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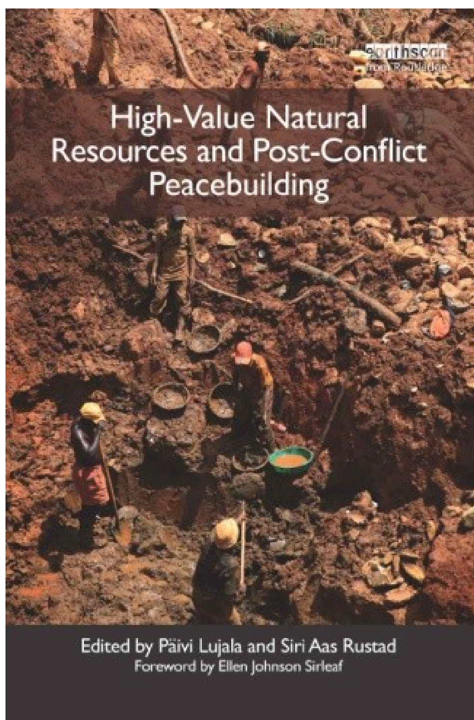

Contract renegotiation and asset recovery in post-conflict settings

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Contract renegotiation and asset recovery in post-conflict settings

Philippe Le Billon

Properly managed, high-value natural resources can help consolidate peace by providing jobs, revenues, and infrastructure. Sharing resource wealth can also provide an incentive for cease-fire agreements between belligerents. But when high-value resources are subject to unfair contracts or diverted to war profiteers, they can undermine the transition to a durable peace. This chapter describes two principal means of addressing such problems: (1) reappraising and renegotiating resource exploitation contracts and (2) freezing, recovering, or claiming compensation for stolen assets.

Contract reappraisal and renegotiation can increase public revenues, provide greater transparency and accountability, and support the regulation of the social and environmental impacts of resource sectors. Over the long term, through the cancellation of poorly run concessions, reappraisal can also attract higher-quality investments that are more fiscally advantageous for the government. Finally, a well-run reappraisal scheme that yields demonstrably successful development outcomes can strengthen trust in, and improve the legitimacy of, the government.

To deal with war profiteering, the United Nations Security Council (UNSC) has made increasing use of (1) asset freezing, in which assets are rendered inaccessible to their (illegitimate) owners, most notably to curtail funding for further hostilities, and (2) asset recovery, in which assets are returned to their rightful owners or allocated to victims who require compensation. Such measures are often undertaken on the basis of investigations conducted by sanctions committees and panels of experts. The objective of asset recovery is not only to shore up public revenues for post-conflict recovery,[1] but also to signal an end to impunity for war profiteering and to discourage extractive companies and banking institutions from

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[1] Although some funds may be recovered through the repatriation of assets, others may be irretrievable because of contractual provisions inherited from previous governments. International aid can temporarily mask these losses, but they will become more apparent when foreign aid declines and countries are most in need of sustained revenues.

participating in resource looting. In some cases, host governments have sued individuals and firms that have profited from the exploitation of conflict resources (Harwell and Le Billon 2009).

This chapter is divided into three parts: (1) a discussion of the reasons for, and approaches to, contract reappraisal and renegotiation; (2) a consideration of efforts to freeze, recover, or claim compensation for stolen assets; and (3) a brief conclusion.

CONTRACT REAPPRAISAL AND RENEGOTIATION

During or shortly after a conflict, resource concessions are often awarded by authorities that have questionable legitimacy. Politicians, cronies, rebel groups, mercenary outfits, or members of the armed forces may receive resource rights, either on their own or as part of power-sharing agreements. Even in peaceful times, the negotiation of contracts for high-value resource projects is often marred by secrecy, corruption, and lack of expertise, resulting in terms that are unfavorable both for the state and the populace. Moreover, such negotiations rarely involve consultation with, or the approval of, local communities; as a result, the most vulnerable local residents may be taken advantage of by local leaders and by wealthier households eager to tap into the new revenue streams.

The drive for post-conflict contract reappraisal stems, in part, from concerns, largely among development nongovernmental organizations (NGOs), about the effects of the liberalization of extractive sectors.[2] Such liberalization has been promoted since the 1980s, most notably by the World Bank, as a means of increasing foreign direct investment and economic output; it has also been promoted by the home governments of international mining companies, which provide substantial support to facilitate overseas ventures.[3] One problem with contracts made under conditions of liberalization, however, is that the terms may reflect the limited bargaining power of post-conflict states; specifically, the host countries are often at a disadvantage because of the obvious risk of investing in a post-conflict setting (Emel and Huber 2008).

