SARW
Southern Africa Resource Watch

Resource Insight
Special Edition June 2007

Guidelines for the Revision of Mining Contracts in the DRC

The Quest for Justice, Fairness, Transparency and Accountability

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Resource Insight is published by the Southern Africa Resource Watch
Sothern Africa Resource Watch (SARW) is a project of the Open Society Initiative for Southern Africa (OSISA).

ISSN: 1994-5604
Key title: Resource Insight

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Cover Photograph: Eric Miller/iAfrikaPhotos
Production: DS Print Media

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Acronyms

DRC	Democratic Republic of the Congo
EITI	the Extractive Industry Transparency Initiative
MDGs	Millennium Development Goals
SADC	Southern African Development Community
UN	United Nations

Acknowledgements

SARW would like to acknowledge the key role played by Tawanda Mutasah, the Executive Director of OSISA, for his intellectual contribution and guidance in the drafting of the guidelines. Thanks also go to colleagues at OSISA who took time to comment on the draft text and engaged with me in the debate around the legality and the legitimacy of the Congolese government's decision to review mining contracts. All contributions are greatly appreciated and have enhanced the quality of arguments. It is our hope that these guidelines will make a positive contribution to the revision of mining contracts already underway in the DRC.

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Introduction

These guidelines provide a framework, which the Democratic Republic of the Congo (DRC) government can use to ensure that the revision of contracts is fair, just and transparent. Minerals form part of a country's national assets, the proceeds of which should be used to help meet national development objectives. Mineral production constitutes a major source of foreign and fiscal revenues for most African governments. For post conflict countries, such the DRC, resource flows from extractive industries could be a lifeline. However, the existence of dubious mining contracts is a serious impediment to that objective, as is the case in the DRC where dozens of mining contracts are suspected of being shady. The state cannot intervene meaningfully in social service provision and in meeting other public sector investment needs if it remains tied to what are clearly unconscionable contracts inherited from a chequered political past. As such, the newly elected DRC government's decision to review mining contracts, and if need be to rescind them, is a step in the right direction.

This move has, however, created some agitation: there is uncertainty within government itself about what is supposed to happen and how far it ought to go; and there is some trepidation that companies may resist this move, while others have suggested that contract revisions could scare away investors. But the government of Prime Minister Antoine Gisenga has decided to face up to the challenge. On 11 June 2007 the Ministry of Mining launched the work of the ad hoc government commission established to review 60 existing mining contracts.

The mining sector in the DRC is characterised by lack of transparency and irregularities around the exploitation of resources. Although the exploitation is mostly done legally, there are flaws in many of the contracts that favour the extractive companies, which draw excessive benefits to the detriment of the host government and its people. The contracts in effect allow for the plunder of resources due to the levels set for royalties, the tax breaks on corporate investments and the issue of transferability.

The corrupt nature of the mining business in the DRC means that government cannot raise enough money from the extractive industry, which is the country's comparative advantage, to promote efficient and equitable development and to work towards meeting the

Millennium Development Goals (MDGs).[1] In fact, instead of contributing to growth and development, minerals extraction in the DRC has done the opposite: it has contributed to increasing poverty and unemployment, the destruction of the environment and the abuse of human rights. Congolese working in this sector, especially those involved in artisanal mining, are subjected to conditions sometime far worse than the slavery of King Leopold II.[2]

The revision of mining contracts should therefore be seen as part of a larger and unavoidable audit of the mining sector in the DRC. The commission should in the process also propose, where necessary, changes to DRC extractive industry legislation to ensure that it is in line with regional and international norms and standards.

Background

The DRC's successful elections of 2006 put in place the country's first democratically elected government since independence some 40 years ago. However, the new democratic dispensation has come with its own political, economic and social challenges. Two critical challenges facing the new leadership are the provision of basic services to citizens and the rebuilding of infrastructure.

