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# **Regulating for change? Influencing Business Contributions to Peacebuilding**

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## **Abstract**

*Those actors that attempt to influence business approaches to social responsibility are typically concerned with preventing businesses from causing harm or holding businesses accountable for harmful activities when they occur. In post-conflict settings, these twin aims are particularly important given the innumerable instances of businesses undermining transitions from conflict to peace through harmful practices.*

*However, businesses can also be positive agents of change. As an emerging discourse on business and peacebuilding is suggesting, businesses can contribute positively to transitions from conflict to peace in a range of ways. But can other actors influence businesses to engage in peacebuilding processes? Can they require, induce and persuade positive business-based contributions to peacebuilding? If so, how?*

*Examining two case studies on Northern Ireland and South Africa, I will argue that different actors can influence businesses to act as peacebuilding agents. I use the findings from these case studies to consider opportunities for thinking about a global policy instrument on business and peacebuilding.*

## **Declaration**

In accordance with Regulation 25 of the Assessment Regulations for Research Degrees at the University of Edinburgh, I certify that this thesis I have presented for examination for the Ph.D degree of the University of Edinburgh is solely my own work. It has not been submitted for any other degree or professional qualification

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## Abbreviations

AECID	Agency for International Development Cooperation
AI	Amnesty International
ANC	African National Congress
ATS	Alien Tort Statute
B4P	Business for Peace
B-BBEE	Broad-Based Black Economic Empowerment
BEE	Black Economic Empowerment
BHHRC	Business and Human Rights Resource Centre
CAO	Compliance Advisor Ombudsman
CBI	Confederation of British Industries
CBM	Consultative Business Movement
CMMRD	Commission for the Management of Strategic Resources, National Reconstruction and Development
CMR	Conflict Minerals Rule
CODESA	Convention for Democratic South Africa
CSV	Creating Shared Value
CSI	Corporate Social Investment
CSR	Corporate Social Responsibility
DDR	Disarmament, Demobilisation and Reintegration
DED	Department of Economic Development
DfID	Department for International Development (United Kingdom)
DRC	Democratic Republic of Congo
DTI	Department of Trade and Industry
ECA	Export Credit Agency
ECNI	Equality Commission Northern Ireland

EP	Equator Principles
EU	European Union
FEA	Fair Employment Agency
FE Act	Far Employment Act
FETO	Fair Employment and Treatment Order
FIFA	Fédération Internationale de Football Association
FLA	Fair Labour Association
FNC	Federación Nacional de Cafeteros
FoE	Friends of the Earth
FSC	Forest Stewardship Council
GEAR	Growth, Employment and Redistribution
GFA	Good Friday Agreement
GM	General Motors
GRI	Global Reporting Initiative
HP	Holyland Principles
HRC	Human Rights Council
HRW	Human Rights Watch
JSE	Johannesburg Stock Exchange
IA	International Alert
IBA	International Bar Association
ICC	International Criminal Court
ICGLR – MTCS	International Conference of the Great Lakes Region Mineral Tracking and Certification Scheme
ICoC	International Code of Conduct
ICoCA	International Code of Conduct Association
IDEA	Institute for Democracy and Electoral Assistance
IDP	Internally Displaced Person



IEM	Independent External Monitoring
IFC	International Finance Corporation
ILO	International Labour Organisation
IMF	International Monetary Fund
IPIECA	International Petroleum Industry Environmental Conservation Association
IRA	Irish Republican Army
MDGs	Millennium Development Goals
MIGA	Multilateral Investment Guarantee Agency
MNC	Multinational Corporation
MNE	Multinational Enterprise
MOGE	Myanmar Oil and Gas Enterprise
NAP	National Action Plan
NCP	National Contact Point
OECD	Organisation for Economic Co-operation and Development
PCSR	Political Corporate Social Responsibility
PDPs	Peace Development Programmes
PRI	Principles for Responsible Investment
PRIO	Peace Research Institute Oslo
PSRP	Political Settlements Research Programme
R2P	Responsibility to Respect
RAAD	Rights and Accountability in Development
RDP	Reconstruction and Development Programme
SAI	Social Accountability International
SAIS	School of Advanced International Studies
SAMFU	Save my Future Foundation
SBR	State-Business Relations

SDGs	Sustainable Development Goals
SEC	Securities and Exchange Commission
SLA	Sustainable Livelihoods Assessment
SME	Small to Medium Sized Enterprise
SRSG	Special Representative to the Secretary General
SOMO	Stichting Onderzoek Multinationale Ondernemingen (Centre for Research on Multinational Corporations)
TC	Truth Commissions
TCOG	Talisman (Colombia) Oil and Gas Limited
TJ	Transitional Justice
TNCs	Transnational Corporations
TRC	Truth and Reconciliation Commission
UK	United Kingdom
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNEP	United Nations Environment Programme
UNGA	United Nations General Assembly
UNGC	United Nations Global Compact
UNGP Rights	United Nations Guiding Principles on Business and Human Rights
UNSC	United Nations Security Council
UPR	Universal Periodic Review
US	United States
USAID	United States Agency for International Development
VPSHR	Voluntary Principles on Security and Human Rights
WB	World Bank
WBCSD	World Business Council for Sustainable Development

WFE

World Federation of Exchanges

## **Mapping the Business and Peace Terrain**

This thesis seeks to examine the ways and means by which different actors might require, incentivise, or encourage businesses to contribute to peacebuilding. This study suggests that a range of actors, from shareholders to international financiers, states to civil society, can all influence business contributions to peacebuilding. To substantiate this claim, I examine what some term 'regulatory pluralism, which refers to the broadening of actors involved in the regulation of businesses and the diverse methods that these actors use to shape business conduct. I will suggest that through different forms of influence, which arise from the pluralisation of regulation, different actors can prompt businesses to contribute to peacebuilding efforts.

I use the findings from two case studies on Northern Ireland and South Africa to demonstrate different ways in which various actors have influenced businesses to contribute to peacebuilding in these contexts. I argue, in turn, that these examples provide opportunity for considering the possibility for a global policy instrument on business and peacebuilding. Such an instrument could provide a reference point to help inform those that attempt to shape business conduct as to how they can use their influence to promote business contributions to peacebuilding. This introductory chapter outlines why the issue is important and explains how I will conduct this research. It also includes an overview of the methodology and outline of the remainder of the thesis.

### **1.1. Introduction**

We can understand the relationship between business and peace from different perspectives. Firstly, businesses can hinder the realisation of peace. Amongst other things, businesses can support repressive governments, helping to sustain dictatorial regimes. They can also undermine fundamental human rights, both directly through their actions, and indirectly through their relationships with others. In certain contexts, this negative view of the relationship between business and peace

is better characterised under the heading of business and conflict because it reflects the various ways that businesses can undermine peacebuilding efforts.

Alternatively, we might see businesses as necessary for peace to be realised. Businesses create jobs, widen the tax base, and contribute to the physical reconstruction of the state. These contributions are all crucial components of a peacebuilding process. Finally, some might suggest that any positive contributions that companies can make to peacebuilding processes is subject to the extent to which businesses are not causing harm. That is, while in theory, businesses might contribute much during transitions to peace by generating prosperity and employment, whether these outcomes promote or impede peacebuilding efforts will depend on the extent to which businesses act in socially responsible ways.<sup>1</sup>

More recently, however, writers and practitioners have begun to examine the opportunities for and untapped potential of businesses to contribute to peace in ways that extend beyond the limited understandings outlined above.<sup>2</sup> Because peacebuilding measures involve all levels of society and target all aspects of the state structure, peacebuilding requires a wide variety of agents for their implementation.<sup>3</sup> There are those that contend, in line with this integrative approach to peacebuilding, that '[t]he relevance of the business sector's backing of peace negotiations and peacebuilding cannot be over-stated.'<sup>4</sup>

Evidence of the increasing importance attached to businesses in peacebuilding processes is easy to identify. A small sampling of institutions that work on the topic includes the United Nations (UN) Global Compact (UNGC), the United States

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<sup>1</sup> J. Ford, *Regulating Business for Peace: The United Nations, the Private Sector, and Post-Conflict Recovery*, New York, Cambridge University Press, 2015, at 61. Throughout this thesis, I use the terms business, enterprises, firms, and companies interchangeably.

<sup>2</sup> See. J.L. Nelson, 'The Business of Peace: The Private Sector as Partner in Conflict Prevention and Resolution', International Alert, Council on Economic Priorities, and the Prince of Wales International Business Leaders Forum, 2000; J. Oetzel, K.A. Getz and S. Ladek, 'The role of multinational enterprises in responding to violent conflict: A conceptual model and framework for research', *American Business Law Journal*, vol. 44, no. 2, 2007; A. Gerson, 'Peace building: The Private Sector's Role', *The American Journal of International Law*, vol. 95, no. 1, 2001; K.A. Getz, and Oetzel, J., 'MNE strategic intervention in violent conflict: Variations based on conflict characteristics', *Journal of Business Ethics* vol. 89, no. 4, 2010.

<sup>3</sup> M. Maiese, 'Peacebuilding', in G. Burgess and H. Burgess (ed.) *Beyond Intractability*. Conflict Information Consortium, University of Colorado, Boulder, July 2003.

<sup>4</sup> A. Rettberg, 'Peace is Better Business, and Business Makes Better Peace: The Role of the Private Sector in Colombian Peace Processes', GIGA Research Programme: Violence and Security No. 240, 2013, at 5.

See also N. Turner, V. Popovski, and O. Aginam, 'Post-conflict Countries and Foreign Investment', United Nations University, Policy Brief 8, 2008.

Institute for Peace, the Institute for Economics and Peace, The Hague Centre for Global Justice, Business for Peace Foundation, One Earth Future Foundation, Peace Research Institute Oslo, and SwissPeace.<sup>5</sup> Similarly, policy developments have emerged focused on the integration of businesses in peacebuilding efforts. As an example, recognising that economic underdevelopment can be conflict generating, the UN Security Council (UNSC) included corporate stakeholders in the drive to attain the Millennium Development Goals (MDGs), calling for more investment in conflict-affected areas to stimulate development.<sup>6</sup> More progressively, the 2015 Sustainable Development Goals (SDGs) explicitly recognise a central role for businesses in helping to achieve development objectives, including the realisation and facilitation of peace.<sup>7</sup> Institutions such as the UN peacekeeping are also bringing businesses centre stage.<sup>8</sup> In September 2013, UN Secretary-General Ban Ki-moon launched Business for Peace (B4P), a multi-stakeholder initiative involving governments, business, and civil society.<sup>9</sup> The initiative seeks to support companies to implement responsible practices aligned with the UNGC principles throughout their business operations and supply chains in conflict-affected/high-risk areas.<sup>10</sup> As a final example, as part of efforts to implement the New Deal, the Organisation for Economic Cooperation and Development (OECD) continues to explore the potential of the private sector in supporting peacebuilding and development.<sup>11</sup>

<sup>5</sup> See J. Forrer, and C. Seyle, C. (ed.) *The Role of Business in the Responsibility to Protect*, Cambridge, Cambridge University Press, 2016, at 2.

<sup>6</sup> See, for example, Global Compact Office, The United Nations and The Private Sector, United Nations, September 2008. See also, J. Miklian, 'Mapping Business-Peace Interactions: Five Assertions for How Businesses Create', Peace Research Institute Oslo (PRIO), 2016, at 3.

<sup>7</sup> See J. Nelson and Z. Torres-Rahman, 'Business and the United Nations: Working Together Towards the Sustainable Development Goals: A Framework for Action', SDG Fund, Harvard Kennedy School CSR Initiative and Inspiris Limited, 2015; J. Nelson, B. Jenkins and R. Gilbert, 'Business and the Sustainable Development Goals: Building Blocks for Success at Scale', Business Fights Poverty and Harvard Kennedy School's CSR Initiative, 2015; Institute for Human Rights and Business, 'State of Play Business and the Sustainable Development Goals: Mind the Gap – Challenges for Implementation', *IHRB State of Play Series: Vol. Four*, 2015.

<sup>8</sup> J. Miklian and P. Schouten, 'Business for Peace: The New Paradigm of International Peacebuilding and Development', International Peace Research Institute, Oslo (PRIO) Working Paper 8, 2014.

<sup>9</sup> UNGC, Business for Peace, <https://www.unglobalcompact.org/library/381> [last visited 15 December 2017].

<sup>10</sup> The UNGC is a United Nations initiative to encourage businesses worldwide to adopt sustainable and socially responsible policies and to report on their implementation. See further chapter 3.

<sup>11</sup> The New Deal was a key agreement between fragile and conflict-affected states, development partners, and civil society to improve the current development policy and practice in fragile and conflict-affected states. See OECD DAC, 'A New Deal for Engagement in Fragile States', International Dialogue on Peacebuilding and Statebuilding, 2012, [http://www.pbsbdialogue.org/media/filer\\_public/07/69/07692de0-3557-494e-918e-18df00e9ef73/the\\_new\\_deal.pdf](http://www.pbsbdialogue.org/media/filer_public/07/69/07692de0-3557-494e-918e-18df00e9ef73/the_new_deal.pdf) [last visited 13 January 2018].

Underpinning this increase in activity is, as will be developed, a suite of more proactive contributions suggested by scholars and policymakers that business might make to peacebuilding. What is less clear, however, is why businesses would assume positive roles in transitions from conflict to peace. The same scholars and policymakers that tout the potential of businesses to positively contribute to peace employ a range of arguments for why businesses 'ought to do so'. These arguments include the 'business case for peace'- that it is in the economic self-interest of businesses to promote peace- as well as arguments that companies have moral and social responsibilities to contribute to peacebuilding efforts. As I will suggest, these arguments have various shortcomings. Most notably, they do not help to inform if, when, and how businesses will contribute to peacebuilding efforts in any reliable way.

Mostly missing from current discussions are the linkages between business, peacebuilding and the roles that other actors might play in helping to bring businesses into the peacebuilding fold. In response, this thesis explores how different actors might require, induce, and/or encourage businesses to contribute to peacebuilding efforts. The intention is to move the discussion beyond relying on the decisions of individual companies to instead asking how different actors might influence business contributions to peacebuilding.

I suggest that discussions on what some term the 'pluralisation of regulation' help to show that a range of actors, employing different methods, can influence the decisions of businesses. Types of regulation exist across a spectrum, spanning from binding law, in the form of legislation at one end, to softer, more persuasive approaches, such as guidelines, on the other. In between, there exist myriad forms that regulation can take. I argue that because of this spectrum of possibilities for shaping business conduct, there are possibilities for thinking about how to use these different forms of influence to engage businesses in peacebuilding processes.

To demonstrate these possibilities, I examine how different actors have attempted to engage businesses in peacebuilding processes in South Africa and Northern Ireland. The purpose is to draw conclusions, which should help to develop our understanding about the various ways that businesses might contribute to peacebuilding, and how different actors might influence these contributions. The intended output of this research is to suggest that there is scope for thinking about

the emergence of a global policy instrument on business and peacebuilding. Such a tool could help to inform a range of actors as to the different ways they might support business contributions to peace, while at the same time deepening the discussion on business, peacebuilding and regulatory possibilities.

The purpose of this chapter is to explain the gap, which currently exists in the business and peace literature before outlining how I am conducting this research and the remaining structure of the thesis. The discussion begins by considering what it might mean for businesses to contribute to peacebuilding.

## **1.2. Business contributions to peacebuilding**

Academics and policy makers offer a broad range of possibilities for how businesses might contribute to peacebuilding efforts. For instance, some direct attention to the roles of business in maintaining security.<sup>12</sup> Drawing on the Responsibility to Protect (R2P) concept,<sup>13</sup> scholars have examined the ways that companies might prevent the outbreak or re-emergence of conflict.<sup>14</sup> Contributions along these lines include launching publicity campaigns for peace and lobbying against violence.<sup>15</sup> Others explore the role of businesses in democratisation processes engaging with ways that businesses might influence, both positively and negatively, political elites and regime change.<sup>16</sup> Those writing on business and peace have also offered empirical examples of businesses contributing to peace by helping to broker peace deals between conflict participants.<sup>17</sup> Referring to examples of such practices in places

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<sup>12</sup> See, for example, Forrer and Seyle, *supra* note 5.

<sup>13</sup> The responsibility to protect embodies a political commitment to end the worst forms of violence and persecution. It seeks to narrow the gap between Member States' pre-existing obligations under international humanitarian and human rights law and the reality faced by populations at risk of genocide, war crimes, ethnic cleansing and crimes against humanity (United Nations Office in Genocide Prevention and the Responsibility to Protect, *Responsibility to Respect*, <http://www.un.org/en/genocideprevention/about-responsibility-to-protect.html> [last accessed 13 December 2017]) .

<sup>14</sup> V. Owuor and S. Wisor, 'The Role of Kenya's Private Sector in Peacebuilding: The Case of the 2013 Election Cycle,' Research Report, May 2014, (Join publication of One Earth Future Foundation & Responsibility 2 Protect).

<sup>15</sup> *Ibid.*, at ii.

<sup>16</sup> Institute for Democracy and Electoral Assistance, 'Private sector development and democratization', Policy Brief, Stockholm, Nov. 2016.

<sup>17</sup> See, for example, A. Iff, and R.M. Alluri, 'Business Actors in Peace Mediation Processes', *Business and Society Review*, vol. 121, no. 2, 2016; A. Rettberg, 'Local businesses' role in formal peace negotiations', in C. Gündüz, N. Killick, and J. Banfield. J., (ed.) *Local Business, Local Peace: the Peacebuilding Potential of the Domestic Private Sector*, London, International Alert, 2006; S. Tripathi and C. Gündüz, 'A Role for the Private Sector in Peace Processes? Examples, and Implications for Third-Party Mediation', Center for Humanitarian Dialogue, 2008; N. Marais, and J. Davies, 'The Role of the Business Elite in South Africa's Democratic Transition: Supporting an Inclusive Political and



like Colombia, Northern Ireland, Sri Lanka, Nepal and South Africa, scholars have highlighted how firms can facilitate peace negotiations, bringing conflict participants to the negotiation table.<sup>18</sup> Some concentrate specifically on the roles of businesses in post-conflict reconstruction efforts.<sup>19</sup> Other studies are more encompassing, interrogating the possibilities for companies to contribute to peace through the broader conflict-to-peace cycle.<sup>20</sup>

Despite these different examinations, many acknowledge that the central task of peacebuilding is to create positive peace, understood as a 'stable social equilibrium in which the surfacing of new disputes does not escalate into violence and war.'<sup>21</sup> The signing of a peace agreement is often the genesis rather than the end of these efforts.<sup>22</sup> Reaching consensus between warring elites on such issues as the allocation of political power, the economy, development, and the rights of minorities, signals the beginning of a journey, with peace agreements often acting as roadmaps for these transitions. This thesis is primarily concerned with business contributions to peace in the aftermath of negotiated peace settlements. In situating my discussion here, I want to understand how businesses can and have been involved in helping to facilitate transitions from conflict to peace by supporting longer-term peacebuilding efforts. I, therefore, define peacebuilding in line with Temitope Olaifa to mean 'a process that facilitates the establishment of durable peace and tries to prevent the recurrence of violence by addressing root causes and effects of conflict through reconciliation, institution building, and political as well as economic

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Economic Transformation', Inclusive Political Settlements Paper 8. Berlin: Berghof Foundation, 2015; N. Killick, V.S. Srikantha, and C. Gündüz, 'The Role of Local Business in Peacebuilding', in M. Fischer, H. Gießmann, and B. Schmelzle, B., (ed.) *Berghof Handbook for Conflict Transformation*, Berlin, Berghof Research Center for Constructive Conflict Management, 2005;

M. M. Melin, 'Business, peace, and world politics: The role of third parties in conflict resolution', *Business Horizons* vol. 59, no. 5, 2016; A. Vines, 'The business of peace: 'Tiny' Rowland, financial incentives and the Mozambican settlement', *Conciliation Resources, Accord Issue 3*, 1998.

<sup>18</sup> A. Iff, et al., 'Money Makers as Peace Makers? Business Actors in Mediation Processes', *Swisspeace Working Paper 2*, 2010.

<sup>19</sup> P.B., Davis, 'The Role and Governance of Multinational Companies in Processes of Post-conflict Reconstruction', PhD Thesis, University of London, 2010; P.B. Davis, *Corporations, global governance and post-conflict reconstruction*, London, New York, Routledge, 2013; J. Bray, 'International companies and post-conflict reconstruction - cross-sectoral comparisons. Social development papers', *Conflict prevention and reconstruction series*; no. CPR 22. Washington, DC, World Bank, 2005.

<sup>20</sup> J. Nelson, *supra* note 2; M. Berdal, and N. Mousavizadeh, 'Investing for Peace: The Private Sector and the Challenges of Peacebuilding', *Survival*, vol. 5, no. 2, 2010.

<sup>21</sup> School of Advanced International Studies (SAIS), 'The Conflict Management Toolkit: Approaches', The Conflict Management Program, Johns Hopkins University [available at: <http://www.sais-jhu.edu/resources/middle-east-studies/conflict-management-toolkit>]

<sup>22</sup> Berdal and Mousavizadeh, *supra* note 20, at 41.

transformation.<sup>23</sup> This consists of a set of physical, social, and structural initiatives that are often an integral part of post-conflict reconstruction and rehabilitation.<sup>24</sup> Business-based peacebuilding, it follows, refers to the ways in which businesses contribute to the emergence of a stable or durable peace, characterized by the absence of physical and structural violence, the elimination of discrimination, and self-sustainability.<sup>25</sup>

It is necessary, at this stage, to add a caveat. A great amount of literature addresses the ways in which businesses can play proactive roles in society. For instance, political corporate social responsibility (PCSR), as a sub-field of corporate social responsibility (CSR), examines the ways that businesses assume state-like responsibilities, providing public goods such as healthcare.<sup>26</sup> In the field of development, some have suggested that businesses can be ‘agents of development’, purposely helping to tackle poverty, or improving education.<sup>27</sup> Similarly, human rights scholars have argued that businesses have obligations to help to realise human rights, pushing beyond those that suggest that businesses must merely avoid undermining the enjoyment of rights.<sup>28</sup>

Proactivity, however, does not necessarily equate to peacebuilding. Because a positive peace requires addressing the root causes and consequences of conflict, and because these underlying factors differ across contexts, the ways that businesses can and do contribute to peace will depend on the context in question.<sup>29</sup> In other words, because there is no abstract way to do peace, there is no abstract way for businesses to contribute to peacebuilding.<sup>30</sup> As the methodology section will

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<sup>23</sup> T. Olaifa, ‘Curbing Violent Extremism Through Peacebuilding in Nigeria’, *Journal of US-China Public Administration*, vol. 14, no. 4, 2017, at 221.

<sup>24</sup> See B. Boutros-Ghali, *An Agenda for Peace*, New York: United Nations 1995.

<sup>25</sup> L. Reyhler, ‘From Conflict to Sustainable Peacebuilding: Concepts and Analytical Tools’, in L. Reyhler and T. Paffenholz, (ed.) *Peacebuilding: A Field Guide*. Boulder, Colorado: Lynne Rienner Publishers, Inc., 2001, at 12.

<sup>26</sup> See A.G. Scherer, and G. Palazzo, ‘The New Political Role of Business in a Globalized World: A Review of a New Perspective on CSR and its Implications for the Firm, Governance, and Democracy’, *Journal of Management Studies*, vol. 48, no. 4, 2011.

<sup>27</sup> M. Blowfield, ‘Business and development: making sense of business as a development agent’, *Corporate Governance: The International Journal of Business in Society*, vol. 12, no. 4, 2012. M. Blowfield, ‘Business, Corporate Responsibility and Poverty Reduction’, in P. Utting, and J.C. Marque (ed.) *Corporate Social Responsibility and Regulatory Governance: Towards Inclusive Development*, United Nations Research Institute for Social Development, 2010.

<sup>28</sup> F. Wettstein, *Multinational Corporations and Global Justice: Human Rights Obligations of a Quasi-Governmental Institution*, Stanford, California, Stanford University Press, 2009.

<sup>29</sup> C. Hauss, ‘Addressing Underlying Causes of Conflict’, in G. Burgess and H. Burgess (ed.) *Beyond Intractability*. Conflict Information Consortium, University of Colorado, Boulder, July 2003.

<sup>30</sup> B. Ganson, ‘Business and Peace: A Need for New Questions and Systems Perspectives’, African Centre for Dispute Settlement, CDA and PRIO, 2017 at 7; Ford, *supra* note 43, at 454.

make clear, a case study approach is necessary when considering how and in what ways businesses might contribute to peacebuilding. It helps us to examine how businesses have contributed to peace in context-specific ways and to draw connections between these interventions and the broader peacebuilding effort in question.

Nevertheless, even in the aftermath of negotiated settlements, there are multiple ways that businesses might assist peacebuilding efforts. These contributions can be categorised loosely as falling into three broad groups: ‘business as usual approaches’; approaches grounded in ‘doing no harm’; and businesses acting as agents of positive peace. I develop these in turn below before outlining why it is that I am focusing on the latter category.

### 1.2.1. ‘Businesses as Usual’: The Bare Minimum

Milton Friedman famously argued that because businesses belong to shareholders, those running businesses owe fiduciary duties to shareholders and shareholders alone.<sup>31</sup> Friedman criticised CSR arguments by stating that ‘few trends could so thoroughly undermine the very foundations of our free society as the acceptance by our corporate officials of a social responsibility other than to make as much money for their stockholders as possible.’<sup>32</sup> The starting point of Friedman’s argument is that people have responsibilities, but businesses do not. That Friedman advanced his ‘shareholder primacy model’, however, was not to suggest that businesses are not significant contributors to the welfare of society and citizens. On the contrary, Friedman promoted the view that by pursuing individual gains and generating economic growth, businesses are already serving critical public functions.

Advocating this position from the perspective of peacebuilding, proponents adopt the same rationale.<sup>33</sup> Those advancing the ‘business as usual’ viewpoint suggest that while businesses may not, and indeed should not, concern themselves with peacebuilding-related activities; there are nevertheless peacebuilding consequences

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<sup>31</sup> M. Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, New York Times Magazine, 13 Sept 1970, <http://umich.edu/~thecore/doc/Friedman.pdf> (last visited 12 July 2017).

<sup>32</sup> M. Friedman, *Capitalism and Freedom*, Chicago, Ill: University of Chicago Press, 40th ed. 2002), at 133.

<sup>33</sup> See, for example, A. Gerson *supra* note 2; A. Gerson, ‘The Private Sector and Peace’, *The Brown Journal of World Affairs*, vol. VII, no. 2, 2000.

that flow from normal business activity.<sup>34</sup> At the core of this argument is a view that by operating as they normally would in other, non-conflict-affected settings, businesses will contribute to peace. A number of reasons support this argument.

Firstly, because of conflict, states face significant resource constraints.<sup>35</sup> Not only is conflict itself a significant strain on state resources, transitioning from conflict to peace also requires a significant amount of resources to help address the underlying causes of conflict. By generating economic growth, companies contribute to peace by growing economies and providing much-needed resources. In linking conflict to underdevelopment and poverty, arguments arise that through expanding the tax base and providing necessary revenue streams for post-conflict governments, businesses will already be making valuable contributions to peacebuilding efforts.<sup>36</sup> As Pescka notes:

Political settlements and processes lay the groundwork for future stability, long-term growth and security, but early economic development is what most readily translates into tangible differences in people's lives. These positive changes are vital in the course of peace consolidation, where the successful implementation of peace agreements is —often contingent on swift materialization of peace dividends.<sup>37</sup>

To this end, organisations such as the World Bank (WB) frequently have 'conflated business, peace and development to argue that business ventures stabilize fragile states by providing development in areas of poor or non-existent governance.'<sup>38</sup>

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<sup>34</sup> K. Hayward, and E. Magennis, 'Peace and the private sector: Northern Ireland's regional experience of globalised trends', in T. White, (ed.) *International Relations Theory and Northern Ireland*, Manchester, Manchester University Press, 2016, at 4.

<sup>35</sup> See P. Collier, *Breaking the Conflict Trap: Civil War and Development Policy*, World Bank and Oxford University Press, 2003.

<sup>36</sup> B. Leo, V. Ramachandran, and R. Thuotte, 'Supporting private business growth in African fragile states: A guiding framework for the World Bank Group in South Sudan and other nations', Washington, DC, Center for Global Development, 2012; J. Bray, 'The role of private sector actors in post-conflict recovery', *Conflict, Security & Development*, vol. 9, no. 1, 2009, at 2.

<sup>37</sup> M.P. Peschka, 'The Role of the Private Sector in Fragile and Conflict-Affected States', World Development Report 2011 Background Paper, 2011, at 10.

<sup>38</sup> Miklian, *supra* note 6, at 5.

Secondly, businesses contribute to peace by creating jobs.<sup>39</sup> For peace to be sustainable, change must reach the 'everyday lives' of those affected by conflict.<sup>40</sup> Economic inclusion is viewed as providing a necessary complement to inclusive peace settlements, which often involve some form of inclusion at the political level but which do not always lead to improvements for the broader population 'on the ground'.<sup>41</sup> Employment can, amongst other things, offer hope and economic and social opportunities to those at the margins. As Gerson asserts:

Conflict settlement requires the injection of optimism and hope born of employment and economic opportunity. Otherwise, fragile peace arrangements can rarely be sustained... [O]ver the long term, only the private sector is capable of growing new enterprises, opening investment opportunities, and providing employment and enduring economic security. The creation of employment and other economic opportunities can nurture and sustain fragile peace arrangements.<sup>42</sup>

As a final example of contributions that fall within the 'business as usual' category, some suggest that businesses are necessary to build the physical foundations of the state in the aftermath of violence. Conflict or periods of repression often result in the complete or partial destruction of a state's physical infrastructure. In other cases, such foundations have never existed. In post-conflict settings, there must often be a reconstruction of roads, ports, railway lines and airports.<sup>43</sup> Similarly, states must improve basic services and access to amenities such as electricity and water. The

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<sup>39</sup> See K.W. Beasley, 'Job creation in postconflict societies', United States Agency for International Development (USAID), Bureau for Policy and Program Coordination, Issue Paper No. 9 April 2006; H. Haider, 'Long-term job creation in fragile states' (Helpdesk research report), Birmingham, GSDRC, 2009; D. McLeod, and M.E. Dávalos, 'Postconflict employment creation for stabilisation and poverty reduction', United Nations Development Programme (UNDP) Poverty Group, 2008.

<sup>40</sup> See R. MacGinty, 'Everyday peace: Bottom-up and local agency in conflict-affected societies', *Security Dialogue*, vol. 45, no. 6, 2014.

<sup>41</sup> For a discussion on the meaning of political settlements see, V. Dudouet, and S. Lundström, 'Post-war Political Settlements: From Participatory Transition Processes to Inclusive State-building and Governance', Research Report. Berlin: Berghof Foundation, 2016;

C. Bell, 'What we talk about when we talk about political settlements Political Settlements: Towards Inclusive and Open Political Settlements in an Era of Disillusionment', Political Settlements Research Programme, Working Paper 1, 2015.

<sup>42</sup> A. Gerson, *supra* note 2, at 103.

<sup>43</sup> See, for example, K. Macintosh, and J. Buckley, 'Economic Development in Fragile and Conflict-Affected States', Department for International Development (DfID) Topic Guide, Birmingham: GSDRC, 2015, at 26.

See also P. Anand, 'Getting infrastructure priorities right in post-conflict reconstruction', UNU-WIDER Research Paper, 2005/42, Department for International Development, 'Systematic reviews and evidence informed policy-making: Overview', London, DfID, 2014.

realities are often such that the normative aspirations of peacebuilding require the less grandiose but equally important aspects of infrastructural reconstruction. Businesses are necessary to build from the ground up.

Karen McKenna sums up the business as usual position by noting that '[t]he logic [...] is that economic development, the alleviation of poverty, the rebuilding of infrastructure destroyed as a result of violence, as well as livelihood opportunities, are crucial elements in building sustainable peace. Importantly, all of these activities depend on business.'<sup>44</sup> In short, advocates of the business as usual approach to business and peace suggest that by being businesses and doing what companies do best-making profit- contributions to peace flow consequentially.

### 1.2.2. 'Doing no harm': asking a little more of Business

A second set of contributions that business can make to peace is to 'do no harm.' The importance of 'doing no harm' stems from the negative impacts, such as environmental degradations or exploitation of indigenous land, that can result from business activity and links directly with the consequential contributions to peacebuilding that arise from businesses pursuing economic opportunities.<sup>45</sup> Those advocating this position acknowledge that important consequences can flow from business activity but also stress that the manner in which commercial activities are conducted is just as if not more important than economic growth itself. In support of this position, for instance, Timothy Fort and colleagues have proffered the 'peace through commerce' perspective.<sup>46</sup> These scholars assess that contributing to peace does not require a wholesale transformation of corporate governance, but rather ethical business practices that attempt to avoid causing harm.<sup>47</sup> In other words, business contributions to peace do not necessarily require an engaged commitment to the broader peace process but rather a commitment to ethical business practices. When businesses are socially responsible, they inevitably contribute positively to

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<sup>44</sup> K. McKenna, 'Corporate Social Responsibility Plus Peace?' Australian National University, In Brief, 2013, at 1.

<sup>45</sup> See, for instance, D. Reed, 'Resource Extraction Industries in Developing Countries', *Journal of Business Ethics* vol. 39, no. 3, 2002.

<sup>46</sup> See, for example, T.L. Fort and C.A. Schipani, *The Role of Businesses in Fostering Peaceful Societies*, Cambridge, Cambridge University Press, 2004; M. Westermann-Behaylo, 'Institutionalizing peace through commerce: Engagement or divestment in South Africa and Sudan', *Journal of Business Ethics* vol. 89, no. 4, 2010.

<sup>47</sup> T.L. Fort, 'The Times and Seasons of Corporate Responsibility', *American Business Law Journal*, vol. 44, no. 2, 2007, at 288.

society. Thus, this approach aligns with, but also qualifies, the business as usual approach.

There are derivative consequences to peacebuilding that some suggest flow from efforts to do no harm.<sup>48</sup> For example, there are those who would argue that when businesses comply with international human rights law, this can have the effect of inspiring states to follow suit.<sup>49</sup> Others claim that when firms are socially responsible, employing, for example, based on principles of non-discrimination; this can have the effect of bringing previously conflicting communities together.<sup>50</sup> Moreover, some assert that companies 'can transfer know-how with regard to private sector development especially to local communities.'<sup>51</sup>

Doing no harm also merges with the concepts of 'context' or 'conflict sensitivity.' Principally, these concepts suggest that when those running businesses are not mindful of the broader surroundings in which they operate and even when not intending to do so, they can nevertheless undermine transitions from conflict to peace. As Jolyon Ford summarises:

An enterprise's actions may often unwittingly aggravate or expose social fault lines, compromise land claims, affect ecosystems, discriminate ethnically, or result in corruption, resentment and rights abuses, and so on. In particular, the close links between natural resources, land, identity and insecurity in many regions increase the importance of how business operates and how it is governed.<sup>52</sup>

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<sup>48</sup> J. Oetzel, and J. Doh, 'Multinational Enterprise in Developing Countries: Spillovers, Liabilities and Resource Complementarity', *Journal of World Business*, vol. 44, no. 2, 2009; J. Spencer, 'The Impact of Multinational Enterprise Strategy on Indigenous Enterprises: Horizontal Spillovers and Crowding Out in Developing Countries', *Academy of Management Review*, vol. 33, no. 2, 2008.

<sup>49</sup> A. Kolk, and F. Lenfant, 'Multinationals, CSR and Partnerships in Central African Conflict Countries', *Corporate Social Responsibility and Environmental Management*, vol. 20, no. 1, 2013; R. Van Tulder and A. Kolk, 'Multinationality and Corporate Ethics: Codes of Conduct in the Sporting Goods Industry', *Journal of International Business Studies*, vol. 32, no. 2, 2001.

<sup>50</sup> Killick, Srikantha, and Gündüz, *supra* note 17 at 9.

<sup>51</sup> A. Wenger, and D. Mockli, D., *Conflict prevention: The untapped potential of the business sector*, Lynne Rienner Publishers, Boulder, 2003, at 8.

<sup>52</sup> J. Ford, 'Engaging the private sector in post-conflict recovery Perspectives for SADPA', Institute for Security Studies, 2014, at 3.

As in the case above, to contribute to peace, businesses must ensure that at the very least they are not causing harm.<sup>53</sup> Approached from the perspective of sensitive business practices, this requires understanding the broader dynamics of the context.<sup>54</sup> The essence of approaches grounded in ‘doing no harm’ and/or context sensitivity, therefore, is that businesses are thought to contribute to peace as consequences of context-sensitive or ethical business activity. By doing no harm, businesses will inevitably be contributing to peace.

### 1.2.3. Businesses as Agents of Positive Peace

There is a commonality in both of the categories discussed above: business contributions to peace arise as consequences of business activity. According to business as usual approaches, peacebuilding contributions flow from normal commercial operations. In the second case, the same argument exists, subject to businesses operating in a socially responsible or conflict/context-sensitive manner.

However, for numerous reasons, the belief in the consequential impacts of business on peacebuilding efforts is often misplaced. For instance, inherent in the business as usual approach is a presumption that the economic prosperity of a few can generate economic success for the many. In economic theory, it is this logic, which underpins Adam’s Smith idea of the invisible hand in free markets.<sup>55</sup> Despite these claims, however, numerous scholars have challenged ‘trickle down’ economics, highlighting instead the growing disparities between those that have and those that have not.<sup>56</sup> Similarly, in the context of societies undergoing transitions from conflict to peace, arguments that, for instance, job creation will necessarily contribute to the realisation of peace says little about the realities of pre-existing horizontal inequalities between groups.<sup>57</sup> It does not address how growth can affect these dynamics, such as those instances where jobs created benefit groups previously favoured under a particular political regime. Is employment creation conducive to

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<sup>53</sup> See A. Hoffmann, ‘From “Business as Usual” to “Business for Peace”? Unpacking the Conflict-Sensitivity Narrative’, *CRU Policy Brief*, 28, De Hague, Clingendael Institute, 2014

<sup>54</sup> P. Woodrow and D. Chigas, ‘A Distinction with a Difference: Conflict Sensitivity and Peacebuilding’, CDA Collaborative Learning Projects Research Paper, 2009, at 10.

<sup>55</sup> See A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, Oxford: Oxford University Press, 1976 [1776].

<sup>56</sup> J. E. Stiglitz, ‘Inequality and Economic Growth’, *Rethinking Capitalism* vol. 86, no. 1, 2015

<sup>57</sup> See F. Stewart, ‘Horizontal Inequalities: A Neglected Dimension of Development’, CRISE Centre for Research on Inequality, Human Security, and Ethnicity Working Paper 1, 2004.



peacebuilding even if it excludes those groups whose grievances lie at the heart of conflicts?

Arguments around the peacebuilding consequences of doing business as usual or acting in a conflict-sensitive manner are also often highly anecdotal.<sup>58</sup> Scholars argue, for instance, that the 'underlying assumptions of how business practices relate to peace are either entirely implicit or remain vague and unexamined.'<sup>59</sup> Jolyon Ford notes that there is a 'degree of conceptual wooliness accompanying much business and peace scholarship.'<sup>60</sup> Brian Ganson also highlights that 'much of the analysis [on] causal connections that are asserted about a particular business activity and peace positive impacts are premised not on specific case evidence of peace outcomes (or lack thereof), but rather on a set of postulates from related but distinct perspectives.'<sup>61</sup>

In response to the limitations and indeed dangers of assuming that peacebuilding consequences necessarily flow from business activity, the third category of possible contributions- the businesses as agents of positive peace approach- examines how companies might play more proactive roles in peacebuilding processes. This category includes those targeted and deliberate efforts undertaken by firms to play peacebuilding roles.<sup>62</sup>

In deeply divided societies, an example of such an approach could include businesses adopting affirmative action policies focused on integrating those previously marginalised from the labour market. It might also involve investing in the skills development of the same marginalised groups or empowering women through the provision of economic opportunities. Even more progressively, it may include efforts focused on actively attempting to place sections of a disadvantaged group in positions of ownership or management as part of broader attempt to redistribute wealth. Through core business activities, socially responsible investment,

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<sup>58</sup> Ganson, *supra* note 30.

<sup>59</sup> CDA, 'Collaborative Learning Project, 'Business for Peace: Understanding and Assessing Corporate Contributions to Peace', A discussion paper presented at the UN Global Compact's Business for Peace (B4P) conference Istanbul, Turkey 29 September 2014 by CDA Collaborative Learning Projects, at 3.

<sup>60</sup> J. Ford, 'Perspectives on the Evolving "Business and Peace" Debate', *Academy of Management Perspectives*, vol. 29, no. 4, 2015, at 452. See also J. Hoenke, 'Business for peace? The ambiguous role of 'ethical' mining companies', *Peacebuilding*, vol. 2, no. 2, 2014.

<sup>61</sup> Ganson, *supra* note 30, at 7.

<sup>62</sup> Ernstorfer, et al., 'Advancing the Sustainable Development Goals by Supporting Peace: How Business Can Contribute', UN Global Compact, Business for Peace, and CDA Collaborative Learning Projects, 2015, at 20-21.

collaborations, and policy dialogue, businesses have the potential to act as agents of peacebuilding in a range of ways. I will develop these categories further in chapter 2. In essence, the business as agents of peacebuilding perspective pushes beyond arguments revolving around the consequences of business activity to ask how the same actors might play more targeted and proactive roles.

I seek to push this discussion even further. I am particularly interested in understanding how different actors have been able to engage businesses to play these more proactive peacebuilding roles. To make sense of the importance attached to the influence of other actors, it is necessary to engage with some of arguments offered for why businesses ought to assume more proactive roles and to explain their limitations.

### **1.3. Why would businesses contribute to peacebuilding?**

When taking seriously the view that business might play positive roles in peacebuilding processes, we must ask why it is that businesses would do so. Existing literature offers various reasons. These can be categorised loosely as those grounded in the economic costs/benefits associated with conflict/peace, and the social and moral responsibilities of businesses to do more in societies in which they operate or invest.

By way of signposting the argument that follows, what I suggest is not necessarily that the arguments advanced below cannot and do not influence businesses decisions as to whether or not to contribute to peacebuilding. Instead, I contend that these arguments often fail to ensure that businesses will do so in any reliable or predictable way- a claim that I substantiate below. We might improve this situation, I will argue, by focusing on the ways that different actors can influence business decisions by requiring, incentivising or persuading businesses to play decisive roles in peacebuilding processes. For now, I briefly examine these arguments before explaining how a broad understanding of regulation might offer a useful way of thinking about the possibilities for other actors to shape business involvement in peacebuilding processes.

### 1.3.1. Conflict is bad for business

The primary justification that many employ regarding why businesses should contribute to peacebuilding is that conflict is bad for business.<sup>63</sup> What some label the 'reciprocal relationship between business and peace' suggests that because conflict can prevent businesses from making a profit, businesses have an enlightened economic self-interest to help bring about peace.<sup>64</sup> Timothy Fort stresses, for instance, that 'sustainable peace may be the most powerful existential goal one can imagine. Not only is it beneficial for most companies, but it is powerful enough, if the relationship between business and peace can be understood, to change the way companies behave [...].'<sup>65</sup> For Oetzel et al., because businesses rely on sound and efficient background institutions such as markets for goods and services, stable regulatory systems, and effective courts that enforce property rights,' and because conflict erodes these institutions, it is in the interests of businesses to help end and prevent conflict.<sup>66</sup>

To this end, others cite additional costs associated with violence. These include high insurance premiums, loss of insurance coverage, emergency training programmes, and threats to employees.<sup>67</sup> Scholars have also suggested that in such places as Colombia,<sup>68</sup> Sri Lanka,<sup>69</sup> and Nepal,<sup>70</sup> insurgents targeted businesses for their perceived connections to particular political regimes. In much the same way, directing attention to Multinational Enterprises (MNEs), Kolk and Lenfant argue that 'the direct impact of conflict on MNEs includes threats to personnel, installations, and supply lines.'<sup>71</sup> They continue that 'MNEs are potential victims of plundering, asset damage, or extortion, which sometimes leads to the suspension of

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<sup>63</sup> J. Oetzel, et al., 'Business and peace: Sketching the terrain', *Journal of business ethics*, vol. 89, no. 4, 2009, at 358. See also M.B. Anderson and L. Zandvliet, 'Corporate Options for Breaking Cycles of Conflict', Cambridge, MA, CDA Collaborative Learning Projects, 2001; Killick, Srikantha, and Gündüz, *supra* note 17, at 4.

<sup>64</sup> T. Bauer, 'Business - A Force for Peace Why and What? A Theoretical Study', Master's Thesis Department of Management Studies, Aalto University School of Business, 2015, at 41.

<sup>65</sup> T.L. Fort, *Prophets, Profits, and Peace: The Positive Role of Business in Promoting Religious Tolerance*, Yale, Yale University Press, 2008, at 27.

<sup>66</sup> Oetzel, et al., *supra* note 63, at 358.

<sup>67</sup> Nelson, *supra* note 2, at 13-16.

<sup>68</sup> A. Rettberg, 'The Business of Peace in Colombia: Assessing the Role of the Business Community in the Colombian Peace Process', Prepared for delivery at the 2003 meeting of the Latin American Studies Association, Dallas, Texas, USA, March 27-29, 2003, at 4.

<sup>69</sup> C. Gündüz, N., Killick, and J. Banfield, *Local Business, Local Peace: the Peacebuilding Potential of the Domestic Private Sector*, London: International Alert, 2006, at 58.

<sup>70</sup> *Ibid.*, at 87.

<sup>71</sup> Kolk and Lenfant, *supra* note 49, at 44-45.

operations.<sup>72</sup> On this basis, Kolk and Lenfant assert that it is in the economic self-interest of MNEs to contribute to the realisation of peace.

In other cases, and mirroring in many ways the positions described above, some claim that there are economic opportunities in peace. This is often what is termed the 'peace dividend' argument.<sup>73</sup> These arguments suggest that peace creates economic opportunities. For instance, a peace dividend might include renewed investment opportunities in places, which have suffered capital flight because of conflict. Peace might also allow businesses to access global markets previously denied to them because of sanctions levelled against conflict-affected states.<sup>74</sup> Thus, Forrer and Seyle contend that the economic arguments for stability are clear: 'If a business can effectively invest in the prevention of mass atrocity crimes, it can appropriate the commercial advantages of political stability.'<sup>75</sup>

In advancing the view that there are economic benefits associated with contributing to peace, these arguments align, in some ways, with those who contend that there are economic opportunities to be gained through contributing to social progress more generally. For example, 'base of the pyramid' theories suggest how multinational firms might adapt to global drivers for change, such as population growth and poverty, to capitalize on the 'fortune at the bottom of the pyramid.'<sup>76</sup> Similarly, Rosabeth Moss Kanter articulated the notion of 'social innovation' as a process where companies take 'community needs as opportunities to develop ideas and demonstrate business technologies, to find and serve new markets, and to solve long-standing business problems.'<sup>77</sup> Stuart L. Hart presented new strategies for identifying sustainable products, technologies, and business models that could drive urgently needed growth and help solve social and environmental problems at

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<sup>72</sup> *Ibid.*

<sup>73</sup> See J. Brauer and J. Tepper Marlin, 'Defining Peace Industries and Calculating the Potential Size of a Peace Gross World Product by Country and by Economic Sector', Economists for Peace and Security USA, Institute for Economics and Peace, 2009.

<sup>74</sup> S. Klei, 'Colombia's peace deal opens the door to British business', *Beyond Brics*, [web blog] 29 September 2016, <http://blogs.ft.com/beyond-brics/2016/09/29/colombias-peace-deal-opens-the-door-to-british-business/> (last accessed 25 November 2017)

<sup>75</sup> Forrer and Seyle, *supra* note 5, at 4.

<sup>76</sup> C.K. Prahalad and S.L. Hart, 'The Fortune at the Bottom of the Pyramid', *Strategy+Business*, vol. 26, no. 1, 2000.

<sup>77</sup> R.M. Kanter, 'From Spare Change to Real Change: The Social Sector as Beta Site for Business Innovation,' *Harvard Business Review*, vol. 77, no. 3, 1999, at 122.

the same time.<sup>78</sup> More recently, the concept of Creating Shared Value (CSV) developed by Porter and Kramer contends that CSR creates values for both business and society.<sup>79</sup>

Thus, similar to theories that speculate that businesses can do well economically by doing good socially, and while differing in the precise contexts and suggested interventions, arguments grounded in the 'reciprocal relationship of business and peace' or the 'peace dividend' perspective reflect the perception that contributing to peacebuilding brings financial rewards.