More generally, high risk and low returns tend to operate in a vicious cycle. The risks associated with damaged physical infrastructure, the potential for renewed conflict, and regulatory uncertainty not only put the host government at a disadvantage in its negotiations with investors,[4] but also tend to attract

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2 Liberalization generally involves the opening of resource sectors to foreign investment, easier profit repatriation, and weaker environmental and social regulations (Bridge 2004; Christian Aid 2009).

3 On the case of Canada, see Campbell (1998).

4 For some companies, hostilities and high risk may be considered an advantage. For example, the stock market dropped in response to the cessation of hostilities in Angola, probably because peace would bring about more intense competition and stronger government bargaining power (Guidolin and La Ferrara 2007). (The authors sampled seven companies listed on the exchanges of Toronto, Canada; Johannesburg, South Africa; and Australia.)

high-risk companies that may be more inclined to use bribery, deploy private armed protection, and come up short in the realm of corporate social responsibility.

Both local government and development agencies—eager to fast-track foreign direct investment—may turn a blind eye to the backgrounds and records of these companies, a decision that has implications both for new contracts and for older ones in need of renegotiation. For example, contracts may be awarded to companies that have poor records in terms of corporate social responsibility; ventures may be permitted that are mostly "mining the market"—that is, speculating on the future value of concessions, rather than bringing in investment, creating jobs, and generating tax revenues; or companies may be allowed to cherry-pick—to take the most profitable ore or timber out of the concession in the shortest time, while diminishing the long-term commercial value of the entire reserve. In some cases, the emphasis on foreign investment is political in origin: domestic rulers may favor foreign companies and businesspeople out of a desire to avoid creating a business class that could fund (or become) a source of political opposition.

Yet another problem is that decisions with long-term impacts are often based on short-term considerations. Warlords focus on winning the next battle—and when warlords become politicians, they focus on winning the next election (meanwhile securing their futures through corruption, in case of defeat). Thus, both warlords and politicians may ignore long-term economic interests in favor of resource contracts that bring quick returns; such returns can then be used, for example, to pay soldiers and civil servants whose salaries are in arrears—an important move for staying in power. As an election approaches, announcements of massive incoming foreign investment may help win votes and secure the backing of foreign donors. It is essential to build safeguards again such short-term incentives.

Host-country leaders may also be more eager to pursue investment on the part of a foreign company, which can jump-start operations, than to promote the development of domestic champions within the extractive sector. Foreign companies have many advantages; for example, they are generally in a better position to fast-track investment, ramp up exploitation, and build infrastructure. In addition, foreign companies may be more likely to incorporate socially responsible initiatives into their business practices, although the extent of such initiatives will depend on the demands of local communities, on the firms' relationship to the government, and on the extent to which overseas constituencies hold companies accountable for meeting their official standards for corporate social responsibility. In fact, foreign companies are often the only option, especially in capital- and technology-intensive resource extraction: there are simply no domestic companies able to take on the work. When the capacity of local companies has been worn away by the conflict and its aftermath, partnership between foreign and domestic companies—including the employment and training of local workers—may help revive such capacity.

Nevertheless, the pursuit of foreign investment may have several disadvantages for a post-conflict government, and for the effective transition to a peaceful and prosperous society:

- It may lock the resource sector into an arrangement with a poorly regulated foreign company (although it may admittedly be better regulated than a domestic one, especially if the foreign company is publicly listed and subject to minimum disclosure requirements).
- Foreign companies, preferring to concentrate on their core activities, may have little interest in spawning upstream or downstream businesses within the resource sector because of the significant risks involved.
- Foreign companies may choose to diversify into entirely different sectors (as many domestic oil companies have done, with various degrees of success).[5] In addition, foreign companies may not be interested in investing in local communities or may be prevented from doing so by the government.

Thus, while foreign companies may help jump-start the local economy, their long-term impacts, particularly with respect to economic diversification, are more problematic. Finally, there is the matter of taxes. Host governments often provide major tax incentives to attract large-scale investment and demonstrate that the country is "open for business" (Le Billon and Levin 2009). Although the overall impact on host governments' tax revenues has varied, observers have pointed to the long-term risk of lower fiscal returns on nonrenewable resources (Bridge 2004; Otto 2006).