Importantly, the state is unable to generate resources internally and is dependent on international support to meet its financial needs. This is because despite its enormous extractive industry potential (34 per cent of the world's known reserves of coltan and 10 per cent of its copper; other minerals include cobalt, gold, oil, timber, water, energy, uranium, gas methane, manganese and zinc, to mention but a few), the DRC government is unable to draw financial benefits from the extraction of its minerals and the country is one of the poorest in the world, with per capita annual income of US$120.[3]

The contracts being called into question were signed during the DRC wars (from 1996 to 2003) or during the transition period after the successful Inter-Congolese Dialogue at Sun City in South Africa. This is, of course, in addition to the many corrupt concessions made in the mining sector over the years under Mobutu, and the myriad other arrangements that have been made in more recent times as assets have been systematically looted, these purporting to be concessions contemplated under the country's Mining Code developed with the support of the World Bank.

The mining sector is supposed to be the cornerstone of the DRC's economic development. The contractual arrangements signed between the Congolese leaders and investors remain unknown to the majority of the Congolese people. In light of the UN Panel of Expert's Report on the illegal exploitation of the DRC natural resources, the Lutundula Parliamentary Report and many other reports from Congolese civil society, people believe that most of these contracts, if not all, are dubious. The Assembly of Bishops from the Katanga Province, in its address to the new democratically elected Congolese leaders, argues that only a few Congolese individuals are drawing benefits from the minerals, but the peo-

ple are not benefiting. The bishops "… request that the law and legislation that guide the exploitation of mineral resources be clear and the working conditions conform to human dignity."[4]

Together with some important challenges, the democratic dispensation has brought with it unprecedented opportunities for the mining sector to play a leading role as a contributor to the country's reconstruction. However, for it to play this role successfully, it will need to undergo extensive restructuring. It is in this context that we applaud the decision of the DRC government to review mining contracts.

While the overall restructuring of the mining sector is necessary and expected, the proposed revision of mining contracts is an important step towards arresting the resource spoliation and human rights abuses taking place in the mining sector in the DRC – and which in the context of war were not dealt with. But the democratic dispensation has given the Congolese people their power back, and action in this regard is expected. We must bear in mind, however, that corruption and mismanagement of revenue in other parts of the world and on the African continent is raising discontent among populations and creating political instability, and the same could happen in the DRC if there is no transparency in the way contracts are signed and implemented.

The guidelines are divided into two parts. The first part examines the need for a revision of mining contracts in the DRC, and the second part looks into ways in which this can be done.

Reasons favouring the revision of contracts

The question that is raised repeatedly is whether the new government in the DRC has the right to review contracts signed by its predecessors, especially since contracts between private companies and government, as ultimate owner of the resources, are often complex. A risk associated with complex contracts is that the true market value of the contracts may be better understood by companies than by the government.[5]

It must be remembered that most mining contracts on the basis of which minerals are being extracted in the DRC today, were signed under conditions of war and in the absence of democracy. This situation did not favour fair contract negotiations between a weak government and financially strong multinationals. In fact, in order to persuade multinationals to take risks during a period of much uncertainty, the Congolese "government" at the time signed contracts on terms that were not in the best interests of the Congolese people. In this context two arguments – a moral argument and a legal/rights based argument – can be made which justify and legitimise the Congolese government's decision to review and revise mining contracts.

The moral argument

The moral argument begins with the premise that the Congolese people have suffered numerous atrocities – slavery, colonialism, dictatorship and war – all linked to exploitation of the country's natural resources. The Congolese have never controlled or benefited from these resources, and today its 60 million people live in adverse poverty.

The recent war, which started in 1996 and which is continuing in the eastern part of the country, killed over four million people. The war was associated with the control of natural resources, as different groups fought each other in an attempt to gain control of the extraction of resources. It seems fitting, therefore, that with a democratically elected government in place, the Congolese should take control of their natural resources. Part of this process would thus naturally include the scrutiny of questionable contracts signed mostly during the war and the transition period.

It is estimated that 70 per cent of the DRC's most valuable copper and cobalt reserves have already been signed away to international companies. Former Zambian president, Kenneth Kaunda, referring to how copper mines are being sold in his own country to international investors, said something which resonates well with what is happening in the DRC: "We are giving up control over our riches, and it's a disgrace. The rest of the country has gone downhill."[6] In the DRC, as an African Development Bank and Organisation of Economic Cooperation and Development recent report puts it: "Growth of mining is hampered by overall bad management of resources, fraud and slow structural reform, and the country has not been able to benefit fully from the opportunities provided by rising world metal prices."[7]

> A well-managed mining sector is critical for the DRC's development. If the contracts are not revised, the new government will find it difficult to meet its budgetary targets and consequently deal with its pressing developmental challenges; and without development and economic growth, there can be no peace.