### 1.3.2. Businesses owe responsibilities to post-conflict societies

Some also argue that businesses are now not only economic entities but also social enterprises, with responsibilities to wider society. These views depart drastically from Milton Friedman's shareholder primacy model. Stakeholder theories of the firm call for a revitalisation of the concept of the shareholder primacy model by replacing the notion that managers have a duty to stockholders with the concept that managers bear a fiduciary relationship to stakeholders.<sup>80</sup> Proponents of stakeholder theories argue that different stakeholder groups have a right not to be treated as a means to some end, and therefore must participate in determining the future direction of the firm in which they have a stake.

More progressive views and understandings like these create, in turn, expectations that businesses should do more for society; expectations which if unmet can lead to adverse impacts on the bottom line of businesses.<sup>81</sup> As Karen Ballentine states:

For progressive firms operating internationally and concerned with their reputational capital, obtaining a 'social licence to operate' among local and national stakeholders in host countries is now seen as an essential

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<sup>78</sup> S.L. Hart, *Capitalism at the Crossroads: The Unlimited Business Opportunities in Solving the World's Most Difficult Problems*, Upper Saddle River, NJ, Pearson Prentice Hall, 2005

<sup>79</sup> M.E. Porter and M.R. Kramer, 'Creating Shared Value', *Harvard Business Review*, vol. 89, no. 1-2, 2011.

<sup>80</sup> See A. Keay, 'Stakeholder Theory in Corporate Law: Has It Got What It Takes?', *Richmond Journal of Global Law & Business*, vol. 9, no. 3, 2010.

<sup>81</sup> J. Prno and D. Slocombe, 'Exploring the origins of 'social license to operate' in the mining sector: Perspectives from governance and sustainability theories', *Resources Policy*, vol. 37, no. 3, 2012; J.R. Owen, and D. Kemp, 'Social licence and mining: A critical perspective', *Resources Policy*, vol. 38, no. 1, 2013; J.L. Nelson, 'Social licence to operate', *International Journal of Mining, Reclamation and Environment*, vol. 20, no. 3, 2016.

component of sound business planning. Fiscal transparency, positive community relations, environmental protection, and sponsorship of health and education initiatives have already become standard elements of today's corporate social responsibility (CSR) agenda.<sup>82</sup>

As the latter part of Ballentine's statement suggests, stakeholder theories of the firm submit that business contributions to society should extend beyond limiting the harms that they cause to include proactively contributing to the welfare of society, including peacebuilding processes. Failing to do so, so the argument proceeds, can adversely affect a company's bottom line.

Angelika Rettberg summarises these social and economic arguments in the following way.<sup>83</sup> First, she notes that business needs peace to solve specific problems related to their operations in unstable contexts (need). Second, she suggests that some business leaders believe that social change is positive and in their self-interest and are willing to promote transformations (creed). Finally, business participation in peacebuilding, according to Rettberg, may be motivated by the anticipation of renewed investment, profit, and growth (greed).<sup>84</sup>

### 1.3.3. Businesses have moral responsibilities to contribute to peacebuilding

In proposing that businesses should assume peacebuilding responsibilities, some also argue that those that own and control businesses have a moral obligation to do more than refraining from doing no harm. These arguments often seek to challenge the legal separation of a company and its shareholders by drawing on the moral responsibilities of those behind the 'corporate veil.' As Fort outlines:

I propose the telos of sustainable peace as an aim to which businesses should orient their actions both for reasons of the good of avoiding the activities that contribute to or make more likely the spilling of blood as well as for the good of sustainable economic enterprises, which are fostered by

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<sup>82</sup> K. Ballentine, 'Promoting Conflict-sensitive Business in Fragile States: Redressing Skewed Incentives', in O Brown et al. (ed.) *Trade, Aid and Security: An Agenda for Peace and Development*, London, Earthscan, 2008, at 134.

<sup>83</sup> See A. Rettberg, 'Need, creed, and greed: Understanding why business leaders focus on issues of peace', *Business Horizons* vol. 59, no. 5, 2016.

<sup>84</sup> *Ibid.*, at 481.

stable, peaceful relationships. Sustainable peace, of course, sounds like Mom and apple pie. Yet, I will suggest that a commitment, indeed a militant commitment, to peace is one that clarifies ethical obligations in the business environment and makes legitimate economic endeavours subject to a countervailing moral goal.<sup>85</sup>

In some senses, arguments grounded in the moral responsibilities of executives to contribute to peacebuilding align with other trains of thought regarding the moral obligations of businesses to contribute to development, justice, and the realisation of human rights. These arguments often draw on the capabilities of businesses to do more for society. Onora O'Neill, for instance, has argued that while states should assume the responsibilities of helping to deliver social goods, in cases where they are unable to do so, such as in weak or failed states, corporations as 'secondary agents of justice' should assume these roles.<sup>86</sup> Ivar Kolstad departs from a similar fragile and context-related basis. He offers the view that when approached from the perspective of realising human rights '[a]t some point, after the default of a succession of duty-bearers, corporations may be next in line, and should hence address the task of protecting, promoting or fulfilling human rights.'<sup>87</sup> Kolstad advances this position on the basis that companies often have significant resources with which to help promote the realisation of rights. He argues, essentially, that can implies ought. Similarly, Marion Iris Young argued that 'all agents who contribute by their actions to the structural processes that produce injustice have responsibilities to work to remedy these injustices' subject to the 'power' that such entities have to contribute to addressing structural injustices.<sup>88</sup>

The positions of these scholars, while differing in certain respects, depart from a similar basis. They suggest that because states often cannot assume their responsibilities and because businesses can do more- so then they should.<sup>89</sup> The tenor among these and other accounts is that remedial responsibility grows

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<sup>85</sup> T.L. Fort, 'Corporate Makahiki: The Governing Telos of Peace', *American Business Law Journal*, vol. 38, no. 2, 2001, at 306.

<sup>86</sup> O. O'Neill, 'Agents of Justice', *Metaphilosophy*, vol. 32, no. 1-2, 2001, at 192 and 194.

<sup>87</sup> I. Kolstad, 'Human Rights and Assigned Duties: Implications for Corporations', *Human Rights Review* vol. 10, no. 4, 2009, at 578.

<sup>88</sup> See I.M. Young, 'Responsibility and Global Justice: A Social Connection Model', *Social Philosophy and Policy*, vol. 23, no. 1, 2006, at 102-103.

<sup>89</sup> See M.A. Santoro, 'Post-Westphalia and Its Discontents: Business, Globalization, and Human Rights in Political and Moral Perspective', *Business Ethics Quarterly*, vol. 20, no. 2, 2010.

proportionally to an agent's capabilities,<sup>90</sup> capacities,<sup>91</sup> and leverage.<sup>92</sup> From the perspective of business contributions to peacebuilding, some have suggested that businesses are morally obliged to play more proactive roles, mainly when states are unable or unwilling to do so.

Thus, different arguments support the view that businesses can and should contribute to peacebuilding. For some, businesses should contribute to peace because it is in their economic self-interest to do so. There are those that also suggest that businesses have moral responsibilities to do more. For others, as social entities, companies should do more in and for the societies in which they operate.

#### **1.4. Existing Limitations of why-based arguments and persuasions**

There are, nonetheless, shortcomings in current articulations as to why businesses should and would contribute to peacebuilding. These include the fact that (1) not all businesses will be persuaded in the same way; (2) not all businesses benefit from peace; (3) not all businesses wish to be peacebuilders; and (4) relatively few businesses have assumed peacebuilding responsibilities. I develop these in turn below.

##### **1.4.1. Not all 'businesses' are persuaded by the same arguments**

The ways in which businesses perceive the above arguments will often differ, with the strength of these arguments likely to vary according to the types of intervention that businesses are being asked to make. For instance, scholars like Ernstorfer et al.,<sup>93</sup> Nelson,<sup>94</sup> Jamali and Mirshak,<sup>95</sup> Van Dorp,<sup>96</sup> and Iff et al.,<sup>97</sup> have compartmentalised types of business interventions in peacebuilding processes

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<sup>90</sup> Wettstein, *supra* note 28, at 135–39.

<sup>91</sup> D. Miller, 'Distributing Responsibilities', in A. Kuper (ed.) *Global Responsibilities: Who Must Deliver on Human Rights?*, New York, Routledge, 2005.

<sup>92</sup> S. Wood, 'The Case for Leverage-Based Corporate Human Rights Responsibility', *Business Ethics Quarterly*, vol. 22, no. 1, 2012.

<sup>93</sup> Ernstorfer et al, *supra* note 62, at 12–13.

<sup>94</sup> Nelson, *supra* note 2, at 7.

<sup>95</sup> D. Jamali and R. Mirshak, 'Business-conflict linkages: Revisiting MNCs, CSR, and Conflict', *Journal of Business Ethics*, vol. 93, no. 3, 2010, at 448.

<sup>96</sup> M. van Dorp, 'Multinationals and Conflict International principles and guidelines for corporate responsibility in conflict-affected areas', Stichting Onderzoek Multinationale Ondernemingen (SOMO) Centre for Research on Multinational Corporations, 2014, at 16.

<sup>97</sup> A. Iff et al, 'The pyramid of business and peace', The National Centre of Competence in Research (NCCR), Policy Brief, 2012.



along a continuum. These include: (1) company risk management in conflict-affected areas; (2) do no harm; and (3) peacebuilding.

This continuum reflects the fact, as outlined above, that ‘contributions to peace’ are diverse, spanning from doing no harm, at one end, to direct and deliberate efforts to contribute to peacebuilding, at the other. However, arguments focused on why businesses would contribute to peacebuilding often fail to acknowledge these different levels. For example, many use the same economic rationale to persuade companies to do no harm as they do to convince businesses to act as agents of peacebuilding. The same moral justifications for asking businesses to curtail adverse impacts are also employed to engage businesses to act as facilitators of peace negotiations. In other words, despite considerable efforts to differentiate types of intervention, discussions on why businesses would do so are often conflated. This conflation undermines the reliability of these arguments by failing to address the significant differences between doing no harm and actively engaging in peacebuilding processes.

Secondly, there is a tendency to conflate businesses under the one bracket without differentiating firms according to size and type. Consider this statement by Berman:

Understanding how corporations think about war is the sine qua non for engaging corporations in nurturing peace. Diplomats seeking to negotiate solutions to conflict have potential allies in the corporate sector, but they will realize that potential only if they understand the motivations that underlie it. NGOs desiring to influence corporate behavior in areas of conflict must understand the concerns that motivate that behavior. Governments seeking foreign investment to rebuild war-torn countries need to understand how corporations will assess the risk from tensions that persist both during conflict and even after a truce is signed. By understanding how corporate managers think about war, constituencies to peacebuilding will go further toward engaging the corporate sector in achieving their goals.<sup>98</sup>

While seemingly progressive in contending that we must better understand the mindsets of corporate executives, Berman implicitly suggests an overarching

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<sup>98</sup> J. Berman, ‘Boardrooms and Bombs: Strategies of Multinational Corporations in Conflict Areas’, *Harvard International Review*, vol. 22, no. 3, 2000, at 32.

mindset that exists. In reality, businesses are far from monolithic and the priorities and objectives of those running businesses are often highly diverse. For instance, businesses differ in terms of their size and capabilities, with local businesses,<sup>99</sup> small-to-medium sized entities,<sup>100</sup> and multinational conglomerates all possessing different levels of resources and capacities.<sup>101</sup> These differences affect the ways that companies might contribute to peacebuilding. Evers *et al* note, for example, that ‘this diversity is noteworthy since it causes variation with regard to how, and with what effect, the private sector impacts peacebuilding. Large and resourceful multinational companies can be expected to play a different role in a peacebuilding process than smaller local companies.’<sup>102</sup>

The existence of different types of businesses means that companies are likely to be persuaded differently and to respond to these arguments in different ways. In spite of this, however, we are nevertheless to assume that the business case or perceived levels of moral and social responsibility apply equally to all businesses, all of the time. The fact is that the normative strength of these arguments is subject to numerous variables, the consequence being that whether and to what extent a business might engage proactively in peacebuilding processes is at best uncertain.

#### 1.4.2. Not all businesses benefit from peace

Some shortcomings are more specific. One is the assumption that peace is indeed good, or that businesses perceive that peace is good for business. Scholars such as Joras have argued, however, that conflict often affects different businesses differently and that these variations will impact on the extent to which economic arguments can convince businesses to contribute to peacebuilding.<sup>103</sup> Accordingly, Joras assesses that ‘[i]n reverse to the argument that high economic costs may

<sup>99</sup> On local businesses see: Killick, Srikantha and Gündüz, *supra* note 12; Rettberg, *supra* note 12.

<sup>100</sup> On Small to Medium Sized Entities see: R. Nusrat, ‘Small and Medium-Sized Enterprises and Peacebuilding’, *International Alert*, 2015; T. O’Brien, ‘Are Businesses Able to Contribute to Peace-Building in the Frame of Corporate Social Responsibility?-An Exemplary Case Study of Small and Medium-Sized Enterprises in Old Nicosia’, Masters Thesis, Universität Marburg, 2010; Berdal and Mousavizadeh, *supra* note 20.

<sup>101</sup> For discussions on MNCs see: Bray, *supra* note 19; Davis, *supra* note 19; Haufler, ‘Foreign Investors in Conflict Zones’, in P. Dombrowski (ed.) *Guns and Butter: The Political Economy of International Security*, Lynne Rienner, London, 2005.

<sup>102</sup> J.J. Andersson, T. Evers, and G. Sjöstedt, ‘Private Sector Actors and Peacebuilding: A Framework for Analysis’, *The Swedish Institute of International Affairs and International Council of Swedish Industry*, 2011, at 40.

<sup>103</sup> U. Joras, ‘Motivating and Impeding Factors for Corporate Engagement in Peacebuilding’, *Swisspeace Working Paper*, 2009, at 10.

mobilize corporate activities in support for peace, low economic costs may negatively influence private companies' propensity to engage in peacebuilding.<sup>104</sup> In other words, not all businesses are persuaded by the argument that conflict is bad for business because conflict does not affect all businesses in the same way.

Secondly, it is often difficult for businesses to assess the costs of conflict. As Rettberg notes:

If we could only document how much the private sector loses from armed conflict and could gain from peace, [...] self-interested organizations would prefer investing time and money in peace-building instead of enduring ongoing physical devastation affecting trade and exchange of goods and services, extortion and attacks by illegal armed actors (including recurrent kidnapping of business executives), lack of investment, and uncertain markets, which are the most common costs associated with conflict.<sup>105</sup>

Moreover, businesses affected by conflict might interpret that the costs required to contribute to peace are less than those incurred by the continuation of violence. As an illustration, Hayward and Magennis, citing Mees,<sup>106</sup> assess that in 'the Basque Country, [while] the business community was keen to see an end to violence, [...] it did not go so far as to exert political pressure on policymakers to maintain momentum in the peace process.'<sup>107</sup> The reason being, according to the authors, that a cost-benefit analysis undertaken by businesses suggested that the impact of conflict on the private sector fell somewhat short of accelerating the embryonic transformation of conflict.<sup>108</sup> Sweetman reasons, therefore, that intervention is 'necessarily dependent on their assessment of the pragmatic and short-term gains for the actors involved.'<sup>109</sup> He further claims that the success of private sector input depends on a rational assessment of the benefit to accrue to them from engaging in

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<sup>104</sup> *Ibid.*, at 10.

<sup>105</sup> A. Rettberg, 'Private sector participation in peace-building: Tacking stock and identifying some lessons', in M. Prandi and J. M. Lozano (ed.) *CSR in conflict and post-conflict environments: from risk management to value creation*, School for a Culture of Peace (UAB) / Institute for Social Innovation (ESADE), 2010, at 92.

<sup>106</sup> L. Mees, 'The Basque peace process, nationalism and political violence', in J. Darby and R. Mac Ginty, (ed.) *The management of peace processes*. New York, St. Martin's Press, 2009, at 166.

<sup>107</sup> Hayward and Magennis, *supra* note 34, at 6.

<sup>108</sup> *Ibid.*, at 6.

<sup>109</sup> D. Sweetman, *Business, conflict resolution, peace: Contributions from the private sector*, London, Routledge, 2009.

peacebuilding efforts.<sup>110</sup> Simply stated, whether or not conflict is bad for businesses is often dependent on the ways that different types of business experience it. It also depends on how businesses interpret the economic costs associated with conflict compared to the costs that might be incurred by contributing to peacebuilding. While not contesting the fact that some businesses might consider it to be in their economic interests to contribute to peacebuilding, the point is that it is often uncertain whether or not they will.

Thirdly, and as is well documented, it is true that some businesses do well financially through conflict.<sup>111</sup> Whether in those instances where businesses align with repressive elites and benefit from systems of patronage and corruption, or in the case of private security firms whose markets depends on the continuation of violence, peace is often bad for businesses. Cohen and Ben-Porat note, for example, that some businesspeople, especially in less developed states, might perceive peace not as a potential benefit but rather as an economic threat that endangers their secured position by, for one, exposing them to international competition.<sup>112</sup> In other words, although there is a tendency to advance unequivocally the benefits of peace to business, the realities are often somewhat different on the ground. Thus, when in 2014 Julia Roig wrote a weblog entitled 'Business for Peace — We Know Why, But How?'<sup>113</sup>, the why was both implied and expressed, a position adopted throughout much of the business and peace literature, but one which is rarely substantiated in ways more specific than sweeping or anecdotal claims.

#### 1.4.3. Not all businesses wish to be peacebuilders

Another set of limitations builds on the fact that business is far from a homogenous group. Many businesses are often ambiguous as to what their role in peacebuilding

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<sup>110</sup> Hayward and Magennis, *supra* note 34, at 6.

<sup>111</sup> See, for example, P. Kanagaretnam and S. Brown, 'Business, Conflict, and Peacebuilding: An Operational Framework', Pearson Peacekeeping Centre: Canadian Peacekeeping Press, 2005, at 1.

<sup>112</sup> N. Cohen and J. Ben-Porat, 'Business Communities and Peace: The Cost-Benefit Calculations of Political Involvement', *Peace & Change*, vol. 33, no. 3, 2008, at 438.

<sup>113</sup> J. Roig, 'Business for Peace-We Know Why, But How?' *GE Perspectives*, [web blog], 22 October 2014, <http://www.ge.com/reports/post/100657563638/business-for-peace-we-know-why-but-how/> (accessed on 17 October 2016).

processes could be.<sup>114</sup> They may, as Miller notes, lack the understanding of, and interest in, sensitive political processes.<sup>115</sup> As Cechvala develops:

Few, if any, companies see themselves as peace actors. When asked about peace, they often take the view that peace belongs to the “political” sphere and is therefore outside the remit of corporate activities. Time and time again, we hear companies assert that when it comes to politics, “*we are neutral*” or “*we want to remain below the radar [in politics]*.”<sup>116</sup>

Moreover, businesses tend to focus on ensuring that they do not cause harm or adversely affect conflict dynamics.<sup>117</sup> Accordingly, Miller notes that a ‘significant part of their time and energy is consumed by their efforts to avoid being drawn into conflicts between communities, between themselves and communities, and between communities and state actors of various sorts.’<sup>118</sup> Similarly, businesses tend to avoid becoming involved in highly complex political processes at all costs, not least because doing so can be detrimental to their interests in the end.

#### 1.4.4. Relatively few businesses have been persuaded to act as peacebuilders

Finally, the above arguments regarding why businesses should contribute to peace are all, in varying ways, challenged somewhat by the fact that relatively few businesses have actually done so. In fact, some claim the great majority of businesses have lowered their investment in comparable capacity with respect to conflict analysis and practical experience on conflict mitigation and prevention.<sup>119</sup> To date, most corporations outsource these services to specialized risk analysis and mediation outfits when necessary, yet corporate capacities and consequently the

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<sup>114</sup> Iff and Alluri, *supra* note 17, at 196.

<sup>115</sup> M. Miller, ‘The Idea of Business and Peace: “Assuming the Can Opener”’, *CDA Perspectives*, [web blog], 17 February 2017, <http://cdacollaborative.org/blog/the-idea-of-business-and-peace-assuming-the-can-opener/> (accessed on March 11 2017). See also A. Hoffman, *supra* note 52.

<sup>116</sup> S. Cechvala, ‘Failing the Duck Test: Labeling companies as peace actors’, *CDA Perspectives* [web blog], 1 June 2017, <http://cdacollaborative.org/blog/failing-the-duck-test-labeling-companies-as-peace-actors/> [last accessed 20 July 2017].

<sup>117</sup> See, R. Davis and D. Franks, ‘The costs of conflict with local communities in the extractive industry’, paper presented at the First International Seminar on Social Responsibility in Mining, Santiago, Chile, 19–21 October 2011, [www.shiftproject.org/publication/costs-conflict-local-communitiesextractive-industry](http://www.shiftproject.org/publication/costs-conflict-local-communitiesextractive-industry) [last accessed 24 May 2015]

<sup>118</sup> Miller, *supra* note 115.

<sup>119</sup> A. Wennmann, ‘Business and the UN Peace and Security Agenda Report on a consultation for the High-level Thematic Debate on UN, Peace and Security’, Geneva Peacebuilding Platform, Brief No. 1, 2016, at 3. See also Miklian, *supra* note 6.

sustainability of adopted politics remain limited even in major multinational corporations.

There are, therefore, a number of suggested reasons for why businesses ought to contribute to peacebuilding processes. Businesses might interpret that conflict is bad for business or that peace is profitable. Businesses might also act out of a social or moral sense of responsibility to use their resources to help facilitate transitions from conflict to peace. At the same time, factors undermine the strength of these arguments. Different businesses are motivated in dissimilar ways and types of contributions will require different levels of persuasion. Businesses might not perceive peacebuilding to be worth the investment and, in any event, might be uncertain as to how to intervene in 'political matters'.

We can summarise the difficulties with a statement that reflects the current uncertainty of the business and peacebuilding ideal: we simply do not know when and if businesses will contribute to peacebuilding processes. So how might we attempt to respond to this uncertainty?

### **1.5. The Possibilities of Regulation**

This thesis attempts to respond to the aforementioned uncertainties by exploring how different actors might require, induce or persuade businesses to contribute to peacebuilding efforts. The intention is to move the discussion beyond the decisions of individual businesses to understand how different actors might influence these choices. I examine how different forms of regulation, emerging because of the gradual pluralisation of regulation, might be used to engage businesses to contribute to peacebuilding efforts. This approach argues that regulation includes not only traditional modes of regulation such as legislation and judicial enforcement, but also less binding or formal methods of influencing business behaviour.

How one receives or interprets this argument, however, is highly influenced by the way in which one interprets the concept of regulation more generally. The discussion below focuses on some different understandings of regulation to substantiate the view that regulation has pluralised and to provide the basis for advancing the argument that there are opportunities for thinking about the different ways that businesses might be influenced to contribute to peacebuilding processes.

### 1.5.1. Orthodox Regulation

Departing from a position, which suggests that businesses might be regulated to contribute to peacebuilding, could be rejected outrightly as spurious. Such a response is likely to arise when one understands regulation in a particular, formalistic way. The OECD, for example, defines regulation as:

[T]he full range of legal instruments by which governing institutions, at all levels of government, impose obligations or constraints on private sector behaviour. Constitutions, parliamentary laws, subordinate legislation, decrees, orders, norms, licences, plans, codes and even some forms of administrative guidance can all be considered as 'regulation'.<sup>120</sup>

This definition of regulation encapsulates the components of what many term orthodox regulation or old governance. Regulation, according to this understanding, has three primary components: (1) states regulate businesses (2) through the use of legal instruments (3) to prevent businesses from causing harm and in some cases holding them accountable for practices, which contravene state-based commands.

The first component is straightforward. For many, regulation is thought of as a 'bi-partite process involving government and business, with the former acting in the role of regulator and the latter as regulatee'.<sup>121</sup> The State, government, or some governing institutions regulate the activities of business.

Secondly, orthodox regulation is synonymous with command and control-based regulation. Command and control regulation is the direct regulation of an industry or activity by legislation that specifies what is permitted and what is illegal.<sup>122</sup> The 'command' is the standards by a government authority that must be complied with; 'control' signifies negative sanctions that may result from non-compliance.<sup>123</sup> For den Hertog, for instance, regulation refers to the 'the employment of legal

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<sup>120</sup> OECD, Recommendation of the Council of the OECD on Improving the Quality of Government Regulation, OECD/GD(95)95, Note 1.

<sup>121</sup> N. Gunningham and S. Sinclair, 'Smart Regulation', in P. Drahos (ed.) *Regulatory Theory*, Australia National University Press, 2017, at 133.

<sup>122</sup> O. McManus, *Environmental Regulation*, Elsevier Ltd, Sidneat, Australia, 2009 cited in B. Junquera and J.A. Del Brío, 'Preventive Command and Control Regulation: A Case Analysis', *Sustainability*, vol. 8, no. 1, 2016, at 1, note 5.

<sup>123</sup> A. Scanlan et al., 'Diverging Approaches to EU Environmental Policy: An Explanation of the Implementation Deficit', *Maastricht University Journal of Sustainability Studies*, vol. 1, no.1, 2013, at 4.

instruments for the implementation of social-economic policy objectives.<sup>124</sup> He continues that a characteristic of legal instruments is that individuals or organizations can be compelled by government to comply with prescribed behaviour under penalty of sanctions.<sup>125</sup>

Thirdly, states, as regulators, focus primarily on curtailing the adverse impacts of business or holding businesses accountable when adverse impacts arise. Some make a distinction between economic and social regulation. Economic regulation consists of two types of regulations: structural regulation and conduct regulation.<sup>126</sup> Structural regulation regulates market structure. Examples are restrictions on entry and exit and rules against individuals supplying professional services in the absence of recognised qualifications.<sup>127</sup> Conduct regulation focuses on behavior in the market. Examples are price control, rules against advertising and minimum quality standards. Social regulation, by contrast, comprises regulation in the area of the environment, labor conditions (occupational health and safety), consumer protection and labor (equal opportunities etc).<sup>128</sup> Instruments applied here include regulation dealing with the discharge of environmentally harmful substances, safety regulations in factories and workplaces, and banning discrimination on race, skin color, religion, sex, or nationality in the recruitment of personnel.<sup>129</sup>

Different theories underpin orthodox regulation. One example is that of 'public interest theory'.<sup>130</sup> In western economies, the allocation of scarce resources is to a significant extent coordinated by the market mechanism. In theory, under certain circumstances, the allocation of resources by means of the market mechanism is optimal.<sup>131</sup> Because these conditions are frequently not adhered to in practice, the allocation of resources is not optimal and a demand for methods for improving the allocation arises.<sup>132</sup> In these circumstances, governments must intervene, in the public interest, to address market failures. In other words, the government must

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<sup>124</sup> J. Den Hertog, 'Review of Economic Theories of Regulation', Tjalling C. Koopmans Research Institute, Discussion Paper Series 10-18, 2010, at 3.

<sup>125</sup> *Ibid.*

<sup>126</sup> J. A. Kay and S.J. Vickers, 'Regulatory Reform: An Appraisal', in G. Majone, (ed.) *Deregulation or Re-regulation*, London, Pinter Publishers, 1990.

<sup>127</sup> Den Hertog, *supra* note 124, at 3

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.*

<sup>130</sup> See M. Hantke-Domas, 'The Public Interest Theory of Regulation: Non-Existence or Misinterpretation?', *European Journal of Law and Economics*, vol. 15, no. 2, 2003.

<sup>131</sup> Den Hertog, *supra* note 124, at 5.

<sup>132</sup> *Ibid.*



regulate market activities and actors to ensure that the public interest is not undermined by a system of market exchanges.

For example, public interest theory identifies a role for states in addressing negative externalities. A negative externality is a cost suffered by a third-party because of an economic transaction. As an example, pollution is termed an externality because it imposes costs on people who are 'external' to the producer and consumer of the polluting product. Governments can intervene to reduce negative externalities in the form of legislation mandating that companies reduce, for instance, their carbon emissions.

Public interest theory also helps to summarise the essence of orthodox regulation.<sup>133</sup> Government regulation is the instrument for overcoming the disadvantages of imperfect competition, unbalanced market operation, missing markets and undesirable market results. This view of regulation holds that government regulators will implement rules, which improve the welfare of consumers and society.<sup>134</sup> Orthodox regulation, therefore, comprises a number of elements. It includes a government defining legal rules and norms, executing these norms and, if a breach occurs, sanctioning businesses for doing so.

### 1.5.2. Regulatory Pluralism

A common dictionary definition of regulation is 'a rule or directive made and maintained by an authority.'<sup>135</sup> As recognised by Julia Black, however, 'Any walk through the regulatory literature soon throws up meanings other than the dictionary definition.'<sup>136</sup> Similarly, Baldwin, Cave, and Lodge, in the introduction to the Oxford Handbook of Regulation, assess that '[t]he very concept of regulation has evolved so that study in this area is no longer confined to the examination of dedicated

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<sup>133</sup> For an overview of different approaches see E. Avgouleas, 'The 'softness' of soft law and global financial governance', in E. Avgouleas (ed.) *Governance of Global Financial Markets*, Cambridge University Press, 2012.

<sup>134</sup> C. J. Coyne and R.L. Coyne, 'Does regulation serve the public interest?' [web blog], Institute of Economic Affairs, 21 January 2016, <https://iea.org.uk/blog/does-regulation-serve-the-public-interest>

<sup>135</sup> Oxford Dictionaries, <https://en.oxforddictionaries.com/definition/regulation> [last accessed 20 Feb 2018]

<sup>136</sup> J. Black, 'Decentring regulation: Understanding the role of regulation and self-regulation in a "post-regulatory" world', *Current Legal Problems*, vol. 54, no. 2001, at 136.

‘command’ regimes that are designed to offer continuing and direct control over an area of economic life.’<sup>137</sup>

The idea that regulation has pluralised exists as a direct challenge to the notion that there is only one type of regulation- orthodox regulation. MacRaea and Winfield describe regulatory pluralism, for example, as:

A governance regime that embraces a wide range of coordinated and integrated instruments (including some traditional command and control regulations), well matched to the desired effect and implemented by an equally wide range of state and non-state actors.<sup>138</sup>

Coglianesse refers to regulatory pluralism as:

A rulemaking process that involves a subset of the broad public with a high level of interest in and knowledge about a particular rulemaking. In this sense, pluralism seeks more participation by members of the public than does insulated or secretive decision-making by a few unelected regulatory officials.<sup>139</sup>

In most cases, however, rather than defining ‘regulatory pluralism’, scholars opt to demonstrate the limitations of a narrow understanding of regulation through processes of observation, identifying alternative forms of regulation that exist in practice. For instance, proponents of regulatory pluralism do not depart from a preordained idea of what regulation is: they do not suggest that regulation is x, carried out by (only) y, in order to achieve z. They suggest instead that the pluralisation of regulation arises from the different ways that scholars suggest regulation occurs.

Take, as a brief example, the work of Ayres and Braithwaite.<sup>140</sup> The significant contribution that these authors made to discussions on regulation was to advance

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<sup>137</sup> R. Baldwin, M. Cave, and M. Lodge, ‘Introduction: Regulation- the Field and the Developing Agenda’, in R. Baldwin, M. Cave, and M. Lodge (ed.) *The Oxford Handbook of Regulation*, Oxford Handbooks Online, 2010, at 6.

<sup>138</sup> R. MacRaea and M. Winfield, ‘A little regulatory pluralism with your counterhegemonic advocacy? Blending analytical frames to construct joined-up food policy in Canada’, *Canadian Food Studies*, Vol. 3, No. 1, 2016, at 160.

<sup>139</sup> C. Coglianese, ‘Expanding Regulatory Pluralism: The Role for Information Technology in Rulemaking’, Kennedy School of Government, Harvard University of Pennsylvania Law School, Working Paper 2006, at 13.

<sup>140</sup> See, I. Ayres and J. Braithwaite, ‘Designing Responsive Regulatory Institutions’, *The Responsive Community*, vol. 80, no. 1, Summer, 1992.

the theory of responsive regulation. Despite the state-centric nature of their model, they observed a wider number of actors involved in influencing the social control of organisations.<sup>141</sup> Amongst other things, the theory of responsive regulation suggests that states frequently draw on other methods of regulation in order to address limitations and difficulties associated with command and control-based approaches. This leads to the regulation of self-regulation, itself a reflection of at least two understandings of the concept.

Finding examples of different manifestations of regulation is not difficult. For instance, expanding notions of business regulation beyond company self-regulation, Scherer and Palazzo speak of 'a new paradigm, one in which the firm is drawn into greater political roles, performing tasks that we traditionally associate with the state. These include elements of regulatory functions and the production of public goods.'<sup>142</sup> Tim Bartley notes that:

Standard setting and regulation are increasingly being accomplished through private means. This includes not only traditional programs of industry self-regulation but also systems of transnational private regulation, in which coalitions of non-state actors codify, monitor, and in cases certify compliances with labor, environmental, human rights, or other standards of accountability.<sup>143</sup>

In ways similar, theories on the hybridisation or privatisation of law,<sup>144</sup> metaregulation,<sup>145</sup> innovative uses of public law to provide for private sector accountability,<sup>146</sup> new governance,<sup>147</sup> multi-polar governance,<sup>148</sup> and global

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<sup>141</sup> P. Drahos, 'Meta-Regulation', in P. Drahos (ed.) *Regulatory Theory*, Australia National University Press, 2017, at 150.

<sup>142</sup> Scherer, and G. Palazzo, *supra* note 26.

<sup>143</sup> T. Bartley, 'Institutional Emergence in an Era of Globalisation: The Rise of Transnational Private Regulation of Labor and Environmental Coalitions', *American Journal of Sociology* vol. 113, no. 2, 2007, at 298.

<sup>144</sup> I. J. Sand, 'Fragmented Law – From Unitary to Pluralistic Legal Systems: A Socio-legal Perspective of Post-national Legal Systems', Arena Working Paper No. 18, University of Oslo Printing Office, Oslo, 1997.

<sup>145</sup> R. Shamir, 'Corporate Social Responsibility: Towards a New Market-embedded Morality?', *Theoretical Inquiries in Law*, vol. 9, no. 2, 2008.

<sup>146</sup> D. McBarnet, 'Corporate Social Responsibility Beyond Law, Through Law, for Law: The New Corporate Accountability', in D. McBarnet, A. Voiculescu and T. Campbell (ed.) *The New Corporate Accountability: Corporate Social Responsibility and the Law*, Cambridge, Cambridge University Press, 2007.

<sup>147</sup> D. M. Trubek and L. G. Trubek, 'New Governance and Legal Regulation: Complementarity, Rivalry or Transformation', *Columbia Journal of European Law*, vol. 13, no. 3, 2006.

<sup>148</sup> O. Perez, 'The New Universe of Green Finance: From Self-regulation to Multi-polar Governance', Bar Ilan University Public Law Working Paper No. 07-3, 12 February 2007.

administrative law,<sup>149</sup> all demonstrate variations of regulation. These examples all emerge from processes of observation, identifying different types of regulation and constructing theories to help explain them.

Following on, alongside processes of observation, scholars of regulatory pluralism also seek to understand why it is that these alternative approaches emerge. For instance, the dictionary definition cited above, in line with orthodox views on regulation, presumes an overarching or singular 'authority' that exists- a state that can issue commands and enforce them. Yet, in such places as the Democratic Republic of Congo (DRC), as an example, authors like Lake have noted that 'in some ways, the state's presence has entirely disappeared from Eastern DR Congo. No single power controls the entire Congolese territory, leading many scholars to conclude that DR Congo represents the archetypal "collapsed state".<sup>150</sup>

This does not mean, however, that such contexts are devoid of regulation. As discussions on multiple sites of public authority;<sup>151</sup> hybrid forms governance;<sup>152</sup> and literature on political corporate social responsibility highlight, different forms of authority and sources of regulation exist beyond the state.<sup>153</sup> These theories all reflect the fact that there are multiple sources of authority in any given polity, operating at national, regional, international, global and even non-state levels, which exist precisely because of the failure of a centralised authority to regulate effectively.

In other words, while proponents of orthodox regulation identify the importance of a single state authority (or some other branch of government), for regulatory pluralists, the point of departure for explaining alternative forms of regulation is often that no central and omnipresent authority is identifiable. Referring to Phillip Selznick's seminal definition of regulation as 'the sustained and focused control exercised by a public authority over activities valued by the community'<sup>154</sup>, Baldwin, Cave, and Lodge argue, therefore, that:

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<sup>149</sup> N. Krisch and B. Kingsbury, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order', *European Journal of International Law*, vol. 17, no. 1, 2006.

<sup>150</sup> M. Lake, 'Organizing Hypocrisy: Providing Legal Accountability for Human Rights Violations in Areas of Limited Statehood', *International Studies Quarterly*, vol. 58, no. 3, 2014.

<sup>151</sup> N. Krisch, 'Global governance as public authority: An introduction', *International Journal of Constitutional Law*, vol. 10, no. 4, 2012.

<sup>152</sup> See generally, R. Mac Ginty, *International Peacebuilding and Local Resistance: Hybrid Forms of Peace*, Hampshire: Palgrave Macmillan, 2011.

<sup>153</sup> Scherer, and Palazzo, *supra* note 26, at 20.

<sup>154</sup> P. Selznick, 'Focusing Organisational Research on Regulation', in R. Noll (ed.) *Regulatory Policy and the Social Sciences*, Berkeley: University of California Press, 1985.

The distribution of ‘public authority’ over levels of government and between private and state sectors varies and is highly contested, ... ideas about how to exercise ‘control’ are controversially considered, and what is constituted by ‘community’ is similarly problematic in the light of transnational and supranational sources of regulation or indeed cross-border policy issues.<sup>155</sup>

Similarly, for Gunningham and Sinclair, it is precisely because of the limitations of orthodox regulation that ‘we should focus our attention on understanding such broader regulatory influences and interactions, including: international standards organisations; trading partners and the supply chain [...]’.<sup>156</sup> As Chapter 3 will develop, in post-conflict settings, for a range of reasons, identifying forms of regulation that exist beyond the state is critically important, not least because defining who or what the state is can be an arduous task.

Thus, in terms of how the regulatory pluralist addresses the concept of regulation, we might distinguish their approach from orthodox approaches in two ways. On one hand, proponents of regulatory pluralism do not depart from a pre-existing definition of regulation but rather develop understandings empirically, based on the observation of the different ways that regulation occurs in reality. Secondly, proponents of regulatory pluralism offer narratives and explanations for why these different approaches emerge. These explanations are often rooted in discussions around the realities of a post-national constellation, coupled with the emergence of globally operating companies, where states simply lack the ability to regulate through state-based command and control.

As the discussion below elaborates, from these processes of observation and explanation, regulatory pluralists have helped to demonstrate that, alongside states, different actors, using different methods, can shape business conduct in various ways.

#### 1.5.2.1. *The Pluralisation of Actors*

Whereas orthodox approaches to regulation hold the state as the sole regulator of business activity, the study of regulatory pluralism identifies the possibilities that different actors can assume regulatory roles and perform regulatory functions. In line with the narrative component of regulatory pluralism touched upon above, for the

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<sup>155</sup> Baldwin, Cave, and Lodge, *supra* note 137, at 12.

<sup>156</sup> Gunningham and Sinclair, *supra* note 125, at 134.

proponent of regulatory pluralism, the reality of globalisation has caused a major shift in how we view regulation along Westphalian lines. For instance, Halliday and Schaffer assess that '[m]odern processes of economic globalisation have blurred the basic coordinates of the Westphalian nation-state juridical system.'<sup>157</sup> Where once states assumed a monopoly on regulatory authority, the realities of globalisation have challenged the ability and willingness of states to exercise that authority. Kobrin thus emphasizes a loss of the regulatory power of state institutions due to 'the fragmentation of authority [and] the increasing ambiguity of borders and jurisdictions.'<sup>158</sup>

In this space, scholars suggest that other actors emerge to fill regulatory gaps. As Scherer and Palazzo note:

The decline in governance capability of nation states is partly compensated by the emergence of new forms of global governance above and beyond the state. International organizations, civil society groups, and private businesses in cooperation with state agencies, or without their support, have started to voluntarily contribute expertise and resources to fill gaps in global regulation and to resolve global public goods problems.<sup>159</sup>

Justine Nolan, in a 2014 paper on private modes of regulation, referred to this pluralisation as 're-regulation', stating that '[a]ll around the global marketplace, non-state actors such as non-governmental organisations (NGOs), unions, companies, multi-stakeholder groups and industry bodies, have stepped in to fill this gap.'<sup>160</sup> Black explains the phenomenon as 'decentred regulation', where 'regulation involves a shift (and recognition of such a shift) in the locus of the activity of 'regulating' from the state to other, multiple, locations, and the adoption on the part of the state of particular strategies of regulation.'<sup>161</sup>

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<sup>157</sup> T.C. Halliday and G. Schaffer, *Transnational Legal Orders*. New York, Cambridge University Press, 2015, at 4.

<sup>158</sup> S.J. Kobrin, 'Private political authority and public responsibility: transnational politics, transnational firms and human rights', *Business Ethics Quarterly*, vol. 19, no. 3, 2009, at 353.

<sup>159</sup> Scherer, and Palazzo, *supra* note 26, at 20.

<sup>160</sup> J. Nolan, 'Refining the Rules of the Game: The Corporate Responsibility to Respect Human Rights', *Utrecht Journal of International and European Law*, vol. 30, no. 78, 2014, at 8-9.

<sup>161</sup> Black, *supra* note 136, at 112.

Scholars of regulatory pluralism do not contest orthodox understandings of regulation on their own terms. Rather, they suggest that other actors can also perform regulatory functions, often explaining the plurality of regulatory actors against the broader contextual shifts and limitations of relying only on the state to regulate. That regulation both includes and extends beyond the state is captured succinctly by van Rooij et al.<sup>162</sup> They note:

To start, this landscape is inhabited by the bureaucrats and legislators traditionally associated with the regulatory tasks of gathering information, setting standards, and changing behaviour. At the same time, the landscape also contains actors whose core roles, goals, and identities were not originally regulatory, and who have undergone a transformation. One can think, for instance, of citizens or citizen groups, banks, courts, industry associations, and civic organizations that now play a regulatory role.<sup>163</sup>

Slowly but surely, therefore, scholars identify a paradigm shift where, in the context of regulating businesses, the state is being viewed as (possibly) part of the solution, but not *the* solution.<sup>164</sup> As chapter 3 will develop, from host states to home states, civil society to business, multi-stakeholder initiatives to multilateral institutions, there is a range of different actors that seek to shape business conduct in post-conflict settings and which many consider to be performing regulatory functions.

#### 1.5.2.2. *Pluralisation of Methods*

The literature on regulatory pluralism also identifies numerous methods of regulation. At the state level, for instance, scholars illustrate that regulation can take various forms. As an example, Knudsen et al suggest that governments adopt four different forms of regulation to promote CSR issues: endorsement, facilitation, partnership and mandate.<sup>165</sup>

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<sup>162</sup> See B. van Rooij, R.E. Stern and K. Fürst, 'The authoritarian logic of regulatory pluralism: Understanding China's new environmental actors', *Regulation & Governance*, vol. 10, no. 1, 2016, at 3.

<sup>163</sup> *Ibid.*

<sup>164</sup> Nolan, *supra* note 160, at 10.

<sup>165</sup> J.S. Knudsen, 'Government Regulation of Corporate Social Responsibility (CSR): Implications for Corporate Governance', in C. Driver and G. Thompson (ed.) *Corporate Governance in Contention*, Oxford University Press, 2017.

Other scholars reflect the fact that those regulating businesses are not only states, with softer methods emerging as possible regulatory tools to accommodate non-state actors. Justine Nolan suggests that in contrast to old governance or orthodox regulation, the concept of regulation now ‘incorporates formal and informal, legal and non-legal mechanisms or techniques [that are] designed to influence or at times coerce corporations [...] to act [...]’.<sup>166</sup> Julia Black concurs that definitions of regulation can range from ‘a type of legal instrument, to any area of law that aims at social control, to any intentional process of controlling behavior with reference to some standard or purpose, to an outcome of an interaction of forces and actors, and even a property of selfcorrection.’<sup>167</sup>

For Jolyon Ford, therefore, no common definition of regulation currently exists. Regulatory pluralism is instead a ‘social fact... where [alongside states] multiple decentred actors modify and mediate regulatory attempts, shaping the agenda and affecting intended outcomes.’<sup>168</sup> This leads Christine Parker to suggest that scholarly understandings of how to define ‘regulation’ are themselves highly pluralist:<sup>169</sup>

For most, regulation is something done by government actors, e.g. through ministries or agencies, but some have also included courts. For many others it is something also done by non-government actors (organizations, associations, firms, individuals, other specialist bodies, e.g. auditors, technical committees). For some regulation can (additionally) be performed by economic forces (principally the interactions of buyers and sellers in a market, though it can also include macro-economic factors such as inflation, foreign exchange rates, money supply, etc.). For yet others, ‘regulation’ is the action of, or outcome of, social forces, this time the usual suspects of sociology: norms, institutions, culture, etc.<sup>170</sup>

As Chapter 3 will develop, in contrast to the notion that regulation occurs solely through commands and sanctions of a state, some suggest that regulation can emerge in various guises, such as standard setting, guidelines, public and private procurement, multi-stakeholder certification schemes, best-practice sharing, human

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<sup>166</sup> Nolan, *supra* note 160, at 8 at note 9.

<sup>167</sup> See Black, *supra* note 136.

<sup>168</sup> Ford, *supra* note 1, at 12.

<sup>169</sup> C. Parker, ‘The Pluralization of Regulation’, *Theoretical Inquiries in Law*, vol. 9, no. 2, 2008, at 350.

<sup>170</sup> Black, *supra* note 136, at 137.



rights governance, and variations of soft accountability, such as consumer boycotts. As the analysis of these initiatives will further suggest, there are great disagreements over the efficacy of different initiatives, with some suggesting that binding approaches to law are, and should be regarded, as the most efficient way to regulate. Challenging the merits and demerits of different approaches to regulation, however, should not be confused with discussions over what does or does not amount to regulation.

Thus, discussions on regulatory pluralism help to identify the fact that different actors, beyond the state, can shape business conduct in various ways. As I elaborate on below, what I seek to explore is whether opportunities exist for using these different approaches for the purposes of engaging businesses in peacebuilding processes.

#### 1.5.2.3. *Recognising the Limitations of Regulatory Pluralism*

A final issue to address is confronting (and I suggest accepting) the limitations of regulatory pluralism. As noted, orthodox approaches to regulation focus on the role of the state, regulating businesses, through formal legal instruments. For all its limitations, this approach to regulation is at least definable, providing a degree of predictability and certainty, necessary principles for any country underpinned by a commitment to the rule of law.

Understood against these criteria, initiatives that fall within the expanded understanding of regulation might be perceived as lacking and incomplete. For instance, some suggest that guidelines that help inform businesses as to how to approach a particular issue, say, their environmental impact, are a form of regulation.<sup>171</sup> While we might regard such guidelines as useful in setting out processes for businesses to follow, can we really define them as a form of regulation in the absence of enforcement mechanisms and oversight? Similarly, civil society actors might monitor the activities of business, but there is an abundance of normative standards from which they can draw to assess business conduct, and thus an ambivalent set of criteria against which to 'regulate' the activities of business.<sup>172</sup> Does this render these forms of influence important, but not quite regulation? In other words, while these different initiatives might have certain,

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<sup>171</sup> See *infra* chapter 3, section 3.4.1.2.