Arguably, whether the resource companies are public or private, national or foreign may matter less than the capacity of the host-country institutions that are regulating them; this concern is relevant to both new contracts and to renegotiation. To avoid rushing projects into inadequate institutional settings, donor agencies, local authorities, companies, and civil society groups must cooperate to strengthen institutional capacity and to implement resource projects that are capable of delivering broad development outcomes.

Strategies

The reappraisal and renegotiation of resource exploitation contracts signed during or immediately after a conflict offer a valuable opportunity to improve the development outcomes of resource exploitation. But there are important questions about the timing of such undertakings. On the one hand, the earlier reappraisal and renegotiation are implemented, the better: first, allowing the contracts to remain as they are implies tacit acceptance by post-conflict authorities; second, the interest and influence of external actors, who may be able to assist in bringing about

[5] On the cases of national oil companies based in the Middle East, see Marcel (2006); on Angola's oil company, Sonangol, see Soares de Oliveira (2008).

better contracts, is the greatest during the early post-conflict phase. On the other hand, given the background and incentives of transitional authorities (especially domestic authorities, such as "governments of national unity," which bring all armed factions into a power-sharing agreement), rushing into reappraisal and renegotiation may leave the door open for a new round of poorly negotiated contracts. One option is a two-phase process in which audits, reappraisal, and discussions of reforms would occur under the transitional authorities, and renegotiations would occur under, and be put in place by, a post-transition government—that is, a government that is brought to power through a general election of both the chief executive and the legislature.[6]

Reappraisals may result in the cancellation, renegotiation, or confirmation of existing contracts. Donor agencies and other international organizations should help sustain reappraisal and renegotiation processes by providing technical assistance and supporting the host-country civil society groups that demand and monitor such efforts. To gain the support of domestic authorities, donors may consider providing funding to make up for revenue losses during review periods.

Contract reappraisal and renegotiation generally involve a systematic review of extractive sector activities and contracts, including those that involve state companies, by interministerial, parliamentary, or tripartite commissions (government, NGO, and donor-agency representatives). Contracts that are determined to fit the definition of "odious contracts" may be canceled.[7] The reappraisal and renegotiation process may also include reappraisal, for tax purposes, of business activities conducted during the war, and the imposition of penalties on companies that knowingly traded in "conflict resources."[8] Reappraisal and renegotiation are challenging, primarily because of the stakes involved and the risk of costly and lengthy legal battles.

One of the first steps is to ensure the legality of the contracts that are already in place. In Liberia, for example, none of the logging contracts that were due for reappraisal could be proven to be legal; thus, it was relatively easy to cancel them (Blundell 2008). Most importantly, ensuring legality requires the full disclosure of contracts (including any confidential clauses), corporate structure, and ownership.[9] Contracts must also be closely reviewed for evidence of tax

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[6] It would be naive, however, to think that elections alone can bring transition to a close.

[7] An odious contract, like "odious debt," is undertaken against the interests of the people, without their consent, and with the full awareness of the creditor. For a discussion of these two concepts, see Khalfan (2006) and Alvarez-Plata and Brück (2008).

[8] According to Global Witness, an international NGO whose work focuses on breaking the link between natural resources and conflict, *conflict resources* are those "whose systematic exploitation and trade in a context of conflict contribute to, benefit from or result in the commission of serious violations of human rights, violations of international humanitarian law or violations amounting to crimes under international law" (Global Witness n.d.).

[9] Confidential clauses may be suspended if they are superseded by the reappraisal legislation.

evasion and of abusive practices such as tax holidays, transfer pricing, biased commodity-pricing mechanisms, and the sheltering of liabilities; provisions allowing such practices should be revoked.[10] In the course of reappraisal, conflicts can emerge on a number of levels; for example, companies and governments may disagree about confidentiality clauses or about the validity of new legislation in the resource sector (especially if the contract currently in place includes stabilization clauses that effectively freeze the legal setting and preclude the application of new legislation).