The revision of mining contracts is therefore critical for the government's own survival and for the consolidation of peace and democracy in the DRC. Furthermore, the revision of shady contracts is justified in that the government is now trying to break with a past characterised by mismanagement, opacity and kleptocracy (resource plundering), and is in the process of establishing a new institutional framework that conforms to the principles of good governance, transparency and accountability. The government needs to be encouraged and supported in this process. The revision of contracts would help minimise the cheating that is happening in the extractive industry in the DRC.

The legal / rights based argument

The legal and human rights argument maintains that all contracts that were concluded in a manner which did not respect national and international legal frameworks, norms and standards of good governance, transparency, accountability and respect for human rights can be renegotiated. In a democracy, contracts are only secured if they are legitimate. Most contracts which the Congolese government wants to revisit are suspected to have been concluded in bad faith, and are therefore illegitimate. Put differently, the interest of commercial contracts cannot override the interests of the public.

There are precedents which suggest that it is possible to renegotiate and introduce adjustments to mining contracts. A recent example is the Arcelor Mittal in Liberia. Johnson Sirleaf's government last year renegotiated a major iron ore mining project with Arcelor Mittal that was signed during the transition under cater-taker president Gyude Bryant. The revised deal boosted the state's benefits and raised the total investment to US$1 billion.

The DRC government's decision to review mining contracts can find justification within the confines of national, regional, continental and international norms and standards. The extraction of natural resources (oil, gas, timber or mining) is also regulated by international legal provisions to protect human rights and the environment

At the national level, the Congolese legal framework has changed in recent years following the adoption of the new Mining Code in 2002, the new investment legislation and the new constitution in 2006. These instruments prescribe the manner in which minerals ought to be exploited. The DRC Constitution in Article 9 recognises the Congolese state's sovereignty over its natural resources, while the Mining Code in Article 8 specifies that the state guarantees the valorisation of mineral commodities in conformity with the nature of the code. Chapter III of the Mining Code specifies the framework within which the acquisition of mineral and mining rights should occur, and stipulates that "it must be done in a transparent, objective and efficient manner." The Mining Code also prescribes the kind of sanctions the state can put in place against non conformity with the rules and standards provided (see articles 293, 295, 296,289,290, 291 and 292).

At the international level, the United Nations (UN) through Resolution 1803, which set the Principle for Permanent Sovereignty, recognises the existence of states' sovereignty over their resources. While it affords states wide discretion to dispose of their resources as they see fit, it does, however, prescribe the context within which states must act. It requires states to exercise this sovereignty in the interest of the people: "The rights of the people and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well being of the people of the State concerned."[8] This is a permanent sovereignty doctrine which can also be found in the Charter of Economic Rights and Duties of States, passed by the UN General Assembly in 1974 as a centrepiece of what came to be called the "New International Economic Order".[9] Article 2 of the Charter reads as follows:

1 Every state has and shall freely exercise full permanent-sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.
2 Each state has the right: (a) To regulate and exercise authority over foreign investment within its national jurisdiction and take measures to ensure that such activities comply with its laws and regulations and conform with its national objectives and priorities …; (b) to regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies.

It is clear from the Charter that the UN General Assembly reinforces a state's authority against unlawful exploitation of resources.

Another international principle that supports the Congolese government's decision to review mining contracts is the International Covenant on Economic, Social and Cultural Rights (Ecosoc Covenant). It stipulates that the misuse of a nation's resources is a violation of human rights, and it obligates states to "respect, protect, and fulfill the rights it sets forth."[10] Therefore, it will not be a contradiction – or wrong for that matter – to argue that the Congolese government is within its rights and powers to reconsider deals which are unlawful and harmful to its people.