<sup>172</sup> See *infra* chapter 3, section 3.4.1.4.

regulatory components, does the lack of holistic regulatory characteristics render them something else? As Baldwin, Cave, and Lodge note:

Defining what regulation is and, arguably more importantly, what regulation is not, has remained at the centre of considerable debate. A field of study that does not know its boundaries could be accused of youthful empire-building or unimaginative scholarship: if regulation is everything, then it is nothing.<sup>173</sup>

Approaching discussions on regulatory pluralism from the perspective of whether they meet the criteria of orthodox regulation, however, overlooks the broader context and the explanatory component of regulatory pluralism as a field of study. As suggested, proponents of regulatory pluralism do not simply seek to identify alternative approaches to regulation. They also seek to understand why they exist. A central existential claim made by those who embrace regulatory pluralism is that regulatory alternatives emerge to fill regulatory gaps. In post-conflict contexts, the existence of alternative initiatives is often a response to the realities that post-conflict governments are unable or unwilling to regulate businesses.<sup>174</sup>

We cannot and should not regard fragmented and often partial initiatives as optimum regulatory approaches. Yet, few make such claims. Indeed, to do so would undermine the narratives that accompany discussions on alternative regulatory initiatives- narratives that explain why these alternatives exist- as measures to respond to the failures of orthodox regulation. Assessing whether these various initiatives are in fact regulation according to the standards of orthodox regulation and rejecting any approach that does not meet this criterion, misses the point of their existence. Indeed, taken to its logical conclusion, orthodox regulation, in many cases, would also not be regulation because it cannot meet its own standards. Varieties of regulation discussed in chapter three are initiatives that seek to fill, in some way, regulatory gaps, and we should assess them on these terms. Thus, when we refer to the pluralisation of regulation, we are talking about different types of influence, exerted over businesses, to help shape business conduct. They exist on a spectrum, from binding orthodox approaches, to softer, less coercive forms that often emerge to plug the gaps left when orthodox approaches fail.

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<sup>173</sup> Baldwin, Cave, and Lodge, *supra* note 137, at 11-12.

<sup>174</sup> See *infra*, chapter 3, section 3.3.2.

### 1.5.3. Possibilities for regulating business to contribute to peacebuilding?

What then is the relevance of discussions on the pluralisation of regulation to this thesis? As Chapter 3 will show, despite a number of different types of what many consider to be variations of regulation and regulatory efforts, these initiatives are often assessed against what Surya Deva terms the ‘twin test of efficiency’ for any form of regulation: whether can prevent harms from occurring and provide a remedy when they do.<sup>175</sup> The literature on different approaches to regulation in post-conflict settings is no different.

For example, Andrea Iff and Andreas Graff have mapped existing conflict-sensitive guidelines used in conflict-affected settings.<sup>176</sup> They understand guidelines to be a form of regulation that guide businesses as to how to act in conflict-sensitive ways. Categorised according to standards developed business organisations, international actors, civil society and multilateral institutions, this mapping focuses on standards and guidelines that attempt limit the adverse harms caused by business prior to, during and in the aftermath of conflict. A similar contribution is that of Mark Van Dorp’s work on MNCs in conflict-affected contexts,<sup>177</sup> and International Dialogue’s overview of existing corporate social responsibility standards in fragile contexts.<sup>178</sup> Koerber, for his part, discusses corporate codes of conduct and their strengths and limitations in preventing businesses from causing harm in those contexts affected by conflict.<sup>179</sup> All of these contributions examine forms of regulation that extend beyond orthodox understandings but assess their merits or demerits based on how they prevent businesses from causing harm.

Another example is Jolyon Ford’s seminal contribution to the business and peacebuilding discussion, *Regulating Business for Peace: The United Nations, the*

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<sup>175</sup> See S. Deva, *Regulating Corporate Human Rights Violations: Humanizing Business*, Oxon, Routledge, 2012, at 47-50.

<sup>176</sup> A. Graf and A. Iff, ‘Conflict-Sensitive Business Review of Instruments and Guidelines’, Swisspeace, 2013.

See also A. Iff, ‘What guides businesses in transformations from war to peace?’ in M. Prandi, et al. (ed.) *Companies in Conflict Situations: Building a Research Network on Business, Conflicts and Human Rights*, Institut Català Internacional per la Pau, 2013.

<sup>177</sup> Van Dorp, *supra* note 96.

<sup>178</sup> International Dialogue, ‘International Standards for Responsible Business in Conflict-Affected and Fragile Environments: An Overview’, 2015.

<sup>179</sup> P. Koerber, ‘Corporate Responsibility Standards: Current Implications and Future Possibilities for Peace Through Commerce’, *Journal of Business Ethics*, vol. 89, no. 4, 2009.

*Private Sector, and Post-Conflict Recovery*.<sup>180</sup> Ford illuminates that the formal mandates of UN-authorized peacekeeping missions and the practices of external interveners have failed to offer a regulatory framework for the private sector that might cultivate peace. Drawing on a number of case studies, including East Timor and Liberia, Ford identifies that despite their potential to act as regulators of business activity, at present private sector actors have not come within the regulatory jurisdiction of UN peacekeeping operations. He proceeds to consider the possibilities for future transitional authorities to regulate private sector actors as part of their peacebuilding mandates. The primary argument of Ford's work is that peacebuilding authorities can and should regulate the activities of businesses.

Others focus on whether initiatives are successful in holding businesses to account for harmful practices. Scholars such as Sabine Michalowski and colleagues have discussed the concept of corporate accountability in the context of Transitional Justice (TJ) and have outlined a number of existing accountability-based initiatives that can and have helped to hold businesses accountable for their roles prior to, during and in the aftermath of conflict.<sup>181</sup> Different regulatory initiatives considered include the use of Truth Commissions (TCs),<sup>182</sup> extraterritorial accountability,<sup>183</sup> and soft law mechanisms, such as the limited number of accountability mechanisms that accompany corporate social responsibility guidelines.<sup>184</sup> The discussions all question how different initiatives, whether through legal or softer forms of regulation, achieve some degree of accountability for victims.

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<sup>180</sup> Ford, *supra* note 1.

<sup>181</sup> S. Michalowski, 'Introduction' in S. Michalowski (ed.) *Corporate Accountability in the Context of Transitional Justice*, Oxon; New York: Routledge, 2013.

See also, L.A. Payne and G. Pereira, 'Corporate Complicity in International Human Rights Violations', *Annual Review of Law and Social Science*, vol. 12, no. 1, 2016; I. Pietropaoli, 'Corporate Accountability and Transitional Justice in Myanmar', *Justice Info.net* [web blog], 7 February 2016, Available at <http://www.justiceinfo.net/en/research/26259-corporate-accountability-and-transitional-justice-in-myanmar.html> [last accessed 23 June 2017]; R. Carranza, 'Transitional Justice, Corporate Responsibility and Learning from the Global South', *Manifesto*, [web blog], 28 April 2015, <http://jamesgstewart.com/transitional-justice-corporate-responsibility-and-learning-from-the-global-south/> [accessed 24 June 2016]; N. Bernaz, 'Corporate Accountability for Human Rights Violations in Countries in Transition', *Rights as usual*, [web blog], 4 April 2014, <http://rightsasusual.com/?p=824> [last accessed 3 September 2017];

<sup>182</sup> C. Sandoval and G. Surfleet, 'Corporations and Redress in Transitional Justice Processes', in S. Michalowski (ed.) *Corporate Accountability in the Context of Transitional Justice*, Oxon; New York: Routledge, 2013.

<sup>183</sup> T.L. Van Ho, 'Transnational Civil and Criminal Litigation,' in S. Michalowski (ed.) *Corporate Accountability in the Context of Transitional Justice*, Oxon; New York, Routledge, 2013

<sup>184</sup> Y. Farah, 'Toward a Multi-Directional Approach to Corporate Accountability', in S. Michalowski (ed.) *Corporate Accountability in the Context of Transitional Justice*, Oxon; New York, Routledge, 2013.

Like the contributions of these scholars, I suggest that the pluralisation of regulation illustrates that there is a spectrum of types of regulation, spanning from hard law approaches rooted in command and control, to softer initiatives that seek to guide business conduct. I also argue, however, that we can look beyond how and whether different approaches to regulation achieve Surya Deva's twin tests of efficiency, to ask how different forms of regulation or influence might also shape business conduct in more proactive ways.

For instance and as touched upon briefly above, different actors often develop guidelines to inform business conduct, with the intention of preventing adverse harms being caused by businesses in conflict-affected settings. How though might the use of guidelines help to inform businesses as to how to contribute to peacebuilding? Might guidelines also inform businesses about the processes they could and should adopt to make valuable contributions to peacebuilding processes? Might civil society actors exert pressure on businesses to adhere to these guidelines? Similarly, shareholders can demand that businesses act in environmentally sensitive and socially responsible ways. But can they also command that businesses work to contribute to peacebuilding, specifying objectives or requiring adherence to peacebuilding guidelines, if developed? When we identify a spectrum of regulatory possibilities that exist, what do studies on regulation and the pluralisation of regulation tell us about how the same forms of influence might be used for alternative purposes? Essentially, I suggest that numerous forms of influence exist and that the pluralisation of regulation usefully demonstrates possibilities for thinking about using these forms of influence to promote business-based peacebuilding.

#### **1.5.4. Towards a Global Policy Instrument on Business and Peacebuilding?**

In chapter 3, I examine a number of different initiatives that many suggest are variations of regulation. The purpose is to identify different forms of influence that exist and to introduce the possibility for thinking about how these forms of influence might be used for different purposes.

To that end, in chapters 4 and 5, I adopt a case study approach to examine how different forms of regulation have been used to engage businesses to contribute to peacebuilding in Northern Ireland and South Africa. Based on these findings, I will

argue that there is space to think about what a global policy instrument on business and peacebuilding might look like. The type of instrument envisioned is one that seeks to involve different actors in putting pressure or incentivising businesses to contribute to peacebuilding processes. It should respond to the limitations of relying solely on the individual decisions of individual companies as to when and how to intervene.

To conclude this section, therefore, I suggest, in line with proponents of regulatory pluralism, that there is a spectrum of approaches to regulation that range from orthodox regulation to less binding and softer methods of regulation. Thus, I understand regulation broadly to refer to the ways that different actors, employing different methods, are able to influence the decisions of businesses. The range of ways in which these actors attempt to influence businesses suggests that there are possibilities for thinking about how we might further advance the role of others actors in influencing business contributions to peace, with a global policy instrument on business and peace emerging as one such possibility.

## **1.6. Methodology**

As touched upon above, the thesis uses a case study method. Case study research, according to Robson, is 'a strategy for doing research which involves an empirical investigation of a particular contemporary phenomenon within its real-life context using multiple sources of evidence.'<sup>185</sup> Dissecting this brief statement helps to substantiate why it is that I have opted to use this methodological approach and how it fits in with the broader research objective of examining the ways that different approaches to regulation might be used to engage businesses in peacebuilding efforts.

### **1.6.1. Different forms of regulation as the phenomenon**

The phenomenon under investigation is, as suggested, that of different forms of regulation that can be used to shape business conduct. To identify these variations, I examine the concept of regulatory pluralism. Given the range of approaches to regulation that will be examined, I adopt a holistic rather than an embedded research approach. While the latter would entail focusing specifically on one type of

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<sup>185</sup> C. Robson, *Real World Research: a resource for social scientists and practitioner-researchers*, Oxford, Blackwell, 2002, at 178.

regulation, a holistic approach allows for an examination of the pluralisation of regulation and the impact of different approaches in post-conflict societies. This is in keeping with the exploratory nature of the study of regulatory pluralism itself.

To this end, this research is partly exploratory in nature seeking to examine the ways that regulation exists to influence the decisions of businesses. The research is, however, also partly explanatory and descriptive. I seek to understand the possibilities that emerge from the pluralisation of regulation and to use the findings to help explain how different forms of regulation might help to advance a global policy instrument on business and peacebuilding.

### 1.6.2. Case Study Selection

The particular 'real-life contexts' under investigation are post-conflict settings. In order to gain a deeper understanding of different regulatory possibilities, I adopt a case study approach examining regulation in both Northern Ireland and South Africa. I select these case studies for a number of reasons.

In Northern Ireland and South Africa, conflict formally ended through negotiated settlements approximately two decades ago. Given this temporal timeframe, the case studies offer the opportunity to examine how businesses have contributed to the longer-term peace processes, and how and whether different actors have influenced these contributions. Moreover, in both settings, significant peacebuilding moments in the peacebuilding processes were impacted by and impacted on the development of the regulatory landscape at the state level. Significant peacebuilding moments are those milestones that were key to reaching and sustaining peace while the significance of regulatory moments derives from the ways that businesses were integrated into peacebuilding efforts because of them. These case studies, therefore, offer the opportunity to consider how regulation is and can be linked to the political peacebuilding process.

Building on, in both cases, a range of actors and various methods were adopted. In regards to state-level regulation, for instance, even in the aftermath of conflict, both countries had relatively strong regulatory frameworks. This led to a number of different experimental approaches being adopted by post-conflict governments, offering useful insights for future post-conflict settings. At the same time, other actors have played important roles. In both cases, for instance, different business

types were present prior, during and after conflict. These business types ranged from local businesses at one end of the spectrum to global multinational corporations at the other. This diversity created opportunities for actors, including other states and international institutions, to influence business conduct in the post-conflict era through different forms of regulation. The case studies offer the opportunity to examine the roles that different types of regulators can play.

In both Northern Ireland and South Africa, businesses engaged in conflict in different ways. In some cases, business benefitted from the repressive policies of a state while in other cases businesses help to support and sustain repressive regimes and violence. These interactions provided important opportunities for regulators to target businesses. Thus, the case studies allow us to explore the relationship between business, conflict and regulation and to examine the opportunities that can arise when businesses are implicated in supporting or benefitting from a particular type of political system.

As a final justification, in both contexts, by targeting businesses directly, regulatory actors were able to force a number of further institutional developments in the regulatory landscapes. As such, the case studies allow us to examine the different impacts that regulation can have, beyond simply altering the actions of individual businesses.

The case studies have been selected, therefore, in order to help inform the research objective of better understanding how different forms of regulation can be used in different ways to require, influence and persuade businesses to engage in peacebuilding efforts.

### 1.6.3. Sources of Evidence

Finally, Robson identifies the importance of the sources of evidence when undertaking case study research. The sources of evidence used in this thesis reflect the plurality of ways in which regulation can occur. These sources include peace agreements, legal cases, truth commission findings and recommendations, civil society reports and corporate social responsibility standards and guidelines. I also refer to secondary literature in the form of books, book chapters, working papers, policy reports and variations of academic literature. Given the broad spectrum of documentation examined, this thesis consists primarily of desk-based research. This



was appropriate in order to ensure that important regulatory moments were examined and that the plurality of regulation was properly reflected in the case study examination.

#### 1.6.4. Limitations of the Study

There are a number of general limitations with a case study approach. While case studies can help to provide a detailed overview of phenomena in context, there is the persistent problem of representation and transferability. In particular, how the findings from one study can and will transfer to another is uncertain. In post-conflict settings, given the variations across and within conflict divides, these difficulties of transferability are somewhat magnified.

This overarching problem is arguably present in the case study selection. Both Northern Ireland and South Africa are somewhat different to many other post-conflict settings. Most notably, while other contexts emerge from periods of violence completely or wholly destroyed; South Africa and Northern Ireland had relatively functioning institutions even in the aftermath of conflict. This was driven in part because these were relatively mid-level conflicts. In this sense, the findings from the case studies might appear inapplicable given that the institutional structures that existed which allowed for the respective post-conflict governments to adopt a number of progressive regulatory initiatives.

However, the case studies also attempt to respond to this very limitation. By focusing on both South Africa and Northern Ireland, contexts in which a range of actors have been involved in different ways, these case studies help to illuminate not only how states can influence businesses, but also how other actors are able to contribute to play important roles. Thus, in exploring the pluralisation of regulatory actors, these case studies offer findings that are at least potentially useful to those contexts where the state is less able or willing to use its influence to engage businesses in contributing to peacebuilding.

A second limitation is one less capable of being resolved through any particular methodological approach or selection and relates to the potential impact of this research. Firstly, I am not offering regulation as a panacea or 'cure all' for the difficulties of engaging businesses in proactively contributing to progressive social

change. In many cases, it is unlikely that regulation will be able to influence all or even many businesses.

Secondly, there have been great strides made in such places as business schools, law firms, industries and individual businesses to increase the consciences of business owners and executives as to their social impact. The result has been a significant increase in regards to how businesses approach their impacts in and on societies and, in some cases, how they contribute to peace. By focusing on regulation, I do not seek to undermine these efforts.

What I seek to achieve is simply to outline a different perspective, one that suggests that possibilities exist for other actors to help push businesses in contributing to transitions from conflict to peace in different ways. If achieving this objective, I will have at least made some contribution to the much more difficult task of integrating businesses into peacebuilding processes.

#### 1.7. Remaining Structure

Chapter 2 examines a number of ways that businesses might contribute to peacebuilding efforts. Drawing on the business and peace literature and a number of empirical examples, I explore the contributions that businesses might make to peacebuilding efforts according to four categories: core business, socially responsible investment and philanthropy; public policy and dialogue, and collaborations. The intention of this chapter is to introduce a number of ways in which businesses might push beyond doing no harm to help contribute to peacebuilding efforts. I conclude this chapter by asking how other actors can influence businesses to act in these more proactive ways. In order to identify these different forms of influence, I suggest that the pluralisation of regulation has much to offer.

Chapter 3 examines what some consider to be different regulatory initiatives in post-conflict settings. I begin the discussion by exploring different ways that businesses might undermine transitions from conflict to peace directly and indirectly, through their relationships with other actors. I use this discussion as the backdrop against which to examine a range of different approaches to regulation that seek to prevent and in some case hold businesses to account for harms that they might cause. In this chapter, I explore the different ways in which the concept of regulation has

expanded from coercive legal approaches to less binding forms of regulation. Beginning with command and control, I outline the parameters of this approach to regulation before identifying a number of limitations of command and control-based approaches in post-conflict settings. I then examine three alternative approaches to regulation: persuasive regulation, conditionality-based approaches and alternative regulatory paradigms, before exploring a number of initiatives that fall within these different categories.

I then examine the impact that these initiatives seek to make in post-conflict settings. I will suggest that in different ways, these initiatives are linked to peacebuilding efforts by attempting to ensure that businesses do not derail peace processes through their deleterious activities. Despite the tendency to examine these different approaches according to how they prevent or remedy harms, I suggest that we can identify a number of different forms of influence, which could also be used to engage businesses in peacebuilding efforts.

Chapters 4 and 5 examine how different actors have sought engage businesses in contributing to the peacebuilding effort in South Africa and Northern Ireland. In doing so, I examine a number of significant regulatory moments during the peacebuilding processes. The purpose of these chapters is two-fold. Firstly, I seek to examine how different actors have directly regulated businesses to contribute to peacebuilding. Secondly, I seek to examine how and in what ways the regulation of business has contributed to other developments, including institutional change and how these efforts have in turn been supported by significant peacebuilding moments.

In chapter 4, I tell the story of regulation in two parts. The first examines the Broad-Based Black Economic Empowerment Framework (B-BBEE), a state-based framework that seeks to incentivise businesses to contribute to peacebuilding. The second story examines a number of additional regulatory moments, which have interacted with the B-BBEE in different ways. I examine how a number of different initiatives helped contribute to the emergence of B-BBEE; how they have reinforced the objectives of B-BBEE; how they gap-fill for B-BBEE; and how different initiatives have conflicted with B-BBEE. The findings of this chapter can be broadly categorised in two ways. Firstly, I show the potential opportunities that exist for different types of regulation to influence how businesses contribute to peacebuilding efforts. Secondly, I suggest how different regulatory initiatives can interact in both

positive and negative ways. These findings help to inform the discussion in chapter 6.

In chapter 5, I tell three stories, all of which relate to the promotion of equality in Northern Ireland. The first story examines the MacBride Principles in Northern Ireland, a set of guidelines developed by civil society actors and used by different actors to change discriminatory businesses operating in Northern Ireland. I also examine how these principles led to the adoption of an experimental and creative approach to promoting affirmative action under the Fair Employment and Treatment Order 1998. The second discussion focuses on the role of the EU, which through its PEACE funds has been able to incentivise businesses through offering businesses the opportunity to help shape the future development of the economy. The final discussion highlights how important potential contributions can be overlooked by states. The findings of this chapter are twofold. Firstly, I show the potential opportunities that exist for different types of regulation to influence how businesses contribute to peacebuilding efforts. Secondly, I suggest how different regulatory initiatives can interact in both positive and negative ways and how without a centralised and coherent approach important opportunities for engaging businesses in peacebuilding can be overlooked. These findings help to inform the discussion in chapter 6.

Chapter 6 examines what lessons can be learned from the case studies for the possibilities of developing a global policy instrument on business and peacebuilding. Based on these possibilities, I will propose that there are reasons and space to consider what a global policy instrument on business and peacebuilding might look like; one that seeks to harness these possibilities through the development of common approach. In doing so, I will draw on the United Nations Guiding Principles on Business and Human Rights (UNGP),<sup>186</sup> which act as the primary global instrument on business and human rights. As I will develop, the UNGP is useful on two fronts.

Firstly, the UNGP help to illustrate the possibility that a global policy instrument can attempt to involve numerous actors, all influencing businesses in different ways, to

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<sup>186</sup> UN Human Rights Council, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, 2011 A/HRC/17/31. 21 March.

shape corporate conduct. While the UNGP ultimately focus on improving how businesses respect human rights, I nevertheless argue that they are a useful template for considering what a global policy instrument on business and peacebuilding might look like. Secondly, and paradoxically, the UNGP show that such a policy instrument can invoke considerable debate and pushback. As I will argue, the UNGP have many limitations. However, these limitations have inspired a wealth of discussions about how to progress the business and human rights agenda and the role of other actors in supporting these developments. This is useful because any policy instrument on business and peacebuilding must be developed by a broad range of actors, reflecting the complexities of (1) business-based (2) peacebuilding in (3) diverse and differing contexts. It should also reflect the (4) heterogeneity of business and (5) the diverse range of potential actors involved in influencing businesses.

For all its faults, the UNGP highlight that a policy instrument can galvanise the types of conversation that are necessary, with this thesis serving as only a speck on the road of what would need to be a much longer journey in formulating a global policy instrument on business and peacebuilding. That I push the discussion in this way reflects the view proffered by Graf et al that while ‘there is a growing enthusiasm in exploring the potential of business contributions to peace,’<sup>187</sup> ‘future steps ‘will need to establish specific instruments and tools to support companies in their peacebuilding efforts more effectively.’<sup>188</sup>

## 1.8. Conclusion

In summary then, rather than focusing on business as usual or consequential impacts of socially responsible behaviour, this thesis examines how businesses have and might become actively involved in the processes of peacebuilding. More importantly, I seek to examine how different actors have required, induced or persuaded businesses to do so. I do this through examining regulatory pluralism in order to identify different forms of influence and to examine how different actors have sought to influence businesses to contribute to peacebuilding South Africa and Northern Ireland. Based on the findings of the studies, I interrogate the possibilities

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<sup>187</sup> A. Graf, A. Iff, and R. Alluri, ‘The Business of Conflict Sensitivity’, in S. Handschin, E. Abitbol and R. Alluri (ed.) *Conflict Sensitivity: Taking it to the Next Level*, Swisspeace, Bern, 2016, at 43.

<sup>188</sup> *Ibid.*, at 46.

for thinking about a global instrument on business and peacebuilding. I do so to help develop how such an instrument might encourage and inform different actors about how to engage businesses in peacebuilding processes.

### **Businesses as Agents of Peacebuilding**

Drawing on both the business and peace literature, along with a number of empirical examples, this chapter explores the potential of businesses to contribute to peacebuilding processes.

#### **2.1. Introduction**

This chapter examines different ways in which businesses might contribute positively to peacebuilding. The objective is to expand how we consider the relationship between business and peacebuilding in greater detail. As was briefly alluded to in the previous chapter, historically, many have understood the relationship between business and peace from a number of prevailing perspectives. Some consider that businesses undermine peace. Because businesses have supported violent non-state actors, colluded with repressive regimes, and undermined peacebuilding efforts by violating the rights of workers, women, and/or minority groups, many consider businesses undermine peace processes. Others contend that businesses are important for the realisation of peace. Because businesses create jobs and generate economic growth, they are important players in any peacebuilding process. In between, some suggest that in order for the latter contributions to be realised, we must focus on preventing businesses from causing harm.

These prevailing views have ensured that considerations regarding how businesses might contribute to peace have been rather limited. With the exception of a body of literature on business and peacebuilding, discussions either have centred on preventing businesses from causing harm or have understood businesses contributions to peace to be the consequences of economic pursuits. This short chapter helps to introduce a more enlightened view of businesses in peacebuilding processes by drawing attention to the possibilities for positive interventions. Through different contributions that fall within four broad categories of intervention types, businesses can contribute to peacebuilding in a range of ways. The discussion

below focuses on four categories, namely: core business (section 2.2.1), socially responsible investment (2.2.2), advocacy and public policy dialogue (2.2.3.), and collaborations (2.2.4.).

## **2.2. Examples of business-based peacebuilding**

### **2.2.1. Core Business**

Businesses can contribute to peacebuilding through their core business activities. Core business activities are those corporate activities aimed principally at generating profits.<sup>1</sup> These activities are central to the operations of a business and include such issues as who a business conducts commercial relations with, who a business employs, and where and with whom a business sources its materials. Various opportunities arise for contributing to peacebuilding through core business activities. For now, I focus on possible contributions that can arise from employment practices, skills development, supply chain relationships, and community reconciliation.

#### **2.2.1.1. *Employment***

The employment practices of a business can affect peacebuilding. As mentioned above, those advancing a ‘business as usual’ approach to business-based peacebuilding promote the view that businesses can contribute to peace through creating employment. Those that advance the ‘do no harm’ approach tout the peacebuilding impacts of employing without discrimination. It is also the case, however, in many ways provoking questions regarding what it means to do no harm in post-conflict settings, that even well-meaning practices can be either limited or counterproductive. For instance, because of the marginalisation of the past, some sections of society may lack the skills required to attain gainful employment. Non-discriminatory employment-practices may have little impact on peacebuilding if groups continue to be excluded from employment. In post-conflict contexts, what is often required is a more proactive approach to employment. There are a number of possibilities for businesses to use employment practices in more proactive ways.

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<sup>1</sup> UN Global Compact, ‘Doing Business While Advancing Peace and Development’, New York, United Nations Global Compact, 2010, at 7. While specific terms and names are abbreviated throughout this thesis, I include the full names again for ease of reference when each previously abbreviated word is mentioned.



#### 2.2.1.1.1. Affirmative Action

In contexts characterised by histories of repression, peace settlements often attempt to accommodate previously marginalised groups through representation in a new post-conflict political dispensation.<sup>2</sup> Constitutional reform and the inclusion of human rights provisions are measures that can strengthen these aims. While certainly important, it is also necessary to ensure the integration of these sections of society into other aspects of life, including in the economic sphere. Businesses are well-placed, as direct market participants, to help integrate different groups into the economy. For instance, and as explored in the coming chapters, in both South Africa and Northern Ireland, businesses have been at the forefront of helping to address inequalities between groups through affirmative employment action programmes by integrating sections of these societies that were previously marginalised.

As an illustration from elsewhere, Gündüz et al. draw attention to La Frutera Inc. (LFI), a business operating in Mindanao, the Philippines.<sup>3</sup> Recognising that the conflict had its roots in history and Muslim socioeconomic grievances, such as lack of access to education, the loss of land to settlers, horizontal inequalities and poverty, LFI actively sought to integrate Muslim's into the workforce.<sup>4</sup> In response to an important trigger of conflict in the region, LFI made efforts to actively employ Muslim workers alongside Christians to advance the peacebuilding process in the region.

#### 2.2.1.1.2. Reintegrating Former Conflict Participants

Businesses can also help to reintegrate ex-combatants back into society when a conflict ends.<sup>5</sup> In Colombia, for example, the “Peace Welders” are a group of 10 metalworking enterprises joined in a private-public initiative to meet the demand for

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<sup>2</sup> See, V. Dudouet, and S. Lundström, ‘Post-war Political Settlements: From Participatory Transition Processes to Inclusive State-building and Governance’, Research Report, Berlin: Berghof Foundation, 2016.

<sup>3</sup> C. Gündüz, N., Killick, and J. Banfield, *Local Business, Local Peace: the Peacebuilding Potential of the Domestic Private Sector*, London: International Alert, 2006, at 86.

<sup>4</sup> *Ibid.*

<sup>5</sup> Global Partnership, ‘Partnering with business for peace and development in Colombia’, *Global Partnership*, [web blog], 18 January 2015. Available at <http://effectivecooperation.org/2015/01/partnering-with-business-for-peace-and-development-in-colombia/> [last accessed 3 September 2017].

welding services in the Colombian state of Santander.<sup>6</sup> This group actively employs ex-combatants in order to provide an alternative to violence.

Integrating or helping to facilitate the integration of former combatants back into society is important for a number of reasons. Spoilers are those individuals or groups that actively undermine peace processes. By offering an alternative to violence in the form of economic participation, businesses can help to complement Disarmament, Demobilisation and Reintegration (DDR) programmes. Body and Brown, for instance, highlight the importance of entrepreneurial programmes to help ex-combatants who cannot find wage-employment.<sup>7</sup> They note that because former conflict participants frequently resort back to violence in the absence of any alternative, businesses, in providing employment to former combatants, can help to offer these individuals a 'different path', thereby reducing the likelihood of conflict relapse.

In much the same way, businesses can also help to support the reintegration of ex-political prisoners. In Northern Ireland, for instance, a key aspect of the transition from conflict to peace was the release of former political prisoners.<sup>8</sup> There is, however, quite a difference between prisoner release and prisoner reintegration. Whereas the former is a term to describe a moment, reintegration is a much longer and more arduous task. It is, nevertheless, an important one. As McKeever notes: 'the process of transition must bring political ex-prisoners on board, not despite but because they used violence as a means of challenging the state.'<sup>9</sup> Businesses can contribute to the peace process by supporting aspects of the peace settlement, in the case of Northern Ireland, helping to support prisoner reintegration.

As a final point, businesses can also actively employ those previously displaced because of a conflict. A recent article published by the World Economic Forum has argued that business can help refugees through training and employment.<sup>10</sup> For

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<sup>6</sup> *Ibid.*

<sup>7</sup> See T.E. Body and S. Brown, S., 'Reintegration of Ex-Combatants through MicroEnterprise: An Operational Framework', Pearson Peacekeeping Centre, Canadian Peacekeeping Press, 2005.

<sup>8</sup> See *infra*, chapter 5.

<sup>9</sup> G. McKeever, 'Citizenship and Social Exclusion: The Re-Integration of Political Ex-Prisoners in Northern Ireland', *The British Journal of Criminology*, vol. 47, no. 3, 2006, at 431.

<sup>10</sup> K. Koser, 'How Can We Get Business to do More to Help Refugees?'. *World Economic Forum* [blog post] 9 October 2015, <https://www.weforum.org/agenda/2015/10/how-can-we-get-business-to-do-more-to-help-refugees/> [last accessed 27 June 2016].

example, Forest notes that business leaders in Germany have responded to the refugee crisis in Europe by calling for the thousands of people arriving each day to be given help to find employment.<sup>11</sup>

#### 2.2.1.1.3. Promoting Gender Equality

Businesses can also use employment practices to empower women. The peacebuilding literature frequently and correctly highlights the importance of including women in peace processes. As is reflected in Security Council Resolution 1325 on women and peace,<sup>12</sup> this refers to inclusion in the processes that establish peace,<sup>13</sup> and in the post-conflict political settlement and social order.<sup>14</sup> The latter can be achieved through constitutional provisions protecting women's rights, along with guarantees of women's representation within political institutions through quotas.<sup>15</sup>

Along with facilitating inclusion in these areas, scholars are also highlighting the importance of women's economic empowerment and women's entrepreneurship.<sup>16</sup> Again, businesses can use employment practices to contribute to this broader objective. Scholars such as Gündüz et al. for instance, draw attention to The Three

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<sup>11</sup> A. Forrest, 'Refugees Will Have the Right to Work – Why Not Employ Them?', *The Guardian*, September 11, 2015, <https://www.theguardian.com/sustainable-business/2015/sep/11/business-refugee-crisis-employment-work-asylum-seekers> [last accessed 24 June 2016]. Another example is the case of Starbucks. In response to the international refugee crisis, Starbucks announced a pledge (in January of 2017) to hire 10,000 refugees worldwide over the next five years. See S. Spary, 'Starbucks to hire 2,500 refugees in its European coffee shops despite backlash', [web blog] Buzzfeed, June 20 2017, [www.business-humanrights.org/en/world-refugees-day-companies-take-actions-in-support-of-rights](http://www.business-humanrights.org/en/world-refugees-day-companies-take-actions-in-support-of-rights), cited in J. Oetzel, 'Multinational enterprises, risk management, and the business and economics of peace', *Multinational Business Review*, vol. 25, no. 4, 2017, at 275.

<sup>12</sup> UN Security Council, *Security Council resolution 1325 (2000) [on women and peace and security]*, 31 October 2000, S/RES/1325 (2000).

<sup>13</sup> See, for example, M. O'Reilly, A. Ó Súilleabháin and T. Paffenholz, 'Reimagining Peacemaking: Women's Roles in Peace Processes', New York, International Peace Institute, 2015; M. McWilliams, 'Women at the Peace Table: The Gender Dynamics of Peace Negotiations', in M. Flaherty et al. (ed.) *Gender and Peacebuilding: All Hands Required*, Lexington Press, 2015; C. Bell, 'Women and peace processes, negotiations, and agreements: operational opportunities and challenges', Norwegian Peacebuilding Resource Centre, Policy Brief, 2013; P. Domingo et al., 'Women and peace processes, negotiations, and agreements: operational opportunities and challenges', Norwegian Peacebuilding Resource Centre, Policy Brief, 2013; S. Nazneen and S. Mahmud, 'The Gendered Politics of Securing Inclusive Development', in S. Hickey, K. Sen and B. Bukenya, (ed.) *The Politics of Inclusive Development: Interrogating the Evidence*, Oxford, Oxford University Press, 2014.

<sup>15</sup> C. Bell, 'Text and Context Political Settlements: Evaluating Peace Agreements for their 'Gender Perspective', Political Settlements Research Programme, Report 1, 2015.

<sup>16</sup> See, for example, International Finance Corporation (IFC), *Strengthening Access to Finance for Women-Owned SMEs in Developing Countries*, International Finance Corporation and Global Partnership for Financial Inclusion, Washington, D.C. IFC, 2011; G.T. Lemmon, 'Entrepreneurship in Postconflict Zones', Council on Foreign Relations Working Paper, 2012.

Sisters' Trekking Agency in Nepal.<sup>17</sup> This business chose to adopt inclusive hiring as a best-business practice to address the gender and caste-based, socio-economic inequalities that are at the root of the conflict. They achieved this by training and employing disadvantaged women from the region.<sup>18</sup> In doing so and read alongside the broader macro elements of peacebuilding and constitutional reform, supporting women through employment can help to contribute to and complement broader peacebuilding objectives.

Moreover, and building on the discussion on from the discussion on affirmative action above, businesses are well placed to position women in places of management. As discussions on political settlements are suggesting, while peace agreements often contain provisions focused on gender empowerment, whether and to what extent provisions actually materialise is often uncertain.<sup>19</sup> One reason that provisions such as these are not implemented is that, in spite of the change in a particular political dispensation, underlying predispositions regarding the status of women can persist. In these circumstances, the transformation of women's rights is not always realised because of underlying patriarchal structures.<sup>20</sup> Businesses that empower women can help to contribute not only the empowering women but also breaking down structural and cultural barriers.

#### 2.2.1.1.4. Skills Development

In some senses, a discussion on affirmative action presupposes that those previously marginalised groups will be in a position to avail of increased economic opportunities when and if they arise. One of the consequences of structural marginalisation, however, is those previously excluded often lack the requisite skills and competencies to enter the labour market. Businesses can help to increase the prospects for future employment through training and education delivery.

For example, a further consequence of patriarchal systems is that women are often uneducated and unskilled, realities stemming from views that understand the role of

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<sup>17</sup> Gündüz, Killick, and Banfield, *supra* note 3, at 172

<sup>18</sup> *Ibid.*, at 172-173. See also S.G. Bishnu and R. Upreti, 'Peace by Corporate Means: How Mature Is the Private Sector for Peacebuilding in Nepal?', *Journal of Peacebuilding & Development*, vol. 9, no. 2, 2014.

<sup>19</sup> P. Domingo et al., *supra* note 13.

<sup>20</sup> *Ibid.*

women solely in terms of familial responsibilities.<sup>21</sup> To this end, progressive companies such as the minerals Conglomerate Coca-Cola have been at the forefront of championing women's progress, both economically and socially. In 2007, the company teamed up with the Harvard Kennedy School of Government and the World Bank's (WB) International Finance Corporation (IFC) - the private sector lending arm of the WB Group. The coalition sought to identify the major obstacles for female entrepreneurs in their markets, which included the lack of business skills, the lack of access to finance and the lack of peers and mentors.<sup>22</sup> The result was the former of the 5by20 programme. This initiative aims to expand economic opportunity for five million women entrepreneurs throughout the Company's global value chain by the year 2020 through a combination of core business operations, cross-sector partnership, and strategic social investment.<sup>23</sup> According to Bank, a typical example of the model offers women access to business skills training courses, financial services, and connections with peers or mentors together with the provision of a business starter kit—three cases of product, a table, a cooler, and an umbrella.<sup>24</sup> One example of such a programme was launched in Nigeria in 2013 when Coke, the IFC and Access Bank signed an agreement to provide financing for small and medium enterprise (SME) distributors (the majority of whom are women) of Coke in Nigeria.<sup>25</sup>

#### 2.2.1.1.5. Community Reconciliation

Scholars have also cited facilitating 'community reconciliation' as an important contribution that businesses can make to peacebuilding processes.<sup>26</sup> Niva Golan-

<sup>21</sup> Dudouet and Lundström, *supra* note 2, at 51.

<sup>22</sup> A. Roberts, 'Gender, Financial Deepening and the Production of Embodied Finance: Towards a Critical Feminist Analysis', *Global Society*, vol. 29, no. 1, 2016, at 110.

<sup>23</sup> B. Jenkins, K. Valikai, and P. Baptista, 'The Coca-Cola Company's 5by20 Initiative Empowering Women Entrepreneurs across the Value Chain' CSR Initiative', Harvard Kennedy School and Business Fights Poverty, 2013; C. Niethammer, 'Women, Entrepreneurship and the Opportunity to Promote Development and Business', Brookings Blum Roundtable 27 September 2013, Session V: Female Entrepreneurship [last accessed 14 September 2015]; S. Stahlenius, 'The Ideal Woman – a case study of the Coca-Cola Company's 5by20 initiative' LUP Student Papers, 2014.

<sup>24</sup> H. Bank, 'The business of peace: Coca-Cola's contribution to stability, growth, and optimism', *Business Horizons*, vol. 59, no. 5, 2016, at 459. See also S. Tornhill, 'A bulletin board of dreams': corporate empowerment promotion and feminist implications', *International Feminist Journal of Politics*, vol. 18, no. 4, 2016, at 529.

<sup>25</sup> Roberts, *supra* note 22, at 110. See also, International Finance Corporation, *Coca-Cola Join Forces to Support Thousands of Women-Owned Businesses in Emerging Markets*, Washington, D.C, IFC, March 11, 2013.

<sup>26</sup> See, for instance, J. Katsos and J. Forrer, 'Business practices and peace in post-conflict zones: Lessons from Cyprus', *Business Ethics: A European Review*, vol. 23, no. 2, 2014, at 157; J. Oetzel, et al., Business and peace: Sketching the terrain', *Journal of business ethics*, vol. 89, no. 4, 2009, at 352.

Nadir and Nissim Cohen assess, for instance, that businesses can build bridges between different communities by bringing previously at war communities together through employment.<sup>27</sup> Ernstorfer et al. highlight an example from the Balkans, where companies have sought to promote improved inter-ethnic relations in the area by bringing people from Serbia, Kosovo and Bosnia together to work on rebuilding war-damaged electricity infrastructure.<sup>28</sup>

Others suggest that businesses can contribute to community reconciliation by increasing the interaction of different groups through commercial relations. Thus, for Miklian, 'firms can also provide a neutral space for suppliers/sellers of different ethnicities and similar inclusivity characteristics, believing that engaging in such activities will promote trust, reduce stereotypes and build inter-personal relationships, reducing participation in or support of violence'.<sup>29</sup> A UNGC report entitled 'Doing Business in a Multicultural World' details a range of possible examples.<sup>30</sup>

In contributing to community reconciliation, businesses can again support the political peace process. Mueller-Hirth, drawing on the work of Brewer on social transformation, highlight the importance of social peacebuilding. They describe this as 'the repair and rebuilding of social relationships, interpersonal and inter-group reconciliation, the restoration of community and the social bond, and social and personal healing [...]'.<sup>31</sup> Although peace is often made at the elite level, bottom-up processes are equally necessary. As Roig notes: 'As peace agreements are conducted by very high-level political leaders, there is always a need to consolidate peace at the local level through broad-based reconciliation and societal healing.'<sup>32</sup> Business, by bringing different communities together through employment and the

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<sup>27</sup> N. Golan-Nadir and C. Nissim, 'The role of individual agents in promoting peace processes: business people and policy entrepreneurship in the Israeli–Palestinian conflict', *Policy Studies*, vol. 38, no. 1, 2017.

<sup>28</sup> A. Ernstorfer, et al., 'Advancing the Sustainable Development Goals by Supporting Peace: How Business Can Contribute', UN Global Compact, Business for Peace, and CDA Collaborative Learning Projects, 2015, at 32.

<sup>29</sup> J. Miklian, 'Mapping Business-Peace Interactions: Five Assertions for How Businesses Create', Peace Research Institute Oslo (PRIO), 2016, at 9.

<sup>30</sup> United Nations Alliance of Civilizations, *Doing Business in a Multicultural World: challenges and opportunities*, New York, 2009 (Joint publication with UNAC and Global Compact).

<sup>31</sup> J.D. Brewer, *Peace Processes: A Sociological Approach*, Cambridge, Polity Press, 2010, at 200-201.

<sup>32</sup> J. Roig, 'Business for Peace — We Know Why, But How?' *GE Perspectives*, [web blog], 22 October 2014, <http://www.ge.com/reports/post/100657563638/business-for-peace-we-know-why-but-how/> [last accessed 17 October 2016].

forging of economic and commercial relationships can potentially contribute to the social peace process.

#### 2.1.1.2. *Empowering Local Businesses*

Businesses interact with many different groups. A supply chain refers to the different businesses that a particular company or group of companies conduct commercial relations with.<sup>33</sup> They often help a business to deliver a particular service or good. Through these relationships, some have suggested that businesses can also use their supply chains to empower previously disadvantaged groups in different ways.<sup>34</sup> Anderson and colleagues, for instance, draw attention to Bralirwa, a subsidiary of Heinekin in Rwanda. Amongst other things, the company purchases grain from local farmers sustaining a number of local farmer communities, their families and relatives.<sup>35</sup>

Similarly, in Mozambique, the Sunshine Nut Limitada Company adopts a business model called the Sunshine Approach, which focuses on financial, environmental, social, and transformational issues. The purpose is to develop a market for the smallholder farmer communities. The factories employ mainly young men and women who were abandoned or orphaned in their youth. 90% of the company's distributed profits (a reverse tithe) go to the poor and orphaned of the country – 30% to orphan care, 30% to transformative projects for the farming communities, and 30% as a growth component to open up other food companies using this same philanthropic business model.<sup>36</sup>

As will be discussed in due course, in South Africa, empowering black-owned businesses through both procurement and enterprise development is one of the central roles played by the business community in the peacebuilding process.<sup>37</sup> It will suffice to note for present purposes that through their economic interactions,

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<sup>33</sup> See K. McCall-Smith and A. Rühmkorf, 'Reconciling Human Rights and Supply Chain Management through Corporate Social Responsibility', in V.R. Abou-Nigm, K. McCall-Smith and D. French (ed.) *Linkages and Boundaries in Private and Public International Law*, Hart 2017, at 2 [page number according to a pre-publication version of the chapter].

<sup>34</sup> J.J. Andersson, T. Evers, and G. Sjöstedt, 'Private Sector Actors and Peacebuilding: A Framework for Analysis', The Swedish Institute of International Affairs and International Council of Swedish Industry, 2011, at 18.

<sup>35</sup> *Ibid.*, at 34.

<sup>36</sup> Religious Freedom & Business Foundation, 'Don Larson: Founder & CEO, Sunshine Nut Company, Mozambique'. <http://www.blog.cdacollaborative.org/how-do-businesses-strategize-peace-emerging-issues-from-colombia/?src=bnpage> [last accessed 10 September 2017].

<sup>37</sup> See *infra* chapter 4.

businesses can help to include those that are at the margins of society, communities and groups who might not necessarily benefit from a new more 'inclusive' political settlement forged between political elites.

Thus, through their core business activities, businesses can play a range of peacebuilding roles. While the specific nature of these roles will vary, through certain core business activities, businesses can help to address the underlying causes of conflict and, in the case of former combatants and political prisoners, the consequences of conflict.

### **2.2.2. Socially Responsible investment and Philanthropy**

A second way that businesses can contribute to peacebuilding is through socially responsible investment and philanthropy.<sup>38</sup> Distinct from core business activities, these contribution types are often external to the primary functions of a company and involve businesses opting to direct finances and resources in such ways that help support peacebuilding processes. As Micklian and Rettberg assert in regards to philanthropy, '[p]hilanthropic Strategies include companies' efforts to provide public goods that yield no clear returns on their investments.'<sup>39</sup>

In defining the ways in which businesses might contribute to peacebuilding through these activities, Jane Nelson has drawn attention to a number of companies that have played important roles in peacebuilding processes.<sup>40</sup> Examples include Rio Tinto, which has established several foundations focused on community-based development in South Africa; and Chevron and Citibank, which have supported a business development centre run by the United Nations Development Programme (UNDP) with funding, management support and technical advice in Kazakhstan.<sup>41</sup>

In Sri Lanka, work by International Alert has highlighted a number of roles assumed by businesses during and in the aftermath of conflict. These have included capacity

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<sup>38</sup> UN Global Compact, 2010, *supra* note 1, at 7.

<sup>39</sup> K. Miklian and A. Rettberg, 'How do Businesses Strategize Peace? Emerging Issues from Colombia'. *CDA Perspectives* [web blog], 2 May 2017, <http://www.blog.cdacollaborative.org/how-do-businesses-strategize-peace-emerging-issues-from-colombia/?src=bnpage> [last accessed 24 August 2017] .

<sup>40</sup> J.L. Nelson, 'The Business of Peace: The Private Sector as Partner in Conflict Prevention and Resolution', International Alert, Council on Economic Priorities, and the Prince of Wales International Business Leaders Forum, 2000, at 68.

<sup>41</sup> *Ibid.*



building of undergraduates and development of schools; and afforestation programmes. They have also consisted of sharing best practices with farmers; responsible marketing; and raising safety awareness. Along with these contributions, businesses have helped in the improvement of local living conditions by providing water supply; setting up medical centres; providing entertainment facilities; and small business development.<sup>42</sup>

Similarly, Gündüz et al. draw refer to Interconexión Eléctrica S.A., the largest electricity transporter in Colombia. Through Peace Development Programmes (PDPs), community relations and social investment are directed entirely towards addressing conflict issues and the promotion of peace. PDP's are long-term macro-projects with multiple components (economic development, environmental protection, strengthening of institutions, civil society empowerment, the promotion of a peace culture, and education, health and housing) that are implemented in several municipalities at the same time.<sup>43</sup> Miklian contends that interventions of this type 'have effectively defused small-scale tensions between local communities, (re)built health and education infrastructures, and empowered disadvantaged communities, often prioritized by firms through 'win-win' profit and peace relationships.'<sup>44</sup>

In these examples, businesses have played a number of roles in providing public goods. While the state is and must remain the primary obligation bearer of providing services to a population, for various reasons, including incapacity and a lack of institutional infrastructure, it is often unable to do so. In these circumstances, businesses have at least the potential to assist.

### 2.2.3. Advocacy and public policy engagement

Barbara describes policy dialogue as "political" peacebuilding involving dialogues with local stakeholders.<sup>45</sup> Essentially, under this type of approach, businesses use their political and economic influence to help further different aspects of a peacebuilding process. Citing work by International Alert, for example, Barbara

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<sup>42</sup> International Alert, *Peace through profit: Sri Lankan perspectives on Corporate Social Responsibility*, London, International Alert, 2005.

<sup>43</sup> Gündüz, Killick and Banfield, *supra* note 3, at 84.

<sup>44</sup> Miklian, *supra* note 29, at 9.