Among the concerns associated with contract reappraisal is the risk that renegotiations will give way to, or even be motivated by, corruption (Chêne 2007). Another is that if reappraisal criteria are not clear, companies may be deterred from future investments out of concern that they might be subject, at a later date, to unpredictable criteria. This concern can be addressed by the adoption of international standards, such as those included in the Natural Resource Charter.[11] Other measures that can help in this area include an assessment of institutional vulnerability, to identify the risk of corruption; the creation of an autonomous regulatory agency that is separate from the ministries that are in charge of the daily management of resource sectors; and the selection of reappraisal teams that have strong expertise and as few conflicts of interest as possible.[12] Another risk is that disgruntled companies, especially those that have lost contracts, will seek compensation through international arbitration. Although compensation has been standard practice where industries have been nationalized, companies that have signed contracts during hostilities are often on very weak legal grounds; in Liberia, for example, contracts with all logging companies were canceled after they failed to demonstrate that they had been operating legally during Charles Taylor's administration.

Yet another risk is that reappraisal may delay projects—and thereby delay investment, jobs, and tax revenues. Concerns about delay may be intensified by

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[10] Under transfer pricing, prices declared at export are set artificially low, to reduce tax liability; the importing entity (which is often located in a tax haven) then resells the commodity at a higher price. The same approach can be used in reverse for the importation of staff and materials. Under biased commodity-pricing mechanisms, prices are determined and indexed to the advantage of the company, thereby reducing taxes. Companies shelter liabilities by creating "independent" subsidiaries and subcontractors; so, for example, a subsidiary that owed compensation for environmental damages would simply declare bankruptcy. For purposes of tax evasion, subsidiaries can be headquartered in territories with lax regulations.

[11] See www.naturalresourcecharter.org.

[12] Reappraisal teams are diverse but generally include legislative representatives from the major political parties; officials from relevant ministries; prominent members of civil society organizations; and experts on taxes, the resource sector in question, and contractual law (such experts are often paid for by donor agencies). Nominations to reappraisal teams are often made by political parties and civil-society umbrella organizations, in consultation with donor agencies and international financial institutions, but may also be made by the head of state.

the cyclical character of resource prices, creating an incentive to rush projects when prices are high or rising.[13] Finally, there is the risk that reappraisal will further undermine the legitimacy of the political class without providing a suitable alternative—which could, in turn, further radicalize elements in the population. As will be seen in the following section, Liberia provides an example of relatively successful reappraisal and renegotiation, but this was not the case in the Democratic Republic of the Congo (DRC), where the reappraisal and renegotiation process further tarnished the reputation of the political class and caused the country to largely miss the commodity boom that occurred between 2003 and 2008.

Examples

The next two sections describe contract reappraisal and renegotiation efforts in Liberia and the DRC.

Liberia

Liberia has had a number of successes with contract reappraisal and renegotiation.[14] President Ellen Johnson Sirleaf not only canceled logging concessions, but also renegotiated an iron-ore mining contract that had allowed the company to determine the price of iron ore—and thereby control its own taxation level.[15] A number of factors contributed to the substantially improved terms of the new contract, including Johnson Sirleaf's background in banking, her personal involvement in the renegotiation, and her international profile as Africa's first elected female president; finally, there was the effort undertaken by Global Witness to publicly expose the inequities in the previous contract (Global Witness 2006, 2007) (see table 1).

The renegotiation of a second major contract, a Firestone rubber concession, also yielded significant improvements, including a quadrupling of the lease price; a reduction in the risk of transfer pricing, accomplished through the use of international market prices;[16] a fifty-year reduction in the duration of the contract; and improved housing for workers (Kaul and Heuty 2009; Stier 2009). Critics had a number of concerns about the Firestone contract: inadequate time for public consultation (only two days); a reduction in the U.S.-based parent company's

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[13] From the perspective of investors, the incentive to expedite projects may be offset, however, by the fact that development prices are higher during boom periods. The link between boom-and-bust cycles and investments is not straightforward.

[14] For a detailed analysis of the renegotiation process, including challenges and outcomes, see Kaul and Heuty (2009). On international oversight of renegotiations, see Ford and Tienhaara (2010).

[15] The contract was originally made between Mittal Steel and the previous transition government.

[16] Transfer pricing is a means of accounting for the value of goods and services transferred within a company; when applied across tax jurisdictions, however, it is often used to evade taxation.