At the regional level is the Southern African Development Community (SADC) Mining Protocol, which came into force in February 2000. The objective of the SADC Mining Protocol is to create a thriving mining sector that can contribute to economic development, alleviate poverty and improve the standards and quality of life in the region. One of the protocol's areas of focus is the promotion and monitoring of internationally accepted standards of health, mining safety and environmental protection. The SADC Protocol also calls for the economic empowerment of the historically disadvantaged in the mining sector.

Also at regional level, the SADC mining ministers in August 2001 approved the Mining Strategic Plan, which spells out how the Mining Protocol would be implemented. It is also critical to refer to the African Mining Partnership, which encourages the participation of women in the mining sector.

At the continental level, the African (Banjul) Charter on Human and Peoples' Rights adopted in 1986 (to which the DRC is a signatory) stipulates in Article 21 that:

> "All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation. ..."

There is in fact an outcry, both within the DRC and internationally, that the Congolese people are being exploited and dispossessed of their resources by unscrupulous investors. According to a man whose child works in a Chinese-controlled mine as a digger and earns just US$5 a week: "They are just using him … There is a possibility we could have violent confrontation."[11] It is sentiments such as these which have prompted the new leadership in the DRC to revise existing mining contracts.

There is also pressure on the DRC government to take action because the DRC is a signatory to the Extractive Industry Transparency Initiative (EITI), which aims to promote transparency and social and economic benefits in oil, gas and mining countries. The DRC is well known for the level of spoliation of revenues from mining which go into private pockets. Indeed, the enormous mineral wealth that lies beneath the ground of this vast country not only has dubious connection with human development but it also appears to foster a perverted political and institutional culture, based on corruption. It is therefore not surprising that despite the high price of minerals on the international market, the DRC has nothing to show from the sale of its minerals.

There is thus need to strengthen the utilisation of revenue and this requires, on the one hand, that companies pay internationally acceptable taxes and royalties and, on the other hand, that the government has the capacity to collect these taxes and use the revenues collected efficiently and in a transparent way. The EITI provides a framework within which this can happen.

The African Charter stipulates further in Article 21 that:

> "… States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources."

The Congolese government's decision to review and revise mining contracts is a response to studies undertaken by both national and international experts, which have pointed to the existence of dubious contracts and to the fact that the exploitation of mineral resources does not benefit the Congolese state and its people, but instead perpetuates human rights violations.[12]

While there are sufficient grounds for the Congolese government to proceed and revise the mining contracts, the process leading to their revision must also be transparent in respect of international law, norms and standards. This is confirmed in the African Charter when it states in Article 21 that: "The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law."

The revision of mining contracts will not be an easy process, and it is not supported by all, especially those in government and companies who stand to lose. It is therefore critical that the process be transparent and inclusive.

There are good reasons to believe that increased transparency and the restoration of justice in the mining sector in the DRC would be beneficial, indispensable, and morally correct for both government and companies. Consistent transparency can increase productivity for companies, boost revenue for government, and increase the protection of human rights for citizens. This is why the process must not limit itself to the revision of contracts but must also elaborate mechanisms that prevent similarly unconscionable contracts from being signed in the future; in other words, mechanisms for protecting Congolese interests in new contract negotiations must be secured.

Over and above the international and national instruments which regulate the exploitation of natural resources, mining companies in the DRC need to incorporate into their activities, among others, the Convention on the Elimination of all Forms of Discrimination against Women, indigenous people's human rights safeguards, and the International Labour Organisation's Core Labour Standards.

The commission appointed to review and revise mining contracts in the DRC therefore has numerous instruments, norms and standards at its disposal to lead a fair and transparent process. The revision of contracts must also be informed by national policies, and these national policies themselves need to be informed by the principles of stability, consistency, stakeholder dialogue, management of expectations, social obligations and the tradability of mineral rights.

Guidelines for reviewing mining contracts in the DRC

Objectives of the commission

The objectives of the commission appointed to revise mining contracts have been defined by the Ministry of Mines.[13] However, if the process is to have any real significance, it is important to determine whether these objectives, as defined, meet the expectations of the Congolese people. If not, the objective must be redefined and clarified.

The commission's mandate

Defining the role of the commission is not enough. The mandate of the commission must be established very clearly in terms of its scope, operation, power and responsibilities, before it begins its work.

