

Leiv Lunde and Mark Taylor, with Anne Huser

Commerce or Crime?

Regulating Economies of Conflict

Economies of Conflict: Private Sector Activity in Armed Conflict



Leiv Lunde and Mark Taylor, with Anne Huser

Commerce or Crime? Regulating Economies of Conflict

Economies of Conflict: Private Sector Activity in Armed Conflict

© Fafo 2003

ISBN 82-7422-414-0

ISSN 0801-6143

Coverphoto: © Rune Eraker

Printed in Norway by: Interface Media as

For Rick, who was there at the beginning

Contents

Acknowledgements 6

1 Introduction 7

2 Mapping Conflict Trade 11

2.1 Coercion 13

2.2 Anarchy 16

2.3 Criminality 18

3 Regulating Conflict Trade 21

3.1 A Malign Problem Structure 22

3.2 Challenges to Regulation 25

4 The move to regulate 33

4.1 A Continuum of Regulatory Options 36

5 Where do we go from here? 51

Appendix A Knowledge Inputs to Policy 54

References 58

About the Authors 62

Acknowledgements

We are indebted to many people who have, over the past two years, shared with us the various situations and analyses relevant for this study. They include company and government officials, campaigners, lawyers and researchers from many different countries. The analysis that follows has benefited tremendously from those discussions and debates and for that we are grateful. In particular Karen Ballentine, Philippe Le Billon, Anita Ramasastry and Wegger Strømmen deserve our thanks. The work that went into this study would not have been nearly as interesting and fruitful without the invaluable support and keen insight of Christian Ruge. Thanks also to Josefine Aaser for her critical comments and editorial assistance in the final stages of the work. We are grateful to the Government of Norway for the financial support provided to Fafo AIS for the *Economies of Conflict* project, of which this report is a product. Of course, none of the above bear responsibility for our errors in what follows.

1 Introduction

In June 2002, a Canadian-registered oil and gas exploration company signed a deal with the government of the Democratic Republic of the Congo (DRC). The agreement opened the way for the Heritage Oil Corporation to develop exploration in 7.7 million acres of the eastern DRC, mostly along the western shores of Lake Albert and the border with Uganda, including the area around the town of Bunia. Across the border in Uganda, Heritage was drilling in a concession it operated at the south end of Lake Albert. By the end of March 2003, the company had announced that the results from its Uganda operation indicated the Lake Albert area had the “potential of being a new world class basin.”¹

As Heritage was making its announcement, the security situation near Lake Albert was deteriorating rapidly. The UN Security Council had declared the situation in eastern DRC a threat to international peace and security and had urged Uganda to withdraw its troops from the DRC.² Uganda was soon withdrawing its troops, but not before allegedly arming rival Hema and Lendu ethnic militias in the area in an attempt to sow instability in DRC that it could exploit.³ By early June, thousands of Hema refugees were fleeing violence in the DRC for Uganda, with at least one Hema political leader charging that the DRC government and its local Lendu militia allies were targeting the Hema for expulsion in order to “control oil exploitation from Lake Albert”.⁴

Investments and operations in war zones place companies and other economic actors at the intersection of conflict and trade. This is as true of Heritage Oil in the Lake Albert region as it is of a number of companies – both local and multinational – that operate in conflict situations worldwide. In principle, the presence of Herit-

¹ Press release, Heritage Confirms Uganda Oil Potential and Outlines Further Investment Plans, Monday, March 31, 2003; <http://www.heritageoilcorp.com> (on file with author).

² S/Res/1468 (2003)

³ ‘Uganda accused of helping to fuel eastern Congo fighting’, Financial Times, 15 May 2003.

⁴ ‘DRC: Lendu militias accused of massacre of more than 250’, IRIN, 3 June 2003. The Security Council authorised the strengthening of the UN forces in the area in an attempt to prevent what observers predicted could be a wave of mass killings. Additional UN forces, an EU force led by France, were deployed to Bunia, DRC in early June 2003 at the same time as reports began to emerge of massacres in rural areas outside the area covered by UN troops.

age Oil in the conflict zone of on the border of Uganda and the DRC should not be sufficient grounds for allegations of wrongdoing. It does raise questions about what would.

What constitutes unacceptable economic practice in a war zone? What should citizens, communities, companies or governments reasonably expect in terms of economic behaviour in situations of conflict and insecurity? How should the company behave? What should affected communities and international civil society demand? Is it, for example, a good or bad thing that companies divest from conflict zones? Should governments or multilateral bodies concerned with peace and security seek to judge the activities of these companies? If so, against what standards?

The answers to these questions are only now beginning to be formulated. Affected populations know all too well the significance of war for their livelihoods. Most companies know what conflict means to their investments and operations. Yet, there are few remedies for - or even common approaches to - the economic dimensions of conflict. Policies and regulations concerning economic activities in zones of conflict are in their infancy. Governments and companies have little in the way of regulation to refer to, while shareholders, citizens and affected communities have few standards against which to assess the performance of a company or other economic actor in a conflict zone. One result is that decision-making, by companies or governments, is mired in significant uncertainty.⁵

In this report, we argue that there is a pressing need for clarity concerning the full range of formal and informal economic activities in war zones. In the absence of clear regulatory definitions of unacceptable private sector activity affected communities or governments will find it difficult to communicate the nature of the economic and human rights challenges they face during conflict. Similarly, international companies with otherwise legitimate commercial interests will inevitably end up on the wrong side of international opinion and find themselves targeted as rogue companies.⁶ Multilateral institutions seeking to re-launch development or prevent or resolve conflict will have little success if they do not comprehend the economic dimensions of these tasks.

The immediate objective should be to single out abusive or unfair activities that occur in situations of conflict and to design some form of response. To this end, we attempt to map the terrain of economic activity where trade and conflict converge

⁵ See, e.g., *Private Sector Actors in Zones of Conflict: Research Challenges and Policy Responses*, a report of Fafo AIS and the International Peace Academy, April 19, 2001. Rapporteur: Jake Sherman.

⁶ See, e.g., Report of the Panel of Experts, DRC, Annex III; S/2002/1146, October 2002; the Annex of the Report named eighty-five companies for violations of OECD Guidelines concerning multinational corporations without clarifying the nature of the violations alleged.

and to suggest a framework that will help in the identification of unacceptable behaviour. We analyse the structure of the political problem that is conflict trade, with a view to suggesting some of the constraints and opportunities that will be faced in formulation of policy responses, and we assess the variety of options for pursuing the regulation of economies of conflict.

2 Mapping Conflict Trade

Violent conflict is ruining the lives of millions of people annually. Despite present peace-making efforts, conflict is as deadly, devastating and protracted as ever. The persistence of civil war is a particular concern. While the number of armed conflicts has dropped since the early 1990s, of those that continue 66 per cent were more than 5 years old in 1999 and 30 per cent were more than twenty years old. In addition, many conflicts that were suspended in the 1990s – not least in Europe, the Middle East, and Central Asia – have not been resolved.⁷

The protracted nature of contemporary civil war has fuelled recent concerns that the economies of these conflicts may play a crucial part in motivating them. The attention paid to economic incentives to wage war, as distinct from other drivers of conflict - such as ethnicity, historical hatreds, political grievance - is due in part to the attraction for policy makers of being able to target relatively tangible phenomena. Compared to ethnicity or political grievance, financial resources represent more-or-less objective tangibles that in theory can be traced, manipulated or halted to serve given political purposes. The relative weight given to this view, that greed in conflict may often be at least as important a motivating factor as grievance, depends very much on the chosen analytical perspective. The series of sector studies commissioned by Fafo AIS, upon which much of this present report is based, makes clear that economies play a key role in sustaining war fighting capacity and therefore in the decision-making of belligerents.⁸

Events of recent history have also contributed to illuminating current patterns of protracted conflict. The crumbling of the Berlin wall appeared to choke state-sponsored financing of many conflicts, and forced belligerents to look to non-official resources. Unfortunately, these efforts have proved less of a scramble than the immediate post cold war peace-dividend optimists envisaged. This is attested to by the generous availability of natural resources, conspicuous governance failures, and trade opportunities for belligerents in such countries as Sierra Leone, Democratic Republic of the Congo, Liberia, and Afghanistan. The “paradox of plenty” is described by Terry Lynn Karl⁹, and supported by findings of a recent World Bank-led

⁷ Dan Smith (April 2001).

⁸ Mark Taylor (forthcoming 2004).

⁹ Terry Lynn Karl (1997).

project on “Economics of civil war, crime and violence”.¹⁰ The paradox rests in the fact that the easy access to natural, financial and military resources significantly increases the likelihood and persistence of deadly conflict, suggesting some answers to the pattern of contemporary conflict.

Globalisation, too, has contributed, primarily by facilitating access to global commodity markets and by increasing the speed, reach and fungible nature of economic transactions in general. Today’s warlords, governments and non-state actors alike, make use of global financial and commodity markets to transform control over natural resources into war fighting capacity. Under the cover of secrecy and the inevitable ‘fog of war’, legally or illegally produced commodities are traded on the legitimate, but highly unregulated, global markets to obtain financial resources, weapons and other materiel needed to sustain the war.

Mapping conflict trade requires an analytical framework that makes sense out of this complex environment. The purpose of the categories of conflict trade described below is to identify unacceptable economic activities in situations of conflict in a manner that is useful for the development of policy. It will not be possible, in the confines of this report, to identify all the specific ways in which economic activity can become problematic. Indeed, as noted above, it is difficult to distinguish between legitimate business activities and rogue company behaviour. Rather, what is described in this section is an analytical framework for approaching the evidence of conflict trade, case by case.

This conflict trade analysis involves understanding the evidence of economic activity in relation to definitions of coercion, anarchy, and criminality. It requires consideration of the totality of economic activities in conflict situations in relation to these characteristics, with a view to identifying what is and is not acceptable market-based activity in relation to conflict zones. The analysis should include, among other things, the economic activities of non-economic actors, such as militias or their political or economic allies, as well as the non-economic behaviour of economic actors, particularly business entities.

It should be stressed that it is not our intention to suggest that all economic activities in conflict zones should be made illegal. We do not even suggest that conflict trade itself, as a general category, describes only illegitimate economic activity. Rather, the aim of the conflict trade analysis developed below is to help explain *how* economic activities converge with conflict. Conflict trade analysis is meant to flag the potential for predatory or market-based abuses across a number of conflict scenarios, from significant human rights abuse to all out war. In this sense, the analysis acts as a filter, helping to identify activities or relationships in specific situations that require closer scrutiny.

¹⁰ Ian Bannon and Paul Collier (2003)

The conflict trade framework should enable all those concerned – NGOs, multi-lateral organisations, companies, governments, and affected communities - to develop definitions of unacceptable behaviour or involvement in armed conflict that would be relatively transparent and comprehensible across different sectors. This will make it easier for companies to carry out due diligence to avoid participating in abuses. It should also help citizens, shareholders and communities to hold governments, companies and other economic actors accountable for their actions.

2.1 Coercion

The violence of conflict takes many forms, from open warfare through civil unrest to varying levels of organized criminal violence. It can involve a range of security forces, including government soldiers, state paramilitary police, militia factions, guerrilla, bandits, or private security personnel. A spectrum of violence, and variety of actors, can be found in different parts of a conflict zones, at different times, and may take place before during or after all out war, both civil and inter-state.

War economies research to date makes clear that economic activity does not stop when conflict erupts. In some cases, the sheer magnitude of the values extracted has implied that the continued exploitation of the economic opportunity may become necessary – or an incentive - to the continuation of the war. Regardless of the incentive structure, the proximity of armed groups to economic opportunity raises the potential for the integration of the illegitimate use of force to economic activity.

The marriage of commercial assets and armed force – coercion – is a common feature observed in a number of situations. In some cases, states may assert the legitimate need or obligation to deploy forces to provide protection to strategic economic assets. However, over time, and to the extent that a force exercises continuous control of a territory and its infrastructure, state or rebel armies can influence production cycles and determine the viability of investments. In other cases, where there is ready access to the resource, the military *is* the company and its troops *are* the labour pool. In others, they operate as sector-wide protection rackets, determining the production cycles, ‘managing’ or enslaving labourers and protecting (or attacking) personnel and capital investments. In these situations, coercion - in the form of the threat or use of armed force - has become a factor of production.

Coercion is most likely to become a factor of production when a commodity takes on strategic significance for armed faction. For a commodity to become a strategic resource, the determining factor is opportunity, or the viability of profit based on access to the commodity and control of marketing routes. In the alluvial diamond or timber industries, the nature of the production process means that access

to the resource, plus control of local marketing and transportation routes, are enough to make them a viable economic activity for rebels or government forces. The extraction of alluvial rough diamonds in armed conflict zones is often an informal affair, run almost entirely by the forces in control of the region or their proxies. Since rough diamonds are 'low-volume, high-value' they are easily marketed.

Similarly, in their study of conflict timber, Global Witness has found that access equals opportunity also with respect to tropical timber. However, compared to rough diamonds, the physical size of the logs makes their marketing more dependent upon an armed force's control of transportation routes out of the conflict zones, a sufficient level of corruption at transit points, and the willingness of otherwise legitimate timber companies to launder the logs of war onto the global market. Logging companies play a crucial role, and they tend to "side with whoever controls forest territory...in many instances insurgent groups ...political, military and criminal groups".¹¹

Similar though distinct dynamics can be found in almost every other commodity related to conflict, from the control of transit trade in consumer goods in Afghanistan to the narcotics trade in Columbia.¹² By contrast, the relatively high costs involved in producing and marketing oil mean that, for rebels and governments alike, access does not equal opportunity. For an oil field to represent a revenue opportunity it requires investment, usually by an oil company. The result is that, in most cases, rebels or government troops are unlikely to be involved in the production of oil, or even the management or oversight of production facilities.¹³ However, in many cases, the threat or use of force by state or rebel armies or private security firms assures access to the resource through the control of territory, by providing security to the production facilities, and by enabling local or regional marketing activities.