Table 1. Renegotiation of Mittal iron-ore mining contract in Liberia: Summary of changes

Initial contract	*Renegotiated contract*
Mittal sets iron-ore price.	Iron-ore price determined by international market price.
Five-year tax holiday, with unlimited extension.	No tax holiday.
Obligations are guaranteed only by the concessionaire (a subsidiary of Mittal).	Obligations are guaranteed by the parent company.
The ownership of the main national railway line and deep-sea port were transferred to Mittal.	No transfer of railway or port; no exclusive rights to use of railway or port.
Extended and backdated the equitable-treatment clause, which required that Mittal be treated similarly to all past and future companies in sectors other than iron ore.	Equitable-treatment clause limited to the iron-ore sector; no backdating.
Concessionaire has rights to all minerals in the concession area.	Concessionaire has rights to iron ore only.
Contract governed by United Kingdom law.	Contract governed by Liberia law.
Minimal social obligations.	Recruitment of senior managers from within Liberia; health care obligations toward workers.

Sources: Global Witness (2006, 2007).

direct social and environmental liability; government regulation of pricing; and the inclusion of a clause that limits future government regulation of the industry (Global Witness 2008a). More generally, formal consultations with NGOs, easier public access to contracts, and stronger backing from international donors and agencies would likely have improved the process. Nevertheless, contract renegotiations in Liberia stand as models of success, thanks largely to an engaged leadership, a collaborative and unified government negotiation team, and "world-class" technical assistance (Kaul and Heuty 2009, 14).

Democratic Republic of the Congo

Three main processes influenced the renegotiation of mining contracts in the DRC: a World Bank–sponsored liberalization of the mining sector and two sequential contractual review processes undertaken by parliamentary and interministerial commissions. In 2002, the World Bank established a new mining code to increase foreign direct investment and to facilitate the partial privatization of a largely publicly owned sector (Mazalto 2005). This donor-driven effort also sought to reassure foreign investors by providing greater contractual stability and regulatory predictability, particularly in light of the DRC's past history of nationalizing industries; contract renegotiations and cancellations (apart from those of targeted public companies) were not a priority. In contrast, the goal of the two contractual review processes was to reassess the legality and fairness of past contracts,

including those of foreign investors, and to develop clear recommendations for renegotiation or cancellation. Final renegotiations, however, remained firmly under the prerogative of the Congolese president—and proved to be limited in scope.

Although the Transitional Parliament Commission was established on April 2, 2003, to reassess contracts passed in the DRC during the civil wars of 1996–1997 and 1998–2003, it did not begin its work until May 2004.[17] The commission, which was chaired by opposition leader Christophe Lutundula, had a limited budget from the DRC government (only US$8,000), but it had significant financial support from the World Bank (US$443,000). Nevertheless, the commission faced several problems. First, there were delays in nominating members because some political parties were initially excluded, and there were intraparty negotiations

[17] The commission was established by resolutions 16 and 19 (DIC/CEF/01 and DIC/CEF/04) of the Inter-Congolese Political Negotiations: Final Act, which was signed in Sun City, South Africa, on April 2, 2003.

Note: The DRC constitution, which was ratified in 2005 and came into effect in 2006, mandated that within three years the eleven provinces be redivided into twenty-six. As of August 2011, the redivision had not yet taken place.

over the nominations. Second, the main political parties, including those in the government—the People's Party for Reconstruction and Democracy, the Movement for the Liberation of the Congo, and Rally for Congolese Democracy-National—refused to collaborate with the commission; only the smallest party in the transition parliament, the Rally for Congolese Democracy–Movement for Liberation, co-operated (NIZA 2006).

The commission submitted its report to the Bureau of the National Assembly in June 2005, but debate within the assembly was repeatedly postponed, allegedly by senior politicians who were implicated in the contracts (Human Rights Watch 2005).[18] The report was finally provided to parliament (and leaked on the Internet) in mid-February 2006. The commission recommended the renegotiation or cancellation of sixteen contracts, judicial investigation of twenty-eight Congolese or international companies, and the prosecution of seventeen people for fraud. Neither parliament nor the executive branch of the government took heed of the report.

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[18] The Bureau of the National Assembly is the secretariat for the legislative body.

Further undermining the commission's work, the report was politicized by Lutundula's affiliation with the Alliance for the Renewal of the Congo, a political party that presented itself as seeking to break from the practices of the principal parties. In the view of some politicians, Lutundula's political affiliation gave him a vested interest in tarnishing the principal parties.