The commission must have a well defined scope of work to be accomplished. The change in concept from the "revision" of contracts to the "revisitation" of contracts has shifted the commission's focus, and this might impact on the expected outcomes. For example, does the revisitation, which appears to be a watering down of revision of contracts include the cancellation of contracts that are found wanting in terms of the national legislation and international norms and standards which guide the exploitation of natural resources?

The commission's powers must be clearly framed. For example, is the commission allowed to decide whether contracts should be cancelled, revised or allowed to continue? Is the commission's decision binding, or is it simply expected to make recommendations?

The commission's responsibilities must be articulated in a clear manner to avoid confusion. Furthermore, the responsibility of the commission should not be limited to contract revision as such. In the course of its work, the commission must be able to identify areas for improving the management of mineral resources by closing gaps in the country's legislation and by domesticating international and regional norms and standards.

It is also not clear which state institution or body is empowered to take the final decision on commission recommendations and who will execute such recommendations.

Composition of the commission

The composition of the commission was determined by government, and it is clear that the commission's permanent members with decision-making powers are government functionaries.[14] However, it would have been appropriate to have outside actors, such as civil society, involved in the deliberation and adoption team.

We therefore propose the following:

1 Members of the commission must include representatives of all state organs identified in the Mining Code as having a role to play in the management of the mining sector. This would therefore include: the Presidency, the Prime Minister's Office, the Ministry of Mining, the Premiers' Office, provincial Ministries of Mining, geology departments, the *Cadastre Miniere*, and others involved in the protection of the mining environment.[15]

2 Members of the commission must have the relevant skills and competence to do the job. The skills within the commission and the calibre of its members will determine its success or failure. It is a positive sign that the internal rules of the commission stipulate that the commission can decide to bring in outside expertise when necessary; however, the fact that these experts will not be part of the deliberations reduces the extent of their contribution.

3 The composition of the commission must comply with the spirit of the DRC constitution's prescription to respect gender balance. Women in the DRC have suffered tremendous human rights abuses and they must be fairly represented in a structure responsible for decisions that affect their lives and the lives of their children.

4 The commission members, taken individually and collectively, must be of high moral standing and can have no vested interest or conflict of interest if the effective revision of contracts is to be ensured. This suggests that members must be neutral in their judgments; and neutrality is a difficult notion, especially in matters as sensitive and politically driven as this one. However, it is critical that the public (and the companies involved) have a level of confidence in the commission, and that the commission operates without outside interference.

5 The commission must be independent, both in terms of its operations and in the management of its finances. Although the commission must remain accountable to

the state treasury on how it uses the money received, financial autonomy will avoid manipulations, which could include using finances to frustrate its operations, thereby leading to unnecessary delays in the process.

The process of revising the contracts

The process must respect the following democratic principles and values:

1 The process must be *transparent*. This is critical if the final verdict is to be accepted by all. The purpose of calls for transparency is to permit citizens to hold government and its commission accountable for the decisions they may take. But despite its benefits, increasing transparency is hard to do. Even when a given government or company would find it in its institutional interest to be transparent, individuals within such institutions may prefer secrecy in order to cover up corruption, to protect opportunities for rent-seeking, or simply to avoid public scrutiny. Transparency means that "when there are adjustments to the terms of the contract, they should be made in an open and transparent manner."[16]

2 The process must be *accountable*. Accountability requires civil society participation and parliamentary oversight – and these two principles can only be achieved through consultation. However, the rules of the commission do not stipulate how it is to engage with civil society, or what role, if any, parliament will play. As mentioned, we believe that parliament should be involved in the process, especially the Parliamentary Portfolio Committee on the Environment and Natural Resources. The revision of mining contracts must be subjected to wide and detailed oversight. This parliamentary oversight could be supported and enhanced during the course of the revision by weekly and monthly reports on the commission's progress.

3 A critical element for accountability is to ensure *community participation* so that people are aware of what is happening. A consultative framework should therefore be established whereby the commission is not cut off from the community, and which ensures that the community is consulted. Democracy is not simply about elections: elections alone cannot provide accountability unless citizens monitor the actions of those whom they have put in power. For their part, multinational companies can no longer assume that once they have signed mining contracts with a government, they can do as they please.