As noted above, states may assert the right to deploy forces to protect strategic industries. In some cases, companies have agreed to pay the local military or police forces in cash for the protection they provide, or to provide support in kind (vehicles, air transport, etc) in exchange for protection. These kinds of agreements may even extend to irregular or rebel militias. In the absence of state protection, companies often engage private security firms to protect staff and facilities. In zones of conflict, companies may abandon production but deploy such firms to protect installations. Regardless of their relative legitimacy, all of these activities constitute the integration of armed force with economic activity.

¹¹ Global Witness, *The Logs of War*, Fafo AIS, PICCR report 379 (2002)

¹² Ballentine, Karen and Jake Sherman, eds., *The Political Economic of Armed Conflict, Beyond Greed and Grievance*, International Peace Academy / Lynne Rienner (2003).

¹³ Phil Swanson, Fafo AIS, PICCR report 378 (2002)

Private military companies (PMCs) constitute perhaps the most integrated relationship between commercial assets and the use of force. PMCs are employed by governments and companies and their activities range from site or personnel security, training as well as to command and control functions, and to combat. Companies have been involved in the provision of arms, or the facilitation of arms transfers. Payments for their services are sometimes made with proceeds from, or via a share in production from, the investments they protect. There is a significant lack of transparency in the organisation and operations of these firms and vast differences between the incentive structures for each firm.¹⁴

The phenomenon of PMCs has been driven by the privatisation of previously public sector security functions. This has been particularly prevalent in industrialised countries, where the practice of sub-contracting by the military and intelligence agencies for operations abroad has expanded dramatically in the past decade. The *de facto* privatisation of state security functions happens also in developing countries, particularly resource rich countries, where the state cannot or will not fulfil its obligations to protect capital investments in extractive industries. In some countries, the state requires companies to hire private firms, rather than provide security itself.

The privatisation of military and security functions can lead to confusion as to who are belligerents in armed conflict. In theory, it is possible to distinguish private military entities from public armies, or to tell the difference between PMCs and irregular or factional militias. Operationally – that is, in terms of what military and economic behaviour they exhibit – it is increasingly difficult to do so. This is particularly true when command and company decision-making authority is vested in the same person, group, or agency.

This applies not just to PMCs. Military factions are increasingly taking on the functions of business entities. Historically, there have always been strategic commodities in war and armies have usually sought to protect or obtain these. But in contemporary wars, it is possible to discern economies of coercion: social and economic spaces in a war zone in which armed force has become central to the activities of business entities, and economic activities have become central to the tactical or strategic considerations of belligerents. In these economies of coercion, armed assets have

¹⁴ Colonial history is replete with these sorts of phenomena (the British East India company is the most famous). But modern warfare, and global markets, have significantly increased and differentiated the players involved. There has been a sharp increase in the number of security firms in the US and UK since the end of the Cold War and again after 11 September 2001. The private security sector in South Africa has become a £ 13.5 billion business. There are an estimate 9,800 firms operating in or out of Russia. In 1997, there were an estimated 80 private security firms operating in Angola alone, mostly to protect foreign private interests; various sources cited in Joanna Spear, *The Political Economy of Private Military Security*, Fafo AIS, PICCR report (forthcoming 2003).

become necessary to exploit the economic opportunity or, put another way, the threat or use of armed or coercion force has become a factor of production.

2.2 Anarchy

Anarchic exploitation is economic activity in the context of drastic regulatory ineffectiveness, often the result of war and corruption. War and corruption drive the informalisation of state powers and economic relations, undermining the rule of law, leading to a form of regulatory anarchy and resulting in the loss of effective sovereign control over a country's wealth. In the absence of effective or legitimate state regulation, access to and control over natural resources and other sources of wealth becomes a rationale for the coercive and criminal behaviour that helps to sustain or cause conflict. Ultimately, anarchic exploitation – particularly the exploitation of natural resources – takes place in an environment marked by informal economies that are not only a product of war or civil conflict, but also a contributing factor to their continuation.

States are not always inclined to govern according to principles of transparency and accountability, and this is true for both developing and industrialized countries. The process of investment or privatisation can enable the pathologies of natural resource wealth, and thereby help to perpetuate or accelerate the deterioration towards corruption and the incapacitation of government regulation:

“[A]ccess to easy oil wealth can undermine efforts to mobilize resources in other sectors of the economy. This is because the relative ease of collecting large revenues from oil production makes the more difficult collection of relatively small revenues in other sectors hardly seem worth the effort... states that are already well developed in terms of legitimacy and administrative competency before the onset of oil wealth (e.g., Norway and to some extent Indonesia) have a better chance of avoiding the [...] corrupting influences of oil wealth. Unfortunately, most oil-rich developing countries have not been in this category.”¹⁵

¹⁵ Phillip Swanson *Fuelling Conflict*, Fafo AIS, PICCR report 378 (2002); this is usually referred to as “Dutch disease”, after the problems faced by The Netherlands subsequent to that country's opening of large scale natural gas production. *See also*, e.g. Karl, Terry Lynn (1977). Swanson notes that spending on social services such as health and education did not increase remarkably following oil booms in Nigeria, Iran, Algeria and Angola. Moreover, these expenditure items have tended to suffer disproportionately during oil price busts, when repayment of government debt has taken up a significant portion of government revenues

In other words, strong institutions backed by political legitimacy are key to protecting public sector management of the economy from the effects of easy money. The undermining of these institutions, often in tandem with the deterioration of domestic political culture, can result in the abdication of the state in its function as an arbiter of sovereign legitimacy on matters of economic governance. In this sense, anarchic exploitation may be understood as market based activity in the absence of the rule of law. Yet, these activities are not taking place in a vacuum. In the absence of effective state regulation, power devolves to parallel structures, such as 'shadow states', that regulate to their own ends.¹⁶

"In a developing country with few resources other than vast tracts of forest, control of this natural capital is control of power...Allocation of timber concessions becomes a mechanism for rewarding supporters and mobilizing wealth to prop up the existing regime. The result has often been massive corruption and loss of revenue to the state. It has also contributed to the erosion of democratic principles, as elected politicians and state officials put the rights of companies before those of the population they are supposed to represent. Protected by powerful allies, timber companies become the *de facto* resource owners and state forestry institutions become the clients of the logging extractors rather than *vice versa*."¹⁷

Through their investments, companies – whether allied with a government or operating in rebel-held territory - can come to play a central role in the political economy of a conflict and may help determine the effective exercise of state sovereignty. Indeed, the role companies play in these situations depends upon a number of factors, not least the nature of the investment and industrial activity, nature of the supply chain, etc. But companies – or other economic actors - can contribute to perpetuating the conflict to the extent that they promote the informalisation of the economy via a lack of transparency of transactions, a weakening or loss of government control, and the impunity of firms and government agencies.

The same dynamics of informalisation, corruption, and regulatory anarchy can translate into the near total loss of government control over market regulation. What a government may claim by right and what it can actually exploit on behalf of its citizens may be very different: *de jure* state ownership can be rendered meaningless in practice by *de facto* control over the resource by individuals, private companies and/or their political-military allies. For governments, the loss of territory through

¹⁶ William Reno, "Shadow States and the Political Economy of Civil Wars", in *Greed and Grievance: Economic Agenda in Civil Wars* International Peace Academy / Lynn Rienner (2000).

¹⁷ Global Witness, *The Logs of War*, Fafo AIS, PICCR report 379 (2002).

armed conflict, or loss of control to favoured individuals or private companies, results in the loss of effective control over the resource.

A state may lose de facto control over a resource or commodity through any of the following circumstances:

- loss of effective control over territory and resources through armed conflict
- loss of effective control through massive corruption, indigenous spoliation¹⁸
- the undermining or collapse of state institutions
- corruption in the granting of concessions or licenses
- resource exploitation in the absence of legislation
- regulation in the absence of enforcement capacity

These conditions are both the causes and the effects of anarchy in war economies. They do not operate in isolation. In fact, the anarchic exploitation that takes place in war is dependent upon a broader lack of regulation for its profitability: global trade integration in goods and services, and the absence of international regulation specific to conflict trade, means that there is almost no way to prevent goods produced or traded in the anarchy of war from reaching consumer markets elsewhere, nor to prevent global financial services from dealing in the proceeds from war economies.¹⁹ Anarchy, the absence of effective regulation, both nationally and internationally, ensures that the worst forms of conflict trade remain viable.

2.3 Criminality

If conflict trade takes place in anarchy – an absence of the rule of law – then identifying criminality will be difficult. What defines criminal activity in a war zone? The short answer is, first, the law of the land and, second, international law. War or conflict can prevent the application of the law, but domestic and international legal regimes do provide conceptual clarity as to what constitutes a violation.

¹⁸ Ndiva Kofele-Kale, *Patrimonicide: The International Economic Crime of Indigenous Spoliation* (28 Vand. J. Transnat'l L. 45; 1995).

¹⁹ Estimates of illegal tropical timber imports to the EU put the figure at about 50% of the total tropical timber imports; Global Witness, *The Logs of War*, Fafo AIS, PICCR report 379 (2002); illicit finance is dependent upon legitimate financial services to make possible the laundering of proceeds from war economies; Jonathan Winer, *Illicit Finance and Global Conflict*, Fafo AIS, PICCR report 380 (2002).

Domestic systems of law cover the kinds of predatory or violent crimes involving the illicit use of force. Domestic legal regimes also cover market-based violations, including so-called 'white-collar' crimes or transactions that amount to illicit or black market activities. In armed conflict, where domestic law is difficult to apply, the laws of war cover most predatory violations. However, there is nothing in international humanitarian law that defines illicit economic activities related to armed conflict, whether international or internal armed conflict. Similarly, humanitarian law has no provision that mirrors the domestic regulations outlawing market-based criminal activities. This gap in international law pertains both to situations of peace and situations of armed conflict. It is particularly significant in situations in which government officials are involved in formally legalising or permitting obviously criminal or corrupt practices, often after the fact.²⁰ (see section 8.1 The Regulatory Continuum, below).

Precisely because of the lack of international legal clarity concerning market-based violations, any consideration of economic crimes in conflict situations requires an analysis of behaviour, regardless of whether or not such activities are actually illegal under international law. In this sense, the definition of criminality used here refers to the set of actually illegal and self-evidently illicit activities carried out to take advantage of war economies. This section is primarily devoted to describing these economic activities.

Dubious transactions are central to profitability of conflict trade activities, and, therefore, to their strategic importance. Stolen commodities are laundered onto legitimate markets and traded as legal goods. In both the diamond and timber trades, the re-labelling of timber shipments, or the blending of legal and illegal diamonds during transshipment, are steps along the road from illegal extraction to consumer markets. The illegal production and marketing practices in the tropical timber sector have proven attractive to criminal networks. Much the same is true for significant parts of the diamond industry: "Conflict diamonds are essentially illicit diamonds that have gone septic. They have simply been used for a new purpose - to pay for weapons in rebel wars".²¹ In this way, the procurement, marketing and payments involved in war economies have compromised the supply chains of a number of goods and undermined the transparency and accountability of companies and state institutions.

The transactions involved in financing armed conflict are similarly criminalized: "Illicit finance is also a key facilitator of civil war... The laundering of the proceeds

²⁰ Berdal and Malone identify the absence of an international regime governing white collar crime as a regulatory gap in this field; see their introduction in *Greed and Grievance: Economic Agenda in Civil Wars* International Peace Academy / Lynn Rienner (2000).

²¹ Smillie, Ian *Dirty Diamonds*, Fafo AIS, PICCR report 377 (2002).

of crime is a necessary means to carry out the trade in diamonds that has fuelled armed conflict in Liberia, Angola and Sierra Leone, together with their accompanying arms deals and payoffs.²² Legal revenues collected by governments are transferred illegally to hidden accounts. Central to the effectiveness of these illicit financial activities, are the licit financial networks across which they operate. In the global financial system, the laundering of dirty money via legal financial institutions is only marginally more difficult than is, in other sectors, the blending of packets of diamonds, or the mislabelling of timber shipments.

In this sense, the criminality involved in conflict trade is entirely recognizable, often as so-called 'white-collar crime'²³ or other non-violent economic crimes. For example:

- The trade in illegally produced (stolen) commodities;
- The improper or unregulated import-export practices (smuggling);
- The misrepresentation, or blending of commodities (smuggling and fraud);
- The diversion of legally obtained revenues (corruption and theft);
- Illicit financial dealings (some arbitrage, tax evasion, money laundering);

Rarely are the marketing chains or revenue streams of a conflict commodity or its producer entirely illegal from start to finish. Nor are the supply lines of combatants necessarily run as criminal networks, or filled with illegal goods. But experience indicates that to operate effectively, the procurement, marketing and payments processes related to armed conflict consist of a series of transactions that combine the perfectly legal and legitimate with the thoroughly illegal or illicit. More often than not, the borders between these categories are ill defined. In fact, there is little to obstruct what is a relatively seamless integration of conflict goods and profits to the markets and financial systems of global trade.

²² Winer, J.M. *Illicit Finance and Global Conflict*, Fafo AIS, PICCR Report 380 (2002).

²³ Usually defined as non-violent crime involving deceit, corruption, breach of trust.

3 Regulating Conflict Trade

Bits and pieces of official regulation with the potential to control conflict trade are already in place. Relevant if diverse examples include:

- Targeted UN sanctions (e.g. against UNITA and RUF diamonds) supported by UN Sanctions Expert Panels;
- The UN Convention against Transnational Organised Crime (2000);
- The ECOWAS Moratorium on the Exportation, Importation and Manufacture of Light Weapons (1998);
- The UN Convention for the Suppression of the Financing of Terrorism (1999);
- The OECD Convention on Combating Bribery of Foreign Public Officials (1997); The UN Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988);
- National legislation, such as the US Foreign Corrupt Practices Act (1977),
- Domestic legal action, primarily in the area of drugs and crime control.
- When the search is widened to generally voluntary, or self-regulatory measures, a number of initiatives linked somewhat more directly to the economic dimensions of conflict or human rights emerge:
- The Financial Action Task Force on Money Laundering (FATF);
- The EU Code of Conduct on Arms (1998);
- The Wolfsberg Principles by a group of 11 of the world's largest international banks to discourage money laundering practices, terrorist financing and related abuses of private banking (2000);
- The UK/US Voluntary Principles on Security and Human Rights (2000);
- The UN Global Compact initiative on private sector activities in conflict zones (2000);
- The OECD Guidelines for Multinational Corporations (1977, revised in 2000).