<sup>45</sup> J. Barbara, 'Nation building and the role of the private sector as a political peace-builder: *Opinion*,' *Conflict, Security & Development*, vol. 6, no. 4, 2006, at 584.

notes that this more political form of engagement could include participating in truth and reconciliation councils, supporting weapons hand-ins, providing capacity-building support for local governments, including judicial and police forces, supporting initiatives to attract foreign investment, and by helping the local private sector build capacity and governance systems.<sup>46</sup>

Businesses can also use their influence to campaign for change or to put pressure on post-conflict governments to implement peace agreement provisions. As Gündüz et al. note:

Given the private sector's dependence for success on the environment in which it operates, it has a natural role and interest in impacting positively on a country's governance architecture and contributing to deeper systemic change. Issues of corruption, lack of transparency and accountability, and non-existent or discriminatory property and land rights are all 'economic' issues that affect the private sector directly, but are symptomatic of wider conflict dynamics.<sup>47</sup>

A number of examples illustrate this potential further. In Colombia, Talisman (Colombia) Oil and Gas Limited (TCOG) have advocated and successfully secured the implementation of multilateral security agreements ('convenios') in the Tangara, Niscota and El Cuacho Blocks.<sup>48</sup> The results have been security agreements with the state security services based on international law in which a written agreement is obtained from the security services agreeing to an expected standard of conduct coupled with the establishment of grievance mechanisms for any incidents of violence potentially associated with TCOG's activities.<sup>49</sup>

Darby and Mac Ginty note the example of the Business against Crime initiative in South Africa, which sought to expand existing law enforcement capacities as a practical means of establishing peaceful conditions.<sup>50</sup> Similarly, Oetzel et al.

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<sup>46</sup> *Ibid.*

<sup>47</sup> Gündüz, Killick and Banfield, *supra* note 3, at 89.

<sup>48</sup> A.M. Duque, A. Jarek and J. Poon, 'Talisman Colombia and Block 8: Engaging with Indigenous Communities in a Conflict-Affected Environment', in UNGC, *Embedding Human Rights in Business Practice*, New York, Global Compact, 2013.

<sup>49</sup> *Ibid.*

<sup>50</sup> J. Darby and R. Mac Ginty, 'Northern Ireland: Long, cold peace', in J. Darby, and R. Mac Ginty, (ed.) *The management of peace processes*, New York, St. Martin's Press, 2000, at 77.

highlight the Colombian subsidiary of General Motors (GM), GM Colmotores, which collaborated with a nonprofit organization to train and employ former members of paramilitary groups as a way to reintegrate them into society.<sup>51</sup> GM was awarded the US Department of State's Award for Corporate Excellence in 2006 for this program.

Luc Zandvliet offers some additional examples of roles played by business in the area of pushing for institutional change.<sup>52</sup> For example, when Placer Dome- a large mining company specialising in gold and copper- found itself in a region of Papua New Guinea without a functioning law and order mechanism, it apparently subsidised the arrival of a prosecutor to the area.<sup>53</sup> At the same time, it engaged in the systematic training of local police forces and set up mechanisms by which residents could report incidents of violence to the company, which were then forwarded to the local police.<sup>54</sup>

Zandvliet further discusses the case of BP Colombia, which used its leverage to help establish a House of Justice in their area of operations.<sup>55</sup> This building houses multiple justice and law and order institutions under one roof and serves as a one-stop-shop for civilians. As a result, the level of impunity has decreased. BP's role has been to use its leverage to set up a partnership between United States Agency for International Development (USAID) (who funded the construction of the building), the government (responsible for salaries and maintenance), and the company itself (who provided office infrastructure).<sup>56</sup>

Businesses often hold important positions in society.<sup>57</sup> In some cases and as already remarked upon, governments, post-conflict and otherwise, depend on businesses. This affords businesses with a degree of influence over holders of political power. Of course, with this influence come serious dangers. Close

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<sup>51</sup> Oetzel et al., *supra* note 26, at 355.

<sup>52</sup> L. Zandvliet, 'Peacebuilding and the Corporate Agenda-Opportunities for Synergy', in B. Austin, M. Fischer and H.J. Giessmann (ed.) *Advancing Peacebuilding*. The Berghof Handbook II, Opladen/Framington Hills, Barbara Budrich Publishers, 2011, at 11.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> See K. Farnsworth, 'Business Power, Social Policy Preferences and Development' in P. Utting and J.C. Marques (ed.) *Business, Politics and Public Policy: Implications for Inclusive Development*, United Nations Research Institute for Social Development, 2010.

relationships can lead to corruption and rent seeking.<sup>58</sup> In addition, these close and backhand relationships have led to the plundering of the natural resources of many countries and have enabled the use of repressive state security forces against protesting populations in order to protect company assets.<sup>59</sup> At the same time, businesses can and often do use their influence for more proactive reasons. The brief examples touched upon above help to introduce this possibility.

#### 2.2.4. Collaboration with other actors

Businesses can contribute to peacebuilding by collaborating with actors, such as governments, civil society and other businesses.<sup>60</sup> Partnerships or collaborative initiatives can emerge in different forms. In the area of governance and regulation and as will be developed in the next chapter, multistakeholder initiatives (MSIs) are collaborative efforts between a multitude of actors to address governance deficits. In light of the spread of globally operating businesses and the emergence of transnational problems such as climate change, which requires global solutions, different actors including businesses have come together to help address these issues.<sup>61</sup> These partnership-based initiatives arguably play an important role in peacebuilding, particularly when businesses are linked to conflict because of socially irresponsible practices.

Businesses can collaborate in other ways. To some degree, the discussions above have alluded to these possibilities. For instance, Coca-Cola developed the 5by20 programme alongside UN Women and the IFC. In other cases, collaborations can emerge between different businesses. In South Africa, different business collectives in the form of, for instance, the aforementioned Business against Crime, the Urban Foundation, National Business Initiative, and the Consultative Business Movement, are all examples of businesses coming together through collaborations to help

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<sup>58</sup> See K. Sen, 'State-business relations: Topic guide. Birmingham', UK: GSDRC, University of Birmingham, 2015, at 17.

<sup>59</sup> See L. Pritchett and E. Werker, 'Developing the guts of GUT (Grand Unified Theory): Elite commitment and inclusive growth', Effective States and Inclusive Development (ESID) Working Paper No. 16/12, 2013.

<sup>60</sup> Ernstorfer et al., *supra* note 28, at 35.

<sup>61</sup> See P. Utting, 'Rethinking Business Regulation: From Self-Regulation to Social Control', Technology, Business and Society Programme Paper Number 15, United Nations Research Institute for Social Development, 2005.

contribute to peacebuilding process.<sup>62</sup> A similar example exists in Northern Ireland through the Confederation of British Industries, which actively campaigned for peace in the region.<sup>63</sup>

In the South Caucasus, Ernstorfer et al.<sup>64</sup> examine the collective efforts of local businesses organized through the Caucasus Business and Development Network (CBDN).<sup>65</sup> Based on a shared vision of an economically connected and cooperating, peaceful South Caucasus, the network consists of business people, civil society activists and academics. In an environment with little interaction across the conflict divide, CBDN is the only functional network engaging with private sectors and economic actors across the region, including in the disputed territories of Abkhazia, Nagorny Karabakh and South Ossetia. Wennmann also highlights a case from Tunisia, where business organizations are playing a crucial role in the country's transition to democracy.<sup>66</sup> This has been recognized by the Nobel Peace Prize Committee which awarded the 'Tunisian Quartet' the Nobel Peace Prize in 2015.<sup>67</sup> The Tunisian Quartet focuses on information exchange and on a partnership that leverage the assets, skills and networks of different types of business actors to advance humanitarian assistance.<sup>68</sup>

Collaborations can also emerge between business and civil society. Hayward and Magennis assess that collaborations of this nature can provide complementary skills, competencies and capabilities to engage in social change and build peace,<sup>69</sup> an argument, which Oetzel and Doh reiterate.<sup>70</sup> Much of the literature has focused on various collaborations involving MNCs and NGOs. One benefit of working with

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<sup>62</sup> See generally, N. Marais, and J. Davies, 'The Role of the Business Elite in South Africa's Democratic Transition: Supporting an Inclusive Political and Economic Transformation', Inclusive Political Settlements Paper 8. Berlin: Berghof Foundation, 2015.

<sup>63</sup> See B.R. Upreti, 'The Business Sector in Peace Promotion: A Comparison of Business Engagement in Assam, India and Nepal', in H. Ware et al. (ed.) *Cultivating Peace: Contexts, Practices and Multidimensional Models*, Newcastle, Cambridge Scholars Publishing, 2010, at 138.

<sup>64</sup> Ernstorfer et al., *supra* note 28, at 17.

<sup>65</sup> *Ibid.*

<sup>66</sup> A. Wennmann, 'Business and the UN Peace and Security Agenda Report on a consultation for the High-level Thematic Debate on UN, Peace and Security', Geneva Peacebuilding Platform, Brief No. 1, 2016, at 5.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

<sup>69</sup> K. Hayward and E. Magennis, 'Peace and the private sector: Northern Ireland's regional experience of globalised trends', in T White, (ed.) *International Relations Theory and Northern Ireland*, Manchester, Manchester University Press, 2016, at 8.

<sup>70</sup> J. Oetzel and J. Doh, 'Multinational Enterprise in Developing Countries: Spillovers, Liabilities and Resource Complementarity', *Journal of World Business*, vol. 44, no. 2, 2009.

civil society actors, they suggest, is that businesses are able to understand how to direct their efforts. Read together with the discussion on business contributing to social development, collaborations can help to maximise impact. As Kolk and Lenfant note:

NGOs with a presence on the ground and positive engagement strategies may help MNEs to build effective community relations, to shape their partnership portfolio and focus, and even assist them in integrating a conflict lens in their core business. NGOs are usually knowledgeable about the local context and have longstanding relationships with local actors, which could be used by MNEs as entry points in their community endeavours.<sup>71</sup>

As an illustration, in 2005, Chevron Nigeria embarked on a new strategy to support the Niger Delta communities in its operating area. The backdrop of this proactive approach was a host of accusations levelled against the company for direct and indirect human rights violations. As developed in the coming chapters, holding businesses accountable for harms committed in the past can be a useful strategy for engaging businesses to do more for societies in the future.

The new strategy that Chevron adopted was termed the Global Memoranda of Understanding (GMOU), a model based on community-driven development planning. Chevron Nigeria has signed GMOUs with eight Regional Development Councils (RDCs). These councils were formed to represent the interests of some 425 communities with an estimated 850,000 people who live near Chevron's onshore oil facilities and operations. The approach is bottom-up, with communities directly involved in deciding the projects undertaken in their communities based on the needs of the people.<sup>72</sup> Before the GMOU process, oil companies hired development experts to analyse the situation in each community and send the analysis to the company's community development units (CDU). The CDU, in conjunction with some influential members of the communities, then designed the projects, which were often carried out by selected community members (often the godfathers), or companies owned by friends of the CDU members which were not

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<sup>71</sup> A. Kolk, and F. Lenfant, 'Multinationals, CSR and Partnerships in Central African Conflict Countries', *Corporate Social Responsibility and Environmental Management*, vol. 20, no. 1, 2013, at 47.

<sup>72</sup> Nigeria-South Africa Chamber of Commerce, *Creating Value Through Social Investment – The Chevron Example*, 25 Jul 2014 [<http://nsacc.org.ng/creating-value-through-social-investment-%E2%80%93the-chevron-example/>] [last accessed 29 September 2016].

even affiliated with the communities.<sup>73</sup> Chevron's more recent approach attempts to facilitate local ownership in the process, an issue often highlighted as deficient in peacebuilding processes generally.<sup>74</sup>

The RDCs, supported by Project Review Committees, are responsible for planning and managing community development projects in their geographic areas.<sup>75</sup> Along with its new strategy, the company decided to revamp its approach to community investment and adopted a Sustainable Livelihoods Assessments (SLA) approach to assess the development context within these communities. Each RDC engaged a team of local NGOs to conduct an SLA in its geographic area. With fieldwork completed in 2006, these SLAs represent the most complete and current analysis of the needs of and development opportunities available to communities in the Niger Delta. To this end, numerous projects from health care centres to schools, training centres for women to the installation of water, housing and infrastructure have all been developed.<sup>76</sup>

Similarly, Jason Miklian notes the examples of the Federación Nacional de Cafeteros (FNC)<sup>77</sup>. FNC joined the Spanish Agency for International Development Cooperation (AECID) and Spanish NGO Humanismo y Democracia (H+D) for several small-scale collaborations on local development and environment issues. By 2008, Miklian notes that this team sought to leverage lessons learned and scale up their joint development initiatives, bolstered by the FNC's interest in applying 'Triple Bottom Line' and other best-practice corporate goals to the community level. These discussions became the Huellas de Paz (Footprints of Peace) project. From 2011 to 2015, this \$9 million USD initiative, conceived by FNC and H+D and financed by AECID, aimed to assist 50,000 people in disadvantaged ethnic groups suffering from conflict-related grievances.<sup>78</sup>

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<sup>73</sup> *Ibid.*

<sup>74</sup> O. Ajala, 'Human Security in the Niger Delta: Exploring the Interplay of Resource Governance, Community Structure and Conflicts', *The Journal of Sustainable Development Law and Policy*, vol. 7, no. 2, 2016, at 98.

<sup>75</sup> International Finance Corporation, *Strategic Community Investment: A Good Practice Handbook for Companies Doing Business in Emerging Markets*, Washington D.C., IFC, 2010, at 47.

<sup>76</sup> Kolk and Lenfant, *supra* note 71, at 48.

<sup>77</sup> J. Miklian, 'How Businesses Can Be Effective Local Peacebuilders- Evidence from Colombia', PRIO Policy Brief, 27. Oslo: PRIO, 2016, at 2.

<sup>78</sup> *Ibid.*

### 2.2.5. Discussion

Many view businesses solely as deleterious actors that can undermine the enjoyment of human or environment rights, as examples, or as economic agents, which contribute to society only indirectly through generating growth. The discussion above shows that there a number of other potential contributions that businesses can make to peacebuilding processes. Drawing on scholarly contributions and empirical examples, I have sought to show that business could contribute to peacebuilding processes in ways that extend beyond the predominant views on the relationship between business and peace. They can achieve this through their core operations, socially responsible investment and philanthropy, lobbying and collaborations.

One should resist the temptation to make generalizable claims based on these discussions. The examples above illustrate possibilities, not definitive contributions. As noted, what amounts to peacebuilding in one context does not necessarily translate to another and the complexities of peacebuilding do not allow for broad claims. For this reason and as previously mentioned, chapters 4 and 5 consider business contributions to peace in two contexts: Northern Ireland and South Africa. Nevertheless, this chapter expands how we conceive of business contributions to peacebuilding, subject to the caveat of context.

### 2.3. Linking Business-Based Peacebuilding to Regulation

How though does the discussion above fit within the broader trajectory of this thesis? As mentioned above and in the introductory chapter, in much the same way that one should be cautious about making broad claims based on anecdotal evidence about how businesses contribute to peacebuilding, one must be equally cautious about assuming why businesses would take on these roles and responsibilities. The business and peacebuilding literature often identifies specific examples of businesses contributing to peacebuilding processes to support claims that businesses could and should be more proactive in peacebuilding processes in the future. As Chapter 1 identified, these include such arguments as conflict is costly for business; that there are economic opportunities in peace; that businesses have moral obligations to contribute to peace; and that businesses, as social enterprises, must be part of the peacebuilding solution. As was also suggested, for a range of reasons, these arguments are often insufficient, resting on assumptions that fail to



identify the fact that businesses are far from homogenous, experiencing the effects of conflict in different ways and motivated by numerous factors.

Thus, the examples identified above are not reflective of the vast majority of businesses that are often far-removed from peacebuilding efforts. Instead, they constitute only a relatively miniscule number of businesses that have opted to be more proactive during transitions from conflict to peace. For this reason, I suggest that the literature is currently suspended in a state of optimistic uncertainty: one characterised by an optimistic outlook regarding the potential roles that businesses might play but one equally characterised by uncertainty as to when, if, how and why businesses would assume these responsibilities in ways that extend beyond a few companies.

It is in this space that this thesis suggests that we must consider how different actors can and have attempted to influence business contributions to peacebuilding. For instance, while businesses might opt to adopt affirmative action policies, how might states, through legislation, require that they do so? Similarly, although businesses might opt to contribute through philanthropy, how might shareholders shape such interventions? Can project finance be linked to conditionalities that require businesses to promote the rights of women? In short, how can other actors shape the decisions of businesses to assume the types of roles that have been identified in this chapter?

Considering how businesses might be influenced by other actors to contribute to peacebuilding requires understanding how different actors influence businesses. To this end, I argue that the pluralisation of regulation offers useful insights into the different ways that other actors can shape business conduct, perhaps in the sort of ways examined in this chapter. Thus, the following chapter develops the more expansive understanding of regulation adopted in this thesis by considering a range of regulatory initiatives currently operating in post-conflict settings. I suggest that while these initiatives primarily focus on limiting the harms that businesses might cause and in some cases holding businesses accountable, we can nevertheless identify different methods and forms of influence that might be used for more proactive purposes. These approaches can and, I will argue, have, been used to engage businesses in peacebuilding efforts.

## **2.4. Conclusion**

This chapter has shown that businesses can contribute to peacebuilding in a range of ways. Through their core business activities, businesses can help to address some of the underlying causes and consequences of violent conflict. Going beyond 'business as usual' approaches or efforts to do no harm, it was suggested that businesses can directly target specific issues and groups, such as helping to integrate marginalised sections of the society into the workforce, empower businesses from the same communities or contribute to community reconciliation between groups. Businesses can also contribute to peacebuilding through investment and philanthropy. In other cases, businesses can contribute to peacebuilding by lobbying for reforms or collaborating with civil society or states to help address peacebuilding issues.

The overview presented above largely draws on an emerging body of literature on business and peace. One of the primary limitations of scholarly and policy-related contributions, however, is the reliance on individual businesses to identify and then opt to participate in these types of intervention. That is to say, the literature largely relies on businesses assessing that it is in their economic self-interests or that they have a moral or social responsibility to contribute to peacebuilding in these ways. While it is certainly the case that in some cases, businesses can, do and will come to these conclusions, I suggest that we must attempt to understand how other actors might influence these contributions. The following chapter engages with a number of different approaches to regulation to develop the argument that different actors can and already do.

### **Sketching the Regulatory Landscape Post-Conflict**

This chapter explores the concept of regulation in post-conflict settings. It examines a number of initiatives that many consider are variations of regulation. These are namely, command and control, persuasion, economic conditionalities and ‘alternative regulatory paradigms.’ This chapter also analyses different initiatives that fall within these broader groups and discusses how and in what ways they are or might be relevant to peacebuilding. I conclude this chapter by suggesting that notwithstanding questions regarding whether these different initiatives constitute regulation or not, or whether these initiatives do or not successfully prevent businesses from causing harm or remedying victims when harms occur, we can nevertheless identify that businesses can be influenced in different ways. These different forms of influence might be used to engage businesses in peacebuilding processes.

#### **3.1. Introduction**

In the previous chapter, I outlined numerous ways in which businesses can or have contributed to peacebuilding. I suggested that while businesses can play a number of roles in post-conflict settings, it is not always clear why it is that businesses would. Indeed, the examples presented in chapter 3 of individual businesses opting to contribute to peacebuilding are relative anomalies, supported by the fact that the vast majority of businesses abstain from peacebuilding efforts. I concluded the chapter by suggesting that we should consider examining the roles that other actors can play in helping to engage businesses in making these types of contribution.

This chapter examines different initiatives that many consider to be varying forms of regulation. From this point forward and while recognising from the outset that there are different views regarding what regulation is or is not, I will refer to these various initiatives as regulatory initiatives for ease of reference.

The first objective of this chapter is to examine four broad categories of regulation adopted in post-conflict settings. These are namely command and control; persuasive regulation; economic-conditionality-based regulation; and alternative regulatory paradigms. As suggested in chapter 1, command and control regulation refers to the direct regulation of an industry or activity by legislation outlining that which is permitted and that which is illegal. Persuasive approaches to regulation focus on encouraging rather than requiring businesses to act in certain ways. They frequently rely on the market; in particular, consumers and other businesses, to either punish or reward businesses that act in socially responsible or irresponsible ways. Economic Conditionality-based regulation relies on incentivising businesses to pursue specific objectives, through the promise of economic opportunities or the threat of economic sanctions. An example in this regard is using public procurement as a means to incentivise businesses to promote particular social ends or threats from shareholders and institutional investors to divest if they do not. Finally, what I term alternative regulatory paradigms are forms of regulation not typically directed at business but which have expanded over time to include them. An example is the (albeit limited) extension of extraterritorial litigation to include businesses. Through these discussions, I seek to illustrate the plurality of regulation and the different forms that regulation can take in post-conflict settings.

The second objective is to examine a number of more specific initiatives that fall within these categories, particularly those of a more persuasive and economic conditionality-based nature, along with regulatory initiatives with expanded remits. I do this by looking at a number of key existing initiatives that apply in post-conflict contexts. Key existing persuasive initiatives examined include non-financial reporting requirements, guidelines and standards, and certification schemes. The conditionality-based initiatives explored include public and private procurement, finance delivery, and pressure exerted on businesses by shareholder and investors. Finally, the discussion on alternative regulatory paradigms includes international criminal law, extraterritorial litigation, and truth commissions. Through these discussions, I seek to illustrate that what we term regulation consists of a range of different actors and types that, at their core, seek to shape corporate conduct.

This chapter then examines the potential connections between these different initiatives and peacebuilding efforts. Although regulation can take many forms, the primary objectives of most regulatory initiatives are to limit the extent to which

businesses impact negatively and to hold businesses to account when harms arise. The linkages to peacebuilding typically arise in that these initiatives attempt to ensure that businesses are not impacting negatively in the post-conflict settings or achieving remedies for victims when they do.

What I seek to question in the case studies that follow this chapter is how and in what ways the different approaches that these initiatives use, be they guidelines, standard setting, or private and public procurement initiatives, as examples, might be and have been used to require, induce, or encourage businesses to play more proactive roles in peacebuilding processes. In this sense, I examine different approaches to regulation in this chapter to help identify the different forms of influence that are being exerted over businesses. This chapter, therefore, acts as an important precursor to the case studies, introducing the various approaches to regulation that might garner these more proactive interventions.

This chapter is set out as follows. Section 3.2 begins with a brief discussion on the importance of regulating businesses post-conflict by highlighting the harms that businesses can cause in conflict-affected settings (3.2.1). I then explore command and control-regulation (3.3) before outlining a number of limitations associated with orthodox approaches to regulation. These limitations include the unwillingness and inability of states to impose regulatory burdens on businesses. I use this discussion on the limitations of orthodox regulation post-conflict settings to map a number of alternative regulatory approaches (3.4.) and different initiatives that fall within these categories that exist in post-conflict contexts. These are namely, persuasive regulation (3.4.1.), conditionality-based regulation (3.4.2.) and alternative regulatory paradigms (3.4.3.). Section 3.5 engages in a discussion of these different types of initiatives and their potential linkages to peacebuilding before suggesting a different way to think about using these different forms of influence and initiatives for promoting business-based peacebuilding. I finish by summarising the chapter's main points (3.6).

## **3.2. The Importance of Regulation**

In post-conflict contexts, preventing businesses from causing harm is particularly salient. Because businesses have the potential to undermine transitions from conflict to peace, preventing adverse impacts from arising is critical. On this basis,

the vast majority of regulatory approaches discussed below seek to prevent businesses from doing so and in some cases, to hold businesses accountable for harmful practices when they occur. It will be useful, therefore and by way of introduction to the discussions that follow, to touch upon some of the ways that businesses can cause harm in conflict-affected settings.

### 3.2.1. The Deleterious Impacts of Business: A Brief Overview

Direct harms caused at the behest of business are those that result from the direct actions of companies. In 2005, for example, Save My Future Foundation (SAMFU) issued a publication entitled 'Firestone: The Mark of Modern Slavery.'<sup>1</sup> This report documented numerous human rights breaches caused by the rubber company prior to, during and even in the aftermath of conflict in Liberia.<sup>2</sup> Various violations of human rights were identified, including requiring employees to work long and overly burdensome hours,<sup>3</sup> deplorable living conditions of workers such as inadequate housing,<sup>4</sup> poor sanitation,<sup>5</sup> and a lack of access to drinking water.<sup>6</sup>

Along with encroaching on the rights of workers, businesses can also adversely affect the rights of those living in close proximity to their operations. Companies can undermine environmental rights; cultural rights; rights of a socioeconomic nature; and civil and political rights. Indeed, a thorough case study of Spanish-Italian palm oil company Poligrow in Colombia was carried out by the Centre for Research on Multinational Corporations (SOMO) and Indepaz between March 2014 and August 2015, based on a combination of interviews, analysis of documents and database research.<sup>7</sup> The study concluded that land-intensive sectors like palm oil are at risk of creating renewed conflict in Colombia, where land disputes have been a key driver of the internal armed conflict, and where territorial claims remain highly contested.<sup>8</sup>

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<sup>1</sup> Save My Future Foundation, *Firestone: The Mark of Modern Slavery*, SAMFU, 2005. While specific terms and names are abbreviated throughout this thesis, I include the full names again for ease of reference when each previously abbreviated word is mentioned.

<sup>2</sup> *Ibid.*, at 8.

<sup>3</sup> *Ibid.*, 10 and 11.

<sup>4</sup> *Ibid.*, 17.

<sup>5</sup> *Ibid.*, at 22.

<sup>6</sup> *Ibid.*, at 23.

<sup>7</sup> M. Van Dorp et al., 'Reconquering and dispossession in the Altillanura The case of Poligrow', SOMO and INDEPAZ, 2015. See also M. Van Dorp and K. Kuijpers, 'Multinational Companies, Conflict Sensitivity and Free, Prior and Informed Consent (FPIC): The Case of Poligrow in Colombia', in S. Handschin, E. Abitbol and R. Alluri (ed.) *Conflict Sensitivity: Taking it to the Next Level*, Swisspeace, Bern, 2016

<sup>8</sup> *Ibid.*

The implications for peacebuilding are such that in spite of efforts to break with the past, in continuing to undermine the enjoyment of rights, businesses can jeopardise peacebuilding efforts, particularly when respecting, protecting and realising rights are central facets of the broader peacebuilding effort.<sup>9</sup>

More often than not, detrimental impacts caused by businesses are more indirect in nature, emerging because of collaborations with other actors, or through supply chains. In regards to the latter, the 'supply chain (sometimes referred to as the 'value chain') includes all the different parties that contribute to the product that is sold to the customer. It, therefore, consists of the seller of the end product as well as the manufacturer, retailers, transporters and various sub-suppliers.'<sup>10</sup> In certain cases, businesses sustain conflict through purchasing conflict minerals through their supply chains. Well-versed examples include the cases of Angola and Sierra Leone, where multinational conglomerates stand accused of sustaining conflict through purchasing blood diamonds.<sup>11</sup> More recently, Global Witness has issued a report exploring how Jade is being used to fund a conflict in Myanmar, which pits the central government against the Kachin Independence Army/ Kachin Independence Organisation. It is claimed that the industry generates funds for both sides in a war, which has claimed thousands of lives and seen 100,000 people displaced since it reignited in 2011.<sup>12</sup>

In some contexts, businesses align with repressive regimes, helping to sustain political systems that undermine rights.<sup>13</sup> The theory of the bureaucratic authoritarian state, for example, explained the appeal to business of the coups that toppled democratic regimes throughout the Americas and elsewhere and implanted repressive authoritarian systems. Businesses united forces with the military and technocrats to eliminate the perceived communist threat and to advance 'capitalist

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<sup>9</sup> Amnesty International, 'Bosnia and Herzegovina: Behind closed gates: ethnic discrimination in employment', 26 January 2006, EUR 63/001/2006 .

<sup>10</sup> K. McCall-Smith and A. Rühmkorf, 'Reconciling Human Rights and Supply Chain Management through Corporate Social Responsibility', in V.R. Abou-Nigm, K. McCall-Smith and D. French (ed.) *Linkages and Boundaries in Private and Public International Law*, Hart 2017, at 2 [page number according to a pre-publication version of the chapter].

<sup>11</sup> Global Witness, 'A rough trade: the role of companies and governments in the Angolan conflict', London, Global Witness, 1998.

<sup>12</sup> Global Witness, 'Jade: Myanmar's "Big State Secret": The biggest natural resources heist in modern history?', London, Global Witness, 2015.

<sup>13</sup> I.M. Young, 'Responsibility and Global Justice: A Social Connection Model', *Social Philosophy and Policy*, vol. 23, no. 1, 2006.

deepening' projects.<sup>14</sup> In Liberia, the Truth and Reconciliation Commission (TRC), a body established to help identify the underlying causes and consequences of the conflict, drew attention to the deeply entrenched relationship between business and government.<sup>15</sup> It noted that Firestone (now Bridgestone) a conglomerate tyre and rubber company, was complicit in a forced labour scandal that led to a League of Nations investigation.<sup>16</sup> The TRC also found that the Liberian government used slavery-like practices to supply laborers to Spanish controlled plantations as well as to the Firestone rubber plantation.<sup>17</sup> The TRC also held that businesses helped to sustain the systematic marginalisation and exploitation of the indigenous Liberian population.

Businesses can also enter into corrupt and corrosive relationships with political elites. When these relationships emerge, resources that might otherwise be used to fund social development programmes are often used to line the coffers of corrupt politicians. The Liberian TRC further stated, for instance, that loggers paid the Government of Liberia less than 2-3% of taxes due and that logging companies paid millions of US dollars in exchange for illegal tax credits and improperly wrote off tax liability.<sup>18</sup> Moreover, 'throughout the conflict, smaller logging companies and civilians were violently removed from their land and from logging concessions by larger logging operations that operated with the support of government militia and rebel factions.'<sup>19</sup> The case of Liberia highlights that the self-interest of company's and repressive governments can align in such a way that both can benefit, often to the detriment of ordinary citizens.

Businesses also pay bribes to paramilitaries, and in doing so, further sustain conflicts and human rights violations. Drummond Inc., for instance, an American mining and processing of coal and coal products company, has been accused of paying paramilitary groups to violently resolve labour disputes, thereby suppressing the unions organising the workforce and generating increased revenue from

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<sup>14</sup> L. A. Payne and G. Pereira, 'Corporate Complicity in International Human Rights Violations', *Annual Review of Law and Social Science*, vol. 12, no. 1, 2016, at 2.

<sup>15</sup> Republic of Liberia Truth and Reconciliation Commission, Volume II: Consolidated Final Report, at 5.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*, at 244.

<sup>18</sup> *Ibid.*, at 336.

<sup>19</sup> *Ibid.*, at 33



decreased labour costs.<sup>20</sup> Similarly, Chiquita Brands, an American banana company, was accused of giving money to armed groups so that they would allow Chiquita operations in conflict zones and counter opposition to the company's operations.<sup>21</sup>

In the direct and indirect examples discussed above, businesses have been involved in sustaining and even contributing to the onset of conflict. With these impacts in mind, promoting and facilitating transparency, anti-corruption, and the protection of land, human and environmental rights, are often important components of broader peacebuilding efforts. We now turn our discussion to a number of different types of regulation in post-conflict settings that attempt to respond to these dangers, examining some specific initiatives that fall within these categories.

### **3.3. Orthodox Regulation**

This section briefly considers orthodox approaches to regulation before outlining a number of limitations associated with its application in post-conflict settings. These limitations, coupled with the importance of preventing businesses from causing harm in the ways identified above, underpins the importance of alternative approaches to regulation in post-conflict settings.

#### **3.3.1. The Post-Conflict State and Orthodox Regulation**

As orthodox approaches to regulation suggest, the primary point of departure when considering the concept of regulation is the host state. By host state, we mean those states, which host business activity- in our case post-conflict settings. Under what is termed orthodox regulation or 'old governance,' many understand regulation as a 'bi-partite process involving government and business, with the former acting in the role of regulator and the latter as regulatee.'<sup>22</sup>

We look to the post-conflict state first for a number of reasons. Firstly and perhaps intuitively, it is often in host states where business activity occurs. As will be

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<sup>20</sup> See Business and Human Rights Resources Centre, Balcerio Giraldo, et al., Romero, et al., & Estate of Valmore Lacarno Rodriguez v. Drummond Company, <https://business-humanrights.org/en/drummond-lawsuit-re-colombia>, [last accessed 23 June 2016].

<sup>21</sup> See O.C. Kahale, 'Project Finance and the relevant human rights,' in S. Leader and D. Ong, (ed.) *Global Project Finance, Human Rights and Sustainable Development*, Cambridge: Cambridge University Press, 2011, at 120.

<sup>22</sup> N. Gunningham and S. Sinclair, 'Smart Regulation', in P. Drahoš (ed.) *Regulatory Theory*, Australia National University Press, 2017, at 133.

developed below, in the context of multinational corporations or global supply chains, other states become particularly relevant to the discussion of regulating businesses in post-conflict states.

Secondly, under the international legal framework, states are the primary duty bearers for regulating corporate conduct. Under international human rights law, for instance, while some challenge the state-centric approach that currently characterises the system, both as inaccurate and inadequate,<sup>23</sup> it is widely recognised that states have obligations both to protect against human rights violations caused at the behest of businesses and to remedy violations when they occur. For instance, human rights treaties place a duty on the state to protect individuals by outlining specific positive and negative obligations with which the state party must comply.<sup>24</sup>

Thirdly, the very texts that end violence and which seek to redefine the state in the aftermath of conflict, frequently reiterate the responsibilities of the state to regulate the activities of corporations. As documents, which both address the past while simultaneously acting as roadmaps for the future, peace agreements can reflect the roles played by businesses in the past and underline the salience of preventing such occurrences in the future. The Lome Accord in Sierra Leone, for instance, specifies that the Government shall 'take the necessary legal action within a period not exceeding two weeks from the signing of the present Agreement to the effect that all exploitation, sale, export, or any other transaction of gold and diamonds shall be forbidden except those sanctioned by the CMRRD.'<sup>25</sup> In Nepal, the peace agreement Constitution states, amongst other things, that '[n]o child shall be employed in factories, mines, or in any other hazardous works,<sup>26</sup> and that '[t]here shall not be any gender discriminations regarding remuneration for the same work

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<sup>23</sup> See S.R. Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility', *The Yale Law Journal*, Vol. 111, No. 3, 2001.

<sup>24</sup> K. McCall-Smith and A. Rühmkorf, *supra* note 10, at 5.

<sup>25</sup> Sierra Leone, Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL) (Lome Agreement), 07/07/1999, at 6. CMMRD refers to the Commission for the Management of Strategic Resources, National Reconstruction and Development. Agreements cited below are taken from PA-X (2017). *Peace Agreements Database and Access Tool, Version 1*. Political Settlements Research Programme, University of Edinburgh, Edinburgh. [www.peaceagreements.org](http://www.peaceagreements.org)

<sup>26</sup> Nepal, Constitution of Nepal 2015, 20/09/2015, at 17. For a discussion on different types of peace agreement see, C. Bell and K. Zulueta-Fülscher, 'Sequencing Peace Agreements and Constitutions in the Political Settlement Process', Policy Paper No. 13, November 2016. Stockholm, International Institute for Democracy and Electoral Assistance, at 19-20

and social security.<sup>27</sup> In this sense, while states have obligations to regulate the activities of businesses under international law by virtue of legal agreements forged, there are also political commitments between formerly conflicted elites and groups.<sup>28</sup> In theory, this should help to strengthen the extent to which states adhere to their obligations.

Along with locating the discussion of regulation at the state level, orthodox approaches to regulation also define the particular method of regulation. As previously remarked upon, command and control regulation refers to the direct regulation of an industry or activity by legislation that stipulates what is permitted and what is illegal.<sup>29</sup> The 'command' is the standards by a government authority that must be complied with; 'control' signifies negative sanctions that may result from non-compliance.<sup>30</sup>

A few examples help to illustrate this form of regulation in post-conflict environments and the salience of adopting legislative approaches in such settings. In the area of environmental protection, for instance, the post-conflict Sierra Leonean legislature has adopted the Environment Protection Agency Act, 2008.<sup>31</sup> It provides, amongst other things, that mining projects must include the preparation and approval of an environmental impact assessment and the issuance of an environmental impact assessment licence.<sup>32</sup> Along with various other contributing factors, such as corruption and the exploitation of natural resources, environmental degradation of indigenous lands was a trigger for the emergence of conflict in Sierra Leone.<sup>33</sup> Commanding and controlling businesses in this way is an important aspect of the peacebuilding process, in that these legislative efforts attempt to curtail the adverse environmental impacts that once contributed to the emergence of violence.

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<sup>27</sup> *Ibid.*, at 10.

<sup>28</sup> For debates on the legal status of peace agreement see C. Bell, 'Of Jus Post Bellum and Lex Pacificatoria', in C. Stahn, J. S. Easterday, and J. Iverson (ed) *Jus Post Bellum: Mapping the Normative Foundations*, Oxford Scholarship Online, 2014.

<sup>29</sup> O. McManus, *Environmental Regulation*, Elsevier Ltd, Sidneat, Australia, 2009 cited in B. Junquera and J.A. Del Brío, 'Preventive Command and Control Regulation: A Case Analysis', *Sustainability*, vol. 8, no. 1, 2016, at 1, note 5.

<sup>30</sup> A. Scanlan et al., 'Diverging Approaches to EU Environmental Policy: An Explanation of the Implementation Deficit', *Maastricht University Journal of Sustainability Studies*, vol. 1, no.1, 2013, at 4.

<sup>31</sup> Environment Protection Agency Act 2008, Part IV-Environmental Impact Assessments.

<sup>32</sup> *Ibid.*, at 26.

<sup>33</sup> R. Maconachie and T. Binns, 'Farming miners' or 'mining farmers'? : Diamond mining and rural development in post-conflict Sierra Leone', *Journal of Rural Studies*, vol. 23, no. 3, 2007.

In other cases, governments use legislation to ensure that companies pay taxes in a transparent way, a particularly important issue in settings where corruption is rampant. In Nigeria, for example, The Companies Income (Amendment) Tax Act, 2007, provides for the imposition of tax on companies, and that tax shall be payable, for each year of assessment, at specified rates on the profits of any company, accruing in, derived from, brought into or received in Nigeria.<sup>34</sup> Again, the importance of legislation in this area links to the underlying causes of conflict.<sup>35</sup> A further example is that of labour law. In Nepalese law, for instance, Section 5 of the Labor Act 2049 (1992) states that children are not to be used for work in any enterprises.<sup>36</sup> Similarly, sections 27, 28, 29, 30, 31 and 32 address the security and health standard for the labours.<sup>37</sup> These provisions are particularly important in a context where exploitation under the Caste system was systemic.<sup>38</sup> With the shift towards an equal society in the aftermath of conflict, eliminating discrimination and exploitation in and by the private sector is an important component of the peacebuilding process.

Essentially, under orthodox approaches to regulation, the post-conflict state uses binding legal instruments and sanctions in an attempt to prevent businesses from causing harm in the future.

### 3.3.2. Limitations of Orthodox Approaches to Regulation

As suggested in the introductory remarks, there are a number of difficulties with limiting a focus on regulation to orthodox regulation and we can understand discussions on the pluralisation of regulation against the backdrop of these limitations. As was also noted in chapter 1, theories on regulatory pluralism arise based on empirical observations. That is, rather than adhering to existing conceptual understandings about what regulation is- the approach favoured by supporters of orthodoxy- scholars of regulatory pluralism examine different approaches to regulation that have arisen. Moreover, scholars of regulatory pluralism do not simply seek to observe and describe alternative approaches to regulation; they also expand

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<sup>34</sup> The Companies Income (Amendment) Tax Act, 2007 [act no. 11].

<sup>35</sup> O. Fagbadebo, 'Corruption, Governance and Political Instability in Nigeria', *African Journal of Political Science and International Relations* Vol. 1 No. 2, 2007.

<sup>36</sup> Labour Act, 2048 (1992), Act No. 9 of the year 2049 B.S.

<sup>37</sup> *Ibid.*

<sup>38</sup> See for discussion on the Caste system, A. J. Nightingale, 'Bounding difference: Intersectionality and the material production of gender, caste, class and environment in Nepal', *Geoforum*, Vol. 42, No. 2, 2011.

upon why it is that these alternative approaches exist. They further contend that over time and for a range of reasons, the power of the nation-state has declined, with the parallel rise of the power of other non-state actors, which often assume regulatory roles and responsibilities. As Reed et al note:

The upshot of these structural, institutional and political changes has been the rise of new forms of governance where non-state actors play a central role in a variety of regulatory functions associated with improving the social, environmental and human rights performance of business and holding corporations accountable.<sup>39</sup>

Alongside these broader realities and changing global and institutional shifts, there are a number of additional limitations associated with orthodox approaches to regulation when considered in respect of post-conflict settings. For present purposes, I focus on two issues: state incapacity and state unwillingness; factors that are often relevant in most settings but which are exacerbated in the aftermath of conflict.

#### 3.3.2.1. *State Incapacity*

When considering regulation from the perspective of command and control in post-conflict settings, it is necessary to keep in mind the contexts in question- states emerging from periods of violence- and the potential implications of conflict on the capacity and willingness of the state to regulate through orthodox approaches. Taking the issue of capacity first, in many contexts, post-conflict states often lack the requisite ability to hold businesses legally accountable. As the very concept of state building implies, institutions such as legislatures and courts are frequently non-existent. In other cases, particularly those emerging from periods of political repression, legislation dealing with such issues as human rights or anti-corruption has not featured in domestic legal systems: their promulgation is often part of a broader process of institutional and legal reform. A useful example is Myanmar, where, during the country's 2011 Universal Periodic Review (UPR) before the UN

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<sup>39</sup> D. Reed, P. Utting and A. Mukherjee-Reed, *Business Regulation and Non-State Actors Whose Standards?*, Routledge, 2012, at vii.

Human Rights Council (HRC), it was recommended that, amongst other things, Myanmar ratify the core international human rights treaties.<sup>40</sup>

Peacebuilding, while extending far beyond these limited issues, is thus interlinked with state-building processes and post-conflict reconstruction efforts.<sup>41</sup> As Ford notes:

[S]erious conflict may have significantly weakened local public and social capacity to regulate the socio-political and environmental impact and influence of business actors. Conflict or post-conflict political impasse may have compromised formal regulatory institutions' physical and human resources, and even if adequate laws technically remain in force, it may be difficult to establish their content.<sup>42</sup>

The implications of state incapacity are such that while a command and control-focused approach requires a diligent and involved state, the institutions necessary to do so are simply not there.

Moreover, another impediment facing command and control-based approaches to regulation in post-conflict states is that defining who or what that state is might be problematic, at least in the immediate post-conflict stage. Along with state-building, there is often the need for constitutional and political reform.<sup>43</sup> Particularly in the post-Cold War era, conflict has ended through negotiated settlements with the use of variations of political power-sharing to help broaden participation in political institutions through the creation of more inclusive political settlements.<sup>44</sup> That is, the very concept of the state and the political order that holds power is being redefined.

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<sup>40</sup> HRC, National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1 Myanmar, A/HRC/WG.6/10/MMR/1. Myanmar has accessed to three core international human rights treaties and one optional protocol: the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Convention on the Rights of the Child (CRC) and its Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, and, in 2012, the Convention on the Rights of Persons with Disabilities. Myanmar lodged a reservation against CEDAW's article 29 exempting it from arbitration of disputes between State Parties to CEDAW.

<sup>41</sup> See P.E. Gaston and E. Jensen, 'Rule of Law and Statebuilding in Afghanistan: Testing Theory', in S. Smith and C. Cookman (ed.) *Peaceworks*, United States Institute of Peace, 2014.

<sup>42</sup> J. Ford, *Regulating Business for Peace: The United Nations, the Private Sector, and Post-Conflict Recovery*, New York, Cambridge University Press, 2015, at 26.

<sup>43</sup> See V. Dudouet, and S. Lundström, 'Post-war Political Settlements: From Participatory Transition Processes to Inclusive State-building and Governance', Research Report, Berlin: Berghof Foundation, 2016.

<sup>44</sup> See T.D. Sisk, 'Power-Sharing in Civil War: Puzzles of Peacemaking and Peacebuilding', *Journal of Civil Wars*, vol. 15, no.1, 2013 - Issue sup1: Institutions for Sustainable Peace? Determinants and Effects of Institutional Choices in Divided Societies.

During these political reconfigurations and even for a time after, states are in their infancy, and approached from the perspective of regulation, in a process of finding their regulatory feet, so to speak. A fundamental prerequisite for command and control approaches is the assumption that the state and its institutions are fully functioning. Yet, negotiating and developing states and their political systems is often part of the very peacebuilding process.

### 3.3.2.2. *State Unwillingness*

Institutional incapacity and political uncertainty merge, in some ways, with the second challenge to command and control approaches- state unwillingness. States emerging from periods of conflict must often facilitate a number of transitions, the attainment of which shapes the perceived legitimacy of the new political order in question. These transitions can include, as examples, those from dictatorships to democracy, from conflict to peace, from gender inequality to equality, from minority marginalisation to inclusive societies, and from human rights violating regimes to human rights compliant ones.<sup>45</sup> All of these transitions require the resources with which to facilitate them and as the introductory chapter alluded to, many see businesses as important players in generating these resources.

The texts of peace agreements reflect the perceived importance attached to private sector-led growth in post-conflict settings. In Afghanistan, for instance, under the Tokyo Declaration Partnership for Self-Reliance in Afghanistan from Transition to Transformation, '[t]he Participants shared the view that developing a vibrant private sector [was] essential for sustainable development of Afghanistan particularly for the long term.'<sup>46</sup> The Peace Agreement Constitution<sup>47</sup> of Zimbabwe also expresses that:

(1) The State and all institutions and agencies of government at every level must endeavour to: facilitate rapid and equitable development, and in particular must take measures to promote private initiative and self-reliance; foster agricultural, commercial, industrial, technological and scientific development; foster the development of industrial and commercial enterprises in order to empower Zimbabwean citizens; and bring about

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<sup>45</sup> C. Chinkin, 'The Protection of Economic, Social and Cultural Rights Post-Conflict', paper series commissioned by the Office of the High Commissioner for Human Rights, 2009), at 5.

<sup>46</sup> Afghanistan, Tokyo Declaration Partnership for Self-Reliance in Afghanistan from Transition to Transformation (Tokyo Conference), 08/07/2012, at 7.

<sup>47</sup> See Bell and Zulueta-Fülscher, *supra* note 26, at 19-20.

balanced development of the different areas of Zimbabwe, in particular a proper balance in the development of rural and urban areas.<sup>48</sup>

Similarly, the Darfur Peace Agreement stipulates that the private sector (national and foreign) [will] play a crucial role in development.<sup>49</sup> Other agreements are more specific highlighting, for instance, the role of companies in creating employment,<sup>50</sup> and even helping the state to fulfil its obligations under international law.<sup>51</sup>

The difficulty arises in that to accumulate the necessary resources; states often require the presence of businesses. Take, as a brief example of this tension, the aforementioned area of human rights. When part of the peacebuilding effort hinges on the new political settlement recognising and realising the rights of those previously denied them, essential discussions emerge about the materialisation of these entitlements.<sup>52</sup> Under international human rights law, rights of a socioeconomic nature require that the state 'progressively realise' these rights with this requirement being subject to the 'availability of resources'.<sup>53</sup> To raise resources, however, states often need private sector actors to generate growth.

As a result, a tension emerges whereby states must first entice businesses into the context in question. The tension typically involves adopting neoliberal-type policies, which favour businesses but which do not lend themselves to the idea of a regulatory state. For example, along with specifying the importance of businesses presence, peace agreements also outline the steps that post-conflict political

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<sup>48</sup> Zimbabwe, Constitution of Zimbabwe Amendment (No 20) 2013, 19/03/2013, at 19.

<sup>49</sup> Sudan, Darfur, Peace Agreement, 05/05/2006, at 33.

<sup>50</sup> Mali Azawad, Accord d'Alger pour la Restauration de la Paix, de la Sécurité et du Développement dans la région de Kidal, 04/07/2006, at 2.

<sup>51</sup> Georgia, Russia (Ossetia), Agreement between the Government of Georgia and the Government of the Russian Federation on Cooperation in Restoration of Economy in the Georgian-Ossetian Conflict Zone and Return of Refugees, 13/12/2000, at 1 agreed on the following:

In order to meet the pledged commitments in full conformity with this Agreement and norms of the international law, the Parties shall make the best use of existing capabilities to attract financial and other resources, contribute to the attraction of investments, favorable credits and subsidies in the Georgian-Ossetian conflict.

<sup>52</sup> C. Bell et al., 'Navigating Inclusion in Peace Settlements: Human Rights and the Creation Of The Common Good', London, The British Academy, 2017, at 10-17.