4 For the community, even civil society, to make an informed contribution, people must have *access to information*: there can be no transparency or effective consultation without the provision of information. During the course of its work the commission

could include in its activities site visits. This will allow the commission to have first-hand experience of the destruction caused by companies, and to register people's concerns. This is part of what is called a "development-centred" approach.

5 A *development-centred approach* means that individuals and communities are helped to take control of their own lives. Communities and civil society can play a role in assisting the process by virtue of being closer to the sites of action, and by speaking to those most affected by the adverse socio-economic impact of mining operations. It is therefore in the interest of both government and the mining companies to hear the voice of civil society and communities in this process. The people of the DRC have never been consulted on matters concerning their resources, and the review process initiated by government is an opportunity to start involving people and giving them a say in how their resources should be exploited.

6 The process must be *time-bound* with clear completion dates to ensure that the revision of mining contracts does not turn into a long and frustrating process. While the timeframe should not include legal actions that might be taken by different parties to the contract, the commission must not be allowed to extend its work indefinitely.

A proper process for the revision of contracts must be based on:

- clear norms and standards for good practice;
- the effective participation of specialised civil society;
- appropriate parliamentary oversight; and
- mechanisms for ensuring citizens access to information around the work of the commission.

What the commission should look for in the contracts

The responsibility of the commission is to assess the compliance of existing mining contracts with the laws of the country, including mining legislation and international norms and standards. When reviewing the contracts, the commission should therefore take into account the following critical issues:

1 The commission must examine the fairness of the process that was followed to sign the contracts. Contracts which were obtained through a flawed process can be rescinded. The Mining Code in Chapter III stipulates that the process of negotiating contracts must be transparent, objective, efficient and expedient in reception, instruction and decision on mineral or mining rights.[17]

2 The commission must examine fiscal terms of mining contracts. The tax and tariff structure of contracts, including royalty, dead rent, state taxes, etc., and the periods for the revision should constitute a critical part of the revision. These must be compared with what obtains in the competing major mineral-producing countries such as Australia, Botswana, Canada and South Africa, to ensure that the DRC government is receiving the tax revenues to which it is entitled. Where discrepancies are found, they must be adjusted; and where there is proof that companies have not paid their taxes and royalties, the companies concerned must be made to pay their arrears in full before they are allowed to continue mining.

3 The commission must assess what the contracts say on issues concerning mineral beneficiation, and the commission must identify and analyse minerals that have value added potential. This would involve assessment of the impact of contracts on downstream mineral based industries. If there are no clauses dealing with these issues, they must be introduced.

4 The commission must repeal confidentiality clauses in all the mining contracts, since such clauses hinder the transparent accounting standards required by the EITI. The prerogative of private firms not to disclose revenue, payments and contract information is an infringement of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.[18] Business secrecy is too often simply a cover for bad behaviour.[19]

5 Furthermore, in an effort to improve revenue management and to guarantee a fair redistribution of such revenues, the commission should insist that all mining companies doing business in the DRC endorse the EITI. As part of the EITI requirements, companies are obliged to publish all payments made to government, and government in turn must declare payments it receives from companies.

6 The commission must assess the degree to which mining contracts empower the Congolese people. Empowerment here goes well beyond the simple provision of jobs (although it is important and necessary for the mining sector to provide employment) to include real empowerment issues, such as Congolese participation in the management and ownership of their resources through partnerships, shareholding and the management of companies. Furthermore, gender mainstreaming in the mining sector should be considered as critical to facilitate the active involvement of women in the sector.

It is in the interests of the Congolese economy for the mining industry to have a wider spread of ownership, and the DRC cannot continue to have a mining sector where the owner of the resources is a perpetual employee.

The commission could ask parliament to prepare empowerment legislation which would oblige companies to include Congolese in their top management and to enter into partnerships with Congolese junior miners. Such legislation is important in ensuring that the Congolese benefit from their resources, which are mostly controlled by foreign capital.