To these can be added even more informal, but not necessarily less effective, efforts inspired by the same goals. Examples include activist campaigns to name-and-shame companies and state actors assumed to be complicit in the fuelling of deadly conflict and related mismanagement of resource revenues. One example of such campaigns is the Fatal Attractions against conflict diamonds, for which Global Witness and Partnership Africa Canada were nominated in March 2002 to the Noble Peace Prize. Another is the Publish What You Pay campaign launched in 2001, which features George Soros as a prominent supporter. The latter campaign aims to stimulate increased transparency and accountability by encouraging extractive industries to make public all payments to governments in countries where natural resources are extracted. Both have been successful in pushing government and industry to begin developing regulatory responses. In the case of conflict diamonds it has been done via the Kimberly process and, in the area of transparency, by convincing the UK and the G8 to consider the Extractive Industries Transparency Initiative (EITI).

Taken together this collection of international law, voluntary measures and policy initiatives may seem impressive. It is true that the relative novelty of most of them is evidence of a dynamic process of regulatory development towards curbing the worst manifestations of global economic integration. On closer scrutiny, however, they constitute a patchwork of binding laws or conventions with very general aims that are only indirectly linked to conflict trade. Most initiatives and campaigns focus more squarely on the financial resources of war, but have resulted in voluntary measures with little or no enforcement capacity. The reason for this seeming absence of targeted and co-ordinated policy responses to choke off conflict trade is that the problem is a relatively new and politically 'immature' post-cold war policy issue, one with a particularly malign political problem structure.

3.1 A Malign Problem Structure

The regulatory bits and pieces described above are precisely that – bits and pieces. This is due to the complexity of the challenge in general, the variety of policy areas affected, and the diverse structure of the relevant actors, many of whom have strong incentives to resist regulation. To understand better the likely barriers against effective regulatory action, and to help identify the opportunities and conditions for overcoming these, it is worthwhile to consider the problem structure of conflict trade.

As an illustration of a benign versus a malign problem structure in political science terms, it is informative to look at recent international efforts to regulate environmental issues. The problem structures of climate change and ozone depletion are a good comparison. While not an easy issue politically, ozone depletion displays

a slightly less malign problem structure than climate change. For example, ozone depletion is characterised by:

- Although complex, a much simpler scientific structure. For instance, fewer scientific disciplines involved. This makes it more difficult to exploit knowledge uncertainty;
- Easy for the general public to comprehend the negative consequences of non-action;
- Relatively easy to change incentives of main producers into making ozone-friendly products – the main corporate culprits have been drivers of new technologies – at least partly by the race for profits from clean products in the anticipation of regulation of dirty ones;
- Benefits of action long term and also uncertain, while costs of action fortunately modest and manageable;

Climate change is typically malign, and features many similarities with conflict trade:

- Lack of scientific consensus, despite commendable IPCC efforts – makes it easy for “regulation losers” to exploit scientific uncertainty;
- Extreme asymmetries in contributions to and likely victims of global warming, including a potentially damaging North/South dimension;
- Potentially severe economic costs of effectively addressing and regulating sources of global warming – limits to win-win opportunities, economic growth implies increasing emissions;
- Major economic players, and countries, with strongly vested interests in continued emission of greenhouse gases, e.g. the USA, OPEC countries, and oil companies.
- Costs of regulation immediate and potentially high for strong political players, benefits very uncertain and very long term;
- Complex domestic/global dimension of regulation challenges – effective regulation requires international co-ordination; domestic structures do not allow for that due to differing politico-economic structures that have created country-specific regulatory structures and preferences;

Regulation of conflict trade in many ways presents us with *a malign problem structure*, partly similar to that of climate change:

- Difficulties in establishing causal links between financial flows and conflict behaviour and thus in spotting the transactions and players to be constrained by regulation;
- A large and heterogeneous set of conflict actors/parties, many of which possess strong incentives to oppose any major regulatory effort;
- Problems in assessing the legitimacy versus illegitimacy of given parties' involvement in conflicts. Also, a lack of consensus internationally on the merits and legitimacy of wars and efforts to stop them;
- Difficulties in targeting regulations in ways that hit the target without harming civilians;
- Regulations are likely to have immediate and visible costs to powerful players while the benefits appear more uncertain and longer term;
- Issues of overall political legitimacy are bound to hamper comprehensive approaches to conflict trade through the United Nations or similar institutions – not least due to resistance by G-77 countries to address these issues squarely in a UN context.

Comparing this regulatory challenge to that of halting financial sources of terrorism provides an illustration of the difficulties we face. While it would be an exaggeration to term the latter a benign political challenge, the following features that provide an impetus to policy implementation stand out in contrast to the problem diagnostic of conflict trade:

- There is a general global consensus that terrorism is bad and that all counter-measures, within the rule of law, are legitimate;
- Terrorists and those that fund them therefore represent a clear-cut culprit image and the case for choking off the funds of those who plan terrorist attacks is intuitive;

The challenge presents policy-makers and regulators with manageable numbers of sources and transactions.²⁴

²⁴ All this is not to say that addressing terrorist finance is easy. Both political and financial stakes are high for assumed terrorist fund-raisers, and they have every motive to hide their tracks well. For example, the fact that gold and other commodities are often the currencies of preference complicates life further for those aiming to track down terrorist finance networks.

3.2 Challenges to Regulation

The implications of the problem structure of conflict trade are that efforts at regulating conflict trade will have to contend with a number of challenges. Some of these are generic for any attempt to secure regional or global public goods, while some are specific to efforts at choking off financial flows that fuel wars.

Taken together these challenges can be described as follows:

- A Heterogeneous set of actors with strong incentives to resist or evade regulation.
- Regulations are likely to inflict immediate and visible costs on powerful players while benefits appear more uncertain and longer term
- Difficulties in establishing clear and causal links between financial flows and conflict behaviour
- Difficulties in designing regulations in ways that hit the target without harming civilians
- Difficulties in assessing the legitimacy versus illegitimacy of given parties' involvement in conflicts
- Challenges in finding common ground for handling of conflict financing issues by global organisations such as the UN

Heterogeneous set of actors with strong incentives to resist or evade regulation.

Here we present a proposed categorisation of main actors with interests in conflict trade regulation. These are very rough categories because of the *diversity* of players in general and the networks of contractual and other relations that transect these categories. Not all actors within them need to be negatively inclined with respect to regulatory initiatives. However, many will be and real efforts will be required to influence the incentive structures of the respective actors towards supporting the idea of smart regulation.

The main categories of affected actors are:

Extractive industry companies, operating, for example, in petroleum, mining of various minerals, timber and diamonds. These range in size from some of the world's largest global multinationals, to national or regional enterprises, to national/local firms, for example linked to particular extraction projects. To the extent that these companies provide the revenues that state and non-state parties depend upon in order to fight wars, they usually do so legally.

Banks and other financial institutions (including investment funds, pension funds, hedge funds etc.). Again, these are legitimate businesses from the large and global

through regional to national and local levels. These institutions are fundamental to the capital management and payments systems that permit states and non-state actors to purchase arms and other key items for use in conflict. They have also provided hiding places and laundry shops for illegitimate groups inside or outside government who need such facilities as depositories for looted assets. Recent efforts to combat conspicuous money laundering practices have achieved much, but the problem remains that perfectly legitimate financial services are used for illegal purposes with relative impunity.

Trading companies and brokers of various guises who facilitate all kinds of commercial deals (including barter) between parties engaged in war and conflict-external economic entities. Arms brokers are an important sub-category in this context, but a substantial part of these are also apparently legitimate, registered companies, although often small and relatively unknown. This category entails a larger share of criminal or marginal actors enriching themselves from shady war-related business.

Governmental institutions at national, regional and global levels responsible for a large part of the flows of resources to present conflict zones. Generally, the poorer and more conflict-prone a country, the larger is the share of official rather than private financial flows to that country. This category includes donor and recipient agencies, from bilateral development agencies to national export-import promotion and guarantee agencies. It also includes the membership of multilateral organisations, such as the regional development banks and global multilaterals such as the UN and the Bretton Woods institutions. Guarantee and lending agencies may be most closely associated with filling the coffers of governments engaged in civil and inter-state wars. Aid fungibility ensures that even the most well-intentioned bilateral budget support programme, and even individual health and education projects, may indirectly serve to sustain military budgets.²⁵

Affected communities. People in war zones are the most vulnerable to violence. They also develop coping strategies and survival mechanisms based on the adaptations to the conditions in which they find themselves, including informal war economies. As a result, while controlling conflict trade is intended to contribute to conflict resolution, and while local communities stand to gain the most by a cessation to violence in the long term, in the short term the control of conflict trade via co-ordinated international action may in effect undermine local coping strategies. While the armed or criminal factions may simply go out of business, the survival of local communities may be threatened directly. This is an unintended consequence of attempts to control conflict trade that can result in more widespread suffering than

²⁵ The fungibility issue became salient in the context of the 1998-2000 war between Ethiopia and Eritrea, in which donors disagreed sharply among themselves and with the respective governments as to what extent aid funds fuelled the war efforts.

the violence itself. This will almost certainly create a fertile basis for the growth or continuation of local support to the factions benefiting the most from conflict trade, reinforcing the position of these factions and perpetuating the local legitimacy of abusive and dangerous commercial activities.

Regulations are likely to inflict immediate and visible costs on powerful players while benefits appear more uncertain and longer term

This is a common regulatory dilemma. It is particularly salient in the case of global environmental problems such as climate change, where regulations can have immediate negative impacts on companies' bottom line (even put them out of business), while positive impacts, if measurable at all, may benefit only future generations.

Even if somewhat less malign, conflict trade shares many of the properties of global warming along this dimension. Here, problems arise partly because those at risk of becoming targets of and/or constrained by regulation can point to significant uncertainties as to the impacts of regulation (see below). Popular support for the longer-term perspectives required to advance comprehensive approaches to conflict trade can be easily undermined by constituencies jumping from one topic to another in the post-modern global political marketplace. Another feature shared with global warming is that significant groups of players are strong and well organized in their relations with regulators, e.g. international oil companies and global financial institutions.

Difficulties in establishing clear and causal links between financial flows and conflict behaviour

Research efforts indicate that economic motives and driving forces are important determinants of the current pattern of bloody civil wars. The notion that revenues from oil production contribute to keep unaccountable governments in power and fund their war efforts has gained wide support in policy communities. It has been demonstrated that the generous availability of money laundering opportunities facilitates the financing of violent conflict, and that the proceeds from extraction and trade in diamonds and timber fuel civil wars that are killing thousands of innocent civilians. The sustained efforts by the UN and non-governmental organisations to differentiate conflict diamonds and timber from legitimate trade in these commodities have created the basis for tangible if still fledgling regulatory initiatives.²⁶ Improved transparency promises to make it easier to hold governments accountable to their suffering populations for diverted revenues.

²⁶ These include UN sanctions against conflict commodities in Angola and Liberia, UN panels to monitor sanctions-busting and broader policy initiatives like the Kimberly process to address conflict diamonds.

To date, these and related links between financial flows and war make up *necessary*, but in most cases not *sufficient*, evidence upon which to build support for action on conflict trade. The main challenge is that most of the links appear indirect and diffuse. This is in part because the levels of transparency are not such that information is easily available to researchers or even investigators. However, it is also the case that the bulk of resources and transactions that armies and warring factions live on reflect their participation in a legal, globalised, fairly liberal world economic system. Regardless of the legitimacy of the actors, their economic activities may be considered legitimate under the present regulatory regimes. Petroleum is a case in point. It is difficult to assert that the flow of revenues from oil production into government coffers in conflict areas around the world reflects, in and of itself, an illegitimate business practice. The challenge is to be able to show how, to take one example, a government at war has been successful in keeping vast chunks of oil revenue outside the domestic budget process. By its very nature, the research subject is untransparent and causal links purposefully elusive.²⁷

This is not the same as saying that the paradox of plenty does not have adverse impacts on countries such as Angola.²⁸ On the contrary, this is a major regulatory dilemma in our context. The sum of flows and transactions adhering to generally legitimate business practices may indirectly inflict far more harm on a given war-torn population than those flows that have been revealed as being shady or explicitly corrupt.

Difficulties in designing regulations in ways that hit the target without harming civilians

Implicit in the logic of halting conflict trade is the assumption that squeezing financial flows to belligerents will end their motivation to fight. This assumption is problematic on many accounts. First, as described above, ill-conceived or poorly implemented attempts to control conflict trade can have significant adverse effects

²⁷ See Fatal Attractions (1999) and All the President's Men (2002) for comprehensive Global Witness documentation and analysis of alleged international oil and financial company complicity in the bloody civil war in Angola. The role of oil revenues (and, by implication, international oil companies) in fuelling conflict in Sudan is probably more direct than in the case of Angola, although even there it is challenging to establish a general case against a company like Talisman Energy and the Sudanese government. See 'God, Oil and Country – Changing the Logic of War in Sudan', International Crisis Group, Geneva, January 2002, for a recent analysis of oil's contribution to the civil war.