<sup>53</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <http://www.refworld.org/docid/3ae6b36c0.html> [last access 23 Aug 2016]; Committee on Economic Social and Cultural Rights (1990) General Comment No. 3, 'The Nature of States parties' obligations,' (article 2(1) *Compilation of General Comments and General Recommendations Adopted by the Human Rights Treaty Bodies*, Vol. 1 (2008), pp 7-10, U.N. Doc. HRI/GEN/1/Rev. 9, Office of the United Nations High Commissioner for Human Rights, Geneva.



dispensations should take to attract investment.<sup>54</sup> In the Democratic Republic of Congo (DRC), an agreement between the Government and Le Congres National pour la Défense du Peuple states that ‘with a view to increasing the competitiveness of the national economy, the parties agree on the need to privatise public enterprises in DRC.’<sup>55</sup> In Iraq, the 2005 peace agreement Constitution stipulates that ‘The State shall guarantee the reform of the Iraqi economy in accordance with modern economic principles to ensure the full investment of its resources, diversification of its sources, and the encouragement and development of the private sector.’<sup>56</sup> In Uganda, the government agreed to ‘support business and investment initiatives in the conflict-affected areas and shall identify and commit special funds to the implementing agency for that purpose’,<sup>57</sup> while in Liberia, parties pledged to ‘ensure an enabling environment which will attract private sector direct investment.’<sup>58</sup> As a final example, in the Philippines in order ‘to encourage investments and other economic activities, the Bangsamoro Government [was given express] power to grant tax exemptions, rebates, tax holidays and other incentives.’<sup>59</sup>

The pursuance of neoliberal policies illustrates the importance attached to growing the private sector. When governments place such reliance on bringing businesses into the context, a primary objective is creating the right company (friendly) environments. As a result, post-conflict states are often unwilling to introduce regulations that curtail or deter business activity, seeking instead to support the prospects that businesses will invest by deregulating and liberating the broader business environment. Against these realities, conventional approaches to regulation are mostly aspirational.

In support of the view that post-conflict states are often unwilling to regulate through formal legal instruments, it is also important to recognise that post-conflict states are

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<sup>54</sup> J. Ahearne, ‘Neoliberal Economic Policies and Post-Conflict Peace-Building: A Help or Hindrance to Durable Peace?’, *POLIS Journal* vol. 2, no. 1, 2009.

<sup>55</sup> Democratic Republic of Congo, Peace Agreement between the Government and Le Congres National pour la Défense du Peuple (CNDP), 23/03/2009, at 7.

<sup>56</sup> Iraq, Constitution of Iraq, 15/10/2005, at 10.

<sup>57</sup> Uganda, Implementation Protocol to the Agreement on Comprehensive Solutions, 22/02/2008, at 4.

<sup>58</sup> Liberia, Peace Agreement between the Government of Liberia, the Liberians United for Reconciliation and Democracy (LURD), the Movement of Democracy in Liberia (MODEL) and the Political Parties (Accra Agreement), 18/08/2003, at 13.

<sup>59</sup> Philippines, Mindanao, Annex on Revenue Generation and Wealth-sharing to the Framework Agreement on the Bangsamoro (FAB), 13/07/2013, at 2.

in competition with others, also attempting to bring businesses to their shores. As Sumi Dhanarajan notes:

Pressures upon nations to compete in the global marketplace, upon suppliers to produce ever-cheaper and everfaster, upon workers to accept more precarious terms of employment and upon communities to give up land and natural resources, all in the pursuit of economic growth have unveiled examples of the darker side of business operations within the global economy.<sup>60</sup>

In short, economic aspects of transitions from conflict to peace can lead to tensions emerging between growing the economy and addressing important aspects of a more social nature.

Adding to the difficulties of relying solely on orthodox approaches to regulation is the fact that political elites and businesses often align their interests in corrosive ways. Alex De Waal, for instance, has developed a concept that he terms, the 'political marketplace.'<sup>61</sup> He suggests that political elites depend on resources with which to buy public support to sustain their networks of followers. Noting the example of oil companies in Sudan, he stresses the dependency of political elites on businesses to obtain the necessary resources with which to sustain power.<sup>62</sup> Granting licences to oil exploration in return for financial backhanders is just one such illustration. Because elites depend on the support of business actors, they are often unwilling to impose stringent regulations on them. Thus, because political elites benefit from close state-business relations, there is less chance of imposing regulations on business

In other cases, it is also true that the divides between public and private are often difficult to discern. For instance, political actors can use positions of public power to benefit privately through systems of patronage or nepotism. As an example, there is considerable evidence that certain sectors in Tunisia—banking, telecommunications, and transport—received protection from domestic and foreign

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<sup>60</sup> S. Dhanarajan, 'Transnational business human rights regulation and their effects upon human rights protection', in C. Lenox, (ed.) *Contemporary Challenges in Securing Human Rights*, Human Rights Consortium, Institute of Commonwealth Studies, School of Advanced Study, University of London, 2015, at 89.

<sup>61</sup> See A. De Waal, *The political marketplace: Analyzing political entrepreneurs and political bargaining with a business lens*. Somerville, MA: World Peace Foundation, 2014.

<sup>62</sup> A. De Waal, 'Inclusion in Peace Making: From Claim to Political Fact', in P. Aall and C.A. Crocker (ed.) *The Fabric of Peace in Africa: Looking beyond the State*, McGill-Queen's Press, 2017.

competition because the former President Ben Ali's family had business interests in these sectors. The 'Ben Ali firms', which accounted for 1 percent of private-sector output and 3 percent of employment, had 21 percent of the profits in the economy.<sup>63</sup> Other well-known examples include the Suharto regime in Indonesia, Mobuto in the Congo, Marcos in the Philippines, and Abacha in Nigeria. State-business relations, in these instances, are not categorised by benign collaborations between state and business, but rather the exploitation of public resources for private enrichment. Similarly, following the financial crisis in South East Asia in 1997, many commentators note that collaboration between business and the state came to be described in negative terms as 'crony capitalism'.<sup>64</sup>

Thus, for different reasons, the realities are often such that states are unwilling to command and control businesses in fear of deterring investment. In the context of understanding alternative approaches to regulation in post-conflict states, the descriptive and analytical approach adopted by proponents of regulatory pluralism assist in explaining the broad approach to regulation adopted in this thesis. On the one hand, as the discussion below demonstrates, observation, illustrated through a mapping of different forms of regulation post-conflict, challenges the notion that regulation is carried out solely by states through the command and control. On the other hand, recognising the difficulties facing post-conflict states, not only as states, which exist within a broader set of global realities of globalisation, but also those emerging from periods of violent conflict, helps to explain why these different approaches are, in fact, necessary.

The discussion below focuses on some different approaches to regulation that exist in post-conflict settings. Along with outlining various initiatives and analysing the extent to which they are or are not successful, the fundamental purpose of this mapping is to display that different forms of regulation exist and to map out the different manifestations of regulation that result from them. Ultimately, I will suggest that this menu of regulatory options might be considered useful when approached from the perspective of asking how the same approaches adopted to prevent harm and hold businesses accountable might also be used to influence companies to act in more proactive, peacebuilding-focused ways.

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<sup>63</sup> S. Devarajan, 'Three reasons why industrial policy fails', [web blog], Brookings, January 14, 2016, <https://www.brookings.edu/blog/future-development/2016/01/14/three-reasons-why-industrial-policy-fails/>

<sup>64</sup> J. Harriss, 'Institutions and state-business relations: Improving institutions for pro-poor growth', (IPPG Briefing Note 2). Manchester: IPPG, 2006, at 1-2.

### **3.4. Mapping Alternative Approaches to Regulation**

Studies on regulatory pluralism attempt to capture a variety of regulatory forms. Along with state-based command and control, regulatory pluralism considers regulation at the state level, which includes but also extends beyond orthodox approaches to regulation. Covered are such methods as the use of economic incentives, like procurement, the issuance of state-based guidelines, or the development of certification schemes. Regulatory pluralism also extends the discussion of regulation beyond the confines of the territorial state in question. For instance, it includes considering the influence of home states, often understood as those countries where parent companies of subsidiaries are domiciled, or states where companies that source materials in other countries are situated. Home states can regulate using non-financial reporting requirements like the UK's Modern Slavery Act, 2015, or through CSR requirements attached to export finance. Regulatory pluralism also reflects the fact that regulation is not confined to nation states. It examines, as illustrations, the role of other actors like non-governmental organisations (NGOs), international financial institutions and shareholders.

This section maps a number of different approaches to regulation, which apply in post-conflict settings. This overview is not exhaustive but rather reflective of different types of regulation that currently exist. I structure this section according to three main types of regulation: persuasive, economic-conditionality-based, and alternative regulatory paradigms.

#### **3.4.1. Persuasive Regulation: Key Initiatives**

Under the heading of persuasive approaches to regulation, regulators of business attempt to encourage companies to behave in certain ways. Through various mechanisms and approaches, different actors attempt to persuade businesses either by creating a set of circumstances whereby acting in socially irresponsible ways may lead to economic losses or where socially responsible behaviour leads to commercial gain. The discussion below focuses on some key existing persuasive oriented approaches to regulation, namely non-financial reporting requirements, guidelines, civil society campaigns, and certification schemes.

#### 3.4.1.1. *Non-financial Reporting Requirements*

Non-financial reporting is described as a process of communicating information on social and environmental impacts of business to interested stakeholders.<sup>65</sup> The broad logic is that if businesses are required or asked to communicate how they approach non-financial issues such as respecting human rights, then they must have policies and procedures in place to report on.

In post-conflict settings, the particular approach adopted is often 'a comply or explain' or voluntary one. Voluntary reporting initiatives take many forms and may be facilitated by either governmental or non-governmental entities that can focus on the national, regional or international levels.<sup>66</sup> Businesses are encouraged to report or risk facing market sanctions such as consumers opting to purchase from more socially responsible businesses.

Non-financial reporting can also be both mandatory and extraterritorial in nature, blurring in some ways the distinction between hard and soft forms of regulation. For instance, when in 2012 the Obama administration lifted economic sanctions on Myanmar, encouraging American investments after decades of treating the nation as a pariah, it did so with a significant caveat. Since 1 July 2013, the United States requires U.S. companies investing over \$500,000 in Myanmar or investing with the country's energy monopoly, Myanmar Oil and Gas Enterprise (MOGE), to disclose information on their policies and procedures. These include those relating to human rights, worker rights, anti-corruption, land acquisition, grievance mechanisms and the environment.<sup>67</sup> The purpose of the public report is to promote greater transparency and encourage civil society to collaborate with US companies toward responsible investment. These requirements were subsequently diluted by raising the threshold and moving to a voluntary basis.<sup>68</sup>

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<sup>65</sup> S. Eickenjäger, 'Non-financial Reporting for business enterprises: an effective tool to address human rights violations?', in K. Bloom et al. (ed.) *Contested Regime Collisions: Norm Fragmentation in World Society*, Cambridge, Cambridge University Press, 2016, at 29.

<sup>66</sup> A. Mehra and D. Blackwell, 'The Rise of non-financial disclosure: reporting on respect for human rights', in D. Baumann-Pauly and J. Nolan (ed.) *Business and Human Rights: From Principles to Practice*, Routledge, New York, 2016, at 278.

<sup>67</sup> U.S. Department of State, Reporting Requirements on Responsible Investment in Burma, <https://business-humanrights.org/en/us-govt%E2%80%99s-burma-responsible-investment-reporting-requirements-reports-comments-guidelines-company-responses> [last accessed 5 September 2017].

<sup>68</sup> D. Mortlock et al., *The United States Lifts Economic Sanctions on Myanmar*, Willkie Farr & Gallagher LLP., October 11, 2016, at 2.

Similarly, section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (2010) requires the Securities and Exchange Commission (SEC) to promulgate regulations requiring listed companies that offer products containing conflict minerals to disclose on an annual basis whether any of those minerals originated in the DRC or an adjoining country.<sup>69</sup> As a further example, the United Kingdom's (UK) Modern Slavery Act (2015) mandates transparency in supply chains.<sup>70</sup> The Act requires companies to prepare an annual statement describing the steps that the company has taken to ensure that slavery and human trafficking is not present in the company's operations or in any of its supply chains.<sup>71</sup> The statement may include information about the company's policies, due diligence processes, risks, performance indicators and training relating to slavery and human trafficking.

Different views emerge about the impact of non-financial reporting. For some, mandatory reporting has the power to 'cast a broader net to include companies that have resisted private regulation and also include sanctions for non-compliance that go beyond reputational sanctions most commonly associated with private regulation.'<sup>72</sup> In respect of s. 1502 of Dodd-Frank, for instance, Anthony Ewing notes that while some have criticised the Conflict Minerals Rule (CMR), the disclosure provisions may already be changing purchasing behaviour. He refers to the ways these requirements are prompting Chinese buyers to ask African minerals exporters to provide information on mineral sourcing.<sup>73</sup> At the same time, he notes the shortcomings of the CMR, in particular, the way in which it limits disclosure to due diligence steps taken, without requiring companies to report any corporate actions flowing from that due diligence, such as concrete efforts to prevent or mitigate adverse human rights impacts once they are identified.<sup>74</sup>

Others have criticised softer CSR reporting initiatives as mainly public relations efforts that remain merely on a ceremonial level with little practical consequences.<sup>75</sup> Mehra and Blackwell also note that the sheer number of reports being produced and the diverse topics that such reports aim to cover have created cottage industries for

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<sup>69</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act', 2010 [US].

<sup>70</sup> Modern Slavery Act 2015 (c. 30)

<sup>71</sup> *Ibid.* Section 54.

<sup>72</sup> J. Nolan, 'Refining the Rules of the Game: The Corporate Responsibility to Respect Human Rights', *Utrecht Journal of International and European Law*, vol. 30, no. 78, 2014, at 19.

<sup>73</sup> A. Ewing, 'Mandatory Human Rights Reporting', in D. Baumann-Pauly and J. Nolan (ed.) *Business and Human Rights: From Principles to Practice*, Routledge, New York, 2016, at 289.

<sup>74</sup> *Ibid.*, at 289.

<sup>75</sup> Mehra and Blackwell, *supra* note 66, at 278.

CSR consultancies while, at times, burdening in-house practitioners and overloading the consuming public.<sup>76</sup> Thus, 'with the rise in corporate reporting on human rights issues, however, comes critical concern over its utility in improving a company's human rights performance on the ground.'<sup>77</sup>

#### 3.4.1.2. *Guidelines and Standards*

One of the most widely used methods of persuasive regulation is that of guidelines and standards.<sup>78</sup> The purpose of guidelines and standards in post-conflict contexts is to help direct businesses as to how to act so as not to impact negatively on post-conflict societies, whether in regards to the environment, human rights or some other related issue. Actors from states to civil society, industry organisations to multi-stakeholder groups, have developed variations of guidelines and standards in post-conflict settings.

##### 3.4.1.2.1. State-based Guidelines and Standards

Post-conflict states can develop guidelines and standards that limit the harms that businesses might cause in the wake of violent conflict. For example, the Ivorian Code of Corporate Governance – Decree 2012- 1123, aims to ensure companies' sustainable growth through a management system based on the principles of transparency, accountability, independence and fairness.<sup>79</sup> The code promotes awareness of the social responsibilities of business, including the environmental and social interests of communities. It takes into account the disclosure of non-financial information through the publication of the Charter of Corporate Governance on the company's website and the corporate governance chapter of its annual report. Information is often linked to economic incentives associated with wider stakeholder theories of the firm, and particularly the importance of acting in a socially responsible manner for reasons pertaining to social licence to operate, reputation etc.

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<sup>76</sup> *Ibid.*, at 276.

<sup>77</sup> *Ibid.*

<sup>78</sup> R.A. Steurer, A. Martinuzzi and S. Margula, 'Public Policies on CSR in Europe: Themes, Instruments, and Regional Differences', *Corporate Social Responsibility and Environmental Management*, vol. 19, no. 4, 2012, at 208.

<sup>79</sup> Carrots & Stick, Ivorian Code of Corporate Governance – Decree 2012-1123, 2012, <https://www.carrotsandsticks.net/regulation/ivorian-code-of-corporate-governance-decree-2012-1123-2012/> [last accessed 19 September 2017].

Home states can also develop guidelines. As an example, in October 2014, the Chinese Chamber of Commerce for Minerals, Metals and Chemicals Importers and Exporters (CCCMC), under the auspices of the Ministry of Commerce, took concrete action to tackle the links between companies registered in China and conflict minerals when it established Guidelines for Social Responsibility in Outbound Mining Investments.<sup>80</sup> The Guidelines' purpose is to reduce operating risks for mining and minerals trading companies overseas and to ensure companies prevent their operations from causing harm. The Chinese Guidelines reflect supply chain due diligence guidance established by the UN Security Council and the OECD,<sup>81</sup> which sets out how companies can carry out checks on the sourcing of natural resources from conflict-affected or high-risk areas.<sup>82</sup> While these guidelines are not mandatory, scholars like Anthony Ewing contend that they are likely to influence the business practices of Chinese companies.<sup>83</sup>

#### 3.4.1.2.2. Civil Society Guidelines and Standards

Civil society actors have also developed a range of standards and guidelines that promote CSR in conflict-affected settings. Some focus on particular issues such as human rights. The Red Flag Portal developed by International Alert and Fafo, for example, lists activities, which should raise a 'red flag' of warning to companies of possible legal risks, and the need for urgent action.<sup>84</sup> The activities identified draw from a review of existing international law and court cases in more than a dozen jurisdictions and relate primarily to potential human rights violations that businesses might cause or contribute to.<sup>85</sup> Similarly, the Global Witness Do No Harm Guide for companies sourcing from the DRC guides companies on how to apply due diligence and attempts to respond to the linkages between human rights violations within

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<sup>80</sup> China Chamber of Commerce of Metals, Minerals & Chemicals Importers & Exporters, *Guidelines for Social Responsibility in Outbound Mining Investments*, 2014, (see pp. 26-56 for version in English) [https://www.emm-network.org/wp-content/uploads/2015/03/Guidelines\\_for\\_Social\\_Responsibility\\_in\\_Outbound\\_Mining\\_Investments.pdf](https://www.emm-network.org/wp-content/uploads/2015/03/Guidelines_for_Social_Responsibility_in_Outbound_Mining_Investments.pdf) [last accessed 23 August 2017].

<sup>81</sup> See *infra* section 3.4.1.2.3. 'Multilateral Institution Guidelines and Standards'.

<sup>82</sup> M. van Dorp, 'Multinationals and Conflict International principles and guidelines for corporate responsibility in conflict-affected areas', Stichting Onderzoek Multinationale Ondernemingen (SOMO) Centre for Research on Multinational Corporations, 2014, at 53.

<sup>83</sup> Ewing, *supra* note 73, at 290.

<sup>84</sup> International Alert, Red Flags for companies, <http://www.international-alert.org/news/red-flags-companies>, [last accessed 26 April 2016].

<sup>85</sup> The activities/domains identified are: expelling people from their communities, forcing people to work, handling questionable assets, making illicit payments, engaging abusive security forces, trading goods in violation of international sanctions, providing the means to kill, and allowing use of company assets for abuses.



supply chains.<sup>86</sup> According to Global Witness, the due diligence that companies using minerals or metals originating from eastern DRC need to undertake consists of:

- A conflict minerals policy supply chain risk assessment, including on the ground checks on suppliers;
- Remedial action to deal with any problems identified;
- Independent third-party audits of their due diligence measures; and
- Public reporting.<sup>87</sup>

Guidelines also encourage businesses to adopt context-sensitive practices. As a general characterisation of these types of guidelines, the intention is not to outline particular standards to meet, but instead, to specify the types of processes that businesses should follow. These can include guidelines as to how to understand the broader contexts within which they operate. As an example, International Alert's *Conflict Sensitive Business Practice: Guidance for Extractive Industries*<sup>88</sup> contains guidelines that outline a process for companies in the extractive sector to improve their impact on host countries.<sup>89</sup> The purpose is to prevent businesses from contributing to violent conflict.<sup>90</sup> Focusing on core business, social investment, and policy dialogue,<sup>91</sup> the document provides extensive practical guidance on conflict risk and a procedure for impact assessments. It also specifies nine flashpoint issues of particular relevance.<sup>91</sup> The tools include an introduction to conflict-sensitive business practice, a Screening Tool for early identification of conflict risk and Conflict Risk and Impact Assessment tools. These include the Macro-level Conflict

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<sup>86</sup> Global Witness, *A Guide for Companies: Do No Harm: Excluding conflict minerals from the supply chain*, London, Global Witness, July 2010, [https://www.globalwitness.org/sites/default/files/pdfs/do\\_no\\_harm\\_global\\_witness.pdf](https://www.globalwitness.org/sites/default/files/pdfs/do_no_harm_global_witness.pdf) [last accessed 24 May 2017].

<sup>87</sup> *Ibid.*

<sup>88</sup> International Alert, *Conflict Sensitive Business Practice: Guidance for Extractive Industries*, London, 2005, [http://www.international-alert.org/sites/default/files/Economy\\_2005\\_CSBPGuidanceForExtractives\\_All\\_EN\\_v2013.pdf](http://www.international-alert.org/sites/default/files/Economy_2005_CSBPGuidanceForExtractives_All_EN_v2013.pdf) [last accessed 27 August 2017].

<sup>89</sup> *Ibid.*, Introduction, at 3.

<sup>90</sup> *Ibid.*, at 23.

<sup>91</sup> These include stakeholder engagement; resettlement; compensation; indigenous peoples; social investment; dealing with armed groups; security arrangements; human rights; as well as corruption and transparency.

Risk and Impact Assessment tool and the Project-level Conflict Risk and Impact Assessment tool during subsequent stages of the project cycle.

#### 3.4.1.2.3. Multilateral Institution Guidelines and Standards

At the international or multilateral level, various organisations have also developed standards and guidelines. For instance, the OECD,<sup>92</sup> the UN,<sup>93</sup> and the International Labour Organisation (ILO),<sup>94</sup> have all developed corporate social responsibility standards that are of general application. That is, these guidelines apply in all contexts. One particular initiative, the United Nations Guiding Principles on Business and Human Rights (UNGP), is explored in detail in chapter 6.

In other cases, guidelines address conflict-affected settings more specifically. The OECD Risk Awareness Tool, as an illustration, is designed for businesses operating in what are termed 'weak governance zones.'<sup>95</sup> The purpose of the guidelines is to help companies that invest in countries where governments are unwilling or unable to assume their responsibilities to address how to ensure that they are not causing harm. It includes risks and ethical dilemmas that companies are likely to face in such weak governance zones, including obeying the law and observing international instruments, heightened care in managing investments, knowing business partners and clients and dealing with public sector officials, and speaking out about wrongdoing. Regarding content, the OECD Risk Awareness Tool covers such issues as disclosure; human rights; employment and industrial relations;

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<sup>92</sup> Organisation for Economic Cooperation and Development (OECD), *OECD Guidelines for Multinational Enterprises*, 27 June 2000, <http://www.refworld.org/docid/425bd34c4.html> [last accessed 1 September 2017].

<sup>93</sup> UNGC, *The Ten Principles | UN Global Compact*, 2000, <https://www.unglobalcompact.org/what-is-gc/mission/principles> [last accessed 8 Aug. 2016].

<sup>94</sup> ILO, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (1977) adopted by the Governing Body of the International Labour Office on November 16, 1977.

<sup>95</sup> OECD, *OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones*, 2006, <http://www.oecd.org/daf/inv/corporateresponsibility/36885821.pdf> [last accessed 24 June 2016]. Weak governance zones are characterised by institutional shortcomings that prevent the public and private sectors from playing their respective roles effectively. These shortcomings include: absence of workable systems for promoting public and private sector ethics; excessive discretionary powers for public officials at all levels of government; absence of rules-based frameworks for investment protection; and lack of adequate tendering procedures and of financial and managerial controls in all parts of the public sector (including state-owned enterprises) (at 25).

For overviews see A. Iff, 'What guides businesses in transformations from war to peace?' in M. Prandi, et al. (ed.) *Companies in Conflict Situations: Building a Research Network on Business, Conflicts and Human Rights*, Institut Català Internacional per la Pau, 2013, at 159; Van Dorp, *supra* note 82, at 38; A. Graf and A. Iff, 'Conflict-Sensitive Business Review of Instruments and Guidelines', Swisspeace, 2013, at 19.

environment; combating bribery, bribe solicitation and extortion; consumer interests; science and technology; competition; and taxation.

Similarly, the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas attempts to guide businesses in respect of sourcing conflict-free minerals.<sup>96</sup> The purpose of the guidelines is expressed in the introductory remarks:

In conflict-affected and high-risk areas, companies involved in mining and trade in minerals have the potential to generate income, growth and prosperity, sustain livelihoods and foster local development. In such situations, companies may also be at risk of contributing to or being associated with significant adverse impacts, including serious human rights abuses and conflict.<sup>97</sup>

It also attempts to help companies respect human rights and avoid contributing to conflict through their sourcing decisions, including the choice of their suppliers.<sup>98</sup> As in other guidelines discussed below, the focus on mineral supply chains reflects the adverse roles that businesses can play in perpetuating conflict by funding non-state and state actors involved in conflict-affected contexts.

#### 3.4.1.2.4. Business/Industry Guidelines and Standards

Business associations can also develop industry codes of conduct to induce socially responsible behaviour. For instance, the International Petroleum Industry Environmental Conservation Association (IPIECA) is the global oil and gas industry association for environmental and social issues. Its Guide to operating in areas of conflict for the oil and gas industry endeavours to provide risk assessment and risk management in conflict settings that oil and gas companies might face.<sup>99</sup> It guidelines that help companies to assess 'the potential risks, community impacts, and reputation and ethical dilemmas they might encounter when first looking to

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<sup>96</sup> OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, Third Edition, Paris, OECD Publishing, <https://www.oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf>, at 12 [last accessed 23 September 2017].

<sup>97</sup> *Ibid.*, at 12.

<sup>98</sup> *Ibid.*, at 12.

<sup>99</sup> IPIECA, *International Petroleum Industry Environmental Conservation Association's Guide to operating in areas of conflict for the oil and gas industry*, London, IPIECA, 2008, <https://www.world-petroleum.org/docs/docs/socialres/guide%20to%20operating%20in%20areas%20of%20conflict%20for%20the%20oil%20and%20gas%20industry.pdf> [last accessed 1 September 2017].

invest in geographic regions of conflict, and when planning new investments in countries where companies have existing operations.’<sup>100</sup> Risk management includes practical guidance on how to manage conflict in ways that do not compromise their ethics and reputation or contravene national laws and international norms and standards. These risk management approaches range from ‘doing no harm’ in operations to active measures to prevent and manage conflict.’<sup>101</sup> Again, the purpose of these guidelines and standards is to limit the adverse impacts that businesses might cause in post-conflict contexts by promoting context sensitivity.

#### 3.4.1.2.5. Discussion

Standards and non-specific guidelines are a helpful way of informing businesses as to how to ensure that they are not doing harm. However, guidelines promoting context sensitivity are also useful for informing businesses as to how to ensure that they are not exacerbating conflict dynamics. By outlining salient issues and elaborating on the processes that businesses should undertake, such initiatives as the IPIECA’s guidelines help businesses to develop processes and approaches that better recognise how and in what ways a company’s actions can negatively impact the societies in which they are operating. The guidelines can do this by stressing the importance of local involvement, participation and dialogue.

At the same time, there are a number of limitations. In most cases, guidelines are voluntary. In only a few instances are there monitoring procedures and even then, these are limited. For example, OECD Members and adhering states are obliged to set up National Contact Points (NCP) to promote the OECD Guidelines. Individuals, workers, and communities can file a complaint or a ‘specific instance’, as they are referred to in the OECD Guidelines. However, only a fraction of the final statements includes a rigorous analysis of the implementation of the Guidelines, most NCPs do not make findings regarding compliance with the Guidelines, and a few do not publish final statements at all.<sup>102</sup> In the case of uncooperative companies that are willingly and knowingly profiting from conflict or contributing to conflict, voluntary

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<sup>100</sup> *Ibid.*, at 1.

<sup>101</sup> *Ibid.*

<sup>102</sup> K. Genovese, ‘Access to remedy: non-judicial grievance mechanisms’ in D. Baumann-Pauly and J. Nolan (ed.) *Business and Human Rights: From Principles to Practice*, Routledge, New York, 2016

international standards, therefore, may not be the most effective way to change a company's behaviour.<sup>103</sup>

Most of these instruments also focus on the extractive or finance industry, while other vital sectors such as tourism or agribusiness remain without specific guidance.<sup>104</sup> A further difficulty is that there is no single guideline or standard for holding companies accountable in conflict-affected areas, and the existing guidelines are not tailored to the specific context of particular conflict settings.<sup>105</sup> Nevertheless and notwithstanding these limitations, the flexibility of guidelines is particularly important when considering how to influence corporate conduct in ways that are also reflective of the conflict. Moreover and as developed later, guidelines can and should be understood alongside other approaches, which have the potential to influence businesses adherence to them.

#### 3.4.1.3. *Certification Schemes*

Another persuasive form of regulation is that of certification schemes. Product certification or product qualification is the process of certifying that a certain product has passed performance tests and quality assurance tests, and meets qualification criteria stipulated in contracts, regulations, or specifications.<sup>106</sup> While complying with certification schemes might arise from a genuine belief in the importance of a particular initiative, in most cases, the broad logic is that in complying with certification requirements, the market might reward these businesses or, alternatively, punish businesses when they opt not to do so. Certification schemes can arise in a number of ways.<sup>107</sup>

##### 3.4.1.3.1. *State-Based Certification Schemes*

States can attempt to induce socially responsible behaviour by requiring that businesses adhere to certain certification requirements. While in some cases, states adopt a command and control-based approach, in other settings, the approach is

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<sup>103</sup> Van Dorp, *supra* note 82, at 65.

<sup>104</sup> Iff and Graff, *supra* note 95, at 54.

<sup>105</sup> *Ibid.*

<sup>106</sup> M.A. Saputra and R. Meyilani 'Business Process Improvement Design of Indonesian National Standard (SNI) Product Certification', 2015 International Conference on Automation, Cognitive Science, Optics, Micro Electro-Mechanical System, and Information Technology (ICACOMIT), Bandung, Indonesia, October 29–30, 2015, at 46.

<sup>107</sup> A further approach to certification schemes not examined in this section is those adopted by MSIs. These are discussed under Multistakeholder Initiatives section (see *infra* s 3.4.1.5.2.).

softer, again drawing on market-driven rationales associated with consumer preferences in order to induce enterprises to certify, for example, the origins of the minerals used in their products.

For instance, the International Conference of the Great Lakes Region Mineral Tracking and Certification Scheme (ICGLR – MTCS) is a government led initiative. It requires that economic actors involved in the chain of custody in the DRC exercise due diligence to ensure that they do not contribute to human rights abuses or conflict in the country.<sup>108</sup> The DRC Government developed the initiatives, which has support from other member states of the ICGLR.<sup>109</sup> It started as a voluntary scheme, yet some elements (such as the Regional Certification Manual) exist in the national legislation of the DRC.

Amongst other things, the scheme aims to ascertain that the mineral chain does not benefit non-state armed groups or public or private security forces who:

- (a) illegally control mine sites or otherwise control transportation routes, points where minerals are traded and upstream actors in the supply chain;
- (b) illegally tax or extort money or minerals at points of access to mine sites, along transportation routes or at points where minerals are traded; and/or
- (c) illegally tax or extort intermediaries, export companies or international traders.<sup>110</sup>

The scheme provides for mine inspections, certification mechanisms, and for independent audits. Consequently, the DRC Mining Ministry published a list of green and red mining sites in North and South Kivu. Minerals from sites flagged red are not conflict free and cannot be traded.<sup>111</sup> By creating a system where minerals must be certified, this approach to regulation is indicative of approaches that rely on the market to respond to companies that are certified, thereby inducing compliance.

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<sup>108</sup> ICGLR *Regional Certification Mechanism (RCM) — Certification Manual*, <http://www.oecd.org/investment/mne/49111368.pdf>. [last access 5 June 2017]

<sup>109</sup> These countries are Angola, Burundi, Central African Republic, Republic of Congo, Democratic Republic of Congo, Kenya, Uganda, Rwanda, Sudan, Tanzania and Zambia.

<sup>110</sup> *Ibid.*

<sup>111</sup> Van Dorp, *supra* note 82, at 52.

#### 3.4.1.3.2. Industry-Based Certification Schemes

Business organisations have also attempted to develop certification schemes. Again, these schemes seek to certify that certain products or commodities adhere to specific standards of expected conduct and in doing so have sought to create market advantages for compliance. For example, the Conflict-Free Gold Standard (CFGS)<sup>112</sup> is an industry-led initiative to combat the potential misuse of mined gold to fund armed conflict. It was launched in 2012, mainly to support the industry's compliance with the Dodd-Frank-Act section 1502 which, as mentioned, requires companies to state whether the gold sourced in the DRC and used in or for their products is conflict free.<sup>113</sup> The system is based on two draft standards to track gold from the mine to the end of the refining process. These consist initially of a Chain of Custody Standard and a Conflict-Free Gold Standard. Both standards are subject to independent audit.<sup>114</sup>

#### 3.4.1.3.3. Discussion

There are different views on the success of certification schemes. Given the importance attached to company reputation, scholars like Potoski and Prakash contend that while certification schemes require participants to incur specific costs to produce public goods, participants receive benefits that are excluded from non-participants, thereby creating incentives to join the programme.<sup>115</sup> Some also suggest that certification introduces positive changes in management practices and improves social and environmental performance<sup>116</sup> and that certifications aid companies in their attempts to tackle sustainability challenges because certifications can serve as invaluable learning tools.<sup>117</sup>

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<sup>112</sup> World Gold Council, Conflict-free gold standard, 2012, <http://www.gold.org/gold-mining/responsible-mining/conflict-free> [last accessed 25 June 2016].

<sup>113</sup> See Dodd-Frank *supra* note 69, Section 1502.

<sup>114</sup> See UN Global Compact and Human Rights and Business Dilemmas Forum, Case Studies, [http://hrbdf.org/case\\_studies/conflict-minerals/conflict\\_minerals/wgc\\_conflict\\_free\\_gold\\_chain\\_custody\\_standards.html#.V6yMME0wgdU](http://hrbdf.org/case_studies/conflict-minerals/conflict_minerals/wgc_conflict_free_gold_chain_custody_standards.html#.V6yMME0wgdU) [last accessed 20 May 2016].

<sup>115</sup> M. Potoski and A. Prakash, 'Green Clubs and Voluntary Governance: ISO 14001 and Firms' Regulatory Compliance', *American Journal of Political Science*, vol. 49, no. 2, 2005, at 236.

<sup>116</sup> S. Savilaakso, 'Timber certification as a catalyst for change in forest governance in Cameroon, Indonesia, and Peru', *International Journal of Biodiversity Science, Ecosystem Services & Management*, vol. 13, no. 1: Special Issue: Certifying Environmental Social Responsibility 2016, at 116.

<sup>117</sup> E. Charlemagne et al., 'Certification: a Sustainable Solution? Insights from Dutch Companies on the Benefits and Limitations of CSR Certification in International Supply Chains', Research commissioned

Alternatively, others are less optimistic. For instance, addressing conflict mineral certification schemes in Eastern DRC, Radleya and Vogel note that certification schemes are often technical approaches (due to the ahistorical and apolitical analysis of underlying theories), which overlook the actual impact of these schemes on the ground.<sup>118</sup> They continue that certification schemes overlook the impact on employment and the fact that in many cases, there is little evidence linking minerals to conflict. Moreover, because certification schemes depend on other actors responding, whether the pressure exerted by them is significant enough to influence business decisions to join certification schemes is often wholly uncertain.

#### 3.4.1.4. *Variations of Civil Society Pressure*

As well as developing standards and guidelines, civil society actors can play a number of roles in persuading business to act in a socially responsible manner. Indirectly, civil society organisations frequently conduct research on how business entities, operating in conflict-affected settings, have or are contributing to rights violations. Some refer to this process as ‘information gathering.’<sup>119</sup> Examples include reports on the practices of businesses in such places as Angola, Colombia, DRC, Indonesia and Sudan by international NGOs like Human Rights Watch;<sup>120</sup> Global Witness;<sup>121</sup> Friends of the Earth;<sup>122</sup> ‘Save My Future Foundation’;<sup>123</sup> and SOMO.<sup>124</sup>

The findings of these reports can be used as the basis for campaigns against businesses, another important form of civil society regulation. Civil society actors can also use boycotts and various forms of pressure to induce socially responsible behaviour.<sup>125</sup> For example, Global Witness has focused directly on the diamond conglomerate De Beers in contexts like Angola and Sierra Leone, through a series

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by MVO Nederland, and carried out by a team of students of the Maastricht University Premium Project. 12 January 2015, at 69.

<sup>118</sup> B. Radleya and C. Vogel, ‘Fighting windmills in Eastern Congo? The ambiguous impact of the ‘conflict minerals’ movement’, *The Extractive Industries and Society*, vol. 2, no. 3, 2015, at 407–408.

<sup>119</sup> B.M. Hutter and J. O’Mahony, ‘The Role of Civil Society Organisations in Regulating Business’, ESRC Centre for Analysis of Risk and Regulation Discussion Paper, 2004, at 5.

<sup>120</sup> See, for instance, Human Rights Watch, *Without Remedy: Human Rights Abuse and Indonesia’s Pulp and Paper Industry*, vol. 15, no. 1(C), January 2003.

<sup>121</sup> Global Witness, *The New Snake Oil? Violence, Threats, and False Promises at the Heart of Liberia’s Palm Oil Expansion*, London, GW, July 2015.

<sup>122</sup> Friends of the Earth France, *Live or drive, a choice has to be made: A Case Study of Sime Darby Operations in Liberia*, FOE, 2012.

<sup>123</sup> Save My Future Foundation, *supra* note 1.

<sup>124</sup> I. Schipper and E. de Haan, *No Golden Future Use of child labour in gold mining in Uganda*, Amsterdam, SOMO, April 2016.

<sup>125</sup> Hutter and O’Mahony, *supra* note 119., at 5-8.



of report and campaigns to highlight the complicity of the company in funding conflicts.<sup>126</sup> The result was that not only did De Beers cease operations in Angola in 2001, but also went on to become a founding member of the Kimberly Certification Scheme.<sup>127</sup>

As will be discussed in the case study section, in both Northern Ireland and South Africa, civil society organisations were also able to develop codes of conduct for businesses and to target investors, including a number of US States, to promote their uptake. A recent incarnation of these codes is the Holyland Principles (HP), developed by Father Sean McManus.<sup>128</sup> Amongst other things, the HP ask that companies 'adhere to equal and fair employment practices in hiring, compensation, training, professional education, advancement and governance without discrimination based on national, racial, ethnic or religious identity',<sup>129</sup> and 'maintain a work environment that is respectful of all national, racial, ethnic and religious groups.'<sup>130</sup> Adherence to the HP has been achieved by the efforts of civil society actors to pressurise investors and shareholders to comply with them.

Civil society actors also perform fundamental functions in putting pressure on states to improve their legislative frameworks. For instance, in the case of Northern Ireland, as developed further below, through the MacBride Principles, US States were able to exert pressure on the UK Government to strengthen protections against workplace discrimination. This pressure subsequently led to greater protections in the form of the Fair Employment Order 1989.<sup>131</sup>

Reports and investigations into corporate misconduct and corrosive relationships between businesses and states can also serve as the basis for other actors to put pressure on businesses.<sup>132</sup> For example, they provide the basis for epistemic communities to interrogate the linkages between businesses and human rights violations, provoking, in turn, the advancement of theoretical arguments as to the roles and responsibilities of business actors. Indeed, civil society reports, which flag the detrimental impacts of business, have been instrumental in catalysing creative

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<sup>126</sup> See, for example, Global Witness, *supra* note 11.

<sup>127</sup> See *infra* section 3.4.1.5.2.

<sup>128</sup> Holy Land Principles, <http://www.holylandprinciples.org/about-hlp/> [last accessed 10 August 2017].

<sup>129</sup> *Ibid.*, Principle 1.

<sup>130</sup> *Ibid.*, Principle 3.

<sup>131</sup> See *infra* chapter 5.

<sup>132</sup> A. Schuit, *Liberia Back in Business?, Conflict and human rights issues in a post conflict environment*, Amsterdam, SOMO, July 2015.

responses from the academic community regarding how to address business and human rights related issues.<sup>133</sup>

Given the multitude of ways that civil society actors can shape business activity, many see civil society regulation as an important component of filling regulatory gaps. Zadek, for instance, notes the ability and willingness of society to create collective pressure on business beyond the rule of law by threatening the productivity” of businesses.<sup>134</sup> This reflects the persuasive qualities of civil society regulation, in particular, the ability of civil society groups to affect a company’s bottom line through such initiatives as consumer boycotts. As stakeholder theory shows in detail, this usually means that stakeholders, i.e. those who contribute to the wealth-creating capacity of a firm and that are therefore ‘its potential beneficiaries and/or risk bearers’, confront businesses with social and/or environmental claims.<sup>135</sup>

At the same time, some might argue that NGOs often pursue objectives that align with their own. Civil regulation builds on networking among civil society actors. However, we should not overlook that the effectiveness of their networking relies ultimately on the ability to harness stakeholders representing market forces (such as consumers or small-scale investors) and/or governmental actors for their purposes. Whether civil society actors are successful might depend on the strength of these networks and their ability to influence opinion within them. In the context of influencing shareholders, for instance, the success of civil society regulation often depends on their ability to influence those that own or invest in companies.<sup>136</sup>

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<sup>133</sup> See as a few examples of scholars thinking creatively about how to regulate business and human rights: D. Cassell and A. Ramasastry, ‘White Paper: Options For a Treaty on Business and Human Rights’, *Notre Dame Journal of International & Comparative Law*, Vol. 6, no. 1, Article 4, 2016; C. Cronstedt and R.C. Thompson, ‘An International Arbitration Tribunal on Business and Human Rights’, Working Paper, *Version 5, Tribunal Working Group and Advisors to the Project*, Apr. 14, 2015; D. Augenstein and D. Kinley, ‘When Human Rights “Responsibilities” become “Duties”: The Extra-Territorial Obligations of States that Bind Corporations,’ in D. Bilchitz and S. Deva (ed.) *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect*, Cambridge, Cambridge University Press, 2013; S. Khoury and D. Whyte, ‘New Mechanisms of Accountability for Corporate Violations of Human Rights’, University of Liverpool, 2015; P. Simons and A. Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage*, (Routledge Studies in Governance and Change in the Global Era) London, Routledge, 2014.

<sup>134</sup> S. Zadek, ‘On Civil Governance’, *Development*, vol. 47, no. 3, 2004, at 26

<sup>135</sup> J.E. Post, L.E. Preston and S. Sachs, *Redefining the Corporation: Stakeholder Management and Organizational Wealth*, Stanford: Stanford University Press, 2002, at 19.

<sup>136</sup> R. Steurer, Disentangling governance: A synoptic view of regulation by government, business, and civil society, Institute of Forest, Environmental, and Natural Resource Policy, Discussion Paper 3-2013, at 11.

#### 3.4.1.5. *Multi-Stakeholder Initiatives*

The term multistakeholder initiative (MSI) refers to voluntary initiatives where two or more stakeholders cooperate to address some area of sustainability, CSR, the environment and or human rights.<sup>137</sup> Such stakeholders include some combination of companies, industry associations, NGOs, trade unions, government agencies, investors, academics and international organisations. There are various sub-types of MSI, defined by Baumann-Pauly et al. as best sharing MSIs, certification schemes and human rights governance.<sup>138</sup>

##### 3.4.1.5.1. Best Sharing Practices MSIs

Some MSIs convene stakeholders across industry, civil society and government to promote principles of sustainability, or to provide a forum for companies to share best practices and self-report on their sustainability activities. The United Nations Global Compact (UNGC), for instance, includes more than 8,000 corporations, in addition to governments and labour and civil society organisations. The UNGC engages the private sector to collaborate with the UN—in partnership with global labor, NGOs, and academia to identify and spread good corporate practices in the areas of human rights, labour rights, protection of the environment, and anticorruption.<sup>139</sup> The primary objective of the initiative is to provide a platform for best-practice and information sharing across the four primary areas.

Based on these collaborative, information-driven approaches, the UNGC has developed context-sensitive guidelines, such as those defined above. The UNGC's 'Guidance on Responsible Business in Conflict-Affected and High-Risk Areas', for instance, aims to assist companies in implementing responsible business practices in conflict-affected and high-risk areas consistent with the Global Compact Ten Principles.<sup>140</sup> As such, they address human rights, environment, corruption and labour. Much like the examples cited above, the Guidelines state that 'for companies

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<sup>137</sup> D. Baumann-Pauly, et al., 'Defining and implementing human rights industry by industry', in D. Baumann-Pauly and J. Nolan (ed.) *Business and Human Rights: From Principles to Practice*, Routledge, New York, 2016, at 108.

<sup>138</sup> *Ibid.*

<sup>139</sup> J.G. Ruggie, 'Global\_governance.net: The Global Compact as learning network', *Global Governance*, vol. 7, no. 4, 2001, at 371.

<sup>140</sup> UNGC, 'Doing Business While Advancing Peace and Development', New York, United Nations Global Compact, 2010, [https://www.unglobalcompact.org/docs/issues\\_doc/Peace\\_and\\_Business/DBWAP2010.pdf](https://www.unglobalcompact.org/docs/issues_doc/Peace_and_Business/DBWAP2010.pdf), at 2 [last accessed 29 June 2017].

of all sizes, operating a business unit in a high-risk area poses a number of dilemmas with no easy answers.’<sup>141</sup> Amongst other things, the Guidelines seek to ‘help reduce corporate risks and (importantly) enhance the capacity of companies to make a positive long-lasting contribution to peace and development’ and categorises responsible business practices into four areas: Core Business; Government Relations; Local Stakeholder Engagement; and Strategic Social Investment.

Central to the guidelines provided is the need to engage with context. Under Core business, for example, Guidance Point #1 asks companies to take adequate steps to identify the interaction between their core business operations and conflict dynamics, to ensure that they do no harm. They are also encouraged to adapt existing due diligence measures to the specific needs of conflict-affected and high-risk contexts. Moreover, companies are also asked to engage in stakeholder consultations to better inform how they conduct their activities.<sup>142</sup>

There are different outlooks on the UNGC. For instance, some suggest that the initiative constitutes ‘a win-win solution to the problem of world poverty.’<sup>143</sup> As state-centered policies have failed, the cooperation with the private sector would be able to play an important role in the fight against poverty. In addition, some argue that the UNGC adds ‘social legitimacy’ to the global markets, as the corporate sector is in strong contact with the UN and NGOs and thus more transparent and visible to the public.<sup>144</sup> The voluntary approach is also considered to have two specific benefits. One is the need to operationalise the ten universal principles implies trial and error and mutual learning from experiences, even in the context of a highly dynamic environment. This approach makes it impossible to define ex ante-operationalised criteria and hence requires more flexible and less hierarchical governance strategies.<sup>145</sup> Secondly, it is believed that a voluntary approach may enhance CSR

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<sup>141</sup> *Ibid.*

<sup>142</sup> *Ibid.*, at 10.

<sup>143</sup> N. Band, ‘United Nations Global Compact: Impact and its Critics’, Covalence Analyst Papers, 2007, at 2.

<sup>144</sup> *Ibid.*

<sup>145</sup> H. Runhaar and H. Lafferty, ‘Governing Corporate Social Responsibility: An Assessment of the Contribution of the UN Global Compact to CSR Strategies in the Telecommunications Industry’, *Journal of Business Ethics*, vol. 84, no. 4, 2009, at 481.

above levels that could be negotiated upon in the case of a regulatory framework, among other things due to the stimulation of dialogue and learning.<sup>146</sup>

At the same time, the UNGC are limited in some fundamental respects. Deva, for instance, notes that the principles hardly provide concrete guidance to corporations about the expected conduct.<sup>147</sup> Similarly, the voluntary nature and lack of accountability are frequently cited as significant limitations of the UNGC.<sup>148</sup> The principle accountability mechanism of the UNGC is an annual mandatory reporting requirement. By participating, companies agree to incorporate the principles into their day-to-day operations and issue an annual Public Communication on Progress, which reports on their progress in implementing the 10 principles.<sup>149</sup> Others note that joining the UNGC is a blue-washing strategy, adopted simply to improve a company's public-image without any real commitment to improving its approach to CSR.<sup>150</sup>

#### 3.4.1.5.2. MSI Certification Schemes

Multi-stakeholder initiatives have also attempted to develop certification schemes, similar to those defined above. For example, the Forest Stewardship Council's (FSC) certification process assesses individual farms' compliance with the FSC forest management standard.<sup>151</sup> Compliance can be aggregated to a chain-of-custody certification for a global retailer or brand. Similarly, Social Accountability International (SAI) assesses and train individual factories in the manufacturing supply chains of large multinational brands and retailers against its SA 8000 standard for decent work.<sup>152</sup>

Perhaps the most well known MSI certification process is the Kimberley Process Certification Scheme (KPCS). The KPCS is a joint government, industry and civil

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<sup>146</sup> *Ibid.*, at 481.