The Interministerial Commission for the Revisitation of Mining Contracts (Revisitation Commission), launched by the Minister of Mines in April 2007, reviewed sixty-one contracts that had been signed with Congolese state companies during the two wars (1996–1997 and 1998–2003) and under the transition government (2003–2006).[19] The Revisitation Commission received limited assistance from foreign donors; only Belgium provided significant support (about US$100,000, through the Carter Center, for legal advice). Several domestic and international civil society organizations also provided advice.

The Revisitation Commission's report, completed in November 2007 but not publicly released until March 2008, stated that of the sixty-one contracts that had been reviewed, thirty-eight had been renegotiated and twenty-three had been canceled for irregularities.[20] An independent review by the Carter Center (2009), which had access to some of the renegotiated contracts, assessed the renegotiations as a "missed opportunity," arguing that

- The "vast array of divergent obligations" would make the contracts difficult to oversee and enforce, especially given the DRC's weak regulatory apparatus.
- Although the renegotiations increased one-time upfront payments, the payments were contingent on economic conditions (such as resource prices and the profitability of mining ventures) and therefore unlikely to be made.
- The renegotiations offered no clear long-term benefits in terms of stronger tax regulation.

In addition to the three major initiatives discussed so far, the Congolese judicial system also reviewed—and canceled—a number of mining and logging concessions. This initially gave credence to the notion that existing institutions (in this case, the judiciary) had the independence and capacity to review the legality of previously awarded contracts, unlike the two commissions that had so far attempted to do so. The involvement of the courts, however, raised concerns about the absence of a concerted approach to contract review that would bring

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[19] See Minister of Mines (2007). The thirty members of the Revisitation Commission were drawn from the office of the president and the office of the prime minister; the ministries of mines, finance, budget, justice, and industry; and specialized agencies such as the Mining Cadastre. Members of national civil-society organizations were invited as observers.

[20] The initial mandate had allowed for a category of contracts that could remain unaltered, but none qualified (IPIS 2008).

together all three branches of government. Finally, because of the particular company that had been targeted by the judicial procedure, there were concerns about political interference.[21]

Overall, given the lack of transparency and independent review that characterized the situation before (and, to some extent, during) the efforts of the commissions, the contractual reappraisal initiatives appear to have yielded minimal long-term benefits for the DRC, while further undermining the credibility of the political class and all branches of government. Moreover, the DRC's inability to bring the reappraisal and renegotiation process to a positive conclusion increases the risk that international arbitration will vindicate the ousted companies that have challenged the decisions of the Congolese government (*Le Potentiel* 2009).

FREEZING, RECOVERING, AND CLAIMING COMPENSATION FOR STOLEN ASSETS

While contract negotiations seek to direct current and future natural resource revenues to the state, the goal of asset recovery is to track down and repatriate the proceeds generated by illegal resource exploitation, as defined by domestic legislation or international sanction regimes. The principal steps in the recovery process are to find the assets, freeze them, identify their rightful owners, and determine the conditions for their repatriation.

Many governments and courts—or, in some cases, the UNSC—impose conditions on repatriation. Despite the difficulties involved, post-conflict political transitions offer a major opportunity for asset recovery because of the confluence of a number of factors, including a change in regime, the presence of international security forces and international courts, and financial and diplomatic support from international donors—not to mention media coverage.

Tracking down assets requires expertise, judicial support, and collaboration from financial institutions (Winer and Roule 2003).[22] Recovery is often slow and costly, and efforts are often ineffective—notably because of lack of material evidence, the high speed of fund transfers, lack of collaboration between jurisdictions, the immunity of perpetrators who are still in power (or are protected by current governments), and legal loopholes and inconsistencies (Smith, Pieth, and Jorge 2007). Even when the assets are still within the country and there has been a change in government, seizure may be difficult. The government of Liberia, for

[21] Boss Mining's contract was canceled and awarded to Katanga Mining because Boss Mining was about to take over Katanga Mining (Kabemba 2008).

[22] In 2006, in one of the rare cases of legal prosecution, a Dutch timber merchant, Guus van Kouwenhoven, was initially sentenced to eight years of imprisonment for breaking the UN arms embargo on Liberia. A Dutch court of appeals overturned the sentence in 2008 (Global Witness 2008b). In April 2010 the Dutch Supreme Court overruled the court of appeal's acquittal and ordered a new trial.

example, was for a long time reluctant to freeze the domestic assets of Liberian politicians, for fear of political backlash from supporters of the profiteers (UNSC 2009).