²⁸ See Terry Lynn Karl (1997) for a much-cited work on the negative impacts of generous resource endowments. See ECON Report 66/2000, Tony Hodges (2001) and Phil Swanson (Fafo, 2002) for elaborations of the adverse impacts of oil revenues on human development indicators in countries like Angola.

on local communities and reinforce the very forces they seek to undermine. Second, even if increased attention to economic motives behind conflict behaviour is justified, almost any civil war has a complex web of causes. Therefore, in cases where explicit economic motives are not the key driver, belligerents are likely to continue fighting even if funding is squeezed quite significantly. Where political cohesion or ideological commitment is high, armed groups – or key elites within them – may endure the higher costs of fighting and seek to supplement them with by seeking out other, available sources of revenue. In addition, a regulatory squeeze at one point of the problem will lead warring parties to look elsewhere for resources, hence the need for a comprehensive approach to conflict trade to avoid this so-called ‘balloon effect’ of regulation.

The combined effects of the denial of resources to belligerents may lead to an intensification of violence and increased predation of civilian populations. This is appears to have happened in the case of otherwise effective UN sanctions against UNITA’s diamond trade. In this case, sanctions contributed to transforming UNITA from a guerrilla force with some political incentives to treat civilians under its control with some respect, into ruthless predators that targeted an already impoverished population.

The UNITA example is telling since the conflict is assumed to have killed 3 million people over the last two decades and has been considered typical of an ideologically empty war driven primarily by the economic motive provided by access to natural resources. In fact, that analysis may have become a self-fulfilling prophecy. The fact that a typical greed-motivated guerrilla force did not stop fighting when funds were squeezed, but instead became far worse predators of innocent victims, is a stark reminder of the complexity of efforts to stem conflict trade and the importance of getting the causal theory right.

Difficulties in assessing the legitimacy versus illegitimacy of given parties’ involvement in conflicts

Regulation of conflict trade aims at choking off financial flows to parties waging war or preparing/conspiring to do so. At first glance, this seems an intuitively attractive and unproblematic goal. Unfortunately it is not. Both formal and informal norms of international politics and law acknowledge that war is legitimate and justified in many circumstances, including self-defence by states, and in some cases rebellion against illegitimate authority. This means that one or more parties to a given conflict may be understood to be fighting “just wars”. If war is legitimate, should we pursue efforts to choke off funds to the parties involved in violent conflict? Do we not risk providing de facto support to already well-endowed dictators in their battle against poorly armed advocates of democratic rule or respect for ethnic diversity? Could we not end up supporting already strong drug-financed guerrillas

against fledgling governments that aim to build new democracies on legitimate economic pillars?

Due to the lack of effective regulation that pertains to war zones, regulation of conflict trade usually implies inter-governmentally based regulation, for instance in the form of UN conventions or sanctions. The result is a clear pro-state bias at the expense of non-state actors. In cases where clearly democratic and legitimate governments are attacked by unscrupulous, unrepresentative insurgents or mere bandits, the case for financial sanctions against the latter is not difficult to justify. However, the reality of policy implementation is far more complex than that. If the example of UNITA is a warning about the predatory behaviour of insurgent groups in their death-throes, in other situations – such as a war between rival ethnic factions – targeted measures against conflict trade could easily spark clashes or even lead to genocide. Simply weakening one party to a conflict, particularly in the absence of mechanisms for the political management of the new variant of instability, is potentially disastrous.

Yet, there are sectors in which the business of conflict has been dealt with. Arms export control is a part of conflict trade that offers a relevant perspective on how to judge the legitimacy of wars and warring parties. In most OECD countries, legislation exists to control arms exports to countries in war or war-like situations. These can be fairly strict regulations that are consciously monitored by politicians and NGOs alike. In Norway like many other countries, exports of arms to Turkey – a fellow NATO country – are particularly controversial. Is Turkey at war with its ethnic Kurd minority, and if so, is it legitimate self-defence or repression of the weak by the strong? The present political climate in Norway dictates an embargo on arms exports to the government in Ankara, even if Turkey's NATO membership makes this a controversial stand with Norway's NATO partners and implies diplomatic skirmishes between the two allied countries.

To judge from a recent Oxfam Briefing Paper, UK arms export legislation is more lenient than that of Norway.²⁹ Existing UK policy will not permit licences to be issued for arms exports if “there is a clearly identifiable risk that the proposed export might be used aggressively against another country, or for internal repression or where it would undermine sustainable development.” According to Oxfam, this policy has not hindered UK arms exports in recent years to countries such as Angola, Burma, Colombia, Congo, Indonesia, Sri Lanka and Sudan.

The case of arms export controls demonstrates that governments make specific and often controversial judgements as to the ‘colour of war’. And even if action may not always follow words, such national legislation sets an important precedent with

²⁹ *The spoils of Peace – how can tighter arms export controls benefit both the poor and British industry?* Oxfam Briefing Paper 13, February 2002.

respect to the relative legitimacy – or lack thereof – in the channelling of arms to countries engaged in inter-state or civil war. However, formulating and implementing such controls at the inter-governmental level against all states involved in wars is likely to be a diplomatic dead end, not least because of the sensitivities in judgments of the nature and legitimacy of given violent conflicts. Add to this that control of arms exports, notwithstanding its monitoring challenges, is a far more delimited and ‘benign’ political problem than that of efforts to regulate conflict trade.

Challenges in finding common ground for handling of conflict financing issues by global organisations such as the UN

We have already noted that conflict trade is a relatively immature post-cold war policy area. As a result, there is at present no established policy forum into which all conflict trade dimensions naturally fall.

Much of the emerging discourse on regulating conflict trade is bound to focus on the United Nations. This is primarily due to the organisation’s unique mandate in the area of global peace and security, while its less unique and more challenged mission in the economic and social areas also serve to move the UN to centre stage on conflict trade regulation. It is therefore not surprising that the brief survey above of already existing regulatory approaches featured the UN, and affiliated institutions, as a key mover in efforts to address conflict trade and related challenges.

However, conflict trade is a tricky issue for the UN. Although in possession of important assets in some regard, its identity as a consensus-oriented inter-governmental body is also a liability. It does at least imply some limitations with regard to its scope of action.

First, quite a number of UN member governments are presently involved in bloody conflict, and are thus not likely to accept the agnostic perspective presented above with respect to complicity in and responsibility for choking off conflict trade.³⁰ Accordingly, it is far easier to arrive at agreement in the UN on restrictions on diaspora remittances of guerrilla/liberation movements (an important source of funding in armed rebellion against governments), than on actions that may imply judgments that make particular governments the main culprits in conflicts against insurgents. In short, the pro-state bias of the UN is a challenge in terms of developing regulatory mechanisms within a UN framework.

Secondly, the discourse on conflict trade threatens to recharge North/South divides that have paralysed UN and other multilateral action in a number of areas for decades. The notion that it is economic incentives (sometimes termed greed) that

³⁰ The resistance by large numbers of UN member states to the concepts and assumed implications of humanitarian intervention and human security are related concerns. These concerns strengthen the case for caution and sensitivity in dealing with conflict trade in the UN context.

motivate conflict behaviour in developing and transition countries, and not national security or political grievances, can easily be interpreted as a new condescending strategy of Western nations that may give rise to new conditionality on aid, loans and investments in the developing world. One example of such sensitivities is the present activity aimed at regulating money laundering and tax havens, the bulk of which are tiny developing nations that often use traditional North/South confrontational rhetoric in defence of their allegedly murky practices. This is not without justification. These jurisdictions are providing services to meet demand generated by Northern economies. They naturally resent being told by Northern governments that they should get out of niche markets that are made profitable by the behaviour of Northern companies.

Similarly, any proposal that seeks to extend extra-territorial regulation by the home states of northern multinational companies will be interpreted as a regulatory power grab by host countries in the South. This, too, is not an unreasonable view. There is a real threat to social and economic development from the random imposition of developed-country regulatory standards on developing economies. In this sense, efforts to deal with conflict trade could play into negotiations over the lowering of barriers to Southern goods in World Trade Organisation negotiations.

The potential resistance to an emerging agenda for conflict trade regulation will almost certainly be global in nature, a fact that poses additional challenges to effective UN action. Extractive industries, financial institutions and a range of other private sector actors, from both the North and South, share comprehensive interfaces with governments around the world. In general, this involves, among other things, lobbying efforts against regulations that are considered negative to short- and longer-term commercial interests. More specifically, many of the culprits in the present discourse on conflict trade (as identified also in reports of UN sanctions-busting panels) are based in powerful nations, some of which are permanent members of the Security Council. In short, this spells tough resistance against effective mandates for the UN in terms of regulating conflict trade.

4 The move to regulate

The toll in human suffering, the protracted nature of contemporary conflict, the role of globalisation and the failure to realise a post-Cold War 'peace dividend' in many parts of the world, have all contributed to an understanding of war economies as a key component of today's wars. The preceding analysis leaves no illusions that regulating conflict trade will be an easy game. There are a number of reasons, however, why we believe that it is doable.

First, the dynamics in the wake of 11 September 2001 both propelled and legitimised numerous initiatives to address gaps in the regulation of financial services. In the name of combating terrorist financing, key players in international politics moved to more positive positions – if not quite effective action – regarding global regulation of financial flows. Similarly, OECD efforts to address financial governance and transparency have seen significant progress lately, not least within the framework of the Financial Action Task Force (FATF) activities against terrorist financing, money laundering and non-cooperative jurisdictions.³¹ The fallout from the conspicuous collapse of Enron, the US energy conglomerate, and other US companies, largely as a result of poor internal financial governance, are also being used to build the case for improved transparency and accountability of corporate entities.

Second, the multilateral system is beginning to respond. UN General Assembly support to the Kimberly process for the certification of conflict diamonds is one example. The UN Security Council has also shown a willingness to consider the economic dimensions of international peace and security. The focus on terrorist financing in the wake of the attacks on September 11 2001 has been an important part of this effort, but only the latest in a series of tentative steps forward. The negative political fall-out from the May 2000 kidnapping of 500 UN personnel in Sierra Leone, served to focus attention of the Council on the intractability of the war in that country. This perspective complemented increasing NGO and UN efforts³²

³¹ See Jonathan M. Winer (Fafo, 2002) for a recent analysis of FATF process achievements and limitations.

³² For a summary of UN oriented initiatives see, e.g., "Economic Agendas in Armed Conflict: Defining and Developing the Role of the UN", *Background Paper* prepared by The International Peace Academy and The Fafo Institute for Applied Social Science, available on www.faf.no/piccr/ecoccon.

to strangle the contributions of conflict diamonds to the war in that country.³³ The recent imposition of sanctions on Liberia and the commissioning of the non-sanctions related Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of Congo are initiatives with similar intent.

Similarly, progress in the development in international law in the past decade has also touched the question of liability for business entities. The UN Commission on Human Rights has been developing a *Draft Commentary on the Norms of Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, otherwise known after its main author, David Weissbrod, as the 'Weissbrod Principles'.³⁴ The draft does not specifically address conflict or conflict trade, although the preamble notes that companies are "obligated to respect" a long list of human rights instruments, including those governing conduct during war, such as the Geneva Conventions and the statute of the International Criminal Court (ICC). Indeed, the 1998 Rome negotiations on the statute of the ICC discussed, and then rejected, a proposal to include legal persons under the jurisdiction of the court. The rejection of the proposal was, in part, due to the analytical and negotiating challenge of integrating to the ICC statute a notion of legal personality that would not conflict with the different notions legal personality from criminal jurisdictions of a variety of national systems.³⁵

Third, NGOs and industry have viewed private sector links to conflict through the increasingly significant lens of corporate social responsibility (CSR). There has been a clear increase in consumer sensitivity resulting from successful campaigns on issues related to corporate responsibility and human rights. This has been assisted by the law courts and the news media in a number of countries, where there continues to be cases and news coverage alleging dubious and illegal behaviour in conflict zones by large multinational corporations. Human rights NGOs and consumer advocates in particular are increasingly concerned to address the ethical values of production in developing countries or zones of conflict. Indeed, consumer advocates are shifting their critical lenses from an agenda formed by issues such as price,

³³ The Kimberly process launched in May 2000 aimed at halting trade in conflict diamonds sets an interesting precedent for more generic regulatory efforts, in that it both propose a specific certification scheme as well as address comprehensive approaches to deal with trade in diamonds as a source of conflict trade. See Ian Smilie (Faf, 2002) for a recent analysis of attempts to regulate the conflict diamond phenomenon.

³⁴ E/CN.4/Sub.2/2003/WG.2/WP.1

³⁵ Andrew Clapham, "The Question of Jurisdiction under International Criminal law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court", in : M. Kamminga and S. Zia-Ziarifi (eds), *Liability of Multinational Corporations under International Law*, 2000, pp.139-195.

quality, and safety to one that is concerned with the ethical values of production. The cumulative effect of this activity is that companies, goods and profits that derive from economic activity in war zones are increasingly viewed as morally suspect.

Increasingly, NGOs are not only raising people's attention to a given problem, but are also networking closely with national policy-makers, research communities and international civil servants in terms of specific policy formulation and design and content of actual negotiations processes. The Kimberly process on conflict diamonds is one case in point, where, after initial resistance, business very quickly moved to ally with NGOs pushed government for a global solution that would solve the brand risk and collective action problems.³⁶

Finally, a UN report in October of 2002 illuminated, albeit unintentionally, what amounts to a regulatory gap. The third Annex of the report by the Panel of Experts on Illicit Exploitation the DRC listed over 85 OECD-based companies operating in DRC that, in the Panel's view, were in violation of OECD Guidelines for multinational corporations. The list caused significant confusion in capitals and boardrooms because it failed to explain what violations were alleged by the Panel. This confusion was compounded by the fact that the Guidelines have very little to say about war economies or even illicit exploitation. Despite, or perhaps because of these criticisms, the effect of the Panel's use of the Guidelines was to point out a glaring lack of regulation of private economic activity in conflict situations. In short, the regulatory gap through which conflict trade activities are able to continue is presently framed on two sides: on the one side, by increasing concern over the economic dimensions of international peace and security and, on the other side, by the evolving agenda for greater corporate accountability.