<sup>147</sup> S. Deva, 'Global Compact: A critique of the UN's "public-private" partnership for promoting corporate citizenship', *Syracuse Journal of International Law and Communication*, vol. 34, no. 1, 2006, at 129.

<sup>148</sup> For Nolan 'accountability, or rather the lack of it, is the crucial issue that faces the Global Compact' (J. Nolan, 'The United Nations Global Compact with business: Hindering or helping the protection of human rights?', *University of Queensland Law Journal*, vol. 24, no. 2, 2005, at 462.

<sup>149</sup> D. Baumann-Pauly, et al., *supra* note 137, at 40.

<sup>150</sup> O.F. Williams, 'The UN Global Compact: The challenge and the promise', *Business Ethics Quarterly*, vol. 14, no. 4, 2004, pp. 755-774, at 762.

<sup>151</sup> Forest Stewardship Council's certification process, <http://www.fsc-uk.org/en-uk/about-fsc/what-is-fsc> [last accessed 20 January 2018]

<sup>152</sup> Social Accountability International, <http://www.sai-intl.org/index.cfm?fuseaction=Page.ViewPage&PageID=1689> [last accessed 20 January 2018]

society initiative to stem the flow of conflict diamonds.<sup>153</sup> The process emerged as a result of the growing evidence in the 1990s that diamond trade was fuelling wars in countries like Liberia, Sierra Leone or Angola.<sup>154</sup> The KPCS aims at inhibiting trade in so-called conflict diamonds through a system of certificates determining the provenance of diamonds.

The KPCS imposes extensive requirements on its members to enable them to certify shipments of rough diamonds as 'conflict-free' and prevent conflict diamonds from entering the legitimate trade.<sup>155</sup> Under the terms of the KPCS, participating states must meet minimum requirements and must put in place national legislation and institutions; export, import and internal controls; and also commit to transparency and the exchange of statistical data. Participants can only legally trade with other participants who have also met the minimum requirements of the scheme, and a KP certificate guaranteeing that they are conflict-free must accompany international shipments of rough diamonds.<sup>156</sup> The KPCS currently has 54 participants, representing 81 countries, with the European Union (EU) and its Member States counting as a single participant and has been credited with helping reduce the market for illicit diamonds.

Despite these requirements and trends, the initiative has faced strong criticism in recent years, including from stakeholders who played key roles in its early stages of development.<sup>157</sup> For instance, Nadia Bernaz notes that notwithstanding the collaborative nature of the process as a whole, states are the sole participants in the system. The original NGO participants, Global Witness and Partnership Africa Canada, as well as the industry body, the World Diamond Council, are simply

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<sup>153</sup> Kimberly Process Certification Scheme, 2003, <https://www.kimberleyprocess.com/> [last accessed 14 October 2016].

<sup>154</sup> See UNGA Res. A/RES/55/56, 29 January 2001, on 'The role of diamonds in fuelling conflict: breaking the link between the illicit transaction of rough diamonds and armed conflict as a contribution to prevention and settlement of conflicts' and UNSC Res. S/RES/1459, 28 January 2003.

<sup>155</sup> For criticisms of the Scheme see L. Graham, 'Time for diamond companies to stop hiding behind Kimberley Process', (Amnesty International, 16 November 2015), [https://www.law.ox.ac.uk/sites/files/oxlaw/oscola\\_4th\\_edn\\_hart\\_2012quickreferenceguide.pdf](https://www.law.ox.ac.uk/sites/files/oxlaw/oscola_4th_edn_hart_2012quickreferenceguide.pdf) [last accessed 20 September 2017].

<sup>156</sup> Other examples of multi-stakeholder certification schemes include ITRI's Tin Supply Chain Initiative <http://enact-kp.streamhouse.org/the-itri-tin-supply-chain-initiative-itsci/> [last accessed 20 December 2017]; the Extractive Industries Transparency Initiative, <https://eiti.org/> [last accessed 20 December 2017], and International Social Accountability's SA 8000, *supra* note 153.

<sup>157</sup> S. Jerbi, 'Extractives and multi-stakeholder initiatives: the Voluntary Principles on Security and Human Rights; the Extractive Industries Transparency Initiative; the Kimberly Process Certification Scheme' in D. Baumann-Pauly and J. Nolan (ed.) *Business and Human Rights: From Principles to Practice*, Routledge, New York, 2016, at 157.

observers. Their role is ‘to monitor the effectiveness of the certification scheme’ and ‘to provide technical and administrative expertise’,<sup>158</sup> but their powers are limited.<sup>159</sup>

Moreover, in 2011, Global Witness announced that it was withdrawing from the KPCS over what it viewed were a series of initiatives failures in specific country situations, most notably Zimbabwe. The withdrawal of Global Witness followed a decision by the KPCS to authorise exports from two companies operating in the Marange diamond fields in Zimbabwe, despite widespread violence and repression of opponents of Zimbabwe’s Robert Magabe. Critics have also raised strong concerns about the KPCS’s functioning, for example, pointing to evidence of corrupt bureaucrats providing KPCS certificates without proper procedures and urging more direct links between state human rights obligations and the implementation of commitments made under KPCS.<sup>160</sup>

#### 3.4.1.5.3. MSI Human Rights Governance

Human Rights Governance MSIs include three primary functions: legislative, executive and judicial. Baumann-Pauly et al. note that when they work well, industry-specific, standards-based MSIs support these functions by concretely defining human rights standards in a specific industry context.<sup>161</sup> MSIs also operationalise the standard into measurable benchmarks that allow for independent and public assessment of a member company’s performance against the standard; and establish processes for sanctioning non-compliance and providing access to remedy. There are various types of MSI’s of this nature.

For example, US and UK governments, NGOs and major extractive companies established the Voluntary Principles on Security and Human Rights (VPSHR) in 2000.<sup>162</sup> This initiative attempts to respond to the realities of businesses collaborating with state and private security forces in ways detrimental to the enjoyment of rights. Companies participating in the VPSHR essentially state their support to a number of principles in the three categories of (1) risk assessment, (2)

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<sup>158</sup> Kimberly Process, FAQ section, <https://www.kimberleyprocess.com/en/faq> [last accessed 20 November 2017]

<sup>159</sup> N. Bernaz, *Business and Human Rights: History, Law and Policy - Bridging the Accountability Gap*, London, New York, Routledge, 2017. at 233.

<sup>160</sup> Jerbi, *supra* note 157, at 157.

<sup>161</sup> Baumann-Pauly, et al., *supra* note 137, at 108.

<sup>162</sup> Voluntary Principles on Security and Human Rights, <http://www.voluntaryprinciples.org/> [last accessed 31 August 2015].

relations with the public security providers (police, military) and (3) private security providers.<sup>163</sup> The VPSHR include:

- practical guidelines to help extractives companies manage risk effectively at the international, national, project level;
- a platform for mutual learning, joint problem-solving, and building best practices on security and human rights challenges with companies, governments, and NGOs;
- and a framework to build capacity of key players to address these issues in complex environments.<sup>164</sup>

A tripartite steering committee made up of between two and four representatives of each stakeholder group- corporate, government and NGO- serves as the main executive body of the VPs initiative.

However, the VPSHR have been criticised on numerous fronts. For instance, Hoenke and Börzel assess that the local production sites of MNCs are often hosted by states, which only loosely adhere to global rights themselves and are neither willing nor capable of making non-state actors comply with them.<sup>165</sup> Home states have been reluctant to foster binding regulation for the human rights behaviour, with a voluntary set of principles doing little to alter corrosive relationships between states and security forces.<sup>166</sup> Lack of enforceability of the VPSHR is a recurring theme throughout the literature. For example, the NGO Rights and Accountability in Development (RAAD) assess that the VPSHR allow companies to capitalise on the normative endorsement of the instrument concerned: it is good business to make a strong policy statement endorsing respect for universal human rights.<sup>167</sup> According to RAAD, this public endorsement does not, however, translate into any discernible improvements in how companies approach human rights issues.<sup>168</sup>

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<sup>163</sup> See, B. Freeman and G. Hernandez, 'Managing Risk and Building Trust: The Challenge of Implementing the Voluntary Principles', in R. Sullivan, (ed.) *Business and Human Rights: Dilemmas and Solutions*, Sheffield, Greenleaf, 2003.

<sup>164</sup> VPSHR, Fact Sheet, [http://www.voluntaryprinciples.org/files/VPs\\_Fact\\_Sheet\\_-\\_March\\_2013.pdf](http://www.voluntaryprinciples.org/files/VPs_Fact_Sheet_-_March_2013.pdf) [last accessed 31 August 2015].

<sup>165</sup> T. A. Börzel and J. Hönke, 'Mining Companies and the Voluntary Principles on Security and Human Rights in the Democratic Republic of Congo', SFB-Governance Working Paper Series 25, October 2011

<sup>166</sup> *Ibid.*, at 7.

<sup>167</sup> RAAD, Principles without justice, The corporate takeover of human rights: Executive Summary Conclusions and Recommendations, March 2015, <http://www.raid-uk.org/sites/default/files/principles-justice-summary.pdf> [Last accessed 20 January 2018], at 3.

<sup>168</sup> *Ibid.*, at 3.



By contrast, other MSI's have more robust monitoring and enforcement mechanisms. In August 1996, President Clinton convened industry, labour, trade union, consumer, NGO and government leaders and challenged them to come up with a system to prevent human rights violations in apparel factories. The group formed into the Apparel Industry Partnership, which negotiated a workplace code of conduct.<sup>169</sup> The Fair Labour Association (FLA)<sup>170</sup> was set up to conduct those external audits.

The FLA Charter sets out 'Obligations of Companies' that join the FLA, the requirements for accrediting independent external monitors, and the 'Principles of Monitoring' that should guide the independent external monitoring (IEM) events organised by FLA staff.<sup>171</sup> At the beginning of every year, member companies are required to submit their factory lists to FLA staff who draw a random, risk-weighted sample of 5 percent for independent external monitoring conducted by accredited auditors selected and paid by the FLA.<sup>172</sup> Once an IEM has been conducted, a member company is required to work with the supplier concerned to develop a remedial action plan that has been approved by FLA staff. Companies have to update FLA staff on their progress in implementing the action plans and the FLA, in turn, updates the information published on the website. The FLA also arranges verification audits up to 1% companies in the original 5 percent sample to ensure that the actions plans were indeed implemented and to assess the degree to which the remedies were effective.<sup>173</sup>

The FLA Board of Directors exercises oversight of the MSI, which comprises representatives from six companies, six NGOs, and six university representatives, as well as an independent chair. The Board is a governing body, not merely an advisory one.<sup>174</sup> Independent monitoring organised by FLA staff tests the degree to which companies have implemented the FLA Charter at the supplier level.<sup>175</sup> Public reporting on company performance include the publication of company monitoring and assessment results, third-party complaint reports and the FLA's annual report.

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<sup>169</sup> A. Van Heerden, 'The Fair Labour Association: improving workers' rights in global supply chains', D. Baumann-Pauly and J. Nolan (ed.) *Business and Human Rights: From Principles to Practice*, Routledge, New York, 2016, at 133.

<sup>170</sup> Fair Labour Association, <http://www.fairlabor.org/> [last accessed 22 January 2018]

<sup>171</sup> See Fair Labour Association, Charter Document as amended, February 12, 2014, [http://www.fairlabor.org/sites/default/files/fla\\_charter\\_2-12-14.pdf](http://www.fairlabor.org/sites/default/files/fla_charter_2-12-14.pdf) [last accessed 22 January 2018]

<sup>172</sup> Van Heerden, *supra* note 169, at 133.

<sup>173</sup> *Ibid.*

<sup>174</sup> *Ibid.*

<sup>175</sup> *Ibid.*

Third-party complaint mechanism and the Special Review clause in the FLA Charter allows the Board to place a company on a 90-day notice of expulsion if it fails to remedy violations in monitoring or third-party complaint reports.

The UN Special Representative on Business and Human Rights, John Ruggie, has held up the FLA as a model multi-stakeholder initiative. He defines it as ‘The gold standard among voluntary initiatives, I think, is the Fair Labor Association. It leads the way precisely because its Secretariat is encouraged and even mandated to cast a critical eye on performance and to recommend practical innovations—to stay focused like a laser on the effectiveness and legitimacy of the effort as a whole.’<sup>176</sup> Justine Nolan concurs, underlining the regulatory importance of the FLA, that:

In this form of re-regulation, private actors are delivering public goods such as labour inspections; traditionally a state function but the assessable standards are a mix of public and private regulations. This acceptance (albeit often reluctantly) by (some) businesses of their human rights responsibilities is indicative of the transformation of the rules of the game and an acknowledgement that the rules can no longer be framed in narrow and legalistic terms.<sup>177</sup>

At the same time, the FLA faces criticism. For example, van Heerdan notes that while the system of tripartite Board representation depends on creative tension between company, civil society and university representatives, the NGO bench has often been weakened because of vacant seats or overstretched directors who cannot fulfil their Board obligations.<sup>178</sup> He also notes that the specific timeframes for submitting monitoring reports, corrective action plans and updates, and publishing tracking charts, have proven hard to maintain and all parties often run well behind schedule.<sup>179</sup> Critics question both the Association’s accountability and its effectiveness, highlighting what they perceive to be its corporate-dominated

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<sup>176</sup> Business and Human Rights Resource Center, ‘Ruggie Message at VPs Plenary’, 2009, <https://business-humanrights.org/sites/default/files/media/bhr/files/Text-of-Ruggie-video-message-to-VPs-plenary-16-Mar-2009.pdf> [last accessed 15 November 2017]

<sup>177</sup> Nolan, *supra* note 72, at 12.

<sup>178</sup> Van Heerden, *supra* note 169, at 133-134.

<sup>179</sup> *Ibid.*, at 134.

governance structure, and its ongoing failure to achieve compliance with international labour standards within the supply chains of many FLA members.<sup>180</sup>

Elsewhere, criticisms have been stronger. For instance, student organisations have criticised the conflict of interests that arise from powerful companies sitting on FLA's Board.<sup>181</sup> On January 25, 2012, the New York Times published an extensive exposé of labor conditions at a supplier factory for Apple iPads in China called Foxconn.<sup>182</sup> The report revealed widespread violations of worker rights, including the use of excessive overtime, crowded dorms, and the use of poisonous chemicals causing worker fatalities. Before the expose, the FLA has praised Foxconn for its excellent working conditions. The scandal led to much criticism over the effectiveness and impartiality of FLA as an organisation.

Nevertheless, advocates of the FLA regard it as a leader in developing innovative approaches to promoting compliance with international labour standards, pointing to the progress made toward building independent auditing and complaints processes, and the FLA's efforts in recent years to strengthen the capacity building dimensions of its compliance program.<sup>183</sup> It is regarded as much more rigorous than other MSIs and includes industry labor standards and metrics.

A second example of a more robust MSI is that of the International Code of Conduct for Private Security Service Providers Association (ICoCA).<sup>184</sup> The impetus for this initiative came from the growing rise in private security companies often operating, in a legal lacuna, outside of the usual oversight of state security services.<sup>185</sup> As guardians of the Geneva Conventions, the Swiss government had already led and concluded the Montreaux Document, which clarified governmental obligations vis-à-

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<sup>180</sup> K. Macdonald, 'Fair Labor Association Structure and Activities', in D. Held and T. Hale (ed.) *Handbook of Transnational Governance Innovation*, Cambridge 2011. [version used not from book version], at 1.

<sup>181</sup> See Cornell Students Against Sweatshops, Organizing for Student and Worker Power, [http://usas.org/files/2011/05/20110516\\_fla\\_critique.pdf](http://usas.org/files/2011/05/20110516_fla_critique.pdf) [last accessed 1 February 2018]

<sup>182</sup> C. Duhigg, 'In China, Human Costs Are Built Into an iPad', New York Times, January 25, 2012, <http://www.nytimes.com/2012/01/26/business/ieconomy-apples-ipad-and-the-human-costs-for-workers-in-china.html> [last accessed 20 October 2017].

<sup>183</sup> Macdonald, *supra* note 181, at 1.

<sup>184</sup> International Code of Conduct for Private Security Service Providers Association <https://www.icoca.ch/> [last accessed 20 January 2018]

<sup>185</sup> A.M. Buzatu, 'The Emergence of the International Code of Conduct for Private Security Service Providers', in D. Baumann-Pauly and J. Nolan (ed.) *Business and Human Rights: From Principles to Practice*, Routledge, New York, 2016, at 162.

vis private and security companies in times of armed conflict.<sup>186</sup> Swiss government launched the International Code of Conduct (ICoC) initiative in 2009. According to Buzatu, the initiative emerged in two distinct standard-setting phases:<sup>187</sup>

1. Development of the ICoC,<sup>188</sup> which articulates human rights-compliant principles and standards for the provision of private security services, as well as specific commitments by management to support the implementation of the ICoC into a company's operations and policies.
2. Development of the ICoCA, or the framework for the multi-stakeholder governance and oversight body tasked with overseeing the ICoC.<sup>189</sup>

Areas covered by the ICoCA include the use of force to defend people and property and a prohibition on the use of torture.<sup>190</sup> The Code also requires private security companies to adopt and implement broader management policies to ensure that they operate in compliance with human rights norms, for example taking measures against harassment, sexual abuse and trafficking, training personnel appropriately and, crucially, thoroughly vetting new hires.

The oversight mechanisms were adopted as the Articles of Association for the ICoCA, launched in September 2013. The ICoCA created three tools to oversee and hold PSCs accountable:

1. Certification is a process where the ICoCA verifies that a member company's systems and policies meet ICoC requirements.<sup>191</sup>
2. Reporting, Monitoring and Assessing Performance describes the processes through which the ICoCA oversees the performance of member companies, including gathering data on their activities and conducting field visits, as well as receiving information from the companies themselves on their performance according to a transparent set of criteria.<sup>192</sup>

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<sup>186</sup> The Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict. 2008, <http://www.eda.admin.ch/psc>. [last accessed 20 February 2018]

<sup>187</sup> Buzatu, *supra* note 185, at 162.

<sup>188</sup> See [https://icoca.ch/sites/all/themes/icoca/assets/icoc\\_english3.pdf](https://icoca.ch/sites/all/themes/icoca/assets/icoc_english3.pdf) [10 February 2018]

<sup>189</sup> Buzatu, *supra* note 185, at 168

<sup>190</sup> See S. MacLeod, 'Private Security Companies and Shared Responsibility: The Turn to Multistakeholder Standard-Setting and Monitoring through Self-Regulation-Plus', *Netherlands International Law Review*, vol. 62, no. 1, 2015.

<sup>191</sup> ICoCA Articles of Association 2013, Art. 11.

<sup>192</sup> ICoCA Articles of Association 2013, Art. 12.

3. The Complaints Process sets out a procedure where the member company's internal grievance mechanisms are the normal forum of first instance to hear complaints.<sup>193</sup>

In cases where the complainant alleges that the company's grievance mechanisms does not offer effective remedy, or is otherwise not compliant with the ICoC, the ICoCA Secretariat will review of the internal grievance process. According to Bazutu, this could have several follow-on effects, including recommending other for alternatives such as mediation, or offering the 'good offices' of the ICoCA to help resolve complaints.<sup>194</sup> The Board is empowered to suspend or terminate a company's membership if it fails to act in good faith to remedy non-compliance with the ICoC, including when it fails to offer effective remedy.<sup>195</sup>

For some, the ICoCA marks a significant step forward, both in efforts to address the human rights responsibilities of the private security industry, and in the wider development of MSIs that seek to advance respect for international humanitarian law and human rights standards.<sup>196</sup> Thus, some suggest that this model can "be useful to promote respect for international humanitarian law as a supplement to other legal instruments, (... / ...) cannot make up for the absence or inadequacy of national or international legislation".<sup>197</sup>

For others, the fact that the initiative is not a state enforcement mechanism and therefore does not have the powers of arrest or to conduct criminal investigations remains an issue.<sup>198</sup> In 2017, a UN expert panel called for new international standards on private military and security companies', a voluntary initiative that did not feature accountability or enforceable remedies for victims.

Nevertheless, despite the relatively nascent stage of the ICoCA, some believe that MSIs such as the ICoC initiative can play an important role in filling some of the

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<sup>193</sup> Bazutu, *supra* note 185, at 168.

<sup>194</sup> *Ibid.*

<sup>195</sup> *Ibid.*

<sup>196</sup> Geneva Academy, The International Code of Conduct for Private Security Service Providers, Academy Briefing No. 4, Geneva Academy of International Humanitarian Law and Human Rights, August 2013, at 53.

<sup>197</sup> J. Jorge Urbina, "Nuevos retos para la aplicación del Derecho internacional humanitario frente a la "privatización" de la violencia en los conflictos armados": Estudios de Derecho internacional y Derecho europeo en homenaje al profesor Manuel Pérez González, Valencia: Tirant lo Blanch, 2012, cited in H.T. Mateu, 'PMSC and human rights: the international Boundaries of the Sovereign Power of Coercion', in M. Prandi et al., *Companies In Conflict Situations: Building a Research Network on Business, Conflicts and Human Rights*, 2013 Institut Català Internacional per la Pau, 2013, at 93

<sup>198</sup> Bazutu, *supra* note 185, at 170.

governance gaps arising out of the activities of these actors, helping to prevent human rights abuses and to improve accountability.<sup>199</sup>

#### 3.1.1.2.1. Discussion on MSIs

As the discussion above shows, MSIs emerge in different forms. It is, therefore, difficult to appraise the success or failures of MSIs generally. This is because MSIs function in very different ways, employ different approaches, and address different issues.<sup>200</sup> Nevertheless, some broad observations can be made.

Firstly, some see MSIs as particularly useful in filling governance gaps. Where states are unable or unwilling to regulate, MSIs fill ‘institutional deficits or governance gaps that have arisen under globalization and the expansion of global value chains, often to un- or weakly regulated sites, and in contexts of retrenchment or ‘failure’ associated with multilateral regulation, the state or trade unions.’<sup>201</sup>

Others suggest that multistakeholder regulation responds to the failure of self-regulation to address both coordination and political problems related to capitalist development under globalization and liberalization.<sup>202</sup> MSIs, therefore, respond to weaknesses and contradictions apparent in both self-regulation and orthodox regulation. Some hold the view that MSIs compliment state-based regulation. Studies have documented a ‘California effect’ wherein public regulation can help to ‘ratchet up’ private standards, and private standards can fill gaps where state capacity falls short.<sup>203</sup> In this way, LeBaron, and Rühmkorf argue that MSIs can strengthen government enforcement of labour law and that a combination of public and private initiatives is required to govern labour standards in supply chains.<sup>204</sup>

At the same time, there are numerous critiques of MSIs. For example, Bernaz cites Cynthia Estlund who, in reference to the FLA and the Ethical Trading Initiative,<sup>205</sup>

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<sup>199</sup> *Idid.*, at 170.

<sup>200</sup> D. Baumann-Pauly, et al., *supra* note 137, at 108.

<sup>201</sup> D. Reed, P. Utting, A. and Mukherjee-Reed, *Business Regulation and Non-State Actors Whose Standards?*, Routledge, 2012, at 2.

<sup>202</sup> *Ibid.*, at 2.

<sup>203</sup> T. Bartley, ‘Transnational Governance as the Layering of Rules: Intersections of Public and Private Standards’, *Theoretical Inquiries in Law*, vol. 12, no. 2, 2011, at 523 note 26 citing B. Cashore et al., ‘Can Non-state Governance ‘Ratchet Up’ Global Environmental Standards? Lessons from the Forest Sector’, *Review of European Community and International Environmental Law*, vol. 16, no. 2, 2007.

<sup>204</sup> G. LeBaron, and A. Rühmkorf, ‘The Domestic Politics of Corporate Accountability Legislation: Struggles over the 2015 UK Modern Slavery Act’, *Socio-Economic Review*, vol. 0, no. 0, 2017, at 5.

<sup>205</sup> Ethical Trading Initiative (ETI) is a UK-based organisation ethical trade in global supply chains by introducing legal protection for 600,000 migrant workers in the UK, aided movements for the increase

another MSI, suggests that these organisations efforts to improve corporate accountability are in chronic conflict with their effort to gain voluntary corporate adherents. This tension constrains efforts to improve enforcement of these voluntary private regulatory undertakings, and maybe the Achilles heel of private transnational regulation.<sup>206</sup> In other words, the increasing number of MSIs makes it difficult for companies to assess which to join, with the possibility that to attract adherents, MSIs begin to lower their standards and enforceability mechanisms.

Despite the governance and enforcement mechanisms that some MSIs have developed, the voluntary nature of MSIs continues to be criticised.<sup>207</sup> Albin-Lackey notes, for example, that because compliance is optional, it is unlikely to result in lasting change.<sup>208</sup> Others also develop more nuanced critiques. Le Baron and Rühmkorf, for instance, highlight that there is a need for more considerable attention to the political agency of business in debates about public and private regulatory interactions.<sup>209</sup> Drawing on scholars such as Kinderman<sup>210</sup> who has argued that industry actors tend to reject and oppose new state-based regulations, favouring instead voluntarism and soft law without hard sanctions, they suggest that MSIs are often promoted only to prevent binding initiatives being adopted.<sup>211</sup> This calls into question the commitment to MSIs, a criticism raised by others.<sup>212</sup> Some also note that MSIs are mainly global initiatives, with major international institutions and Western NGOs dominating, and which operate through a top-down approach.<sup>213</sup> For some, therefore, MSIs must be localised, increasing local buy-in and participation.<sup>214</sup>

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of real wages in parts of Bangladesh, and contributed to more than 133,000 improvements to the welfare of workers worldwide (see <https://www.ethicaltrade.org/>).

<sup>206</sup> C. Estlund, 'Enforcement of Private Transnational Labor Regulation: A New Frontier in the Anti-Sweatshop Movement?' in F. Cafaggi (ed.) *Enforcement of Transnational Regulation. Ensuring Compliance in a Globalised World*, Cheltenham (UK) and Northampton (MA, USA): Edward Elgar (2012) pp. 243-244.

<sup>207</sup> D. Baumann-Pauly et al., *supra* note 135, at 123.

<sup>208</sup> C. Albin-Lackey, 'Without Rules: A Failed Approach to Corporate Accountability', Human Rights Watch, <https://www.hrw.org/world-report/2013/country-chapters/global-0>

<sup>209</sup> See LeBaron, and Rühmkorf, *supra* note 204.

<sup>210</sup> D. Kinderman, 'Time for a Reality Check: Is Business Willing to Support a Smart Mix of Complimentary Regulation in Private Governance?', *Policy and Society*, vol 35, no. 1, 2016.

<sup>211</sup> LeBaron, and Rühmkorf, *supra* note 204, at 1-4.

<sup>212</sup> J. Martinsson, 'Multistakeholder Initiatives: Are they Effective?', 01/05/2011, <https://blogs.worldbank.org/publicsphere/multistakeholder-initiatives-are-they-effective>

<sup>213</sup> *Ibid.*

<sup>214</sup> *Ibid.*

#### 3.4.1.6. *Summary of Persuasive Approaches to Regulation*

The examples discussed above are not exhaustive. However, although existing in different forms, they help to outline the basic essence of persuasion as a form of regulation. Fundamentally, persuasive approaches to regulation seek to convince businesses to act in specific ways, often by drawing on the power of the market to do so. Non-financial reporting, initiatives, when not mandated through law, attempt to promote socially responsible behaviour by outlining to stakeholders how a company is attempting to act in a socially responsible and sustainable manner. Certification schemes try to project the same image, albeit through a process of certifying whether a company is compliant with a particular issue. Guidelines are more informative, arguably providing guidance on how to go about acting in socially responsible ways. Critically, in many cases, these guidelines focus on context sensitivity, developing processes to help businesses minimise adverse impacts in specific settings. MSIs are collaborative. While varying in structure and nature, they are fundamentally about different actors coming together to pursue particular objectives. Their voluntary nature ensures that they continue to rely on persuasion as the ultimate form of regulation. Nevertheless, there have been some important developments, most notably in the more robust initiatives of the FLA and ICoCA.

Read together; these initiatives demonstrate that regulation can occur through different forms of persuasion. As the discussions also briefly alluded to, and as will be developed in due course, there are very different views on the efficacy of these approaches. It is enough to note for now, that while many view with scepticism these softer forms of regulation, perhaps when we shift the objectives from preventing harm to engaging businesses to contribute to peacebuilding, these more flexible, collaborative and at times context-sensitive approaches, are useful forms of influence to engage businesses in peacebuilding processes.

#### 3.4.2. *Conditionality-Based Regulation: Key Initiatives*

Along with the more straightforward command and control approaches to regulation, persuasive approaches often rely on perception: businesses must perceive that it is in their economic interests, whether for reputational reasons or otherwise, to comply with particular socially responsible business practices. Another category of



regulation is that of economic conditionalities.<sup>215</sup> While similar and often difficult to distinguish from persuasive approaches to regulation, we can loosely differentiate this approach in one primary respect- the likelihood of accrued benefits. This approach also relies on the ability of potential economic opportunities to induce businesses to act in a socially responsible manner.

Conditionality-based approaches differ, however, in that compliance with particular social objectives links to, in some cases, a contractual obligation. Economic conditionalities can include gaining access to an economic opportunity, such as a government contract, or in the form of potential economic sanctions such as shareholders divesting. At the core of this approach is a deliberate use of economic instruments to induce businesses to act in socially responsible ways. The discussion below briefly touches upon a number of different types of conditionality. These are namely, public procurement, private procurement, export credits, finance, shareholder and investor activism, and stock exchanges and listing requirements.

#### 3.4.2.1. *Public Procurement*

States often procure services and products from business actors. Governments have used procurement as a means to draw on the economic motivations of business and induce businesses to make welcome contributions in post-conflict settings.<sup>216</sup> The primary way of doing so is linking government opportunities to certain stipulations. In these instances, companies that pursue state contracting opportunities must meet specific mandatory requirements, many of which are related to CSR practices. These requirements concern (1) standards of responsibility, and (2) eligibility; they are the mandatory “rules of the game” for a firm to follow if it wishes to pursue any government contract.<sup>217</sup> Snider et al. note, therefore that CSR requirements are the means by which public procurement potentially influences the CSR of all firms that sell to the government.<sup>218</sup>

Procurement can also be used in an extraterritorial sense. Indeed, both Northern Ireland and South Africa stand as important examples of the roles that states can

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<sup>215</sup> I use the terms economic conditionalities and conditionalities interchangeably.

<sup>216</sup> K.F. Snider et al., ‘Corporate social responsibility and public procurement: How supplying government affects managerial orientations’, *Journal of Purchasing & Supply Management*, vol. 19, no. 2, 2013, at 67.

<sup>217</sup> *Ibid.*, at 61.

<sup>218</sup> *Ibid.*

play in utilising their position to direct the actions of businesses in conflict-affected settings. As Avery notes:

[a] number of selective purchasing laws have been enacted in the U.S. by state and city governments. Most prevent those state and city governments from dealing with companies doing business in Burma (Myanmar) because of the human rights situation in that country. The states with selective purchasing laws on Burma are Massachusetts and Vermont.... And Burma is not the only target: Berkley, Oakland and Alameda County adopted selective purchasing laws on Nigeria during the period of military rule in that country, and Berkley also targets companies doing business in Tibet if their operations have been criticised by the Tibetan government-in-exile.<sup>219</sup>

By economic relationships between business and states, procurement is described by Christopher McCrudden as an extraordinarily adaptable tool, which can be used to meet a regulatory need when other methods of regulation are not considered acceptable, available or effective.<sup>220</sup> McCrudden continues, however, that the relationship between public procurement and the pursuance of social ends cannot only be seen as a compliance gap-filling measure.<sup>221</sup> Because governments operate both as regulators of the market as well as participants, they are well placed to offer market incentives as a mechanism for ensuring compliance with Corporate Social Responsibility standards.<sup>222</sup> I develop these discussions further under the case study section.

The use of public procurement is not without difficulties. For one, Mares assesses that socially responsible public procurement has trailed developments in responsible supply chain management with which large private companies have experimented since the mid-1990s.<sup>223</sup> As a practice, it has not attracted the most explicit support from public authorities around the world.<sup>224</sup> Moreover, selective purchasing can have

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<sup>219</sup> C. Avery, 'Business and Human Rights at a Time of Change', 1999.

<http://198.170.85.29/Chapter2.htm#2.8> cited in Bernaz, *supra* note 160, at 246, note 59.

<sup>220</sup> C. McCrudden, 'Using Public Procurement to Achieve Social Outcomes', *Natural Resources Forum*, vol. 28, no. 4, 2004, at 258.

<sup>221</sup> C. McCrudden, 'Corporate social responsibility and public procurement', in D. McBarnet, A. Voiculescu and T. Campbell, (ed.) *The New Corporate Accountability: Corporate Social Responsibility and the Law*, Cambridge, Cambridge University Press, 2007, at 97.

<sup>222</sup> *Ibid.*, at 98.

<sup>223</sup> R. Mares, 'Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progressin', in R. Mares (ed.) *The UN Guiding Principles on Business and Human Rights – Foundations and Implementation*, Martinus Nijhoff Publishers. Leiden, Boston 2012, at 7.

<sup>224</sup> Bernaz, *supra* note 159, at 248.

an adverse impact on smaller companies and employees in the targeted companies, which are excluded when they cannot reach the benchmarks set by government institutions.

#### 3.4.2.2. *Private Procurement*

Business can also regulate other businesses through their supply chains in what is often termed 'private procurement'. Similar to the concept of public procurement, private procurement involves firms utilising their position and influence to shape the business conduct of businesses further down the supply chain through contractual stipulations. As Crouch assesses:

[I]n its contracts a large transnational enterprise dealing with a large number of small, local contractors- as in a supply chain- acquires something of an authority role. These contracts are asymmetrical, with the large customer firm having many more options than the local suppliers. This enables the firm to impose conditions on the suppliers and therefore to act in a hierarchical relationship to them.<sup>225</sup>

McBarnett and Kurkchian also assess that '[l]egal control of the social impact of business can be exercised through private law as well as through state regulation,' and can be exercised by the business itself.<sup>226</sup> They note specifically that 'contractual control can [...] be seen as a potential mechanism for implementing international norms, with multinational's private law potentially compensating for state failures.'<sup>227</sup>

According to Vandenberg, the discussions on supply chain management are premised on the leverage that influential companies have over their suppliers and distributors, leverage that can be formalised in contractual provisions.<sup>228</sup> As such, Mares contends that CSR provisions have found their way into contracts through which one party communicates its codes of conduct and expectations, outlines due

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<sup>225</sup> C. Crouch, 'CSR and changing modes of governance: towards corporate noblesse oblige?', in P. Utting and J.C. Marques, (ed.) *Corporate social responsibility and regulatory governance: towards inclusive development?* Basingstoke: Palgrave Macmillan, 2009, at 27.

<sup>226</sup> D. McBarnett and M. Kurkchian, 'Corporate Social Responsibility through contractual control? Global Supply chains and 'other-regulation'', in D. McBarnett, A. Voiculescu and T. Campbell (ed.) *The New Corporate Accountability: Corporate Social Responsibility and the Law*, Cambridge, Cambridge University Press, 2007, at 60.

<sup>227</sup> *Ibid.*

<sup>228</sup> M. P. Vandenberg, 'The New Wal-Mart Effect: The Role of Private Contracting in Global Governance', *UCLA Law Review*, vol. 54, no.1, 2007,

diligence measures, and provides that non-compliance can be a ground for termination of contract.<sup>229</sup>In doing so, businesses, particularly those higher up a supply chain, can act as regulators, filling regulatory gaps through the use of private law to promote public goods.

According to Coglianese et al, self-regulatory schemes possess a number of potential advantages over command and control regulation. These include i) proximity (being closer to the industry being regulated); ii) flexibility (absence of political and administrative constraints); iii) greater compliance; and iv) greater potential to mobilize resources. Potential disadvantages include conflicts of interest, inadequate enforcement and accountability, and insufficient monitoring of compliance.<sup>230</sup> Moreover, for businesses to include social and environmental stipulations, businesses must often decide that they are willing to do so.

#### 3.4.2.3. *Export Credit Agencies*

Expert Credit Agencies (ECA) are public agencies and entities that provide government-backed loans, guarantees and insurance to corporations from their home country that seek to do business overseas in developing countries and emerging markets.<sup>231</sup> As with public procurement, the logic of considering the potential opportunities of ECAs is similar. By linking the granting of credit to compliance with particular standards, states can influence the extent to which businesses act in socially responsible ways.

In 2012, the OECD Council adopted a Recommendation on environmental and social due diligence which refers to the UNGP and encourages states to take 'social impact' into consideration when assessing applications for officially supported export credits.<sup>232</sup> Practically, states are encouraged to put each application in one of three

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<sup>229</sup> For an example, see GlaxoSmithKline, The GSK standard contract clause for Ethical Standards and Human Rights, 2011, Cited in R. Mares, 'Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progressin' in R. Mares (ed.) The UN Guiding Principles on Business and Human Rights – Foundations and Implementation, Martinus Nijhoff Publishers (Leiden, Boston 2012) pp. 1-50, at 7.

<sup>230</sup> C. Coglianese, et al., 'The Role of Government in Corporate Governance', Regulatory Policy Program Report RPP-08, Cambridge, MA: Center for Business and Government, John F. Kennedy School of Government, Harvard University., 2004, cited in F. Cafaggi and A. Renda, 'A Public and Private Regulation Mapping the Labyrinth', CEPS Working Document, No.370/October 2012, at 12.

<sup>231</sup> Export Credit Agency Watch, Export Credit Agencies', at <http://www.eca-watch.org/ecas/export-credit-agencies> [last accessed 20 February 2017].

<sup>232</sup> OECD, Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence, TAD/ECG (2012) 5 28 June 2012

categories. Category A projects are those that have 'the potential to have significant adverse environment and/or social impacts, which are diverse, irreversible and/or unprecedented.'<sup>233</sup> Category B projects have environmental and social impacts that are 'less adverse than those of category A projects. Typically, these impacts are few in number, site-specific, few if any are irreversible, and mitigation measures are more readily available.'<sup>234</sup> Finally, Category C projects have 'minimal or no potentially adverse environmental and/or social impacts.'<sup>235</sup>

Nevertheless, there are again limitations. For instance, some ECAs report that they undertake human rights assessments as part of their project due diligence. However, scant information is available about these assessments. ECAs frequently operate on the grounds of client confidentiality. It is unclear exactly how ECA assessments are undertaken, against which human rights standards projects are assessed, and whether project modifications are required to bring clients into compliance. NCPs have also been criticised by civil society organisations (CSOs) for their lack of independence because they are often housed in government ministries such as finance or trade, whose mission is to support and encourage- not regulate- corporate investment abroad.<sup>236</sup>

#### 3.4.2.4. *Finance*

Another possibility and one that has attracted more attention involves attaching conditionalities to the provision of finance. International organisations such as the International Finance Corporation (IFC) have developed guidelines to encourage socially responsible business. The Performance Standards on Environmental and Social Stability of the IFC were introduced in 2006 and adapted in 2012.<sup>237</sup> Essentially, the Performance Standards require that clients of the IFC who enter into project finance, equity investment, corporate finance or intermediary finance deals with IFC must comply with a number of standards. These standards include, Labor

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<sup>233</sup> *Ibid.* para. 11.

<sup>234</sup> *Ibid.*, para. 11.

<sup>235</sup> *Ibid.*, para. 11.

<sup>236</sup> OECD Watch, Assessment of the NCP Performance in the 2013-2014 Implementation Cycle (OECD Watch Submission to the 2014 Annual Meeting of the National Contact Points, June 2014, at 23-4.

<sup>237</sup> See International Finance Corporation, Performance Standards (PF), *supra* note 70. See Iff and Graff, *supra* note 95, at 160; Van Dorp, *supra* note 82, at 43.

and Working Conditions,<sup>238</sup> Community Health, Safety and Security,<sup>239</sup> Land Acquisition and Involuntary Resettlement,<sup>240</sup> and Indigenous Peoples.<sup>241</sup> Similar requirements are stipulated by the African Development Bank Group's Integrated Safeguards System: Policy Statement and Operational Safeguards;<sup>242</sup> The Asian Development Bank's Safeguard Policy Statement;<sup>243</sup> The European Bank for Reconstruction and Development's Environmental and Social Policy;<sup>244</sup> and the Inter-American Development Bank's Environment and Safeguards Compliance Policy<sup>245</sup>

Similarly, the Equator Principles (EPs) were launched in 2003 and are a credit risk management framework for determining, assessing and managing environmental and social risk in project finance. Participating institutions commit themselves to implement ten basic principles for all projects they finance with a volume of USD 10,000 or higher.<sup>246</sup> The EP's are based on the aforementioned IFC Performance Standards. These approaches differ in some respects from other business-related approaches in the sense that businesses are incentivised to comply with corporate social responsibility standards to attain finance. Like the project finance approach of multilateral IFC, and the examples of procurement, and export credit, they are a stronger basis for engaging CSR than market-based persuasion.

However, there are numerous limitations. For one, Dowell-Jones notes that given the scale and complexity of today's financial markets, investors can easily circumvent social responsibility requirements in different ways.<sup>247</sup> These include using products of funding strategies that so far have not been brought within the

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<sup>238</sup> *Ibid.*, IFC, *Performance Standards*, PF 2.

<sup>239</sup> *Ibid.*, PF 4 .

<sup>240</sup> *Ibid.*, PF 5.

<sup>241</sup> *Ibid.*, PF 7.

<sup>242</sup> African Development Bank Group's Integrated Safeguards System Policy statement and operational safeguard, [https://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/December\\_2013\\_-\\_AfDB%E2%80%99S\\_Integrated\\_Safeguards\\_System\\_-\\_Policy\\_Statement\\_and\\_Operational\\_Safeguards.pdf](https://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/December_2013_-_AfDB%E2%80%99S_Integrated_Safeguards_System_-_Policy_Statement_and_Operational_Safeguards.pdf) [last accessed 10 December 2017].

<sup>243</sup> Asian Development Bank, Safeguard Policy Statement, <http://www.adb.org/documents/safeguard-policy-statement> [last accessed 10 December 2017]

<sup>244</sup> European Bank for Reconstruction and Development, Environmental and Social Policy, <http://www.ebrd.com/downloads/research/policies/2008policy.pdf> [last accessed 10 December 2017]

<sup>245</sup> See Inter-American Development Bank, Environment and Safeguards Compliance Policy <https://www.cbd.int/financial/idb2015/iadb-safeguards.pdf> [last accessed 23 January 2018]

<sup>246</sup> The Equator Principles, June 2013 (updated.) <http://www.equator-principles.com/> [last accessed 26 August 2017].

<sup>247</sup> M. Dowell-Jones, 'Investors: models and strategies for engaging with human rights', in D. Baumann-Pauly and J. Nolan (ed.) *Business and Human Rights: From Principles to Practice*, Routledge, New York, 2016, at 216.

ambit of human rights due diligence. Moreover, it is not always clear how and whether social and environmental conditions are enforced. For instance, The Compliance Advisor Ombudsman (CAO) is the independent recourse mechanism for the IFC.<sup>248</sup> The IFC created the CAO to serve monitoring and accountability functions for IFC-funded.<sup>249</sup> As ombudsman, the CAO's major objective is to provide an accessible and useful mechanism for handling complaints from persons who are affected (or are likely to be affected) by the social and environmental impacts of IFC-sponsored projects. The aim is to identify problems, recommend practical remedial actions and address systemic issues that have contributed to the issues, rather than to find fault.<sup>250</sup>

Authors such as Altholz and Sullivan note, however, that CAO's emphasis on mediation rather than accountability 'has led many complainants to conclude that CAO was 'untrustworthy', acting simply as a 'buffer' between the community and the bank, or as 'window dressing.'"<sup>251</sup> They also note the organisations lack of authority. In the context of an entirely voluntary process, CAO must convince bank and company officials to address community concerns case-by-case and issue-by-issue.<sup>252</sup> Thus, some question whether environmental and social impact assessments are taken seriously or whether they serve merely as public relations tools.

#### 3.4.2.5. *Shareholder and Investor Activism*

Shareholders can also use their influence as part owners of a company to pressure businesses to adopt socially responsible practices. This example sits precariously at the intersection of persuasion and economic incentives. Given that the ability of shareholders to use their influence to shape the ways companies operate is subject to the particular moral predispositions of investors and shareholders, relying on shareholder action is a relatively uncertain basis. However, once engaged, as partial

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<sup>248</sup> CAO, <http://www.cao-ombudsman.org/> [last accessed 29 December 2017]

<sup>249</sup> See B. M. Saper, 'The International Finance Corporation's Compliance Advisor/Ombudsman (CAO): An Examination Of Accountability and Effectiveness From A Global Administrative Law Perspective', *International Law and Politics* vol. 44, no.1, 2012.

<sup>250</sup> G. Dimitropoulos, 'A common GAL: The legitimating role of the global rule of law', uncited paper, available at <http://people.unica.it/giacomobiagioni/files/2013/10/Dimitropoulos-globalgovernance.pdf>

<sup>251</sup> R. Altholz, and C. Sullivan, 'Accountability & International Financial Institutions Community Perspectives on the World Bank's Office of the Compliance Advisor Ombudsman', *International Human Rights Law Clinic University of California, Berkeley, School of Law*, 2017, at 73

<sup>252</sup> *Ibid.*, at 74.

owners of a company, shareholders can lean on businesses to adopt socially responsible practices. Activism, according to Amann et al, 'is the expression of a governance mechanism used by companies which allow all shareholders to express their voices in numerous domains, regardless of their participation in the capital.'<sup>253</sup>

The starting point for linking investors and human rights was the recognition that because investors control a huge pool of global funds, their influence over corporations could be a valuable avenue in defending human rights from harmful business conduct and an important source of leverage in fostering respect for human rights.<sup>254</sup> To this end, the Global Reporting Initiative (GRI) has developed a human rights reporting guide and analysis of human rights reporting trends.<sup>255</sup> Similarly, the United Nations Environment Programme (UNEP) Finance Initiative has created a 'Human Rights Guidance Tool for the Financial Sector.'<sup>256</sup>

As an example of how investors can shape business conduct, a joint publication by GRI and UNEP- *Responsible Business Advancing Peace: Examples from Companies, Investors & Global Compact Local Networks*'- outlines a number of such examples.<sup>257</sup> One such example is that of Robeco Asset Management. Robeco Asset Management manages €188 billion in assets for retail and institutional clients. UNGC's and PRI's case study profiles Robeco's engagement with Royal Dutch Shell and its operations in Nigeria. In particular, it highlights the role of institutional investors leaning on companies to demand that they act in socially responsible ways, employing strategic social investment to secure a licence to operate in the Niger Delta.<sup>258</sup> The issue arose after Robeco commissioned independent research that identified that Shell was exposed to risks in its operations in the Niger Delta. Robeco engaged with Shell to understand the risks and the company's management of them, and to share the new Guidance with Shell. During its engagement with Shell, Robeco commissioned further external research to evaluate 16 companies

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<sup>253</sup> B. Amann et al., 'Shareholder activism for corporate social responsibility: law and practice in the United States, Japan, France, and Spain', in D. McBarnet, A. Voiculescu and T. Campbell (ed.) *The New Corporate Accountability: Corporate Social Responsibility and the Law*, Cambridge University Press, 2007.

<sup>254</sup> Dowell-Jones, *supra* note 247, at 210-211.

<sup>255</sup> GRI, Human Rights: A Call to Action initiative, [www.globalreporting.org/humanrights](http://www.globalreporting.org/humanrights) [last accessed 15 December 2017]. GRI is an independent international organization that has pioneered sustainability reporting since 1997.

<sup>256</sup> UNEP, Human Rights Guidance Tool for the Financial Sector, <http://www.unepfi.org/humanrightstoolkit/> [last accessed 20 January 2018].

