation paid to families who will lose land. Ask the families to calculate the net revenue they make each year per acre and ask the company to provide crop compensation in that amount. For example, if a community makes 350,000,000 Leones per year per acre, the company should offer a crop compensation of 350,000,000 Leones per year per acre. This should be *in addition* to the surface rent (the standard rent is $5 per acre per year – although you should advocate for as much as the community deems fit).[[2]](#footnote-2)

Some leases state that in the event of a breach by the company of its obligations, remedies will be limited to damages (rather than termination of the contract, as is standard under contracts law). Be sure to say the community is not amenable to this clause and that the community expects mutual obligations and mutual rights with regards to breach.

Watch out for clauses that indicate that disputes must be settled in a foreign city by arbitration—a clause that renders formal arbitration nearly impossible for the poor. Instead, discuss what dispute resolution mechanism will enable both the company and the community to bring suit, if required.

Be sure to work in any company promises to the community into the actual lease agreement. For example, if the company has promised the people that it will build a hospital, incorporate this provision into the contract document itself for greater enforceability in court if need be.

A starting point for a sample lease agreement is found at the end of the [Sierra Leonean Guidelines for Sustainable Agricultural and Bioenergy Investment](http://www.fao.org/energy/39236-0c8648696dd1c2302a98a613391200e1e.pdf).

1. This section on Land Law and Policy draws heavily from Ade Renner-Thomas, *Land Tenure in Sierra Leone: The Law, Dualism and the Making of a Land Policy*, AuthorHouse, 2010. [↑](#footnote-ref-1)
2. Remember that under the Mines and Minerals Act § 34, 50% of surface rent goes to landowners, 15% to the District Council, 15% to Paramount Chiefs, 10% to Chiefdom Administration, and 10% to a Constituency Development Fund. [↑](#footnote-ref-2)