These two separate agenda are converging. It is arguable that the processes described above represent the gradual emergence of an international moral and political norm under which private sector activity that sustains or profits from armed conflict is unacceptable. This is an intuitively positive and laudable conclusion to draw. But, as with any development in international norms, this process possesses inherent dangers to some. Countries dependent upon a limited number of exports could face serious economic hardship should their goods start to be viewed as tainted in consumer markets. Companies with legitimate investments in such countries face a potential for significant losses and heightened risks to their reputations. The coping and survival mechanisms of communities that have come to rely on the informal economies of war zone may be inadvertently targeted by consumer action abroad.

³⁶ Ian Smillie, (Fafo 2002).

Thus the move to regulate involves governments, multilateral organisations, industry and civil society in the process of elaborating normative principles and operational definitions of what constitutes unacceptable private sector activity in war economies. The present unipolar world order dominated by the USA and characterised by looming transatlantic and global conflicts imply challenges to such a process. Still, historically, the end of the cold war has removed superpower rivalry as excuse for (official) funding of combatants of civil- and interstate wars. This represents a very important necessary, albeit not sufficient, condition for transparency in financial flows to countries in conflict. Similarly, the global political climate is more conducive than before to constructive negotiations over issues with clear North/South conflict potential. For instance, the 2002 UN Financing for Development Summit in Monterrey proved that it is possible to address issues of domestic governance such as corruption, transparency, money laundering in international negotiations without igniting the traditional North/South confrontation over external vs. internal causes of poverty in developing countries.³⁷ Thus, the movement to regulate conflict trade on the basis of an emerging norm may face a more positive political climate for regulatory action than the previous chapters might suggest.

4.1 A Continuum of Regulatory Options

Central to attempts to build a global regime to regulate conflict trade is an understanding of the multifaceted mix of policy instruments. There is a dynamic interface between broadly voluntary and more mandatory-oriented approaches to the enforcement of regulation. They can be mapped along a continuum from purely voluntary approaches based on company self-regulation on one extreme, to the legally based governmental or intergovernmental mandatory regulation and enforcement on the other.

There are also other aspects of conflict trade instruments that need further scrutiny:

- The continuum from regulations with a purely global scope on one extreme to those hammered out under strictly national jurisdiction or self-regulatory schemes within a single company on the other;

³⁷ Controversies surrounding recent wars in Afghanistan and Iraq, over concepts such as humanitarian intervention, and over trade related issues, have served to split both general UN forums and the UN Security Council. Notwithstanding these challenges, however, the main argument holds: negotiations in UN- or related forums over problems such as conflict trade are less likely than before to get bogged down in sterile battles along the North and South divide.

- Regulatory approaches differing according to the type of resource or economic sector, such as oil, timber, diamonds, arms, financial institutions, or type of financial transactions targeted, e.g. direct versus indirect;
- Regulatory approaches differing according to the sequencing of conflict – whether, roughly speaking, regulation is concerned with pre-, during or post-conflict situations.³⁸

While all dimensions have been touched on in the literature just surveyed, we concentrate here on what we find to be the most salient aspect in understanding the regulatory continuum: the voluntary versus mandatory dimension.

i) Voluntary measures, in which companies and/or industry associations take initiatives that are implemented in the absence of any pressure or even involvement from governmental bodies.

Codes of conduct or more general policies for corporate social responsibility (CSR) are examples of purely voluntary measures at the company level. Increasing numbers of companies are adopting such codes, along with management systems to oversee their implementation across the company. The Canadian oil company, Talisman, now has a security/human rights policy, based on its experience in Sudan. Although the company has divested from its Sudan holdings, the security policy developed in the course of its Sudan venture will be used to guide Talisman activities worldwide.³⁹

TotalFinaElf's decision to engage an external research body, GoodCorporation, in order "to find a methodology of checking independently the extent to which it is following its own ethical and security code of conduct in reality" is another example of corporate voluntary action. The company, both in its present form named simply 'Total' as of May 2003, and as three formerly independent companies, Total, Elf and Fina, has been targeted by advocates for its involvement in Myanmar and its close relations to a range of non-democratic African regimes. TotalFinaElf published its first CSR report in May 2003.⁴⁰

The Anti-Corruption Task Force (ACTF) of the International Association of Oil and Gas Producers (OGP) is an example of purely voluntary action at industry

³⁸ Other categories or sub-categories can also be established, not least according to the different types of companies involved in the financing of conflict. While this could be relevant, the important aspects of company variation can be handled with specific sectors.

³⁹ Talisman's 2002 Corporate Social Responsibility report, issued March 2003, page 8 (<http://www.talisman-energy.com>).

⁴⁰ Source: Financial Times, 15 April 2003, page 22.

level.⁴¹ The Wolfsberg Principles, signed in October 2000 by eleven leading international banks, also belong to this category, as they represent a voluntary set of global anti-money laundering guidelines. They were elaborated in cooperation with Transparency International (TI), an international NGO, with TI mainly playing the role of facilitator and not advocate.⁴²

Also included in this category should be voluntary initiatives by companies and/or industry associations where corporate actors *invite* governments and/or NGOs into partnerships where the primary motivation is general CSR/reputation management rather than the anticipation of government regulation. The Global Mining Initiative's Mining Minerals and Sustainable Development project (MMSD) is a relevant example, even if the main cooperating partner of the nine major international mining companies behind this initiative was a research institute (International Institute of Environment and Development, IIED) and not governmental players.⁴³

Companies adopting such initiatives generally network with others facing the same situation, and also often gain experience from and contribute to public/private partnerships featuring more explicit regime-building elements. For example, the new Talisman security policy referred to above makes explicit reference to the US/UK-government sponsored Voluntary Principles on Security and Human Rights. However, the main value of initiatives in this purely voluntary category, beyond their obvious potential impact on corporate behaviour and human welfare, is the explicit or implicit acceptance by companies engaging in them of binding societal principles and norms beyond the profit-making prime directive. In considering how to respond to conflict trade through regulation, the existence and proliferation of such voluntary measures are steps towards accepting certain rules of the game in certain situations and as such should be viewed as sources of future norms.

ii) Voluntary multi-partner initiatives, convened by national or international public bodies, where governments see their role primarily as a convenor, facilitator and motivator rather than actively pursuing specific policy ambitions with regard to companies.

Examples in this category include the UN Global Compact, set up by Kofi Annan in 2000 to facilitate CSR action around a range of general, non-binding principles of corporate behaviour. One of the Compact's multi-partner working groups has

⁴¹ See "Combating corruption: OGP progress report", Report No: I.2I/334, December 2002, OGP, London.

⁴² See Jonathan M. Winer and Trifin J. Roule: "The finance of illicit resource extraction"; page 77 (World Bank 2003). See also Jonathan Winer (Fafo 2002) for more information on the Wolfsberg principles and other finance industry standards.

⁴³ See Philippe Le Billon, in Bannon and Collier (2003).

targeted corporate challenges in war zones, discussing and elaborating best practices to stimulate good corporate performance in countries of conflict.⁴⁴

The OECD's Guidelines for Multinational Enterprises (<http://www.oecd.org>) represents a global framework for responsible business conduct. It also broadly falls into this category, even if the role of the public authority in question is more visible and targeted than in the case of UN Global Compact. Observance of the Guidelines is voluntary for businesses. Adhering governments, however, are committed to promoting them and to making them influential among companies operating in or from their territories. 'National Contact points', located in assigned OECD country ministries, are charged with making the guidelines known by national companies, labour unions and NGOs. According to the Guideline's 2002 Annual Report (OECD 2002), a number of national contact points approached companies operating in Myanmar to discuss corporate performance in light of the guidelines.

The US-UK Voluntary Principles on Security and Human Rights were established in late 2000 in cooperation between these two governments, a number of large oil and mining companies and some NGOs. The principles are meant to guide companies in maintaining the safety and security of their operations and within an operating framework that ensured respect for human rights and fundamental freedoms. Work on the principles started against the backdrop of conspicuous human rights abuses linked to extractive industry security operations. This is an intentionally dynamic process, both in terms of participation (Norway and the Netherlands joined in early 2003) and in substance, implying continuous review to ensure relevance and efficacy. For our purposes, an interesting feature of the Voluntary Principles is the apparent mutual interest between key governments and companies in working out this cooperative venture, and the facilitating - and legitimating - role was played by such NGOs as International Alert.

One lesson to be drawn from these examples is that a large number of companies do seem to consider cooperation with governments to be in their own interest in these matters. Although there is as yet no stick involved, companies spend time and resources to participate in meetings, do homework related to adherence requirements and also to join in the actual development and refinement of the schemes themselves. The motivation of companies consists of a mixture of reputation risk

⁴⁴ As a voluntary initiative, the Global Compact has neither the mandate nor the resources to monitor company behaviour. At the 16 July 2003 meeting of its Advisory council, there was agreement to create a task force to develop a process to address companies engaged in "egregious violations" of the Global Compact principles, as well as to entertain "a proposal that the Global Compact Office consider more explicitly the relationship between voluntary initiatives and regulatory approaches, such as the *Draft Norms of Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*." (source: UN Global Compact website, <http://www.un.org>, April 2003; see also <http://web.amnesty.org/pages/ec-globalcompact-eng>).

management, stakeholder consultation, gaining experience in work with governments and NGOs on topical CSR issues, and genuine aspiration to be good corporate citizens. In most instances it is either inherently difficult or too early to judge the actual effectiveness of these schemes.

Mixed motives and unclear results notwithstanding, this category of initiatives may still herald good news for potential regime-building efforts to control conflict trade. Companies *are* motivated to work with governments and other stakeholders to address global common goods, and they gain experience in the demanding business of public-private partnerships. Many of the initiatives are dynamic. They develop and may increasingly test the perceived limits of acceptable government intervention in corporate affairs.

iii) Public-Private Partnerships (PPPs), where governmental bodies take on more active roles and have more specific policy objectives with regard to companies. The main incentives used are 'carrot-based', positive incentives such as direct financial benefits and/or tax exemptions for companies complying with intended policies.

This category is meant to capture policy areas with more tangible governmental objectives, but where companies cooperate on the basis of enlightened self-interest and positive economic incentives. A candidate for this category might be the Chad-Cameroon Development and Pipeline Project. The overall aim of this unique cooperative venture is to stimulate responsible management of future oil revenues, and to ensure that prospective revenues are not becoming the pretext for violent conflict between rival groups. Important partners in the deal are the government of Chad and Cameroon, the World Bank/IFC, international oil companies led by Exxon-Mobil, and a range of civil society groups in Chad and Cameroon. Add to this a large number of international NGOs watching project developments with a combination of enthusiasm and deep scepticism, the latter due to a mixed record as judged by NGOs of many of the players involved in the project.

The incentive structure for the different partners to the Chad-Cameroon project is interesting and may shed light on the potential to build regimes to regulate conflict trade. Oil companies have welcomed a World Bank-led social compact for the project, at least partly because they need that institution to offset an otherwise unacceptable political risk. For their part, the World Bank and IFC, its private sector affiliate, currently need a broad social compact involving civil society to legitimate further involvement in the petroleum sector and to respond to pressure from shareholder governments, particularly in the North, to take on such roles.⁴⁵ Their interest

⁴⁵ An important motive of the 2001-2003 World Bank-run Extractive Industries Review is to explore to what extent there is general public/political support for continued World Bank Group lending to extractive industries worldwide. The background for this is that its mandate to operate in these

in a broad partnership involving both international oil companies and local governments is also based on a recognition that oil revenues undermine the motivation of even very poor governments to abide by World Bank and IMF advice and conditionality.

In one sense the deep poverty of Chad gives the government few other options when faced with such a *fait accompli* by a consortium of strong international players. This weak bargaining position of Chad's government also limits the extent to which the model is applicable to others. Countries such as Angola, Azerbaijan and Indonesia, or a post-Saddam Iraq for that matter, would not necessarily accept conditions on oil deals with foreign companies of the kind that Chad has accepted. On the other hand, there may be many solid reasons of national interest for Chad to comply with international demands, not least to enhance the overall domestic legitimacy of the government's oil business venture through networking with national NGOs and other local political interests.

Another initiative that fits within this category is the Extractive Industries Transparency Initiative (EITI). Launched in late 2002, EITI aims to gather all main stakeholders; governments North and South, oil and mining companies and NGOs, around a common cause of fostering transparency in resource revenues from extractive industries. An important aspect of EITI is its conscious response to the collective action problems identified in the problem structure discussed above. By stimulating regulation of transparency globally, the intention is to reduce incentives for corporations to free-ride and for governments to employ divide-and-rule tactics in relation to companies seeking oil or mining concessions.

In the course of less than three years, NGOs, led by Global Witness among others, have managed to put a controversial issue with potentially significant regulatory implications for corporate activities squarely on the global political agenda. The EITI featured on the agenda of G8 meeting in Evian, France, in June 2003, and has commanded substantial attention in governments, multilateral institutions, extractive industries and NGOs. Whether or not the EITI results in voluntary or mandatory measures for companies and affected governments, the policy objectives of the British and other governments, supported by a range of NGOs, are to obtain tangible changes in corporate behaviour and developing country governments. The jury is still out on whether EITI will succeed in this objective,⁴⁶ but it appears

areas has been questioned over the last decade. This is an additional reason for the topicality of the Chad-Cameroon project.

⁴⁶ An example of company adherence to increasing demands for transparency is the 2002 CSR report of Canadian oil company Talisman (published March 2003), which provides updated figures for fiscal contributions to host governments, including countries such as Sudan and Indonesia. (page 35, see www.talisman-energy.com)

that the need for more or less enforceable requirements to ensure a level playing field that promotes transparency has moved to a position of international consensus.

iv) Government-based regulation where compliance measures vary from voluntary to quasi-mandatory, including so-called 'naming-and-shaming' and the monitoring mechanisms this requires.

The Financial Action Task Force on Money Laundering (FATF) requests participating countries to police and monitor financial institutions according to agreed principles. The FATF obligates member countries to make self-assessments to agreed performance criteria, and also to join in mutual self-assessment via a peer-review mechanism.⁴⁷ In order to enhance pressure on non-performing governments, the FATF uses the results of these assessments to create a kind of blacklist of jurisdictions or countries in non-compliance with the FATF's forty recommendations. One of the interesting aspects of the FATF example is its implementation history. Its reliance on the national experts seconded to mutual self-assessment teams has enabled it to remain a small office within the OECD secretariat and to build its legitimacy with client states through its effectiveness.