<sup>257</sup> UN Global Compact, *Responsible business advancing peace: examples from companies, investors & Global Compact local networks*, New York, United Nations Global Compact, 2013

<sup>258</sup> *Ibid.*, at 85-88.



that Robeco determined to be operating in areas defined as high-risk or controversial.<sup>259</sup> This resulted in a shortlist, based on criteria that included human rights issues, community relations, labour issues, corruption, transparency, and partnerships with government. The criteria-based research served as a baseline for understanding Shell's activity in the region and for stipulating changes that were necessary prior to investment.<sup>260</sup>

Others are less optimistic about the prospects of shareholder or investor activism. For instance, Millon assesses that many institutional shareholders pursue short-term investment strategies.<sup>261</sup> These investors hold broadly diversified portfolios and buy and sell frequently to realize trading profits. Among all shareholders, the average holding period for particular stocks is now concise, perhaps as low as five months. In turn, short-term-oriented investors can put pressure on corporate managers to produce short-term results in a number of ways. Because shareholders are not necessarily interested in the long-term sustainability of a company, they are less inclined to focus on social and environmental issues. Moreover, Millon also assesses that in addition to pressure from institutional shareholders, corporate managers are also subject to other incentives that encourage short-term horizons. In what is often termed the principle-agent problem, executives can be incentivised to pursue quarterly gains rather than long-term growth.<sup>262</sup>

#### 3.4.2.6. *Stock Exchanges and Listing Requirements*

A stock exchange is an exchange (or bourse) where stock brokers and traders can buy and sell shares of stock, bonds, and other securities. In some cases, Stock Exchanges stipulate that to be listed on a particular exchange, businesses must be socially responsible. For instance, the Johannesburg Stock Exchange (JSE) expects all issuers to address the principles set out in the King Code of Corporate Governance, which currently covers 75 principles, including on sustainability and integrated reporting, disclosing how each principle has been applied or explain why or to what extent they were not applied. Besides, the assessment of the principles

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<sup>259</sup> *Ibid.*, at 86.

<sup>260</sup> *Ibid.*, at 86.

<sup>261</sup> D. Millon, 'Shareholder Social Responsibility', *Seattle University Law Review*, vol. 36, no. 2, 2013, at 913

<sup>262</sup> *Ibid.*, at 916.

must be documented in the form of a register that must be made available on the website of the issuer.<sup>263</sup>

Recognising the potential to influence the social and economic impacts of business through listing requirements, in 2009, UN Secretary-General Ban Ki-moon launched the Sustainable Stock Exchanges initiative, an effort co-organized by the United Nations Conference on Trade and Development (UNCTAD), UNGC, the United Nations-supported Principles for Responsible Investment and the UNEP Finance Initiative.<sup>264</sup> Amongst other things, the initiative has developed Toolkits aimed at helping stock exchanges to better interact with their investors and issuers. As an example, the *Best Practice Guidance for Policymakers and Stock Exchanges on Sustainability Reporting Initiatives* includes current best practices from around the world, with practical options for policymakers and stock exchanges based on real-world experience as such reporting.<sup>265</sup>

In 2010, the World Federation of Exchanges (WFE) conducted a survey among the 30 largest exchanges in the world to assess the efforts made in promoting CSR practices among companies listed.<sup>266</sup> The results showed that some exchanges have developed and/or adopted guidelines/principles of CSR and corporate governance principles. It also noted, however, that fewer exchanges plan to change the criteria for listed companies by introducing additional elements of social responsibility, the most exchanges like to recommend some good practice rather than to impose conditions for listing.

For Matei and Cibotariu, one of the fundamental difficulties is that, despite developments, CSR issues are regarded as 'a utopian problem or incompatible with efficiency and profitability criteria, companies declaring their self-cynical pursuit of profit at any cost, regardless of the negative externalities they create.'<sup>267</sup> They are, in

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<sup>263</sup> UNCTAD, 'Best Practice Guidance for Policymakers and Stock Exchanges on Sustainability Reporting Initiatives', United Nations, New York and Geneva, 2014, at 15.

<sup>264</sup> See <http://www.sseinitiative.org/> [last accessed 19 November 2017].

<sup>265</sup> UNCTAD, *supra* note 263.

<sup>266</sup> R. Morales and E. van Tichelen, 'Sustainable Stock Exchanges: Real Obstacles, Real Opportunities', 2010, UNCTAD, [http://www.responsiblesearch.com/Responsible\\_Research\\_Sustainable\\_Stock\\_Exchanges\\_2010.pdf](http://www.responsiblesearch.com/Responsible_Research_Sustainable_Stock_Exchanges_2010.pdf) [last accessed 23 December 2017]

<sup>267</sup> M. Matei and I.S. Cibotariu, 'Considerations Regarding the Social Responsibility of Stock Market's Actors', *Petroleum-Gas University of Ploiesti Bulletin*, Vol. LXIII, No. 3, 2011, at 93

other words, a problem that they agree to consider, but which rarely lead to practical changes.<sup>268</sup>

#### 3.4.2.7. *Summary of Conditionality-Based Approaches to Regulation*

The use of conditionalities as a regulatory method focuses on different economic instruments that can induce businesses to act in certain ways or to pursue certain objectives. While often difficult to distinguish from persuasive approaches, the difference lies in the fact that the potential advantages or disadvantages are more tangible. While in the case of persuasive approaches to regulation, reliance is often placed on the market, in the present examples, different actors, in different ways, can leverage their economic position to offer opportunities or impose sanctions. States can stipulate that businesses adhere to certain conditions to gain access to government contracts. The same applies in regards to private procurement, in this case, through businesses demanding that companies throughout the supply chain adhere to certain requirements. Those providing finance to businesses, such as export credit agencies or financiers, can, in theory, adopt similar approaches. In these examples, those regulating businesses can incentivise companies to pursue particular social policy or developmental objectives. Alternatively, shareholders and investors can undermine economic opportunities by threatening to divest or refusing to invest if businesses do not act in specific ways. To this end, stock exchanges and listing requirements also have the ability, again, theoretically speaking, to influence corporate behaviour.

Read together; these initiatives demonstrate that regulation can occur through different forms of economic instruments. As the discussions also briefly alluded to, and as will be developed in due course, there are very different views on the efficacy of these approaches. It is enough to note for now, that while many view sceptically on these softer forms of regulation to prevent businesses from causing harm or to hold businesses accountable when damages occur, perhaps when we shift the objectives, economic conditionalities can prove useful forms of influence to engage businesses in peacebuilding processes.

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<sup>268</sup> *Ibid.*, at 93.

### 3.4.3. Alternative Regulatory Paradigms: Key Initiatives

While the initiatives discussed above often differ, both regarding the broader categories to which they belong and the particular individual characteristics of each sub-group initiative, they nevertheless share a common trait in that they are all focused on regulating businesses. Whether in regards to guidelines, certification schemes, procurement, or legislation, businesses are primarily the intended targets of regulation. There is one additional set of initiatives that must also be addressed—those that are not traditionally business-focused but which have either expanded to include businesses or which apply to businesses indirectly. For present purposes, I briefly touch upon some of these alternative regulatory paradigms: international criminal law, extra-territorial liability, and truth commissions (TCs).

#### 3.4.3.1. *International Criminal Law*

International criminal law is a subset of international law. The origins of this international framework lie in the post-World War II era. After World War II, the Allied powers set up an international tribunal to try not only war crimes but crimes against humanity committed under the Nazi regime. The Nuremberg Tribunal held its first session in 1945 and pronounced judgments on 30 September / 1 October 1946. A similar tribunal was established for Japanese war crimes (the International Military Tribunal for the Far East). It operated from 1946 to 1948. International criminal law has since expanded to include a number of different institutions, all of which relate to post-conflict settings.<sup>269</sup> The ultimate institutionalisation of international criminal law emerged in 1998 with the signing of the Rome Statute, enacting the International Criminal Court (ICC).<sup>270</sup>

To a limited extent, international criminal law has attempted to hold business people accountable for their involvement in conflict and/or repressive regimes.<sup>271</sup> For

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<sup>269</sup> These are: the International Criminal Tribunal for the former Yugoslavia; International Criminal Tribunal for Rwanda. A number of "hybrid" courts and tribunals also exist—judicial bodies with both international and national judges: Special Court for Sierra Leone, (investigating the crimes committed the Sierra Leone Civil War); Extraordinary Chambers in the Courts of Cambodia, (investigating the crimes of the Red Khmer era); Special Tribunal for Lebanon, (investigating the assassination of Rafik Hariri); Special Panels of the Dili District Court; War Crimes Chamber of the Court of Bosnia and Herzegovina

<sup>270</sup> UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998.

<sup>271</sup> See for discussion, W. Huisman and E. van Sliedregt, 'Rogue Traders: Dutch Business men, International Crimes and Corporate Complicity', *Journal of International Criminal Justice*, vol. 8, no. 3, 2010.

instance, at its inception at Nuremberg, international criminal law addressed the role of business executives in the commission of international crimes.<sup>272</sup> I.G. Farben, as an example, was a German manufacturer of chemical products which profited from the policy of the Nazi regime during the Third Reich.<sup>273</sup> Of 23 company officials, 13 were convicted for war crimes and crimes against humanity, relating to the plundering and spoliation of foreign property and participation in the slave labour programme while the rest were acquitted.<sup>274</sup>

At the same time, international criminal law has also proven relatively insignificant in holding business entities to account for their commission in international crimes.<sup>275</sup> The I.G. Farben case involved holding individuals rather than a business to account. This is largely the position of international criminal law more generally. The Rome Statute, for instance, does not apply directly to businesses. The difficulties associated with extending international criminal law to businesses are highlighted in the *travaux préparatoires* of the Rome Statute. The drafters of the Statute had the opportunity to include jurisdiction over 'legal entities' and indeed included a bracketed text within the 1998 Draft Statute for the ICC, which covered the possibility of trying 'legal persons.'<sup>276</sup> It was subsequently decided not to include legal persons within its jurisdiction as a reflection of the fact that the ICC is based on the principle of 'complementarity'.<sup>277</sup> Owing to the reality that many domestic legal systems do not recognise legal persons as subject to criminal law, including legal entities would have meant, in effect, that the ICC would have become a court of first instance, thereby eroding the very principle of complementarity on which it was founded.

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<sup>272</sup> Most significant were the trials of German industrialists before the US Military Tribunal sitting at Nuremberg under Control Council Order 10: US v. Friedrich Flick et al., Opinion and Judgement of 22 December 1947, Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10, Vol. VI, 1952, pp. 1187–1223; US v. Krauch et al., Judgement of 29 July 1948, Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10, Vol. VIII, 1952, pp. 1081–1210;

US v. Alfred Krupp et al., Judgement of 31 July 1948, Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10, Vol. IX, 1950, pp. 1327–1452.

<sup>273</sup> For an overview see F. Jessberger, 'On the Origins of Individual Criminal Responsibility under International Law for Business Activity: IG Farben on Trial', *Journal of International Criminal Justice*, vol. 8, no. 3, 2010

<sup>274</sup> *Ibid.*, at 786.

<sup>275</sup> W. Kaleck and M. Saage-Maaß, 'Corporate Accountability for Human Rights Violations Amounting to International Crimes: The Status Quo and its Challenges', *Journal of International Criminal Justice*, vol. 8, no. 1 2010.

<sup>276</sup> Draft Art. 23(5), UN. Doc. A/CONF. 183/2/Add.1, 14 April 1998).

<sup>277</sup> UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, available at: <http://www.refworld.org/docid/3ae6b3a84.html> [last accessed 20 September 2017], Art 17.

At present, international criminal law is of relatively little use in regulating businesses. The glimmer of hope that might be identified is the possibility that individual business people might be held accountable at the domestic level, as discussed below.

#### 3.4.3.2. *Extraterritorial Liability*

In a limited number of circumstances, States have extended criminal law extraterritorially, often to try corporate executives for their roles in violating rights during conflict. In *The Netherlands v van Kouwenhoven*, for instance, Dutch prosecutors charged and tried Guus Van Kouwenhoven, a Dutch national and Director of Operations of the Oriental Timber Company and Royal Timber Company in Liberia.<sup>278</sup> The charge concerned his alleged violations of UN Security Council (UNSC) resolutions establishing an arms embargo in Liberia in 1992.

Van Kouwenhoven was accused of having delivered arms to Liberia and of involvement in war crimes committed in that country. The prosecution also charged him with having breached the embargo decreed by the UN concerning Liberia.<sup>279</sup> He was ultimately acquitted because it was not established whether he was aware of the actions of the security forces. i.e. the mental element was not present. Hitherto, there has apparently been no conviction of a company for an international crime. However, individual employees and corporate officers have been convicted. Examples include the Blackwater prosecutions in the US,<sup>280</sup> and *Public Prosecutor v. van Anraat* in the Netherlands.<sup>281</sup> In the former case, four former security guards for Blackwater USA were found guilty of charges stemming from the Sept. 16, 2007, shooting at Nisur Square in Baghdad, Iraq, while escorting a US embassy convoy.<sup>282</sup> The shooting resulted in the killing of 14 unarmed civilians and the wounding of numerous others.<sup>283</sup> Frans van Anraat was a Dutch businessman who, from 1984 until 1988, purchased large quantities of the chemical thiodiglycol from the US and

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<sup>278</sup> Trial International, 'Guus Van Kouwenhoven', 02.05.2016 ( Last modified: 19.05.2017) (<https://trialinternational.org/latest-post/guus-van-kouwenhoven/>)

<sup>279</sup> *Ibid.*

<sup>280</sup> UNEP, Human Rights Guidance Tool for the Financial Sector, <http://www.unepfi.org/humanrightstoolkit/> [last accessed 20 January 2018]

<sup>281</sup> 09/751003-04, District Court of The Hague (2005).

<sup>282</sup> See for discussion on facts of case, A. F. Williams, 'Case for Overseas Article III Courts: The Blackwater Effect and Criminal Accountability in the Age of Privatization', *The University of Michigan Journal of Law Reform*, vol. 44, no. 1, 2010, pp. 45-82.

<sup>283</sup> *Estate of Himoud Saed Abtan et al. v. Prince et al. No. 1:2009cv00617 - Document 79 (E.D. Va. 2009)*

Japan. This chemical was then sold, through a number of different companies located in different countries, to Saddam Hussein's government of Iraq. After 1984, Van Anraat was the government's sole supplier of the chemical. On 23 December 2005, the District Court of The Hague acquitted the accused of complicity in genocide but convicted him for complicity in war crimes. He was sentenced to 15 years' imprisonment. On 30 June 2009, the Supreme Court of the Netherlands upheld the 2005 conviction of Van Anraat for complicity in war crimes. However, the Court reduced his sentence by six months due to the length of the proceedings.<sup>284</sup>

States can also regulate extraterritorially through legislation, giving rise to possible litigation against companies in civil law. One such example is the US Alien Tort Statute (ATS), initially passed by the First Congress in 1789.<sup>285</sup> While adopted in the context of addressing territorial issues about piracy on the High Seas, beginning in the mid-1990s, a class of ATS suits have emerged that aim to hold multinational corporations accountable for complicity in human rights abuses.<sup>286</sup>

A few examples help to illustrate the circumstances that have led to ATS cases involving businesses. In *Doe v Unocal Corporation*,<sup>287</sup> Unocal plaintiffs alleged that while being forced to work for Unocal's benefit, they were subjected to rape and other forms of torture, murder, and forced relocation by the military in Burma. The plaintiffs in *Presbyterian Church of Sudan v Talisman Energy* claimed that the oil company had aided and abetted in the commission of genocide and war crimes in Sudan.<sup>288</sup> The company built roads that the military used when carrying out military strikes, provided fuel for military aircraft, and paid royalties to the government. The case of *Sarei v Rio Tinto* involved allegations that the mining giant's exploitation of copper in Papua New Guinea destroyed the environment, inculcated a policy of racial discrimination, incited a ten-year armed conflict that amounted to genocide, and facilitated the commission of crimes against humanity and war crimes.<sup>289</sup> The case of *Wiwa v Royal Dutch Shell Petroleum Company* relates to the execution of

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<sup>284</sup> See Simons and Macklin, *supra* note 112, at 208.

<sup>285</sup> Alien Tort Statute, 28 U.S. Code § 1350 [US].

<sup>286</sup> For a useful overview see T.L. Van Ho, 'Transnational Civil and Criminal Litigation,' in S. Michalowski (ed.) *Corporate Accountability in the Context of Transitional Justice*, Oxon; New York, Routledge, 2013; C. Sandoval, L. Filippini and R. Vidal, 'Linking Transitional Justice and Corporate Accountability', in S. Michalowski, (ed.) *Corporate Accountability in the Context of Transitional Justice*. Oxon; New York, Routledge, 2013.

<sup>287</sup> 110 F.Supp. 2d 1294 (C.D. California, 2000), 248 F.3d 915 (9th Circuit, 2001), 395 F.3d 932 (9th Circuit, 2002).

<sup>288</sup> 582 F.3d 244 (2nd Circuit, 2009).

<sup>289</sup> 221 F.Supp. 2d 1116 (C.D. California, 2002); 671 F. 3d 736 (9th Circuit, 2011).

indigenous activists from the Niger Delta by the Nigerian government following riots and protests over pollution in the Niger Delta.<sup>290</sup> Shell was alleged to have ‘instigated, orchestrated, planned, and facilitated’ the arrests, torture and executions.<sup>291</sup> Similarly, in *Kiobel v Royal Dutch Petroleum Company*, the court also addressed issues of co-operation between Shell and the Nigerian government, though it involved a greater number of plaintiffs.<sup>292</sup> Claimants alleged that Shell aided and abetted numerous human rights violations throughout the Niger Delta, principally through assisting the military.

Nevertheless, favourable outcomes are difficult in ATS cases. For one, the fact that MNEs often operate through locally incorporated subsidiaries can make them hard to sue in the US.<sup>293</sup> In *Kiobel*, for example, the parent companies ran their oil operations in Nigeria through a Nigerian subsidiary, which was removed as a defendant at an early stage because it did not have sufficient contacts with the US to subject it to its personal jurisdiction. Even where personal jurisdiction is established, a court would have to find either that the parent company itself engaged in conduct giving rise to liability or that the subsidiary’s conduct was attributable to the parent.

Another difficulty is the doctrine of *forum non-conveniens*.<sup>294</sup> According to this doctrine, courts have the discretion to grant a stay on proceedings despite a real and substantial connection between the forum and the subject matter of the claim, in favour of a forum where the case may be ‘tried more suitably for the interests of all parties and the ends of justice.’<sup>295</sup> Another limitation is the difficulty of establishing the necessary *mens rea* of corporate complicity. Before *Kiobel*, the Courts of Appeals had held that claims for aiding and abetting human rights violations could be brought under the ATS, but had divided on whether liability required a showing of knowledge or purpose. The Second Court adhered to the purpose standard,<sup>296</sup> the

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<sup>290</sup> 226 F. 3d 88 (2d Circuit, 2000).

<sup>291</sup> 226 F. 3d 88 (2d Circuit, 2000), at 96.

<sup>292</sup> 569 U.S.(2013); 621 f.3D 111 (2ND Circuit, 2010).

<sup>293</sup> W.S. Dodge, ‘Business and human rights litigation in US courts before and after *Kiobel*’, in D. Baumann-Pauly and J. Nolan (ed.) *Business and Human Rights: From Principles to Practice*, Routledge, New York, 2016, at 245.

<sup>294</sup> S. Joseph, *Transnational Corporations and Human Rights Litigation*, Oxford, Oregon, Hart Publishing, 2004, at 83-98.

<sup>295</sup> *Spiliada Maritime Corporation v Cansulex* [1987] AC 460, 476, cited in C. Kaufmann, ‘Holding multinational corporations accountable for human rights violations: litigation outside the United States’, in D. Baumann-Pauly and J. Nolan (ed.) *Business and Human Rights: From Principles to Practice*, Routledge, New York, 2016, at 254

<sup>296</sup> See *Presbyterian Church of Sudan*, at 257-259



Eleventh Circuit adhering to its knowledge standard and the Ninth Circuit continuing to reserve the question.<sup>297</sup> The uncertainty regarding the particular test that courts will invoke makes it difficult to determine outcomes.

Moreover, the potential reach of the ATS has been significantly reduced following the decision in *Kiobel v. Royal Dutch Petroleum*.<sup>298</sup> In this case, the US Supreme Court found that there is a presumption against extraterritorial jurisdiction under the Statute, which may only be rebutted if the alleged tort sufficiently touches and concerns the United States. Four Circuits have had occasion to apply the ‘touch and concern’ test to corporations since *Kiobel*.<sup>299</sup> The Second Court held that ‘neither the US citizenship of defendants nor their presence in the United States is of relevance for jurisdictional purposes.’<sup>300</sup> Therefore, ‘if all the relevant conduct occurred abroad, that is simply the end of the matter under *Kiobel*.’<sup>301</sup> The Fourth, Ninth and Eleventh Circuits, on the other hand, have held that the US nationality of the defendant is relevant to the touch and concern analysis but not sufficient by itself.<sup>302</sup> In *Doe v Drummond*, the Eleventh Circuit weighed the alleged planning in the US against the execution of those plans in Colombia and concluded that ‘the domestic location of the decision-making alleged in general terms here does not outweigh the extraterritorial location of the rest of the Plaintiff’s claims.’<sup>303</sup> At best, therefore, the decision in *Kiobel* suggests that whether an alleged tort is deemed to sufficiently touch and concern the United States is wholly uncertain.

Additional barriers include those of international comity.<sup>304</sup> International comity is one of the principal foundations of U.S. foreign relations law. The doctrines of American law that mediate the relationship between the U.S. legal system and those of other nations are nearly all manifestations of international comity—from the conflict of laws to the presumption against extraterritoriality; from the recognition of foreign judgments to the doctrines limiting adjudicative jurisdiction in international

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<sup>297</sup> *Doe v Exxon Mobil Corp*, 654 F.3d. 11, 39 (DC Cir. 2011).

<sup>298</sup> 133 S. Ct. 1659 (2013).

<sup>299</sup> Dodge, *supra* note 293, at 249

<sup>300</sup> *Mastafa v Chevron Corp*, 770 F.3d. 170, 179, n 5 (2<sup>nd</sup> Cir. 2014)

<sup>301</sup> *Balintulo v Daimler AG*, 727 F. 3d 174, 190 (2<sup>nd</sup> Cir. 2013)

<sup>302</sup> See *Doe v Drummond Co.*, 782 F. 3d 576, 596; *Mujica v Airscan Inc*, 771 F.3d 580, 584 (9<sup>th</sup> Cir. 2014); *Al-Shimari v CACI Premier Technology Inc.*, 758 F.3d 516, 527 (4<sup>th</sup> Cir. 2014), cited in Dodge, *supra* note 294, at 249.

<sup>303</sup> 782 F. 3d 576, 598.

<sup>304</sup> W. S. Dodge International Comity in American Law, *Columbia Law Review* vol. 115, no. 8, 2015, at 2071.

cases.<sup>305</sup> The political question refers to the fact that Federal courts will refuse to hear a case if they find that it presents a political problem. That is, if an issue is so politically charged, federal courts, which are typically viewed as the apolitical branch of government, should not hear the issue.<sup>306</sup> For these reasons and others, few decisions have gone in favour of the claimants.<sup>307</sup>

#### 3.4.3.3. *Truth Commissions*

Transitional Justice (TJ) is often described as ‘the full range of processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large-scale past abuses to ensure accountability, serve justice and achieve reconciliation.’<sup>308</sup> One such TJ mechanism, as touched on above, is the aforementioned TRC (also sometimes referred to as a Truth Commission (TC)). These mechanisms can be loosely understood as bodies set up to investigate a past history of violations of human rights in a particular country, which can include violations by the military or other government forces or armed opposition forces.<sup>309</sup>

In some cases and as discussed further in the South African case study, these mechanisms have examined the role of corporate actors during periods of conflict.<sup>310</sup> The Sierra Leone TRC, for instance, decided that ‘perpetrators may be both natural persons and corporate bodies, such as transnational companies or corporations.’<sup>311</sup> It further noted that its mandate ‘is not confined to violations of human rights that might constitute crimes, under either national or international law, nor is it limited to

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<sup>305</sup> *Ibid.*

<sup>306</sup> Joseph, *supra* note 294, at 44-46.

<sup>307</sup> See N. Bernaz, ‘Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?’, *Journal of Business Ethics* vol. 117, no. 3, 2013; J. A. Zerk, ‘Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas’, Corporate Social Responsibility Initiative Working Paper No. 59; J.A. Zerk, ‘Corporate liability for gross human rights abuses: Towards a fairer and more effective system of domestic law remedies’, A report prepared for the Office of the UN High Commissioner for Human Rights.

<sup>308</sup> For an overview see, C. Bell, ‘The Fabric of Transitional Justice: Binding Local and Global Political Settlements,’ University of Edinburgh, Research Paper Series No 22, 2016; C. Bell, ‘Transitional Justice, Interdisciplinarity and the State of the ‘Field’ or ‘Non-Field’’, *The International Journal of Transitional Justice*, vol. 3, no. 1, 2009.

<sup>309</sup> P.B. Hayner, *Unspeakable Truths.*, New York, Routledge, 2001, at 40.

<sup>310</sup> G. Coska, ‘Corporate accountability in times of transition: the role of restorative justice in the South African Truth and Reconciliation Commission’, *Restorative Justice*, vol. 4, no. 1, 2016; C. Sandoval and G. Surfleet, ‘Corporations and Redress in Transitional Justice Processes’, in S. Michalowski (ed.) *Corporate Accountability in the Context of Transitional Justice*, Oxon; New York: Routledge, 2013; C. Darcy, ‘Truth Commissions, the European Union and Reparations from Business’, in F. Medjoubi (ed.) *Building Peace in Post-conflict Situations*, London, British Institute of International and Comparative Law, 2012

<sup>311</sup> Sierra Leone Truth and Reconciliation Commission, Final Report, 2004, Volume II, p 27.

violations committed by States or governments.<sup>312</sup> Similarly, the Liberia TRC found that ‘all... corporations including shareholders and corporate officers and their agents affiliated with or who aided and abetted warring factions or armed groups share responsibility for the commission of those human rights violations including violations of international humanitarian, international human rights law, war crimes.’<sup>313</sup>

Some TCs have also included recommendations that directly or indirectly target business. A study conducted by Payne and Pereira at Oxford University found that 23 out of 27 countries’, truth commissions acknowledge corporate complicity in human rights violations, and most of those name specific companies responsible for abuses, with around 250 companies named.<sup>314</sup> For instance, in summarising the research findings, Payne draws attention to the case of the Brazil National Truth Commission (Comissão Nacional da Verdade, CNV) of 2012, which mentioned 78 companies specifically for their involvement in , detention; detention centers; financing repression; killing; displacement; and labor.<sup>315</sup> It recommended further investigations.<sup>316</sup> In Chad, the Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habré, 1990, highlighted the role of businesses in contributing to economic crimes, recommending that the restitution of Property.<sup>317</sup> In Sierra Leone, the TRC recommended Labor reform, Tax reform, Recovery of assets, Transparency, Anti-corruption.<sup>318</sup>

However, TRCs have proven relatively ineffective in the context of impacting corporations. Payne assesses, for instance, that TCs have rarely made serious efforts to promote accountability or remedy mechanisms for corporate violations in

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<sup>312</sup> *Ibid.* See R. Carranza, ‘Transitional Justice, Corporate Responsibility and Learning from the Global South’, *Manifesto*, [web blog], 28 April 2015, <http://jamesgstewart.com/transitional-justice-corporate-responsibility-and-learning-from-the-global-south/>.

<sup>313</sup> Liberia TRC, *supra* note 15, Title VI, Section 11.4.

<sup>314</sup> L.A. Payne and G. Pereira, ‘La complicitad corporativa en las violaciones de derechos humanos: ¿una innovación de la justicia transicional en Argentina?’, in *Los derechos humanos y las empresas: Reflexiones desde America Latina*, ed. H Cantu Rivera. San José, Costa Rica: IIDH, cited in L.A. Payne and G. Pereira, ‘Corporate Complicity in International Human Rights Violations’, *Annual Review of Law and Social Science*, vol. 12, no. 1, pp. 63–84, at 74.

<sup>315</sup> L.A. Payne, Report on Truth Commissions and Corporate Complicity Report, JusticeInfo.net [web blog], 4 January 2017, <https://www.justiceinfo.net/en/justice-reconciliation/31545-report-on-truth-commissions-and-corporate-complicity.html>. TRC Report available at [http://cnv.memoriasreveladas.gov.br/index.php?option=com\\_content&view=article&id=571](http://cnv.memoriasreveladas.gov.br/index.php?option=com_content&view=article&id=571)

<sup>316</sup> *Ibid.*, Payne.

<sup>317</sup> TC Report available at <https://www.usip.org/sites/default/files/file/resources/collections/commissions/Chad-Report.pdf>

<sup>318</sup> Sierra Leone TRC, *supra* note 312.

their recommendations.<sup>319</sup> She contends that such an outcome is consistent with the plodding progress of prosecutions of companies for human rights abuses that have been initiated at the domestic, foreign, and international level.<sup>320</sup> For example, TCs can entirely omit any recommendations towards business. In Chile, the National Commission on Truth and Reconciliation (Comisión Nacional de Verdad y Reconciliación, 'Rettig Commission') directly named 15 companies involved in various human rights violations but issued no recommendations.<sup>321</sup> The same can be said of Guatemala's Commission to Clarify Past Human Rights Violations and Acts of Violence That Have Caused the Guatemalan People to Suffer (or Commission for Historical Clarification – Comisión para el Esclarecimiento Histórico), 1999,<sup>322</sup> and Haiti's, National Truth and Justice Commission (Commission Nationale de Vérité et de Justice), 1995.<sup>323</sup> Nevertheless, as I will develop in Chapter 6, TCs might be useful in helping to involve businesses in peacebuilding processes.

#### 3.4.3.4. *Summary of Alternative Regulatory Paradigms*

There are a number of ways, therefore, that paradigms not traditionally focused on businesses have expanded (if only incrementally) outwards to include companies. These include the possibility for holding individual business executives responsible under international criminal law, finding businesses liable for complicity in human rights violations in particular jurisdictions like the US, and TCs, which can sometimes include businesses within the remits of their investigations and recommendations.

There are, however, a number of limitations with these approaches. Most notably, they have all proven relatively unsuccessful in holding businesses accountable. In the context of international criminal law, only a small number of executives have been held to account by any international mechanism. Extraterritorial litigation faces numerous constraints, while TCs findings and recommendations to date have had little impact on the activities of businesses post-conflict.

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<sup>319</sup> Payne., *supra* note 315.

<sup>320</sup> *Ibid.*

<sup>321</sup> TC Report available at [https://www.usip.org/sites/default/files/resources/collections/truth\\_commissions/Chile90-Report/Chile90-Report.pdf](https://www.usip.org/sites/default/files/resources/collections/truth_commissions/Chile90-Report/Chile90-Report.pdf)

<sup>322</sup> TC Report available at [https://www.aaas.org/sites/default/files/migrate/uploads/mos\\_en.pdf](https://www.aaas.org/sites/default/files/migrate/uploads/mos_en.pdf)

<sup>323</sup> TC Report available (in French), at <http://ufdcweb1.uflib.ufl.edu/UF00085926/00001>

At the same time, these paradigms intersect with the above discussions in different ways. For instance, in holding the potential to hold business people accountable, international criminal law can be understood as a form, albeit limited, of command and control- regulation. Similarly, given that there is at least the potential for extraterritorial litigation under ATS, it can also be understood as a form of command and control. While findings in favour of plaintiffs have been sparse, we might nevertheless argue that bringing a business before a court can have a particular impact on how they approach such issues and human rights in the future.

### **3.5. Regulatory Pluralism in Action**

#### **3.5.1. How successful are alternative approaches to regulation?**

How then might we assess the initiatives discussed above? As outlined at the beginning of this chapter, businesses, both directly and indirectly, can contribute to conflict and can undermine peacebuilding efforts. Different forms of regulation are, therefore, relevant to peacebuilding to the extent that attempt to deter businesses from causing harm and, in some instances, to provide victims with a remedy. In the case of human rights, for instance, their denial to certain sections of a population is often one of the primary causes of conflict. As such, regulatory initiatives that seek to prevent or limit businesses adversely impacting rights are important parts of peacebuilding efforts. The importance of accountability-based mechanisms maps onto discussions on transitional justice, and in particular rights to justice and remedy. In both instances, how and to what extent different forms of regulation contribute to peacebuilding depends upon the extent to which they are able to achieve these two aims. This helps to explain the lens through which we examine the efficacy or efficiency of different approaches to regulation.

There are different views on the extent to which the different forms of regulation discussed above can achieve these aims. For instance, some suggest that ‘command and control regulation has the virtues of high dependability and predictability (if adequately enforced),’<sup>324</sup> ‘but commonly proves to be inflexible and

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<sup>324</sup> N. Gunningham and D. Sinclair, ‘Designing Smart Regulation’, source not specified, (available at <https://www.oecd.org/env/outreach/33947759.pdf>), at 3.

inefficient',<sup>325</sup> or 'unworkable, too slow or outmoded.'<sup>326</sup> Some view public procurement to be an 'extraordinarily adaptable tool, which can be used to meet a regulatory need when other methods of regulation are not considered acceptable.'<sup>327</sup> Others contest such claims, citing the relative lack of procurement being used as a tool for shaping business conduct.<sup>328</sup> For others, civil society actors successfully draw on and shape 'the ability and willingness of society to create collective pressure on business beyond the rule of law by threatening the productivity' of businesses.<sup>329</sup> Others see civil society groups as pursuing various agendas, complicating the regulatory landscape in unhelpful ways. To this end, while some believe guidelines can be useful methods in helping to inform business conduct, often in complex contexts, others suggest that because there is no single guideline or standard for holding companies accountable in conflict-affected areas, alternative forms of regulation such as these are often confusing.<sup>330</sup>

Some view MSIs as essential and influential forms of co-operative regulation. In the context of the UNGC, for instance, the trial and error nature of implementing the ten guidelines allows for mutual learning from experiences.<sup>331</sup> There are those that hold the view that voluntary approaches may enhance CSR above levels that could be negotiated upon in the case of a regulatory framework, among other things due to the stimulation of dialogue and learning.<sup>332</sup> For others, however, they are products of corporate influence, designed to stave off further binding forms of regulation.<sup>333</sup> Others see them as top-down.<sup>334</sup> Moreover, many note that because compliance is voluntary, it is unlikely to result in lasting change.<sup>335</sup> Indeed, given the soft and often non-binding nature of alternative forms of regulation, the lack of enforceability and reliability proves to be a significant area of criticism.

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<sup>325</sup> *Ibid.*, at 3.

<sup>326</sup> P. Utting, 'Rethinking Business Regulation From Self-Regulation to Social Control, Technology, Business and Society Programme Paper Number 15, United Nations Research Institute for Social Development, September 2005, at 5.

<sup>327</sup> C. McCrudden, *supra* note 220, at 258.

<sup>328</sup> Bernaz, *supra* note 159, at 248.

<sup>329</sup> Zadek, *supra* note 134, at 26.

<sup>330</sup> Iff and Graff, *supra* note 95, at 54.

<sup>331</sup> H. Runhaar and H. Lafferty, 'Governing Corporate Social Responsibility: An Assessment of the Contribution of the UN Global Compact to CSR Strategies in the Telecommunications Industry', *Journal of Business Ethics*, vol. 84, no. 4, 2009, at 481.

<sup>332</sup> *Ibid.*

<sup>333</sup> See Le Baron and Rühmkorf, *supra* note 204.

<sup>334</sup> Martinsson, *supra* note 213.

<sup>335</sup> Albin-Lackey, *supra* note 208.

When it comes to accountability, criticisms of existing approaches are equally abundant. In the case of enforcing existing legislation, for instance, many note the unwillingness and inability of states both to promulgate and enforce laws when they exist. In regards to the OECD NCPs, that ‘only a fraction of the final statements issued by the OECD includes a rigorous analysis of the implementation of the Guidelines’ and that ‘most NCPs do not make findings regarding compliance with the Guidelines’ at all, lead some to question their usefulness in providing remedies to victims.<sup>336</sup> Others note the potential of extraterritorial litigation but equally lament the lack of notable progress and the numerous legal and political barriers that exist to prevent victim’s access to justice.

In short, while there are numerous existing initiatives and thus an abundance of debate on the effectiveness of different forms of regulation, many regard existing approaches to regulation as insufficient. As previously noted, the incomplete nature of these different initiatives leads many to view these efforts as useful approaches to filling in gaps that emerge, but not quite regulation.

### **3.5.2. Identifying different forms of influence from regulatory pluralism**

Putting to one-side debates regarding the effectiveness of these initiatives and conceptual questions revolving around what these initiatives are or are not, I suggest that the existence of these different initiatives illustrates a range of ways that businesses can be influenced.

For example, traditional approaches to regulation focus on states adopting legislation, commanding and controlling businesses. The influence exerted is coercion through legal measures. Alternatively, responsive approaches to regulation maintain a binding approach but focus more on regulating self-regulation. An example of this is mandatory corporate reporting where, while businesses are commanded to report, a degree of discretion is often afforded to businesses as to how they are address a particular issue.

We also see influence in the form of directing or guiding businesses. Guidelines typically attempt to inform businesses as to how to go about acting in particular settings. For example, context-sensitive guidelines such as the OECD or IPIECA

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<sup>336</sup> Genovese, *supra* note 102.

Guidelines, seek to guide businesses to ensure that they are not causing harm in conflict-affected settings by outlining processes for businesses to adopt. Adhering to guidelines is often voluntary in nature. However, when considered from the perspective of regulation, we might say that rather than constituting voluntary approaches, they are in fact discretionary, given the different ways that actors might seek to influence adherence to these guidelines through persuasion.

At the core of persuasive influence is an attempt to convince businesses to act in socially responsible ways. Certification schemes, for example, try to build on the desires of businesses to be viewed as socially responsible or ethical. Such schemes include those developed by industries, states and multistakeholder initiatives. MSIs are also persuasive in other ways. For instance, compliance with human rights governance schemes or best practice sharing MSIs, rarely derives from law or the threat of legal sanctions. Rather, various initiatives attempt to draw on the desire of companies to project to consumers or businesses up the supply chain that they are socially responsible. Not only might consumers opt not to purchase from specific suppliers, but other businesses might decide not to engage in commercial relationships with businesses that are not perceived as ethical or socially responsible. As such, the market acts as a regulator, with different schemes attempting to build on the importance attached to corporate reputation. In other contexts, the persuasion derives from the desire to be part of a club- particularly in the context of MSIs. For example, while accountability before the FLA may not lead to binding legal sanctions, it might have economic repercussions if a business is forced to relinquish its membership to the scheme. MSIs also illustrate the potential of more collaborative forms of influence. In these instances, different actors pull together to address a specific issue, be it conflict minerals or child labour in apparel factories.

The discussion on alternative regulatory paradigms sits at a peculiar position between command and control-based and persuasive approaches to regulation. In certain instances, extraterritorial liability is command and control in nature. It is thus a form of coercive influence. At the same time, the lack of sufficient remedies for victims, coupled with the numerous obstacles facing victims in bringing businesses to book, does not render these approaches useless. For example, even naming businesses as potential defendants might have an impact on a company's bottom line, inspiring changes to how they approach CSR, irrespective of the outcome of litigation. In a similar fashion, TRC findings and recommendations; OECD NCPs



specific instances; civil society campaigns and other soft forms of accountability, can influence businesses indirectly by drawing attention to socially irresponsible practices.

Economic conditions are arguably a more reliable form of regulation. At the heart of these approaches are efforts to influence businesses through economic incentives. For instance, linking conditionalities to export credits, finance, or the use of public and private procurement demonstrate how different actors can use their financial influence in order to shape business behaviour.

There are, therefore, various ways to influence businesses. When we identify different forms of influence, I argue that we can begin to question the ways that these same methods and actors might bring about more proactive interventions on the part of business. For example, while shareholders can use their influence to demand that actors comply with environmental standards or human rights norms, can and do they require firms to challenge corrupt regimes or promote the rights of minorities? As Angelika Rettberg postulates on these possibilities:

The first factor [in engaging businesses in peacebuilding efforts] may come in the form of specific mandates from shareholders seeking to build a positive social record for corporate activity [...].<sup>337</sup>

Perhaps business contributions to peacebuilding can be induced through 'access to special lines of domestic or international credit'.<sup>338</sup> Alternatively, can government policy require businesses not only to avoid discrimination of women or ethnic minorities but also to empower women and ethnic minorities? Can multi-stakeholder processes, often focused on reducing governance gaps, also serve to promote and guide business contributions to peacebuilding? How and to what extent can we develop guidelines, which push beyond requiring that business do no harm, to instead informing businesses as to how and when to contribute to peacebuilding?

Secondly, when we do alter our lens to enquire as to how different forms of regulation might be useful in requiring, incentivising or persuading businesses to act in more proactive ways, does this then alter how we interpret the use of these different approaches? For instance, command and control-based approaches might

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<sup>337</sup> A. Rettberg, 'Private sector participation in peace-building: Tacking stock and identifying some lessons', in M. Prandi and J. M. Lozano (ed.) *CSR in conflict and post-conflict environments: from risk management to value creation*, School for a Culture of Peace (UAB) / Institute for Social Innovation (ESADE), 2010, at 93.

<sup>338</sup> *Ibid.*, at 93.

be viewed as optimum, given the ability of such approaches to outline predictable standards of conduct and thus predictability. However, when approached through a lens, which asks how regulation might influence businesses contributions to peacebuilding in context-sensitive and reflective ways, are these same approaches still the most appropriate? Does the softness of certain initiatives, then become one of its strengths? Similarly, while MSIs suffer the same supposed limitations, does the ability to address issues through collaboration stand as an important aspect?

The case studies take these enquiries forward. I suggest that notwithstanding conceptual debates regarding whether these initiatives amount to regulation, or whether or not they do and can prevent harms from arising or remedy damages when they occur, underpinning the different initiatives examined above is a range of ways that different actors can influence businesses. How and whether these different forms of regulation can be used to engage businesses to contribute to peacebuilding will form the focus of the remainder of this work.

### **3.6. Conclusion**

This chapter has sought to examine how different actors can influence businesses in a range of ways. To understand these various forms of influence, I considered a range of what many interpret to be regulatory initiatives that exist in post-conflict settings. These included command and control-based regulation, along with other less binding forms of regulation in the form of persuasion, economic incentives and some alternative regulatory paradigms. Collectively, these different initiatives often emerge in response to the limitations of state-based formal regulation, a reality present in many, if not most, post-conflict settings.

These initiatives, while many, are often assessed according to a number of criteria. At a conceptual level, many question whether these various initiatives are, in fact, regulation. On a more practical level but directly related, others examine whether and the degree to which they are successful in preventing businesses from causing harm or holding businesses to account when they do. The answers that emerge are as diverse as the initiatives themselves. Some note the importance and benefits of flexibility; others criticise the lack of enforceability and predictability that arise from softer forms of regulation. One might add, however, that assessing these initiatives in a broad and overarching manner overlooks the fact that in different instances, these various forms of influence will lead to different results. That is to say, while

procurement may prove to be ineffective in one context, it may serve as a useful and successful means of influencing corporate conduct.

Nevertheless, despite these various debates regarding the pros and cons, does and does nots, underlying these multiple initiatives are different forms of influence. When we step beyond conceptual and twin-tests of efficiency-based discussions, we can begin to question how these different forms of influence might be used to achieve different ends. In the context of this thesis, I am particularly interested in understanding how different actors, using different forms of influence, might require, incentivise or persuade businesses to contribute to peacebuilding. In asking this question, we can also begin to consider whether what are often understood as the weaknesses of different initiatives- i.e. flexibility and unpredictability, might in fact be regarded as strengths when examined through a different lens. The next two chapters examine how businesses have been influenced to contribute to peacebuilding in both South Africa and Northern Ireland.

### South Africa

This chapter examines how different actors sought to require, induce and persuade businesses to contribute to the peacebuilding effort in South Africa. This chapter also discusses how initiatives interact with others focusing on the ways that they might reinforce, support, and/or undermine efforts to include businesses in the peacebuilding effort.

#### 4.1. Introduction

The previous chapter examined different forms that regulation can take in post-conflict contexts. Along with command and control-based approaches, regulation can be persuasive in nature, or achieved with economic-conditionalities. I also outlined the possibilities of alternative regulatory paradigms that can shape business activities in post-conflict settings.

To this end, a number of initiatives that come under persuasive and conditionality-based approaches to regulation, as well alternative regulatory paradigms that have expanded to include businesses, were discussed. These approaches to regulation typically try to prevent businesses from causing harm and at times to hold businesses accountable for harmful practices when they occur. I also suggested that notwithstanding conceptual debates over how we define these initiatives or whether they can achieve the twin tests of efficiency, underpinning these various approaches are different forms of influence.

This chapter examines how different actors sought to use various forms of influence to engage companies in the peacebuilding effort in South Africa. I do so through two stories that draw on a number of important regulatory moments throughout the peacebuilding process in South Africa. The first is that of the Broad-Based Black Economic Empowerment Framework (B-BBEE). B-BBEE is a state-developed framework that seeks to include businesses in efforts to address the socioeconomic marginalisation of black South Africans under the system of apartheid. B-BBEE

relies primarily on the use of economic conditionalities and persuasion to engage businesses in the peacebuilding process. Through B-BBEE, respective South African governments have sought to incentivise companies to, amongst other things, adopt affirmative practices in the area of employment, engage in the skills development of black South Africans, and to contribute to the socioeconomic development of black South African communities.

The second story that this chapter will tell is one of different initiatives and influences interacting. Firstly, I examine how different initiatives contributed to the emergence of B-BBEE. Focusing on three key initiatives, namely economic sanctions, divestment campaigns and the Sullivan Principles,<sup>1</sup> this discussion demonstrates that different forms of influence and approaches to regulation can help to shape business conduct and the post-conflict regulatory environment. I also identify the importance of significant peace building moments, most notably the South African Constitution of 1996, which has provided the robust constitutional framework upon which B-BBEE is built.

By including aspects of the B-BBEE agenda within the remits of different initiatives, I then explore how various efforts have helped to reinforce the extent to which businesses have engaged in the peacebuilding effort. Following this, I address how different initiatives can be understood as gap filling for the B-BBEE by requiring, incentivising and persuading businesses to do no harm. The final discussion addresses conflicts between initiatives.

These two stories and sub-discussions merge to form a broader narrative of the possibilities and limitations of different actors influencing businesses in post-conflict settings. In particular, this chapter illustrates that different forms of regulation are important not only for engaging businesses in peacebuilding efforts but also in helping to contribute to the emergence of regulatory initiatives that attempt to achieve similar ends. The findings of this chapter help to inform the discussion in chapter 6 as to how a range of actors, employing different methods, might help to engage businesses in peacebuilding efforts and the possibilities that might exist for

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<sup>1</sup> Sullivan Principles, <http://hrlibrary.umn.edu/links/sullivanprinciples.html> [last accessed 15 September 2017]. While specific terms and names are abbreviated throughout this thesis, I include the full names again for ease of reference when each previously abbreviated word is mentioned.

thinking about a global policy instrument on business and peacebuilding, which could seek to promote these possibilities.

This chapter proceeds as follows. Section 4.2 briefly outlines the background to the conflict in South Africa. As many initiatives in post-conflict South Africa emerged in response to the role that businesses played before and during the South African conflict, this background is explored with a strong focus on the relationship between business and apartheid. Section 4.3 examines how different initiatives drew on business involvement during the apartheid era to target businesses in the push for change. I suggest that these initiatives have helped both to galvanise and sustain the participation of business in the peacebuilding efforts and to force regulatory developments at the institutional level. Section 4.4 examines B-BBEE, namely its origins, objectives, methods of regulation and impacts. Section 5.5 then discusses other regulatory initiatives that exist alongside B-BBEE. In different ways, these initiatives can be understood as reinforcing, gap-filling and/or undermining the B-BBEE framework. This chapter concludes by summarising the findings of the case studies (section 4.6.), which will be developed in chapter 6.

## **4.2. Background to the Conflict**

The origins of the conflict in South Africa lie in the system of apartheid. Apartheid in South Africa was described as a political system predicated on a racially exclusive institutional framework that eroded political rights and freedoms, property rights and generated high levels of political uncertainty.<sup>2</sup> Under apartheid, the white-led government viewed blacks as subordinate, expressing and reflecting this perspective through policies and laws adopted.<sup>3</sup> The subordination of black South African's manifested itself in the classification of individuals into racial categories; the denial of voting rights to black South Africans; and the establishment of separate living areas for Whites through the forced resettlement of non-Whites.