A landmark 2005 civil case in the International Court of Justice (ICJ) focused attention on the justiciability of the pillage of natural resources as a war crime (Harwell and Le Billon 2009). In *Democratic Republic of the Congo v. Uganda*, the ICJ found that although there was no evidence of a state strategy to use the military to pillage the resources of the DRC, the Ugandan state nevertheless failed, in its obligation as an occupying power, to prevent its armed forces and their nonstate collaborators from pillaging natural resources in the occupied Congolese province of Ituri, which is rich in gold and other minerals.

Because the two countries had previously agreed that they would decide on any damages through bilateral negotiation, the court did not award damages to the DRC; the negotiations that will determine how the DRC will be compensated for its loss of property were still under way at the time of writing. It would, in any case, have been nearly impossible for the ICJ to enforce a compensation ruling: first, such rulings are contentious because of the subjective nature of valuing the impacts of war; second, the ICJ's reach and enforcement capacity are limited by the principle of sovereignty.

Liberia's Truth and Reconciliation Commission (TRC) can recommend reparations for victims of human rights abuses. In its final report, the TRC recommended that the government of Liberia

> also hold responsible individuals and entities that were responsible for committing tax evasion. In particular, the TRC recommends that corporate officers in the timber, mining and telecommunications sector be prosecuted for their willingness to avoid the payment of tax revenues to Liberia during the civil conflict in Liberia. Government agents that knowingly facilitated and colluded in tax evasion must also be held accountable (TRC 2009, 41).

The TRC also called for the government of Liberia to set up a reparation trust fund financed through

> judgments against economic criminals through three ways: (1) recovering tax arrears from timber, mining, petroleum and telecommunications companies that evaded tax liability under the Taylor regime; (2) obtaining funds from economic criminals that are sentenced by Liberian courts to pay restitution or other fees; and (3) utilizing criminal and civil confiscation schemes in foreign jurisdictions to repatriate Liberian assets (TRC 2009, 43).

One of the most ambitious ongoing compensation schemes is the attempt, by the Republic of Iraq, to sue multinational corporations for having "conspired with the former regime of Saddam Hussein to corrupt the United Nations Oil-for-Food Program" (Bernstein Liebhard LLP n.d.). According to the plaintiffs, companies not only provided Saddam Hussein's regime with kickbacks, but also

benefited from advantageous terms, thus doubly depriving the Iraqi people of billions of dollars in aid while simultaneously busting sanctions.

The return of stolen assets is a central principle of the UN Convention against Corruption (UNCAC), which came into force in 2005.[23] Since 2007, this principle has received further backing from the Stolen Asset Recovery (StAR) Initiative, a joint effort of the World Bank and the UNODC.[24] Although StAR's main focus so far has been on policy analysis for the regulatory reform of the international financial system (World Bank and UNODC 2009), it has also developed training materials, undertaken capacity building, and developed programs in about half a dozen countries. StAR collaborates with the main international corruption and money-laundering initiatives, such as the Financial Action Task Force, as well as with specialized organizations, such as the International Centre for Asset Recovery.[25]

Generally speaking, asset recovery focuses on major investors, traders, and exporters who have profited from conflict resources; other targets include politicians, government officials, and leaders of armed groups that have been linked to human rights abuses. Given the risk that some actors, such as the leaders of armed groups, may spoil the peace in order to avoid facing justice, preventive measures are required; for example, asset recovery should be postponed until any military units or armed supporters associated with the accused have been disbanded. The freezing of assets—and, to a lesser extent, the recovery of assets, which demands a higher level of evidence regarding ownership—also involves specific legal risks: breaching the right to judicial review (because decisions to freeze assets are taken outside of court, and are not easily challenged by courts) and breaching the principle of presumption of innocence (Godinho 2009).

As of this writing, most post-conflict asset recovery has focused on allegedly corrupt heads of state, rather than on businesses or rebel groups funded by conflict resources (Dulin 2007), and most of the assets frozen by the UN have been those of suspected financiers of terrorism. Among political leaders who ruled during armed conflicts, successful asset recovery procedures have been undertaken against Mobutu Sese Seko (DRC), Alberto Fujimori and Vladimiro Montesinos (Peru), and Saddam Hussein (Iraq). Procedures are under way against José Eduardo dos Santos (Angola) and Charles Taylor (Liberia). Although a number of rebel groups are believed to have accumulated large amounts of funds, little information is available on the whereabouts of these funds.