Its relative success has, over time, enabled it to accrue an increasing amount of political backing from member states, as the fight against money laundering moved from the margins to the centre of the international political stage, first via the 'War on Drugs' and, more recently, the 'War on Terrorism'.⁴⁸ In 2001, in an unprecedented move, the FATF threatened a number of countries with sanctions, including withholding of IMF and World Bank loans if money-laundering legislation was not passed. In September 2002, the FATF approach was softened again with a temporary blacklist moratorium to allow a carrot-based initiative with the World Bank and IMF, including capacity-building efforts to improve legislation.⁴⁹

Certification regimes for specific goods involve similar dynamics to those involved in a black list. Certification serves to dissuade or encourage the purchase of targeted goods or services. As with the FATF, participation can be voluntary, mandatory or somewhere in between. The Kimberley process is a regulatory initiative of diamond-producing and diamond-selling states, NGOs and industry, initiated by South Africa following UN Security Council and General Assembly resolutions. The objective is to establish minimum common rules for rough diamond certifica-

⁴⁷ See OECD (2003): *Peer review: an OECD tool for cooperation and change*, for a recent assessment of how peer review is increasingly used to strengthen otherwise voluntary cooperation mechanisms.

⁴⁸ Jonathon M. Winer, *Globalising Transparency: Implementing a Financial Sector White List*, Fafo AIS Policy Brief, May 2003; available on www.fafo.no/piccr/ecocon.

⁴⁹ Financial Times, 26 September 2002: 'Blacklist of "dirty money" havens put on temporary hold'.

tion. Formally, the Kimberly certification scheme, which entered into force in January 2003, is fully voluntary. The participation criteria and compliance and enforcement mechanisms are weak and reflect a basically voluntary approach. Review missions on compliance are to be conducted “with the consent of the Participant concerned and in consultation with all participants.” There is no explicit mention of exclusion procedures for non-complying participants.

The Kimberly process and its certification mechanism provide important lessons for conflict trade regulation. Its voluntary nature was a necessary condition for consensus among recalcitrant governments and, to a lesser extent, companies. But its achievements to date are nonetheless tangible: a comparatively rapid and effective negotiation process, comprehensive corporate buy-in, independent auditors charged with helping government authorities to verify systems of warranties put in place by individual companies, and independent review missions.

To the extent that the Kimberly process remains voluntary in nature it belongs in category 2 or 3 above. Kimberly’s effectiveness in regulating conflict trade remains to be seen. Yet, it does appear to hold the promise of a dynamic process, providing opportunities for improving the system over time. Crucial in this regard will be its monitoring provisions, which will maximise the pressure on non-compliers and provide a standard against which to measure the effectiveness of the mechanism itself. Armed with this information, continued political pressure by NGOs, media and concerned governments might well contribute to a tightening of the Kimberly certification regime, and in theory it could grow into a mandatory-based regime with inter-governmental oversight.

The significance of monitoring and information as part of a process of building policy has been highlighted by the work of the UN expert panels on sanctions busting (Angola, Sierra Leone, Liberia) and illegal exploitation (Democratic Republic of the Congo). The Angola sanctions committee panel in 2000 named governments involved in sanctions busting, setting a precedent that would be followed in subsequent independent panel reports from other sanctions committees.

In 2002, that precedent was extended to the private sector when an annex of the panel report on illegal exploitation in the DRC listed 85 companies to be in violation of the OECD Guidelines for Multinational Corporations. Reference to the OECD Guidelines was probably inappropriate in that the Guidelines say almost nothing about conflict, and very little about human rights. For all that the DRC Panel’s resort to the OECD Guidelines was inappropriate in its substance, its effect has been to provoke governments and companies to begin to consider what is unacceptable practice in war zones. This process is by no means complete and has yet to bear real fruit. The fact that little thought has gone into this before is indicative of the formative stage of the conflict trade policy agenda and the fact that companies

– large and small, local and international – are invested or operating in war zones in the absence of any clear norms of behaviour.

The role of monitoring and information in policy making has also been highlighted by non-governmental efforts, such as activist campaigns to name-and-shame companies and state actors assumed to be complicit in the fuelling of deadly conflict and related mismanagement of resource revenues. Recent examples of such campaigns include those already mentioned, such as the Fatal Attractions campaign against conflict diamonds and the Publish What You Pay campaign launched in 2002. These are the two most well known examples of campaigns that target entire industrial sectors. However, they build directly on earlier campaigns that targeted specific company behaviour in specific countries, e.g. Shell in South Africa in the 1980s or in Nigeria in the 1990s.

v) Pre-emptive voluntary agreements between governments and industry sectors/associations, in which companies commit to specified actions in order to pre-empt proposals for governmental regulation.

Such agreements are common in environmental policy, while they are less well known in the areas concerned with conflict trade. Germany, the Netherlands and Denmark have very advanced voluntary agreement arrangements in the environmental field, where industry associations negotiate closely with governments on the targets and design of the various ‘voluntary’ measures. Ultimately it is the government or Parliament that sets the overall political goals with respect to, for example, reduction in air pollution, while industry has a wide scope to define the means.

The extent to which the regulatory ‘stick’ is clearly present and communicated varies across cases and countries. Proactive performance by companies with a view to weakening the case for potentially costly government regulation, is nevertheless the most common corporate motivation behind volunteerism on behalf of companies in the implementation of the relevant measures. Such pre-emptive voluntary arrangements are often promoted by industry as alternatives to taxation, with the clear understanding that if agreed goals are not achieved, cash-hungry ministries of finance will subject the target company or industry to heavy fines or stiff tax rates.

Voluntary agreements of this kind are confined to the national level. However, governments and industry associations are increasingly seeking to harmonise this form of cooperative regulation across borders. Environmental voluntary agreements (EVAs) now feature quite prominently in environmental policy-making in the European Union, both in Brussels as well as in the implementation of EU directives at country level by virtually all EU members. The Commission’s Industry Directorate (DGIII) is considered the keenest supporter of EVAs as an industry-friendly alternative to taxes and other economic instruments of regulation. The Environment Directorate (DG XI) tends to view EVAs as supplementary of environment law.

Acknowledging the possible shortcomings of EVAs, the Commission has established a set of guidelines to inform the national implementation of EVAs. Critics claim that these are so demanding that they move EVAs close to the category of direct, law-based regulation.⁵⁰

The critical points with regard to EVAs and voluntary agreements in general, are that these lack effective enforcement and compliance mechanisms, and entail free-rider problems and coordination challenges across borders. Environmental NGOs are also generally critical of EVAs because they fear EVAs contribute to more lenient goals and lack of transparency in deal making between government and industry.⁵¹ Still, EVAs may be relevant to conflict trade as an example of flexible ways to induce industry to cooperate with governments in areas that, for whatever reason, may lend themselves easily to conventional forms of regulation. The following EVA assessment is topical in this respect:

“... the clearest advantage with EVAs is their capacity to create constructive cooperation between authorities and target groups which may affect the norms of environmental behaviour. Voluntary agreements probably have a distinct advantage here since they are based on close cooperation, consensus seeking and the principle of shared responsibility between the state and target groups.”⁵²

vi) Conditionality by public or private, domestic or international financial institutions.

Conditionality conventionally relates to conditions concerning macroeconomic performance put on loans from the World Bank and IMF most often to developing or transition countries. In reality it is a wider phenomenon, implying the explicit and/or implicit pressures that follow loans or grants from bilateral or multi-lateral aid organisations to recipient governments. In a study for the World Bank, Philippe Le Billon⁵³ identifies a number of cases where conditionality has been applied by either the World Bank or IMF as an instrument of enforcement in relation to conflict trade. These include the delay of World Bank loans to Indonesia in 1999 due to concerns about illegal logging, US and IMF pressure against Thailand in the

⁵⁰ See Jon Birger Skjærseth: *Environmental “Voluntary” Agreements: Conditions for making them work*, in *Swiss Political Science Review*, 6 (2):57.78, Zurich, 2000, for an assessment of the pros and cons of EVAs.

⁵¹ A comprehensive OECD report on the topic reached a negative verdict on the overall environmental effectiveness of EVAs; “Voluntary approaches for environmental policy: effectiveness, efficiency and usage in policy mixes”; OECD, Paris (June 2003).

⁵² Skjærseth, (2000) page 63.

⁵³ Philippe Le Billon in Bannon and Collier, eds. (2003).

late 1990s to end Thai economic support to the Khmer Rouge in Cambodia, EU suspension of aid to Liberia to cut off resource flows from that country to RUF in Sierra Leone, and finally the IMF efforts from 1999 and onwards to force Angola to install some transparency in the management of the country's oil revenues.

Conditionality involves the threat or enacting of a halt to resource flows to a given country. It relates mainly to governments, although companies may be indirectly affected through sanctions on non-performing countries. The content, impact and legitimacy of conditionality are areas of considerable research and debate. In the context of conflict trade, it is worth noting that governments benefiting from or expecting large inflows of revenues from petroleum or mining, are far less likely to accept the terms implied by conditionality imposed by bilateral or multilateral institutions. The larger the inflow of natural resource revenues, the weaker the motivation for countries like Angola and Kazakhstan to abide by conditionality relating to, for example, transparency in revenue management and the fight against corruption.

As a result, the 'agents of conditionality' very often depend upon informal or formal cooperative processes with other stakeholders in order to achieve the goals of conditionality. This can in theory take the form of cooperation between multilateral and bilateral agencies and the main companies involved in resource extraction, in an attempt to limit the room for manoeuvre of the country in question. Alternatively, as is the case in the Chad-Cameroon project discussed earlier, one can apply softer versions of conditionality in cooperative approaches to work with concerned governments.

*vii) Legally binding regulations at national and/ or international levels, including sanctions authorised by the UN Security Council targeted at natural resource commodities linked to conflict trade.*⁵⁴

There is little in the way of international public or economic law against which the legality of private sector activities in armed conflict might be tested. While some conflict trade activities are clearly illegal under domestic or international law, many other activities are unregulated. Still others are nominally illegal, but are largely unenforced. There is, in short, an absence of law governing economic activities in war.

This anarchy, or the lack of effective regulatory remedy, is the most obvious source of impunity in war economies. Another is the lack of substantive law that creates liability for the specific unacceptable practices at issue. Criminal law in many countries does cover the kind of violations occurring in war zones. Predatory crimes

⁵⁴ These paragraphs on legally binding regulation were provided by Mark Taylor, based on work by Fafo AIS and the International Peace Academy on mapping legal liability for private economic actors in conflict trade; see <http://www.fafo.no/piccr/eccocon>.

– for example, murder, rape or theft – are in principle covered by domestic law in a conflict zone. Yet, many of the market-based activities related to the problem of war economies are not, technically speaking, illegal. It may appear morally unacceptable to obtain a profit or an economic advantage from the exploitation of alluvial diamonds in a war zone, to use a famous example, but there is no domestic law against that specific economic activity in war, nor is there a law which criminalizes exploitation when it is used to finance conflict.

There is a similar gap in public international law responses. There is a range of international instruments that deal with separate aspects of the problem. Relevant if diverse examples include targeted UN sanctions (e.g. against UNITA and RUF diamonds) supported by UN Sanctions Expert Panels, the UN Convention against Transnational Organised Crime (2000), the ECOWAS Moratorium on the Exportation, Importation and Manufacture of Light Weapons (1998), the UN Convention for the Suppression of the Financing of Terrorism (1999), the OECD Convention on Combating Bribery of Foreign Public Officials (1997), the UN Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988). Add to this regional and domestic legal action, primarily in the area of drugs and crime control. Indeed, it is in the areas of trans-boundary trafficking in illicit commodities that the domestic law has most teeth. Perhaps the most developed are domestic laws governing the production and trade in narcotics, small arms and light weapons, and landmines.

Yet, this patchwork of legal instruments mentioned above does not cover all the market-based and predatory violations that are associated with the worst forms of conflict trade and many of these instruments are weak on enforcement. UN authorized sanctions, for example, while binding on all states, cover only a select few conflict trade sectors, and by no means all countries or regions in conflict.

This is not to say that the effective targeting of economic resources cannot help to end conflict. Sanctions on illegal logging in Cambodia facilitated the collapse Khmer Rouge. Slobodan Milosevic was weakened and eventually overthrown after the funds he used to service his patronage networks were pursued and eventually put beyond his reach. The end of the Angolan war was hastened in part by restricting UNITA's ability to market diamonds using UN sanctions.

Yet, none of these sanctions efforts were successful on their own. In fact, until recently, sanctions have been seen primarily as tools of enforcement to ensure compliance with international norms or laws, not as instruments targeted at specific resources of belligerents. To date, it appears that sanctions are most effective when they are intended not simply to exert pressure, but when they seek to isolate the target from its resources, with the object of making the target more vulnerable to other

pressures. In this sense, sanctions can be said to be ineffective in the absence of a larger strategy involving political and military action.⁵⁵

While sanctions were not the sole source of success in any of the examples cited above, it is also true that none of these sanctions efforts created effective liability for business entities operating in these markets. The same is true for non-economic actors profiting from these conflict trade activities. Indeed, by 2002, there had been few, if any, convictions for sanctions busting anywhere in the world.