7 The commission must assess the legal framework. Normally, the framework should guarantee the genuine participation of local communities at all stages of extractive projects. This will mean only granting licences for extractive operations with the prior consent of local communities, and where such projects have built in empowerment clauses. In other words, the "state should impose reasonable social obligation upon holders of exploration and mining licences and should make commitment to social obligations a requirement for the granting and renewing of exploration and mining licences."[20]

8 The commission must assess contracts in terms of companies' adherence to the promotion of research and development in the mining sector. This is critical if the mining sector is to remain relevant to the Congolese economy in the long run. Companies must be required to invest in research and new technology.

9 The commission must verify the validity of the contracts. The Mining Code stipulates two conditions in this regard, which translate into obligations, namely: to start the exploration and mining in a relatively short period as agreed upon; and to pay royalties.

10 The commission must assess the progressive nature of the contracts in terms of human resources issues, corporate social responsibility and respect for human rights. The following issues should be looked at: mine health and safety; human resource development; housing and living conditions of workers; community facilities in areas surrounding the mines; industrial relations; employment conditions; and land rights, especially compensation and future benefits that should accrue to people. The commission should also assess the impact of contracts on social equity, poverty alleviation and employment creation.

11 The commission must evaluate if the contracts make reference to the protection of the local environment (air, water, ecosystems and biodiversity). The commission must request that concerned companies submit their environmental impact assessment reports before mining commences, and that subsequent reports are undertaken and submitted during the mining period. The standards should include a provision which requests all companies to make available, in an accessible language, their environmental impact assessment reports.The commission must propose to government the adoption of standards and the establishment of procedures which would ensure that mining companies' operations do not result in, benefit from, or otherwise contribute to human rights abuses or environmental degradation.

12 The commission must assess the economic impact of the contracts; for example, the impact of a contract on economic activity in an area, on the cost of energy, and on foreign direct investment.

13 The commission must assess the contracts *vis-à-vis* the promotion or transfer of appropriate technology. It should look at positive or negative implications for the transfer of technology to the DRC arising from a contract, as well as the impact of the contract on local skills development.

14 The commission must assess the impact of a contract on decentralisation. In other words, is the contract aligned with national, provincial and local development priorities and objectives, and what impact does the contract have on the provision of, or access to, basic services in the area?

15 The commission must ensure that all contracts are standardised in line with the existing legal framework, thereby bringing transparency, predictability and stability into the sector.

16 The commission must also look into the nature of privatisation of public mining companies and how effective it has been. This is in view of the fact that certain contracts signed between public companies and private companies allowed the latter to obtain their property rights cheaply.

Performance management

The commission must adhere to strict performance criteria. There must be a consistent, rigorous and open approach to performance management to ensure that the commission's objectives, mandates and timelines are respected. In addition, a system of checks and balances is needed to ensure that commission members keep within the agreed brief.

One of the tasks of the commission must be to make proposals on institutional, legislative and administrative reforms to prevent dubious contracts from being signed in the future. These proposals should include measures to promote good governance, accountability and the prevention of tax evasion and human rights abuses in communities.
The commission's recommendations in the area of institutional reform will be included in the final report of the commission to be submitted to parliament and government. The commission's final report must set out substantiated conclusions and recommendations on the status of each contract, or each group of contracts. It must also provide an executive summary, giving an overall appraisal of the commission's performance in terms of its mandate and organisation.

Implementation of the commission's recommendations

After the commission has done its work, it might be necessary to send the recommendations to another much smaller but specialised commission, such as a parliamentary commission, to go through the commission's work and to testify to the fairness of the conclusions reached.

Government will then use the recommendations from the commission to initiate negotiations with companies on how best to introduce changes to a contract that will suit both parties. Government will put together a team of commercial lawyers to negotiate with companies. It is expected that honest investors will come to the table as, happened in Liberia.

In the interest of facilitating people's participation and education on these matters, the commission or the state should allow people and communities directly affected by a mining contract to have a say on the work of the commission. This could also mean appealing against the commission's decisions.

Companies that refuse to renegotiate contracts should be "named and shamed" nationally and internationally.

Government must put in place a task team to monitor implementation of the commission's recommendations for those contracts that are renegotiated to the satisfaction of both parties. This task team must be well financed to ensure that it carries out its tasks efficiently.