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[23] For an analysis of the challenges facing UNCAC, see Smith, Pieth, and Jorge (2007).

[24] For more information on the joint effort, see www.worldbank.org/StAR.

[25] The Group of Seven (G-7) established the Financial Action Task Force in 1989 to address money laundering; more recently, it has begun to address terrorism financing (see www.fatf-gafi.org). The International Centre for Asset Recovery is based at the Basel Institute of Governance (see www.baselgovernance.org/big/) and provides various resources, including assistance and training for asset recovery (see www.assetrecovery.org).

CONCLUSION

This chapter has considered two complementary options for improving the impact of high-value resources on peacebuilding and post-conflict transitions: reappraising and renegotiating resource contracts, and freezing, recovering, and claiming compensation for looted assets. Both options have been experimented with: Liberia has renegotiated the contract on a major iron-mining project, and asset recovery is the focus of ongoing judicial procedures in Angola, Iraq, and Liberia.

As a general rule, revenues from resource sectors should be placed under international supervision during the post-conflict transition period, and transitional authorities, whether national or international, should be prohibited from awarding long-term contracts in extractive sectors.[26] Beyond the transition period, long-term monitoring by a tripartite commission (local authorities, civil society, and international donors) should be put in place, and the UNSC should maintain its authority to intervene in revenue management. It is also important to ensure that the intervening parties lack vested interests in the outcome; questions might otherwise arise about motives. The Australian intervention in Timor-Leste and the American intervention in Iraq offer cautionary examples with regard to the oil sector.

Contract renegotiation and asset recovery have rarely yielded substantial benefits. Both approaches are costly, legally complex, and potentially tainted by political interference—and outcomes are often uncertain. These obstacles should not deter such initiatives, however. Investigations by UN panels of experts and NGOs have demonstrated that it is possible to track down embezzled revenues. More systematic investigations, strengthened by collaboration among governments and UN bodies, can further improve efforts to find and prosecute war profiteers.

Contract renegotiations have also yielded some positive outcomes, as in the case of Liberia. In the DRC, in contrast, the president has yet to follow through on the recommendations made by two major commissions. Poor management of resource sectors, inadequate funding for domestic resource-management authorities, and the failure of the commissions' efforts have been particularly frustrating for the Congolese, who could otherwise have benefited from a major mineral boom that occurred between 2003 and 2008.

The experience of the DRC suggests that the first and most important step is for transitional or post-conflict authorities to open the books and to make existing contracts public at the earliest possible stage in the transition. UN

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[26] This principle could be legally based on the consideration that a transitional authority is akin to an occupying state unless specific powers are legally granted to it. For a description of the rights of the occupying state as "administrator and usufructuary," see Hague Convention (1907, art. 55). The Hague principle, which was upheld by a 1976 memorandum from the U.S. Department of Justice concerning oil exploitation by Israel in the Sinai (Bowen 1997), can be applied to domestic transitional governments through local legislation, through a peace agreement, or through a UNSC resolution.

missions, the UNSC, and donor nations should use their influence to achieve this aim. The second step is to gather sufficient expertise to assess the legality and fairness of the contracts. Contracts signed during conflicts are likely to include flaws that render them illegal—obviating the need for accusations of unfairness or complicity in war crimes. Independent experts, parliamentary commissions, and public hearings can prove valuable during this phase. The third step is to strengthen the legal framework and the institutions that oversee resource exploitation and revenue management, so that revised contracts can be more effectively implemented.

Most resource exploitation contracts are of long duration, stretching thirty years or more. Moreover, many include stabilization clauses that "freeze" legal conditions at the time of signature, thereby locking war-torn countries into arrangements that may have consequences for several generations. Finally, because most high-value natural resources are nonrenewable, most, if not all, of the resources can be tied up in contracts that are unfavorable to domestic authorities and local populations.

Host governments and international transitional authorities are becoming increasingly aware of the problems that can be associated with resource extraction contracts; at the same time, companies are recognizing the risk that glaringly unfair contracts and the growing resentment of host populations may lead to outright contract cancellation and expropriation. Contract renegotiation offers a means for both governments and extraction companies to reevaluate controversial deals and seek new arrangements that will be mutually beneficial over the long term. As discussed in this chapter, such renegotiations are not without risk, and the pressure, participation, and support of civil society groups and international agencies are often crucial in ensuring a positive outcome.

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