Elsewhere in public international law, there are no economic crimes against humanity or economic war crimes *per se*. The sole exception is predatory crimes with economic dimensions, namely slavery or the property crime of plunder/pillage.⁵⁶ Similarly, international trade law is concerned primarily with lowering barriers to trade and does not address the problem of trade based on war. The exception to this rule occurs when trade law goes some way towards facilitating conflict trade by making exceptions to the trade law regime for questions of national security. The same is true for the many bilateral investment agreements established in recent years. In fact, most global trade and service sectors do not have global controls for conflict trade at all.⁵⁷

As already noted above, attempts to tackle the problem of impunity in war economies must also confront problems of jurisdiction and legal personality. Most legal regimes deal with violations committed within their jurisdiction and do not extend to cover acts abroad by companies registered in their jurisdiction. There is scope for action via civil litigation in the home jurisdictions of companies for action of those companies abroad,⁵⁸ but there is little criminal law that captures war economies related activities abroad. While some countries have laws on the books that permit universal or extra-territorial jurisdiction for some crimes, with a few exceptions these are recent and have not been used extensively.⁵⁹

The problem of legal personality represents a challenge to global regulation. In most jurisdictions, individuals (natural persons) may be prosecuted for crimes, while

⁵⁵ R. T. Naylor, *Patriots and Profiteers* (Maclelland and Stewart, 1999)

⁵⁶ Anita Ramasastry, "The War Crime of Pillage and Plunder", (Fafo AIS, forthcoming 2003); also Anita Ramasastry "Corporate Complicity: From Nuremberg to Rangoon, An examination of Forced Labor Cases and their impact on the Liability of Multinational Corporations"; 20 Berkeley J. Int'l L. 91.

⁵⁷ Steven Shrybman "International Trade/Investment Agreements and Legal Initiatives to Regulate Private Sector Participation in War and Conflict Economies", background note to Fafo AIS Stenersen process, (October 2002).

⁵⁸ There are civil liability laws in some countries that permit suits to be filed for torts caused abroad, e.g. the US Alien Tort Claims Act (ACTA).

⁵⁹ The US Foreign Corrupt Practices Act is one example.

legal persons may not, and there are differences in each jurisdiction as to the legal jurisprudence around legal personality.⁶⁰ There are some notable exceptions, for example under the environmental legislation in some countries. However, in general, companies are legal persons and therefore do not qualify for prosecution under the criminal laws of most states, even if their activities are central to a conflict. In effect, while it would be possible to target company personnel for prosecution for specific criminal acts in war, it is not illegal for companies to do business in war zones or based on war zone production.

Advocates involved in recent campaigning efforts around conflict trade issues have highlighted the need for legislative responses that create enforceable liabilities for businesses involved in the negative aspects of conflict trade.⁶¹ In the US, there has been a renewed focus on the courts - and the Alien Tort Claims Act (ATCA) in particular - as a mechanism for applying norms of customary international law to legal persons, and not just natural persons. ATCA has been shown to permit civil action in US courts for violations of international law committed abroad. In these cases, the principles of private sector liability established by the post-World War II trials of Nazi and Japanese industrialists are having an impact many years later. It is arguable that those precedents “could provide a similar foundation for establishing criminal (and perhaps even civil) jurisdiction in other countries.”⁶² While helping to clarify potential liabilities, the political fall-out from the recent spurt of ATCA cases has been to profile the legislation in business circles as a tool for hunting multinational corporations. The result has been a political backlash against ATCA, seeking to de-legitimize and possibly repeal the act.

This is unfortunate. The legal principles established by such court actions will lay the foundations for regulation. When entering new markets or evaluating major changes in their operating environments, most international business looks at the legal regime governing their area of activity. When there is not one, in principle business should look to governments for an elaboration of clear and predictable rules. In the face of the disquieting proximity of some companies to human rights abuse and war, the principles established by court actions such as those under ATCA can

⁶⁰ Andrew Clapham (2000).

⁶¹ See, e.g., *Deconstructing Engagement: Corporate Self-Regulation in Conflict Zones*, Georgette Gagnon, Audrey Macklin, Penelope Simons (January 2003), based on the Canadian experience concerning Talisman oil's involvement in Sudan; available on <http://www.law.utoronto.ca/documents/macklin/DeconstructingEngagement.pdf>.

⁶² Anita Ramasastry, “Corporate Complicity: From Nuremburg to Rangoon, An examination of Forced labour cases and their impact on the liability of multinational corporations”: 20 Berkeley J. Int'l L. 91. See also, Ramasastry, A. ‘Secrets and Lies? Swiss Banks and International Human Rights’: 31 Vand. J. Transnat'l L. 325.

provide the principled foundations for regulation – both voluntary and mandatory - that, in turn, can play a key role in solving the collective action problem for companies. But the absence of legal development will prevent the emergence of the definitions of liability for conflict trade abuses and cut short the movement towards ending the impunity of perpetrators. Legal development is required to end the situation of uncertainty most governments, companies and communities now face concerning the legality of conflict trade.

5 Where do we go from here?

We began by asking a question relevant for the high-profile cases of multinational corporate investment in war zones: What constitutes unacceptable economic practice in a war zone? In describing conflict trade - economic activities in or related to conflict – we found that multinational corporations are only one of the economic actors at issue in conflict trade. In fact, the question as to a definition of unacceptable practice is directly relevant for all those who find themselves in some direct economic relationship to zones of conflict. This includes belligerents, companies of all sorts and sizes, local and national governments, affected communities and households, and international peace operations.

For all of these actors, understanding how to adapt to the economies of conflict must become a priority. While clearly a daunting policy task, there is a practical focus that is inherent in the policy responses already in play: while many and varied, the responses to date have converged around a norm or principle that defines as unacceptable economic activity that sustains or profits from armed conflict. As described above, we believe there are many pitfalls – and dangers – implicit in such a definition. It is, however, the most effective general description of the problem. The challenge is how to move forward.

The first step is to define a common approach to the problem. The conflict trade analytical framework described above involves mapping the presence of economic actors in a terrain marked by anarchy, coercion and criminality. Conflict trade analysis should consider, on a case-by-case basis, the nature and extent of the relationship between an economic actor and the activities that sustain or profit from these characteristics. The objective of such analysis must be to step beyond generalities and consider the specific acts and relationships that may constitute unacceptable behaviour in conflict zones.

This emerging normative and analytical framework requires careful nurturing. In our view, what progress has been made to date is by no means assured. Policy makers from otherwise separate areas - peace and security, development, corporate responsibility and attempts to control trans-national organised crime - should be seeking to bring policy and practice from their respective arena's closer together. But any efforts that ignore the malign problem structure of conflict trade are bound to fail. The problem structure analysis presented here should inform the strategies and

tactics of efforts to regulate conflict trade and help to make these as targeted and effective as possible.

The nature of the problem, the multitude of sectors and players, and their diverse natures, suggests that no single law, sanction, code of conduct or multi-stakeholder agreement is likely to have a decisive, global effect on the problem. There are, however, a number of ways forward:

- **Globalise the norms.** This diversity of regulatory responses suggests the urgent need to elaborate core principles, or norms, which governments, business and civil society organisations and affected communities can use to design responses to conflict trade. Ultimately, this will require some form of inter-governmental negotiation, and possibly an international instrument, to establish a global normative basis for the identification and control of abusive forms of conflict trade.
- **Take advantage of the enforcement continuum.** Discreet initiatives in a wide variety of sectors, countries and institutions are already building a patchwork regime of very different and largely unrelated pieces of regulation. These sit in various positions along a continuum of enforcement measures from the cooperative (voluntary) to the coercive. While many may not be directly targeted at conflict trade as a whole, taken together they could have significant impact on the phenomenon. Measures to combat money laundering or illicit imports, organised crime, terrorism, sanctions-busting, corruption, corporate malfeasance, etc. all address conflict trade issues as increasingly important secondary aims.
- **Nationalise implementation.** Business entities look to national laws to guide their activities. It is in the domestic jurisdiction where legislation will have the most immediate effect and where global norms can be confirmed and developed through practice. However, an international capacity to enforce compliance will also be necessary, not least because conflict trade (with its anarchic, and criminal dimensions) is a global phenomenon with a malign political problem structure. In the absence of a domestic will or capacity to enforce domestic law, international law will be needed to ensure there are legal remedies to abusive forms of conflict trade.
- **Use co-operative regulation.** Given the general complexity and the lack of experience in, and consensus on, regulating private sector players in this area, much attention should be focussed on maximizing the value and effectiveness of different forms of corporate voluntary- and/or self-regulation. A range of precedents already exists, including in the form of codes of conduct. Particular emphasis should be put on multi-stakeholder initiatives of various forms that may be mainly voluntary in nature while at the same time involve government and

international institutions. These may gradually develop regulatory elements such as third party monitoring and control, and binding self-assessment procedures. All of these can help lay the foundations for global norms.

- **Build consensus across constituencies.** Advocates should be careful about bringing regulatory proposals to the UN or other multilateral forums until these proposals are relatively mature, both in their causal analysis and their political base. This implies a need to stress the importance of informal, step-by-step policy-making and consensus-building initiatives in order to build momentum and support for global norms in the global North and South, in industry and affected communities.
- **Address the collective action problems.** Stimulate corporate self-interest in normative approaches, regulatory frameworks and law to address the collective action problem in specific industries, countries or regions. A global approach is likely to be useful to most industries.
- **Do no harm.** Regulation should design responses to unacceptable economic activity in a targeted manner, without causing unintended economic damage to national economies, local communities or conscientious companies.
- **Improve Conflict Trade Analysis.** Conflict trade is still a relatively immature political problem in terms of both knowledge and political processes. The analysis presented above indicates that more research and consensus building is critically important in terms of convincing key players of the needs for, and implications of, political action towards regulation.

Appendix A Knowledge Inputs to Policy

An important feature of recent emerging regulatory regimes in other policy areas, is structured knowledge inputs into negotiations processes. NGOs and concerned policy makers alike are generally keen to involve policy research communities early on in agenda-setting exercises, in order to learn and to enhance the overall legitimacy of pre-negotiation processes. This becomes particularly salient in instances of significant scientific uncertainty, not least because such uncertainty can easily be exploited by groups that oppose the goals of given (emerging) regulatory regimes.

Climate change is a case in point. Here, clear-sighted policy-makers set up the Intergovernmental Panel on Climate Change (IPCC) as a venture to build the necessary scientific consensus on which to build complex and controversial political negotiations. Most observers probably agree today that IPCC has been an important necessary, although of course not sufficient, condition for the relative success of negotiations leading up to the 1997 Kyoto Protocol.

Conflict trade is not marred by scientific uncertainty comparable to that of climate change, especially not in terms of the natural sciences. There is probably not a case for setting up any IPCC-like consensus-making body on conflict trade. Still, the success of future regime-building in this area depends on a foundation of robust and legitimate knowledge inputs, mostly in the area of politico-economic policy research.

To date, considerable work has been done by a variety of research institutions, bilateral aid agencies, multilateral organisations and NGOs on defining the problem.⁶³ Below we survey a number of recent contributions to analyse and clarify various aspects of the regulatory dimensions of conflict trade.

The International Council on Human Rights Policy published a report in February 2002 entitled *Beyond Voluntarism; Human Rights and the developing international legal obligations of companies*.⁶⁴ The report examines the extent to which international rules for the protection of human rights create binding legal obligations on companies. It makes a case for applying existent human rights law to companies. The report addresses a relatively limited policy area but makes a valuable contribution in the effort to deepen the understanding of the legal framework available, including its functions, strengths and weaknesses, loopholes and applicability. The report's main thrust is that voluntary action by companies is positive and important, but totally inadequate in order to ensure companies comply with human rights conventions and norms.

⁶³ See, e.g., www.fafo.no/ecocon for a list of sector studies on conflict trade as well as links to related projects.

⁶⁴ <http://www.ichrp.org/107/1.pdf>

The International Peace Academy (IPA) published a Background Paper in May 2002 entitled *Controlling Resource Flows to Civil Wars: A Review and Analysis of Current Policies and Legal Instruments*.⁶⁵ The paper identifies existing national, regional and multilateral policies, practices and legal instruments available to control the global flow of resources to civil wars. Using a sector approach, it evaluates existing regulatory initiatives based on their effectiveness and consequences. It argues that the lack of a clear distinction between “illicit” and “licit” activities complicates control efforts, but does not attempt to define such ‘illicit’ activities. The paper provides an analytical effort to identify the shortcomings of the various relevant instruments, and calls for a coherent, multilateral legal regime. A central argument is that increased emphasis needs to be dedicated to coordinate the various overlapping control systems to make them mutually reinforcing. The paper provided the analytical background to a conference hosted by the International Peace Academy in Italy in May 2002. The conference report is presented below.

The IPA Conference Report *Policies and Practices for Regulating Resource Flows to Armed Conflict*⁶⁶ addresses the potential of the existing regulatory frameworks for regulating resource flows sustaining war. The report is policy oriented with specific recommendations to all policy makers in the international community, developed states and the UN in particular. It argues that a combined strategy is required involving both improved enforcement of existing policies and development of a new, inclusive, global normative framework. The report is a valuable contribution to efforts at identifying the implementation gap in regulating unacceptable practise in conflict torn societies. A central issue raised is the need to identify the political challenges to regulation. Yet, the report does not approach this issue in detail. Among its the recommendations are; the extension of domestic regulation of MNCs to extraterritorial activities; the broadening and deepening of international financial regulatory standards; the establishment of a permanent sanctions monitoring mechanism within the UN; the establishment of a permanent office to support the Security Council’s Independent Panels of Experts; and the formation of a permanent information sharing and cooperation mechanism among international law enforcement agencies.

A recently published IPA volume *The Political Economy of Armed Conflict: Beyond Greed and Grievance* (2003) brings the debate back to its origins by looking into the explanatory power of the economic factors in violent conflict. Through selected case studies the book sheds light on the political economy of contemporary conflicts. One of the guiding assumptions is that a clearer understanding of the

⁶⁵ http://www.ipacademy.org/PDF_Reports/controlling_resource_flows.pdf

⁶⁶ http://www.ipacademy.org/PDF_Reports/eacw_policiesandpractices.pdf

economic incentives and opportunities that shapes the dynamics of conflict can help identify more effective policy.