Conclusion

The DRC is standing at a crossroads: it can either move forward and consolidate its democratisation process or simply remain in the present state of chaos. The way in which the DRC government deals with the revision of mining contracts will determine strongly which path the country has decided to follow.

The revision of contracts is a challenge to the current political leadership; the success of the process will depend on the political will of the leaders in the DRC and whether they have the courage to support the process until its logical conclusion. It is critical that the new leadership publicly supports the revision process as being for the benefit of the greater good of the country, even if it is inimical to the interests of certain leaders and their collaborators. A successful conclusion of the process will therefore depend on the political courage of the new leadership to stand the course, even when it doesn't suit their interests and the interests of powerful companies. The leadership therefore needs to invest some political capital in this process.

A successful revision of contracts will bring equity and justice to the extraction process and the distribution of revenue. In undertaking the revision, the primary objective should not be necessarily the cancellation of contracts, but their adjustment.

The International community must also play a key role in ensuring that this process reaches its logical conclusion. In the absence of a legal argument to rescind contracts entered into by the government, as many have suggested, the violation of human rights and other violations of international laws are sufficient arguments to suppport the action of the Congolese government. If nothing is done to these contracts, Congolese people will conclude that the international systems of laws and policies remain the tools at the disposal of the northerners, in the construction of a political agenda that favours the rapacious activity of their corporate enterprises.

Notes

1 In the outcome document of the International Conference on Financing for Development (the Monterrey Consensus) developing countries committed to intensify efforts to mobilise resources from domestic sources in an effort to deal with financing shortfalls.
2 Leopold's rule over the DRC conditioned by the exploitation of natural resources resulted in heinous crimes against humanity. Adam hechschild's book, King Leopold's Ghost-A Story of Greed, Terror and heroism in Colonial Africa is a convincing narration of the atrocities he committed.
3 World Bank, 2006.
4 Assembly of Bishops, Katanga Province,e address to the new democratically elected Congolese leaders, 3 March 2007
5 Humphreys Macartan, Sachs Jeffrey & Joseph Stiglitz (eds). 2007. *Escaping the Resource Curse.,* New York: Colombia University Press, p 41.
6 See Dr. Kenneth Kaunda's interview with Spiegel, April 2007.
7 African Development Bank/Organisation of Economic Cooperation and Development Report, 2007
8 Permanent Sovereignty Over Natural Resources, UN General Assembly Resolutions 1803 (XVII), art.1, 17 UN.GAOR Supp. (No.17) at 15, UN DocA/5217(1962).
9 Ibid.
10 International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, UN General Assembly Resolution 2200A (XXI),16 December 1966, *entry into force* 23 March 1976.
11 Barta, Patrick 2007. "Miners' daunting task: digging in risky zones", *The Wall Street Journal*, Wednesday 31 October 2007.
12 See the Lutundula Parliamentary Commission Report, 2004 and the United Nations Panel of Experts on the Illegal Exploitation of the Mineral Resources of the DRC, 2001.
13 See Government Ad Hoc Commission for the 'Revisitation' of Mining Contracts, internal rules; Ministry of Mines, DRC, 2007, p 1.
14 Ibid, p 2.
15 DRC Mining Code, Law No 007/2002 of 11 July 2002. See *Official Journal of the Democratic Republic of Congo*, Special Report, 15 July 2002, p 6.
16 Humphreys Macartan, Sachs Jeffrey & Joseph Stiglitz (eds) 2007. *Escaping the Resource Curse.* New York: Colombia University Press, p 4
17 Ibid, p 9.
18 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental matters, Aarhus, Denmark, 25 June 1998. http://www.unece.org/en/pp/documents/cep43e.pdf (17 April 2007)
19 Humphreys Macartan, Sachs Jeffrey & Joseph Stiglitz (eds) 2007. *Escaping the Resource Curse.* New York: Colombia University Press, p 44.
20 United Nations Economic Commission for Africa, *Harmonization of Mining Policies, Standards, Legislative and Regulatory Frameworks in Southern Africa,* UNECA, Southern Africa Office, 2004, p 54