Evidence from the case studies indicates that very few contemporary wars can be described only as resource wars. Economic incentives have not been the only or even the primary cause of these armed conflicts, rather they interacted with socio-economic and political grievances, ethnic disputes and security dilemmas. Under certain circumstances access to resources has been a salient factor sustaining hostilities, affecting their duration and in some cases their intensity. A key question is whether conflicts that have begun with political aims have mutated into conflicts in which short-term economic benefits are paramount. The findings from the case studies are mixed. There is some evidence that non-state armed groups dependent upon lootable resources may have less incentive to generate support from the civilian population and fewer constraints against predatory behaviour. There are, however, methodological problems in ascertaining the balance of combatants' economic and social priorities. While policy makers, researchers and NGOs in recent years have been emphasising the importance of natural resources and economic agendas in explaining the dynamics of war, this volume adds nuance to the debate and repositions the argument about economic incentives relative to other political, ideological, and strategic factors.

In late 2002, IPA and Fafo AIS embarked on a collaborative research project to undertake a systematic assessment of the legal implications of private sector economic activities that abet, promote, or profit from armed conflict and its associated human rights violations. The project was managed through a consultative process of different NGO and legal experts known as the Stenersen process, named after the venue in which the first meeting took place in Oslo. The research work consisted of two research projects both coordinated by Professor Anita Ramasastry, University of Washington School of Law, Seattle. The first, is a legally annotated commentary aimed at mapping the norms of international law, as set out in statutes concerning genocide, war crimes, crimes against humanity and human rights, as they actually or potentially apply to the behaviour of economic actors in repressive or war-torn states. The second, is a comparative survey of private sector liability for grave violations of international law in national jurisdictions. The output will provide a much-needed comparative survey of the relevant national legislation in selected countries with respect to business entities' liability under civil and criminal law for the commission of or complicity in the commission of violations of international human rights and humanitarian law, both in and beyond national jurisdictions. The output from the Stenersen process research will be made available by Fafo AIS and IPA on CD ROM and on the Internet. Separately, but in support of this work, IPA has commissioned work on complicity and the legal framework con-

cerning economic agendas in civil wars. Fafo AIS has commissioned work on the international humanitarian law of pillage and plunder, as well as trade law.

The Overseas Development Institute published *Regulating Business in Zones of Conflict: A synthesis of Strategies* (July 2002), presents an overview of the issues with special emphasis on implementation of existing regulatory instruments. It attempts to identify the private sector activities that are of concern in conflict situations, mapping relevant responses, and making recommendations on how to fill noted gaps. The approach is pragmatic, not advocating extensive new regulation but recommending better use of the existing options. The report calls for more research on the issue of private economic activity in zones of conflict, on the logic that harmful activities need to be better understood in order to design the right response. It stresses that while it is quite easy to identify regulatory instruments, it is more challenging to assess their impact. The report is thorough in its presentation of regulatory options, but limits discussion to the existing regulatory instruments.

The World Bank project “Governance of Natural Resources Revenues”⁶⁷ commissioned a series of papers in 2002 to examine the ways in which improved resource governance can address the problems linking natural resource exports with corruption, poor governance and armed conflict. Philippe Le Billon’s contribution to this project *Getting it done: instruments of enforcement* deals squarely with regulation issues. The chapter seeks to identify, describe and evaluate the effectiveness of international policy tools that bear on the governance of natural resources. It argues that a comprehensive global enforcement instrument would be more effective than the current ad hoc approach on conflict trade.⁶⁸ The report provides a broad overview of international instruments of enforcement, not limited to the governance of natural resources, but relevant also to other forms of conflict trade. It compares different approaches to regulation, recommending a combination between voluntary and legal regulation while highlighting the many challenges to effective policymaking. It also addresses the role of multilateral institutions, particularly the UN, and raises the issue of increased UN engagement in the light of “the economics of peace building”.

The World Bank report *Breaking the Conflict Trap*⁶⁹ examines both the economic factors contributing to the incidence of civil war as well as some conflict trade mechanisms. It argues for international action along three tracks: better use of aid, im-

⁶⁷ [http://wbi.n0018.worldbank.org/Networks/ESSD/icdb.nsf/D4856F112E805DF4852566C9007C27A6/053047A6F6A0662785256C910059522E/\\$FILE/le+Billon+paper.pdf](http://wbi.n0018.worldbank.org/Networks/ESSD/icdb.nsf/D4856F112E805DF4852566C9007C27A6/053047A6F6A0662785256C910059522E/$FILE/le+Billon+paper.pdf)

⁶⁸ This chapter appears in: Ian Bannon and Paul Collier (ed): *Natural resources and violent conflict – options and actions* (pp 215–286), World Bank, 2003.

⁶⁹ Paul Collier *et al* (2003).

proved governance of natural resources, and careful coordination of military intervention and developmental strategies during the post conflict period. The report argues for a change in the way aid is scheduled to both post-conflict countries and to what the report calls 'low income countries under stress', those with extremely low incomes, poor policies and governance. In both situations, donors should emphasise aid targeted at improving policies, institutions and governance. The Bank's studies suggest that aid is particularly effective during the first post-conflict decade, but more in the middle of the decade than in the beginning. This suggests that disbursements need to be coordinated with the strategies of military intervention and political peace-building to ensure a stable transition, social inclusion and to avoid sky-rocketing post-conflict military expenditures. To mitigate the risk of conflict, the report suggests establishing a more concessional IMF facility triggered at times of severe price crashes to cushion low income countries against price shocks. International templates for domestic and corporate governance of natural resource revenues and related payments would also help build trust within conflict prone countries and lower risk levels for companies considering investment in relatively unstable countries. The report argues that adverse effects of natural resources can be dealt with in a number of ways. Certification and tracking regimes like the one established for rough diamonds through the Kimberly process, can help shut armed factions out of international markets. However, monitoring and investigating the financial transactions may often be easier than tracking the physical transactions. Requiring official scrutiny of physical transactions at customs in relation to information about counterpart financial transactions may also be a useful check. The authors argue for criminalizing 'booty futures'⁷⁰, making such transactions criminal in the country where the company is registered. Similarly, if voluntary agreements like the Kimberly regime prove ineffective, intergovernmental legislation will be necessary.

References

Some of the following can be obtained via www.fao.no/piccr/ecocon.

Ballentine, Karen and Jake Sherman, eds., *The Political Economic of Armed Conflict, Beyond Greed and Grievance*, International Peace Academy / Lynne Rienner (2003).

Bannon, Ian and Paul Collier, eds., *Natural resources and violent conflict – options and actions*, (World Bank, 2003).

Berdal, M. and David Malone, eds., *Greed and Grievance: Economic Agenda in Civil Wars* International Peace Academy / Lynn Rienner (2000).

- Clapham, Andrew "The Question of Jurisdiction under International Criminal law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court", in : M. Kamminga and S. Zia-Ziarifi (eds), *Liability of Multinational Corporations under International Law*, 2000, pp.139-195.
- Collier, Paul "Doing Well Out of War, An Economic Perspective" in Berdal and Malone, eds., (2000)
- Collier, Paul *et al Breaking the Conflict Trap: Civil War and Development Policy* (World Bank 2003).
- ECON Report 62/2000: *Petro-states: predatory or developmental?* Oslo (2000).
- Global Witness, *The Logs of War*, Fafo AIS, PICCR report 379 (2002).
- Global Witness, *Fatal Attractions* (1999).
- Global Witness, *All the President's Men* (2002).
- Hodges, Tony *Angola from Afro-Stalinism to Petro-Diamond Capitalism* (2001).
- International Crisis Group, *God, Oil and Country – Changing the Logic of War in Sudan*, Geneva (January 2002)
- International Peace Academy and Fafo AIS, *Economic Agendas in Armed Conflict: Defining and Developing the Role of the UN*, Background Paper (March 2002).
- International Peace Academy and Fafo AIS, "Private Sector Actors in Zones of Conflict: Research Challenges and Policy Responses", a report of meeting sponsored by Thursday, (April 19, 2001), International Peace Academy, New York. Rapporteur: Jake Sherman.
- Le Billon, Philippe; Jake Sherman, and Marcia Hartwell, *Controlling Resource Flows to Civil Wars: A Review and Analysis of Current Policies and Legal Instruments*, International Peace Academy, Background Paper (May 2002).
- Sherman, Jake (rapporteur) *Policies and Practices for Regulating Resource Flows to Armed Conflict*, International Peace Academy Conference Report, Rockefeller Foundation Bellagio Study and Conference Center, Bellagio, Italy (21-23 May 2002).
- Karl, Terry Lynn *The Paradox of Plenty: Oil booms and Petro-States*, Berkely (1997).
- Kofele-Kale, Ndiva, "Patrimonicide: The International Economic Crime of Indigenous Spoliation" (28 Vand. J. Transnat'l L. 45; 1995).

- Le Billon, Philippe "Getting it done: instruments of enforcement", in Bannon and Collier (2003).
- Naylor, R.T. *Patriots and Profiteers* (Maclelland and Stewart, 1999)
- OECD *Peer review: an OECD tool for cooperation and change*, OECD (2003)
- OECD *Voluntary approaches for environmental policy: effectiveness, efficiency and usage in policy mixes*; OECD (June 2003).
- Oxfam Briefing Paper *The spoils of Peace – how can tighter arms export controls benefit both the poor and British industry?* (13 February 2002).
- "Combating corruption: OGP progress report", Report No: I.2I/334, December 2002, International Association of Oil & Gas Producers, London.
- Ramasastry, Anita. 'Corporate Complicity: From Nuremburg to Rangoon, An examination of Forced labour cases and their impact on the liability of multinational corporations': 20 Berkeley J. Int'l L. 91.
- Ramasastry, Anita. 'Secrets and Lies? Swiss Banks and International Human Rights': 31 Vand. J. Transnat'l L. 325.
- Ramasastry, Anita. *The War Crime of Pillage and Plunder*, (Fafo AIS, forthcoming 2003);
- Reno, W. "Shadow States and the Political Economy of Civil Wars", in Berdal and Malone (2000).
- Ross, M. "Booty Futures: Africa's Civil Wars and the Futures Market for Natural Resources" December 18, 2002; <http://www.polisci.ucla.edu/faculty/ross/bootyfutures.pdf>
- United Nations: "(Third) Report of the Panel of Experts on Illicit Exploitation of Natural Resources and other sources of Wealth in the Democratic Republic of the Congo" S/2002/1146, (October 2002).
- Shrybman, Steven "International Trade/Investment Agreements and Legal Initiatives to Regulate Private Sector Participation in War and Conflict Economies", background note to Fafo AIS Stenersen process, (October 2002).
- Skjærseth, Jon Birger *Environmental "Voluntary" Agreements: Conditions for making them work*, Swiss Political Science Review, 6 (2):57.78, Zurich (2000).
- Smillie, Ian *Dirty Diamonds*, Fafo AIS, PICCR report 377 (2002).

- Smith, Dan *Trends and Causes of Armed Conflict*, Berghof Handbook for Conflict Transformation (April 2001).
- Spear, Joanna *The Political Economy of Private Military Security*, Fafo AIS, PICCR report (forthcoming 2003).
- Swanson, Phillip *Fuelling Conflict*, Fafo AIS, PICCR report 378 (2002);
- Taylor, Mark, ed., *Conflict Trade*, Pluto Press (forthcoming 2004).
- Winer, Jonathan M. *Illicit Finance and Global Conflict*, Fafo AIS, PICCR report 380 (2002).
- Winer, Jonathon M. *Globalising Transparency: Implementing a Financial Sector White List*, Fafo AIS Policy Brief (May 2003) www.fafo.no/piccr/ecocon.
- Winer, Jonathan M. and Trifin J. Roule: "The finance of illicit resource extraction" in Bannon and Collier (2003).

About the Authors

Leiv Lunde is currently a partner and senior policy analyst in ECON Analysis in Oslo. He was State Secretary of International Development and Human Rights in the Norwegian Ministry of Foreign Affairs from 1997-2000, and has worked and published widely on international environment and development cooperation and corporate social responsibility issues. He is author, along with Helge Ole Bergesen, of 'Dinosaurs or Dynamos? The United Nations and the World Bank at the Turn of the Century' (London, Earthscan, 1999).

Mark B. Taylor is the Deputy Managing Director at the Fafo Institute for Applied International Studies (Fafo AIS), Oslo, and editor of Fafo's *Economies of Conflict* research papers. Since 1997, he has worked primarily on issues related to international responses to conflict, human rights and the reform of UN peace operations. He is editor of a volume of studies on war economies entitled *Conflict Trade* (London, Pluto Press, 2004).

Anne Huser is a researcher at the Fafo Institute for Applied International Studies (Fafo AIS) in Oslo working on policy-oriented research related to UN reform, development economics and economies of conflict. She was previously with the multilateral department in the Norwegian Ministry of Foreign Affairs and has an academic background in international political economy and structural adjustment in Africa.

Commerce or Crime?

Regulating Economies of Conflict

What constitutes unacceptable economic activity in a war zone?
What should communities, companies or governments reasonably expect in terms of economic behaviour in situations of conflict?
Commercial secrecy and the fog of war make these difficult questions to answer, but the interests of governments, companies and affected communities make it imperative that we try.

Commerce or Crime? looks at the phenomenon of conflict trade and suggests a way forward. The report presents a framework for the analysis of economic activity in war zones, analyses the politics of attempts to regulate the problem and argues for a normative approach in building policy and law to deal with the worst abuses.

The report was commissioned by the Fafo AIS Programme for International Co-operation and Conflict Resolution as part of the *Economies of Conflict* project, which examines the links between certain private sector activity and armed conflict. For additional titles in the *Economies of Conflict* series and background information from the project, please check our website: www.faf.no/piccr

PICCR is a research programme at the Fafo Institute for Applied International Studies (Fafo AIS). Financial support for *Economies of Conflict* has been provided by the Government of Norway.

Cover photo: Oil field, Azerbaijan © Rune Eraker



Fafo

P.O.Box 2947 Tøyen
N-0608 Oslo
www.faf.no

Fafo-report 434
ISBN 82-7422-414-0
ISSN 0801-6143