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<sup>2</sup> See, J.W. Fedderke, R. de Kadt, and J.M. Luiz 'Indicators of Political Liberty, Property Rights and Political Instability in South Africa: 1935-1997', *International Review of Law and Economics*, vol. 21, no. 1, 2001.

<sup>3</sup> F. Stewart, 'Horizontal Inequalities: A Neglected Dimension of Development', CRISE Centre for Research on Inequality, Human Security, and Ethnicity Working Paper 1, 2004, at 23.

Legislation was one of the primary tools used by apartheid governments to subordinate non-whites.<sup>4</sup> For instance, the Population Registration Act of 1950 established a rigid racial classification system,<sup>5</sup> while the 1953 Reservation of Separate Amenities Act provided governmental authorisation for the enforcement of racially separate public accommodations and other facilities.<sup>6</sup> Interracial property transactions were outlawed under the Group Areas Acts of 1950.<sup>7</sup> The Native Laws Amendment Act of 1952 established a registration process and labour bureau to control the movement of black South African's seeking work in 'white areas'.<sup>8</sup> Laws were also passed outlawing strikes by black workers and prohibiting legally registered trade unions from having black members. The reservation of particular types of work for persons of specific racial groups was enshrined in the Industrial Conciliation Amendment Act of 1956.<sup>9</sup>

Businesses were both, directly and indirectly, involved in helping to sustain the apartheid regime. The Truth and Reconciliation Commission (TRC) established in 1995 was tasked with painting 'as complete a picture as possible of the causes, nature and extent of the gross violations of human rights which were committed during the period from 1 March 1960 to the cut-off date.'<sup>10</sup> As part of these investigations, the TRC dedicated a whole section and two days of hearings to assess the various roles that businesses played during the era of apartheid.<sup>11</sup> The findings of the TRC provide insights into the ways that businesses were implicated in supporting and benefitting from the apartheid system.

Amongst other things, the TRC assessed that the degree to which corporations became complicit in sustaining the apartheid regime varied from 'engaging in activities directly associated with repressive functions to simply benefitting from operating in a structured society in which wages were low, and workers were denied

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<sup>4</sup> See, for discussion, S. Juggernaut, R. Rampersad and K. Reddy, 'Corporate responsibility for socio-economic transformation: A focus on broad-based black economic empowerment and its implementation in South Africa', *African Journal of Business Management*, vol. 5, no. 20, 2011, at 822.

<sup>5</sup> Population Registration Act of 1950 [No. 30 of 1950].

<sup>6</sup> Reservation of Separate Amenities Act, 1953 [No. 49 of 1953].

<sup>7</sup> Group Areas Act, 1950, [No. 41 of 1950].

<sup>8</sup> The Native Laws Amendment Act, 1952 [No. 54 of 1952].

<sup>9</sup> Industrial Conciliation Amendment Act, 1956 [No. 28 of 1956].

<sup>10</sup> See South African History Online. The Truth and Reconciliation Commission (TRC), [www.sahistory.org.za](http://www.sahistory.org.za) [last accessed 15 July 2017].

<sup>11</sup> See, for discussion, N. Nattrass, 'The Truth and Reconciliation Commission on Business and Apartheid: A Critical Evaluation', *African Affairs*, vol. 98, no. 2, 1999.

basic rights.<sup>12</sup> To capture the different degrees of culpability, distinctions were drawn between first, second, and third-order involvement of businesses with the apartheid regime.

Companies that played a central role in helping design and implement apartheid policies were categorized as having first-order involvement. In regards to mining companies, for example, the TRC determined that the system of 'grand apartheid' was itself based on the mining system which preceded it.<sup>13</sup> According to Mueller-Hirth, capitalist development accelerated when minerals were discovered (diamonds in Kimberly in Afrikaner-governed Trasnvaal in 1866; gold on the Witwatersand in today's Johannesburg in 1886), and that the mining sector in particular initiated oppressive and discriminatory practices, which were consolidated and expanded with the formal establishment of apartheid in 1948.<sup>14</sup> Thus, the TRC assessed that 'the blue print for 'grand apartheid' was in fact provided by the mines and was not an Afrikaner innovation.'<sup>15</sup> Essentially, first order involvement suggests that businesses and businessmen were among the architects of apartheid.

Businesses in the second-order involvement group were those that knew 'that their products or services would be used for morally unacceptable purposes'<sup>16</sup> but continued to do business with the apartheid regime regardless. These businesses sought to prosper from the system of apartheid. For example, companies that provided arms and ammunition, military technology, and transportation and all fell within this category.<sup>17</sup>

Lastly, businesses implicated in third order involvement were those that benefitted indirectly from the repressive apartheid regime.<sup>18</sup> These businesses, while not necessarily directly supporting apartheid, failed to challenge the administration,

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<sup>12</sup> TRC South Africa, Final Report, Vol. 6, Chap. 5, 2003, at 140.

<sup>13</sup> *Ibid.*, Vol. 4, chap. 2., at 24.

<sup>14</sup> N. Mueller-Hirth, 'Corporate Social Responsibility and Development in South Africa: Socioeconomic Contexts and Contemporary Issues', in S. Vertigans, S. O. Idowu and R. Schmidpeter (ed.) *Corporate Social Responsibility in Sub-Saharan Africa Sustainable Development in its Embryonic Form*, Springer, 2013, at 54.

<sup>15</sup> South Africa TRC Final Report, *supra* note 12, at 150.

<sup>16</sup> *Ibid.*, at 25.

<sup>17</sup> *Ibid.*, at 25.

<sup>18</sup> *Ibid.*



adhering to repressive policies and often profiting from them. The final report of the TRC stated, for instance, that:

[t]he manufacturing industry benefitted from cheap electricity generated through the exploration of cheap labour in the coal mines. The arms industry benefited from the military requirements of the apartheid regime, resulting in internal repression and external destabilisation. Those banks and financial institutions that bankrolled the mineral-industrial complex and the mineral-energy complexes benefitted vicariously.<sup>19</sup>

Owing to the different ways in which businesses were implicated in helping to support and sustain the apartheid regime, various regulatory efforts sought to directly include business as part of a broader effort to push for change at the political level. As will be developed below, these initiatives had a number of impacts, such as in helping to drive the inclusion of businesses in the peacebuilding effort in the post-conflict era.

### **4.3. Challenging the Relationship between business and conflict**

Different initiatives that emerged during the era of apartheid were instrumental in pressuring companies to reconsider how they conducted their economic activities in South Africa. These initiatives have also been central to the development of regulatory initiatives at the institutional level post-conflict, most notably the B-BBEE framework, that has sought to include businesses in promoting a more inclusive South Africa. For present purposes, I focus on three significant regulatory moments: economic sanctions; divestment campaigns, and the Sullivan Principles. I briefly outline the basic parameters of each approach before engaging in a fuller discussion of their impacts.

#### **4.3.1. Economic Sanctions**

From the early 1960s, anti-apartheid activists urged Western countries with economic relations with South Africa to impose international economic sanctions on South Africa. The main argument advanced was that this route offered the most

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<sup>19</sup> South Africa TRC Final Report, *supra* note 12, at 140–41.

feasible nonviolent strategy to undermine a repressive system of racial oppression.<sup>20</sup> Examples of economic sanctions that were subsequently levelled against South Africa included those by the United Nations (UN), European Economic Community (EEC) in 1985 and the US Comprehensive Anti-Apartheid Act of 1986.<sup>21</sup> Sweden also forbade not only new investments but also the transfer of certain patents and technology to South Africa, while Norway prohibited the use of export credits to finance trade with South Africa. As a final example, Prime Minister Laurent Fabius banned all new French investment in South Africa.<sup>22</sup>

Spearheaded by civil society campaigns, and while initially opposed by the West, sanctions helped to inform the importance and dangers of an unbalanced economy. Sanctions also adversely impacted businesses in different ways. As a result of the economic sanctions imposed on South Africa, businesses were prevented from participating in the global market economy, which had boomed with the onset of globalisation.<sup>23</sup>

#### 4.3.2. Divestment Campaigns

Demanding the divestment of companies from South Africa was another approach pursued by anti-apartheid campaigners.<sup>24</sup> Like economic sanctions, the broad objective of divestment campaigns was to put pressure on both businesses and the apartheid regime to alter their policies and, in the case of companies, to challenge the apartheid regime. Shafir, for instance, assesses that over 350 foreign corporations disposed of their South African investments by the late 1980s.<sup>25</sup>

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<sup>20</sup> G.W. Seidman, 'Monitoring Multinationals: Lessons from the Anti-Apartheid Era', *Politics & Society*, vol. 31, no. 3, 2003, at 6.

<sup>21</sup> N. Marais, and J. Davies, 'The Role of the Business Elite in South Africa's Democratic Transition: Supporting an Inclusive Political and Economic Transformation', Inclusive Political Settlements Paper 8. Berlin: Berghof Foundation, 2015, at 5. The UN also imposed sanctions on South Africa. For instance on 13 November 1963 — The General Assembly, in Resolution 1899 (XVIII) on the question of Namibia, urged all States to refrain from supplying petroleum to South Africa. It was the first of many efforts by the UN to enact effective oil sanctions against apartheid.

<sup>22</sup> N.D. Kristoff, 'The Pressure on South Africa', *The New York Times* (7 August 1985), <http://www.nytimes.com/1985/08/07/business/the-pressure-on-south-africa.html?pagewanted=all&mcubz=3> [last accessed 20 August 2015].

<sup>23</sup> M.P. Mangaliso, 'South Africa: Corporate Social Responsibility and the Sullivan Principles', *Journal of Black Studies*, vol. 28, no. 2, 1997, at 222.

<sup>24</sup> See J. Hanlon, *Independent Expert Study Group on the Evaluation of the Application and Impact of Sanctions Against South Africa*, South Africa: the Sanctions Report - Documents & Statistics, Londres, Commonwealth Secretariat, 1990.

<sup>25</sup> G. Shafir, 'Business in politics: Globalization and the search for peace in South Africa and Israel/Palestine', *Israel Affairs*, vol. 5, no. 2-3, 1998, at 106.

Support for divestment was significantly strengthened in the wake of the Soweto Uprising. On June 16, 1976, police fired on a student demonstration in Soweto, the black township outside Johannesburg. Following a strike wave in 1973, the Soweto students' uprising was a catalyst for increased protests, as black communities challenged apartheid through school boycotts, strikes, occasional guerrilla attacks, and other tactics designed to disrupt and undermine government control.<sup>26</sup>

The Soweto Uprising proved to be the catalyst for a number of campaigns, often led by civil society and institutional investors such as universities and Churches. These actors demanded that businesses cease their operations and relationships with the apartheid government.<sup>27</sup> As Mangaliso notes, 'proponents [...] believed that the presence of overseas multinational corporations (MNCs) in South Africa gave moral legitimacy to the White minority' and thus urged business to cease all economic activities there.<sup>28</sup> Sanctions had the impact of increasing demands for the divestment of hundreds of companies and helped to galvanise businesses to challenge the apartheid regime.

#### 4.3.3. The Sullivan Principles

Some opposed calls for divestment on the basis that businesses were also a force for good in a system characterised by oppression. It was argued, for instance, that in what De Jon terms as ad hoc responsibility,<sup>29</sup> businesses helped to challenge apartheid and to alleviate the suffering of black South Africans.<sup>30</sup> As an illustration, in 1973, two giant mining powerhouses, Anglo American and DeBeers, jointly established a 'Chairman's Fund' to tackle some of the social ills of apartheid rule in non-white communities.<sup>31</sup> Similarly, the 'Urban Foundation', a coalition of

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<sup>26</sup> Seidman, *supra* note 20, at 11.

<sup>27</sup> C. Charney, 'Civil Society, Political Violence, and Democratic Transitions: Business and the Peace Process in South Africa, 1990 to 1994', *Comparative Studies in Society and History*, vol. 41, no. 1, 1999, at 191;

D.L. Spar and L.T. La Mure, 'The Power of Activism: Assessing the Impact of NGOs and Global Business', *California Management Review*, vol. 45, no. 3, 2003.

<sup>28</sup> Mangaliso., *Supra* note 23, at 219-238.

<sup>29</sup> D. De Jongh, 'Corporate citizenship around the world: What happens in South Africa?', *Management Today*, 2009, at 37, cited in N. Mueller-Hirth *Supra* note 14, at 55.

<sup>30</sup> O.A. Babarinde, 'Bridging the Economic Divide in the Republic of South Africa: A Corporate Social Responsibility Perspective', *Thunderbird International Business Review*, vol. 51, no. 4, 2009, at 360.

<sup>31</sup> *Ibid.*

businesses operating in South Africa, was formed in 1976, primarily to improve dreadful living conditions in townships across the country.<sup>32</sup>

The potential political influence of businesses, coupled with these fleeting or 'ad hoc' instances of proactive social interventions, catalysed and strengthened the argument that rather than divesting, companies should use their economic leverage to push for further change in South Africa.<sup>33</sup> From this basis emerged the Sullivan Principles, a corporate code of conduct formally announced in 1977 by Reverend Sullivan. The Sullivan Principles became a focal point of debate about United States (US) foreign policy and the behaviour of multinational corporations (MNCs) during the heyday of the struggle against apartheid laws. At their core, the Sullivan Principles encouraged businesses to challenge discriminatory employment practices through their core business operations. For instance, among the requirements asked of business was that they:

Promote equal opportunity for [...] employees at all levels of the company with respect to issues such as color, race, gender, age, ethnicity or religious beliefs, and operate without unacceptable worker treatment such as the exploitation of children, physical punishment, female abuse, involuntary servitude, or other forms of abuse.<sup>34</sup>

Adherence to the Sullivan Principles was strengthened through a number of different initiatives. For one, investors in businesses that operated in South Africa began to demand changes in how businesses operated, often using the Sullivan Principles as the basis upon which to do so. As Christopher McCrudden notes:

Added weight was given to the Principles by the activities of church groups, human rights groups, institutional investors, college and university students, and several state and local governments in the USA, which used the Sullivan Principles as bench-marks against which to assess corporations with which they contracted, or in which they invested.<sup>35</sup>

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<sup>32</sup> Shafir, *supra* note 25, at 109; Mueller-Hirth, *supra* note 14, at 55.

<sup>33</sup> M. Westermann-Behaylo, 'Institutionalizing peace through commerce: Engagement or divestment in South Africa and Sudan', *Journal of Business Ethics* vol. 89, no. 4, 2010, at 417.

<sup>34</sup> Sullivan Principles, *supra* note 1.

<sup>35</sup> C. McCrudden, 'Human Rights Codes for Transnational Corporations: What Can the Sullivan and MacBride Principles Tell Us?', *Oxford Journal of Legal Studies*, vol. 19, no. 2, 1999, at 175.

At one extreme, McCrudden notes that the restrictions were absolute, requiring divestment from any firm doing business in or with South Africa.<sup>36</sup> Another approach was to limit investment only to firms subscribing to the Sullivan Principles.<sup>37</sup> Alternatively, where states and localities continued to hold stock in companies with South African connections, shareholder resolutions were a favourite method of increasing the pressure to make changes, often by pressing for compliance with the Sullivan Principles.<sup>38</sup> Added to this, state and local activity in South Africa also involved much recourse to the use of 'selective purchasing' as a tool to bring pressure for change. Indeed the first recorded economic initiative at a state or local level involved the adoption of a binding resolution by the city council of Madison, Wisconsin, to seek purchasing contracts with companies that did not have economic interests in South Africa.<sup>39</sup>

Through a mixture of persuasion and economic-conditionalities, these initiatives all attempted to leverage businesses through both opportunities and the threat of sanctions to challenge the policies of the apartheid regime.

#### 4.3.4. Impacts of In-Conflict Initiatives

The section briefly touches upon a number of the impacts that these in-conflict initiatives made. I address the direct effects of influencing businesses and the indirect impacts of shaping institutional reform, which I develop further in the next section.

##### 4.3.4.1. *Shaping the Contributions of Business to Peace*

The initiatives described above, were, in different ways, able to influence businesses to challenge the system of government that was a root cause of conflict in the region. Pressure to divest brought the involvement of businesses in helping to sustain the apartheid regime centre stage, galvanising business action. For instance, even those ad-hoc contributions cited above, the impetus to address socioeconomic conditions in South Africa emerged against criticism against companies for exploiting black South Africans. Moreover, divesting from South Africa meant leaving behind lucrative resources, such as gold and coal. Recognising

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<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*, at 176.

the unsustainability of maintaining presence in South Africa under the then political system was a decisive factor in pushing businesses to challenge the apartheid regime. The Sullivan Principles, which essentially asked businesses to oppose laws that deliberately marginalised black South African's, can be understood as a contribution, on the part of business, to challenge the political order, against which black South African's were fighting. On one level, the example of the Sullivan Principles demonstrates that codes of conduct and guidelines can be used for purposes that extend beyond limiting the harms that businesses might cause. On another, the example further shows that actors such as shareholders and institutional investors can leverage businesses, through both economic sanctions and incentives, to adopt them.

Subsequently, along with adopting the Sullivan Principles and in doing so, opposing the repressive legislation in place, businesses played various roles in contributing to the peace process. As an illustration, in 1988, the Consultative Business Movement (CBM), a coalition of businesses operating in South Africa, was set up 'to mobilize business as a major change agent and communication mechanism'<sup>40</sup> and to foster contact between business and the black leadership.<sup>41</sup> CBM galvanised the business community by convening workshops with the representatives of virtually all the major corporations. The coalition also facilitated dialogue between the ANC and the Government of South Africa by arranging and attending a number of clandestine meetings, the result of which was the signing of a peace agreement in 1991. In implementing the peace agreement of 1991, businesses also played a role in the regional and local peace committees, not only providing financial assistance but also making available human resources and leadership.<sup>42</sup> Moreover, at the end of 1991, the Convention for Democratic South Africa (CODESA) was launched which saw working groups appointed to deal with specific issues. The CBM acted as secretariat to the process.<sup>43</sup> These efforts subsequently led to two further peace agreements in

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<sup>40</sup> C. Nel, 'The Viability of a Mixed Economy in Post-Apartheid South Africa,' paper presented to the IDASA seminar, "A View of the Economy Beyond Apartheid," 22 April 1988, cited in D. Vogel, D. Levi-Faur and G. Sheffer, *Israel: The Dynamics of Change and Continuity*, London: Frank Cass, 1999, at 105.

<sup>41</sup> Charney, *supra* note 27, at 190. See also International Alert, 'Collective Corporate Action: South Africa', 1999, <https://business-humanrights.org/sites/default/files/reports-and-materials/Collective-corporate-action-SA.htm> [last accessed 13 September 2017].

<sup>42</sup> *Ibid.* International Alert.

<sup>43</sup> The Portland Trust, 'The Role of Business in Peacemaking: Lessons from Cyprus, Northern Ireland, South Africa and the South Caucasus', The Portland Trust, 2013, at 31.

the form of the interim constitution of 1993 and the adoption of the final constitution of 1996. Businesses also established such initiatives as Business against Crime, the Business Election Fund, and the National Business Initiative, which all attempted, in various ways, to contribute to the realisation of democracy and peacebuilding.<sup>44</sup>

The various in-conflict regulatory initiatives were able to engage businesses in challenging apartheid in a range of ways. On one level, the particular methods adopted sought to affect the bottom line of businesses. For instance, shareholders and investors were able to threaten divestment if companies did not adhere to the principles. Similarly, attaching conditions to procurement opportunities meant that it was in the economic self-interest of businesses to adhere to the Sullivan requirements. On another level, these initiatives were also able to persuade businesses to act by drawing on the relationship between business and the apartheid regime. Ostensibly, the reputation of firms suffered because of their close connections to morally defunct government. In-conflict regulatory moments, drawing attention to the roles played by businesses during the era of apartheid, helped to highlight the socially irresponsible practices of businesses.

Added to this were developments in thinking regarding the relationship between business and society more generally. One such development was the emergence of the concept of corporate citizenship, itself catalysed, in part, by the practices of businesses in South Africa. As Hamann et al. note: 'The international debates surrounding the role of business in apartheid South Africa, with a focus on labour and human rights issues, were an important driver of the growing corporate citizenship movement in the last 20 years.'<sup>45</sup>

Conversely, against the backdrop of this movement, scrutiny was directed towards the activities of businesses in South Africa, further increasing the pressure mounted against firms to help oppose the system of apartheid. The broader public, in other words, became increasingly aware of the involvement of businesses, with the reputation of companies suffering as a result.

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<sup>44</sup> Marais and Davies, *supra* note 21, at 9-10.

<sup>45</sup> R. Hamann et al., 'Business and Human Rights in South Africa: An Analysis of Antecedents of Human Rights Due Diligence', *Journal of Business Ethics*, vol. 87, no. 2: Spheres of Influence/Spheres of Responsibility: Multinational Corporations and Human Rights, 2009, at 456.

The onset of globalisation also meant the emergence of new business opportunities, which, through the imposition of sanctions, were then denied to business.<sup>46</sup> Shafir notes, for example, that as institutions of the colonial era were losing their value and their political defenders began abandoning them and the world economy and its institutions - the World Bank (WB), International Monetary Fund (IMF), and the World Economic Forum (WEE)- demanded greater openness to the world, new opportunities opened up for the business communities in both societies.<sup>47</sup> The sanctions levelled against South Africa meant that for those businesses that remained in South Africa, global markets were largely off limits. Lost economic opportunities caused by sanctions helped to galvanise businesses to oppose the apartheid regime.

Along with the impacts of these regulatory initiatives, it should also be noted that other factors contributed to business adopting a more engaged role in the early peacebuilding efforts. As just one example, apartheid laws and policies were increasingly viewed by businesses as detrimental to their interests. Whereas businesses wanted a stable workforce so they could hold on to scarce skilled workers, the apartheid system had led to increasing violence and protesting workers. In this sense, it is arguably the case that the susceptibility of businesses to change and to regulatory pressure had shifted over time.

#### 4.3.4.2. *Indirect Impacts of In-conflict Initiatives*

Sanctions, divestment campaigns, and the Sullivan Principles were also instrumental in directing change in other ways. In focusing on the ways in which businesses helped to sustain and benefit from the regime, the public consciousness regarding the inequalities of apartheid was heightened. This aided broader campaigns focused on ending the system of apartheid.

Similarly, while not the sole driving force, in raising awareness in this way, these initiatives arguably helped to contribute to the importance attached to inequality in the post-conflict era. One such example is the constitutionalisation of socioeconomic rights in the 1996 South African constitution, which attempted to respond, in part, to the failures of the South African Government to respect, protect and realise rights of

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<sup>46</sup> Marais and Davies, *supra* note 21, at 5.

<sup>47</sup> Shafir, *supra* note 25, at 108.



black South Africans during the apartheid era.<sup>48</sup> Another is the importance attached to the realisation of equality in the post-conflict era. As will be discussed below, partly driven by these in-conflict initiatives, the South African Constitution focuses heavily on safeguarding equality. From this constitutional basis, one of the most important regulatory moments emerged in the form of B-BBEE.

#### 4.3.5. Discussion

By drawing on the role of businesses during conflict, a number of initiatives attempted to persuade and incentivise businesses to challenge the apartheid regime. These initiatives used methods that included offering economic opportunities through procurement and threatening economic sanctions when businesses failed to comply with the conflict transformative code that was the Sullivan Principles. In other cases, in holding businesses accountable for wrongdoing, companies were driven to play more proactive roles in challenging the apartheid regime. As will be developed in due course, these approaches are somewhat different to the example of B-BBEE, which directly attempts to engage businesses in contributing to a positive peace. Nevertheless, these examples do show the potential for using accountability-based forms of regulation, and economic incentives, as means to galvanise more positive interventions on the part of business.

Thus, driven by a combination of the pressures exerted via different regulatory initiatives, coupled with economic costs of doing business in apartheid South Africa more generally, businesses subsequently became key players in ending the apartheid regime. Moreover, by drawing attention to the broader levels of inequality in South Africa, these initiatives at least contributed to the importance attached to equality in South Africa's Constitution. The combination of this constitutional framework, coupled with the in-conflict regulatory initiatives that drew attention to the relationship between business and the white minority government, were significant catalysts for emergence of the B-BBEE framework.

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<sup>48</sup> See C. Heyns and D. Brand, 'Introduction to socio-economic rights in the South African Constitution', *Law Democracy and Development*, vol. 2, no. 2, 1998.

The discussion below now turns attention to B-BBEE, which is a prime example of state-developed initiative that directly attempts to engage businesses in peacebuilding efforts.

#### **4.4. Broad-Based Black Economic Empowerment**

The B-BBEE framework is the primary driver of business involvement in peacebuilding efforts in South Africa. The discussion below examines the origins of the framework before exploring the methods used to engage businesses in the peacebuilding effort. I conclude by outlining some different perspectives on the impacts of B-BBEE.

##### **4.4.1. Origins**

Black Economic Empowerment (BEE) preceded the B-BBEE framework. BEE emerged as part of the African National Congress (ANC)-led government's commitment to addressing the past. The preamble to the Constitution acknowledges that the South African Constitution must, among other things, 'lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law.'<sup>49</sup> Section 9 explicitly allows the government to take affirmative legislative and other measures to promote the achievement of equality by advancing the interests of individuals or groups disadvantaged by unfair discrimination.<sup>50</sup> This constitutional mandate was the primary driver of the early BBE policy, which was primarily focused on rebalancing the control of capital in South Africa. That is, the primary objective of BEE was to encourage and facilitate the transferring of company ownership to black South Africans.

This initial approach was, however, criticised on numerous levels. For one, some assessed that BEE was underpinned by, and fuelled, corruption.<sup>51</sup> BEE policies

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<sup>49</sup> Constitution of the Republic of South Africa, 1996, Preamble.

See also, P.N. Langa, 'Equality Provisions of The South African Constitution', *Southern Methodist University*, vol. 54, no. 4, 2001.

<sup>50</sup> M. McGregor, 'Affirmative action and non-discrimination: South African law evaluated against international law', *The Comparative and International Law Journal of Southern Africa*, vol.XXXIX, no. 3, 2006.

<sup>51</sup> A. Kasser, "Diggin' Deep Into Gold Fields: South Africa's Unrealized Black Economic Empowerment in the Shadows of Executive Discretion', *Cornell International Law Journal*, vol. 84, no. 3, Article 5, 2017, at 668-670.

were perceived as growing out of the practice of large businesses hiring well-placed members of the ANC to secure good standing with the new government and to reposition themselves in the post-apartheid society.<sup>52</sup> To critics, both black and white, many of the early purchasers appeared to have an inside-track, such as former secretary of the ANC's Youth League, Nthata Motlana, who was given exclusive opportunity by Sanlam, one of South Africa's biggest companies, to buy 10% of its Metropolitan Life subsidiary.<sup>53</sup> As Southhall notes: 'Given the centrality of political leverage to the promotion of BEE and the structure of the South African economy, black capitalism and black capitalists are as likely to tend towards 'cronyism' and 'compradorism' as 'Weberianism' and 'patriotism'.<sup>54</sup>

One of the implications of this approach was that only a few benefitted from BEE, undermining the objective of helping to advance the constitutional mandate of achieving equality in the economic sphere.<sup>55</sup> Thus, on 29 May 1998, Thabo Mbeki opened the National Assembly debate on 'Reconciliation and Nation Building' with what became known in South Africa as his 'Two Nations' speech.<sup>56</sup> In his address, Mbeki argued that national unity and reconciliation between black and white South Africans were impossible dreams if socio-economic disparities, which prevented black South Africans from exercising their citizenship rights to the same extent as white South Africans, were not rapidly overcome.<sup>57</sup> A B-BBEE Commission was subsequently established to identify barriers to black participation and to propose a viable B-BBEE strategy. It recommended national legislation to facilitate economic empowerment, which resulted in the B-BBEE Act, 2003.<sup>58</sup>

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<sup>52</sup> A. Bernstein et al., *South Africa and the Pursuit of Inclusive Growth' Democracy Works Country Report 20*, 2014, (Joint Publication of Centre for Development and Enterprise and Legatum Institute), at 6.

<sup>53</sup> A. Fauconnier and B. Mathur-Helm, 'Black economic empowerment in the South African mining industry: A case study of Exxaro Limited', *South African journal of Business Management*, vol. 39, no. 4, 2008, at 6.

<sup>54</sup> R. Southall, 'Ten Propositions about Black Economic Empowerment in South Africa', *Review of African Political Economy*, vol. 34, no. 111, 2007, at 80.

<sup>55</sup> Mueller-Hirth, *supra* note 14 at 57.

<sup>56</sup> T.M. Mbeki, 'Statement of Deputy President Thabo Mbeki at the Opening of the Debate in the National Assembly, on "Reconciliation and Nation Building", National Assembly Cape Town, 29 May 1998', South African History Online, <http://www.sahistory.org.za/> [last accessed 24 June 2017].

<sup>57</sup> S. Ponte, S. Roberts and L. van Sittert, 'Black Economic Empowerment' (BEE), *Business and the State in South Africa*, *Development and Change*, vol. 38, no. 5, 2007, at 934.

<sup>58</sup> Broad-Based Black Economic Empowerment Act, 2003, [No. 53 of 2003].

#### 4.4.2. Objectives of B-BBEE

The inclusion of 'broad-based' in the B-BBEE Act was a direct response to the limitations of BEE. As per the Act, 'broad-based black economic empowerment means the economic empowerment of all black people including women, workers, youth, people with disabilities and people living in rural areas through diverse but integrated socio-economic strategies [...]'.<sup>59</sup> Codes of Good Practice were also developed and published by the Department of Trade and Industry (DTI) in 2007, setting out seven elements of a B-BBEE framework.<sup>60</sup> These elements were namely, ownership, management and control, employment equity, skills development, preferential procurement, enterprise development, and socio-economic development.<sup>61</sup> The intention behind these Codes was to 'encourage all entities, both public and private, through the issuing of licenses, concessions, sale of assets and preferential procurement to implement proper B-BBEE initiatives.'<sup>62</sup>

##### 4.4.2.1. *Employment Equity*

Employment equity includes the promotion of non-racial, gender-sensitive workplaces as well as a respectable workplace that provides reasonable work conditions, respect to the sustainable development of the environment and cultural diversity.<sup>63</sup> The inclusion of employment equity as an objective is a direct response to the exclusion of blacks during the apartheid era. In particular, under apartheid, few if any blacks enjoyed positions in management. To address this marginalisation, the employment equity objective attempts to address this deficit by encouraging businesses to promote black South Africans.

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<sup>59</sup> *Ibid.*, Section 1: Definitions.

<sup>60</sup> Government of South Africa Department of Trade and Industry, Codes of Good Practice On Black Economic Empowerment, Government Gazette, 9 February 2007.

See D.N. Phakama, 'The impact and related costs of implementing changes in the Broad-Based Black Economic Empowerment (B-BBEE) codes of good practice on companies listed on the Johannesburg Stock Exchange (JSE)', Masters Thesis, The University of the Witwatersrand, 2016, at ii.

<sup>61</sup> G.M. Mersham and C. Skinner, 'South Africa's bold and unique experiment in CSR practice', *Society and Business Review*, vol. 11, no. 2, 2016, at 119.

<sup>62</sup> Department Of Trade And Industry, Executive Summary The 2nd Phase Of Codes Of Good Practice On Broad-Based Black Economic Empowerment, at 1.

<sup>63</sup> A. Mathura, 'The impact of broad-based black economic empowerment on the financial performance of companies listed on the JSE', Master's research project, Gordon Institute of Business Science, University of Pretoria, 2009, at 3.

#### 4.4.2.2. *Skills Development*

While employment equity is salient, the broader backdrop of marginalisation creates an additional set of barriers. In particular and as suggested in chapter 2, a further impact of exclusion is that those marginalised in the past often lack the requisite skills to avail of employment opportunities that can arise post-conflict. The skills development component of B-BBEE, therefore, focuses on helping to increase the skill set of those previously marginalised to help reduce barriers to employment.

#### 4.4.2.3. *Enterprise Development*

While ownership of a company is one thing, it is another to empower previously disadvantaged people to found their own companies. Part of the importance of doing so stems from the fact that transferring company ownership is limited in its reach. To this end, enterprise development focuses on promoting entrepreneurship. Regarding how and in what ways enterprise development can be achieved, some possibilities can be identified.

Firstly, investments can be made in black-owned and black-empowered companies or, joint ventures can be made with these black-owned and -empowered companies. Joint ventures may constitute the outsourcing of projects by the established company to the black company or both companies can contract for the same projects resulting in a spillover of skills.<sup>64</sup>

Within these categories, there are different types of contribution that other businesses might make. For instance, support such as preferential credit terms, preferential pricing structures, mentorship and business skills training can be given by large companies to emerging black-owned businesses are some such examples.<sup>65</sup> According to the South African Enterprises Agency Forum, other examples of enterprise development initiatives can be grants and loans, investment in beneficiary entities, guarantees/security, and providing seed capital.<sup>66</sup> They can also include access to capital through the provision of collateral/relaxed security

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<sup>64</sup> E.P.J. Kleynhans and M.C. Kruger, 'Effect of Black Economic Empowerment on profit and competitiveness of firms in South Africa', *Acta Commercii*, vol. 14, no. 1, 2014 [online journal].

<sup>65</sup> I. Verway, 'Enterprise development unpacked: A tool for prosperity', Development Planning Division Working Paper Series No. 18, 2011, at 5.

<sup>66</sup> *Ibid.*

requirements, early and/or timely payments for goods supplied, and extended credit terms for procurement amounts owed by the beneficiary entity.<sup>67</sup>

Driving the inclusion of the enterprise development component of B-BBEE is encouraging entrepreneurship and economic empowerment amongst the black community.

#### 4.4.2.4. *Favourable Procurement*

A follow-on or variation of enterprise development is that of favourable procurement. While procurement is often thought of in terms of government participation in the market, and through this participation, influencing the social responsibility of business actors, it was also noted that businesses themselves can incentivise businesses throughout a supply chain. Favourable procurement seeks to increase the extent to which businesses procure materials and services from black-owned businesses.

#### 4.4.2.5. *Social and Community Development and Investment*

Finally, in the context of South Africa, the importance attached to socioeconomic development is a direct response to the systematic marginalisation of black South Africans.<sup>68</sup> The Social and Community Development objective of B-BBEE attempts to engage businesses in helping to deliver social goods to those previously denied access. While the primary responsibilities of guaranteeing rights of a socioeconomic nature lie with the state, the B-BBEE framework identifies the possible roles that businesses might also play in this regard.

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<sup>67</sup> *Ibid.*

<sup>68</sup> See generally on linkages between the denial of rights and conflict See, for instance, S. Molloy, 'Justice, Rights and Equality: In Search of the Common Good in an Era of Transition', British Academy for the Humanities and Social Sciences, Working Paper, 2017; M. Parlevliet, 'Rethinking Conflict Transformation from a Human Rights Perspective, Berghof research Centre, 2009; G.E. Frerks, 'Human Rights Violations and Contemporary Violent Conflict: an Inquiry into Causes and Remedies', in I. Boerefijn (ed.) *Human Rights and Conflict: Essays in Honour of Bas de Gaay Fortman* Intersentia 2012.

#### 4.4.3. B-BBEE and the allure of incentives

How then does the B-BBEE attempt to engage businesses to contribute to the realisation of these objectives? Although promulgated, B-BBEE is not a command and control-based regulatory approach.<sup>69</sup> As Chahoud et al. assess:

Despite the wide-ranging legal foundations of B-BBEE, [businesses] not engaged with the South African government in procurement relationships and not acting as suppliers to companies tendering for government contracts are not required by law to contribute to B-BBEE. They fall into the realm of 'soft law', which has no mandatory power.<sup>70</sup>

The B-BBEE framework relies on a combination of economic conditionalities and persuasion. Under the B-BBEE Act, businesses are assessed against how they are performing in relation to the aforementioned criteria. Dependent upon how many points an entity scores for each element, an overall score is allocated. B-BBEE Certificates are then issued by Verification Agencies so long as they are approved to do so by South Africa National Accreditation System, or Independent Regulatory Board for Auditors. The Certificate can only be issued once a full verification has been performed and the documentation presented by a company has been verified and the score translated into a B-BBEE status.

For the most part, economic conditionalities emerge in the form of government-business interactions, while persuasive approaches are linked to business-business relationships. In regards to the former, the B-BBEE Act binds the public sector (i.e. Governmental departments, public entities or State-owned enterprises and organs of State),<sup>71</sup> with the effect that gaining government contracts are linked to how businesses are adhering to the B-BBEE requirements. Businesses that are not B-

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<sup>69</sup> C.P. Abrahams, 'Lessons from the South African Experience', in S. Michalowski (ed.) *Corporate Accountability in the Context of Transitional Justice*, Oxon; New York, Routledge, 2013, at 160.

<sup>70</sup> T. Chahoud et al., 'Corporate Social Responsibility (CSR) and Black Economic Empowerment (BEE) in South Africa: A case study of German Transnational Corporations', Deutsches Institut für Entwicklungspolitik gGmbH Report, Bonn, 2011, at 37.

<sup>71</sup> This includes national or provincial departments, municipalities, Parliament, provincial legislatures and public entities. See I.M. Esser and A. Dekker, 'The Dynamics of Corporate Governance in South Africa: Broad-Based Black Economic Empowerment and the Enhancement of Good Corporate Governance Principles', *Journal of International Commercial Law and Technology*, vol. 3, no. 3, 2008, at 163.

BBEE compliant risk missing out on economic opportunities offered by the state. As Esser and Dekker stress:

If a company falls under the scope of application of the Act and does not properly comply with the prescribed black economic empowerment scorecard the company will receive a poor B-BBEE rating which will negatively affect its ability to do business in South Africa. This will directly impact on the interests of the shareholders.<sup>72</sup>

Thus, through procurement, businesses are incentivised to comply by the allure of economic opportunities in the form of government contracts. This is, however, only one aspect of the B-BBEE framework. B-BBEE also uses economic persuasion in order to help induce businesses to act. The codes as adopted in 2007 apply to the following entities in South Africa:

[...] Any public entity (defined under schedule 3 of the Public Finance Management Act) that undertakes any business with any organ of state, public entity or any other enterprise  
Any enterprise that undertakes any business with any organ of state or public entity  
Any other enterprise that undertakes any business (directly or indirectly) which is subject to measurement as specified above and which is seeking to establish its own level of B-BBEE compliance.<sup>73</sup>

Therefore, according to Kruger:

For all practical purposes, the codes in South Africa thus apply to all government departments, NGOs (nongovernmental organisations), all public and private companies (both those listed on the JSE and those that are AltX listed), close corporations, Article 21 (non-profit) companies, incorporated companies, external companies, sole proprietors and partnerships.<sup>74</sup>

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<sup>72</sup> *Ibid.*, at 166.

<sup>73</sup> See Government Notice 112 of 2007 by the Department of Trade and Industry, entitled the Broad-Based Black Economic Empowerment Act 53 of 2003: Codes of Good Practice on Black Economic Empowerment.

<sup>74</sup> L.P. Krüger, 'The impact of black economic empowerment (BEE) on South African businesses: Focusing on ten dimensions of business performance', *Southern African Business Review*, vol. 15, no. 3, 2011, 209-210.



The B-BBEE framework creates a market for B-BBEE compliance. In essence, because larger companies gain points by doing business with other B-BBEE compliant firms, smaller companies are incentivised to comply with the codes as well. That is, because larger businesses increase their score when they commercially interact with or help empower smaller companies, it is in the interests of smaller companies to engage in peacebuilding. As Esser and Dekker note:

The Act is structured in such a manner as to ensure that B-BBEE will have a “knock-on” effect throughout the business supply chain. Ultimately businesses will in itself become drivers of B-BBEE in the businesses of their suppliers and other stakeholders.<sup>75</sup>

Juggernuth et al. continue that:

[w]ithout it, businesses can expect to experience a steady drop in turnover that will, ultimately have a detrimental effect on the national economy. B-BBEE is not simply a moral initiative to redress the wrongs of the past. It is a pragmatic growth strategy that aims to realise the country's full economic potential while helping to bring the black majority into the economy.<sup>76</sup>

In other words, businesses can influence the contributions that other companies make to peacebuilding. By requiring that the businesses in a supply chain be empowered as a prerequisite for entering into commercial relations, private procurement arguably operates as a form of regulation, incentivising other businesses to contribute to peacebuilding.

#### 4.4.4. Impacts of B-BBEE

Much has been written about the B-BBEE framework and its impacts. Scholars such as Hamann, Khagram and Rohan, for instance, have noted with concern the apparent lack of progress B-BBEE has made in rectifying the legacies of apartheid.<sup>77</sup> Writing in 2008, they assessed that ‘ten years later many of the

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<sup>75</sup> Esser and Dekker, *supra* note 71, at 162.

<sup>76</sup> Juggernath, Rampersad and Reddy, *supra* note 4, at 8224-8225.

<sup>77</sup> R. Hamann, S. Khagram and S. Rohan, ‘South Africa’s charter approach to postapartheid economic transformation: Collaborative governance or hardball bargaining?’, *Journal of South African Studies*, vol. 34, no. 1, 2008.

challenges remain or have become even more acute in terms of poverty, unemployment, housing and basic services, inequality, HIV/AIDS.<sup>78</sup> Kovacevic also observes that ‘the program has achieved little success in eradicating poverty, increasing employment or fostering economic growth.’<sup>79</sup> Many analysts and journalists continue to claim that B-BBEE benefits only the elite.<sup>80</sup> Moreover, more recent discussions have focused on the issue of fronting, which refers to a wrongful and an intentional act in terms of which a company puts a black person in a position of authority, within the company, in order for the company to eventually obtain a better overall BEE rating.<sup>81</sup>

For others, B-BBEE has been instrumental in bringing businesses into the peacebuilding fold.<sup>82</sup> Because of the social and community objective, for instance, businesses have helped to build schools and hospitals and funded programmes focused on battling HIV. Through development trust funds, businesses have engaged in women’s economic empowerment in ways that extend beyond developing employee skills, especially programmes aimed at developing women’s access to microfinance or basic skill sets and education. These contributions are often attributed to B-BBEE.<sup>83</sup>

Some also acknowledge the limitations of B-BBEE but draw attention to its adaptability and improvement over time. For instance, in reference to the initial limitations of B-BBEE, some have assessed that ‘government capacity for enforcement was seriously limited, which reduced the effectiveness of legislation as a driver for CSR.’<sup>84</sup> However, the same authors proceed to note that ‘[o]ver the past decade, the South African government has made significant progress in strengthening the enforcement of the human rights and CSR aspects of its legislation.’<sup>85</sup> Kleynhans and Kruger also assess that over the year’s short-comings

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<sup>78</sup> *Ibid.*, at 25.

<sup>79</sup> N. Kovacevic, ‘Righting wrongs: Affirmative action in South Africa’, *Harvard International Review*, vol. 29, no. 1, 2007.

<sup>80</sup> Southall, *supra* note 54, at 80.

<sup>81</sup> Government of South Africa, Department of Trade and Enterprise, Amended Broad-Based Black Economic Empowerment (B-BBEE) Act Codes of Good Practice, Government Gazette, 4 August 2017

<sup>82</sup> R. Rampersad and C. Skinner, ‘Examining the Practice of Corporate Social Responsibility (CSR) in Sub-Saharan Africa’, *Corporate Ownership & Control*, vol. 12, no. 1, 2014.

<sup>83</sup> See L. Patel and L. Graham, ‘How broad-based is broad-based black economic empowerment?’, *Development Southern Africa*, vol. 29, no. 2, 2012.

<sup>84</sup> B. Arya and G. Zhang, ‘Institutional Reforms and Investor Reactions to CSR Announcements: Evidence from an Emerging Economy’, *Journal of Management Studies*, vol. 46, no. 7, 2009, at 1093.

<sup>85</sup> *Ibid.*

and some unintended consequences have been highlighted, and implementation challenges identified.<sup>86</sup>

Moreover, some of these improvements have been made relatively recently. For instance, until May 2015, government policy was based on the 'voluntarist' principle, providing a methodology for measuring the B-BBEE rating. Under the new approach, by contrast, a full array of policies, procedures, legal requirements, codes of good practice and scorecards including punitive measures, such as hefty fines and even the possibility of imprisonment for non-compliance or partial compliance, accompany the legislation.<sup>87</sup> Similarly, to deal with fronting, the DTI amended the codes to deal with fraudulent empowerment credentials such as fronting<sup>88</sup> and introduced B-BBEE monitoring and compliance through the B-BBEE Commission, as well more onerous requirements to drive a more concerted transformation effort.<sup>89</sup>

In other ways, scholars have argued that B-BBEE has been successful in achieving a delicate balance between enticing businesses into a post-conflict environment, while at the same time using businesses as agents through which to address the past. When it came to power, the ANC-led government inherited a failing economy, driven in part by sanctions levelled against the apartheid state and the divestment campaigns discussed above. Faced with the realities and scale of the transformation process, the ANC's ideology shifted notably throughout the transition process. The most illustrative example of this was the transition from the Reconstruction and Development Programme of (RDP) 1994 to the Growth, Employment and Redistribution (GEAR) of 1996.

RDP was part of the election platform of the ANC in the 1994 elections and was chosen as the primary socio-economic programme. The aim of this socio-economic policy was to establish an equal society through reconstruction and development as well as strengthening democracy for all South Africans. Visser notes, however, that

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<sup>86</sup> Kleynhans and Kruger, *supra* note 64, at 9.

<sup>87</sup> See Mersham and Skinner, *supra* note 61.

<sup>88</sup> E. Plaatjies, 'Funding structure efficiency and empowerment success: A Broad-Based Economic Empowerment Study', Masters Thesis (M.M. (Finance & Investment))--University of the Witwatersrand, Faculty of Commerce, Law and Management, Graduate School of Business Administration, 2014

<sup>89</sup> Krüger, *supra* note 74, at 212.

from the beginning the government could not implement the RDP.<sup>90</sup> Most notably, it became clear that the country's economic and fiscal difficulties would impede the realisation of the RDP's goals.<sup>91</sup> In response, the government embraced a conservative macro-economic strategy in the form of GEAR.<sup>92</sup> In line with neoliberal logic prevalent at the time and reflective of perceived necessity of growing the economy, 'growth through redistribution' was to be replaced by 'redistribution through growth'.<sup>93</sup>

By incentivising rather than requiring businesses to contribute to the peacebuilding effort, the B-BBEE framework is viewed as an effort that has achieved, to an extent, the difficult balance between enticing businesses to invest, on the one hand, while at the same time incentivising companies to play more proactive peacebuilding roles, on the other. Indeed, as Isaacs and Raakjaer note, 'South Africa's B-BBEE policy combines neoliberal market-oriented economic policies with redistributive social policies and notions of social inclusion and social and economic justice.'<sup>94</sup> For some then, the success of B-BBEE derives not only from the extent to which it has engaged businesses in helping to contribute to peacebuilding but that it has done so while also promoting and garnering investment.

#### 4.4.5. Discussion

B-BBEE is an important framework when considering how states might encourage businesses to contribute to peacebuilding efforts. Firstly, it is important to reiterate that the existence of the framework has been driven, in part, by the efforts of different in-conflict initiatives and forms of influence, which, in different ways, underlined the importance of bringing businesses into the peacebuilding effort. Through B-BBEE, governments in South Africa have attempted to engage businesses in the peacebuilding efforts through both persuasive and economic-conditionality-based approaches. Moreover, by creating a market for B-BBEE compliance, the example also illustrates ingenuity and creativity, allowing for the

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<sup>90</sup> W. Visser, "From RDP To GEAR To Post-Polokwane": The ANC and the Provision of Social Security for Post-Apartheid South Africa', *Social Work/Maatskaplike Werk*, vol. 45, no. 3, 2009, at 230.

<sup>91</sup> *Ibid.*, at 231.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*, at 232.

<sup>94</sup> M. Isaacs, M. Hara and J. Raakjaer, 'Has reforming South Africa's fisheries contributed to wealth redistribution and poverty alleviation?', *Ocean & Coastal Management*, vol. 50, no. 5, 2007, at 303. See also Patel and Graham, *supra* note 83, at 193.

emergence of businesses to act as regulators for peacebuilding through private procurement.

The B-BBEE framework, therefore, operates on a system of economic incentives. It should be noted that whether or not to define this particular framework as 'regulation' could be contested. For instance, some might suggest that the B-BBEE approach is different from those initiatives that define standards of conduct for businesses to achieve. While the latter approach focuses on shaping business conduct, often to prevent businesses from causing harm, the latter is more concerned with engaging businesses in development-oriented objectives.

At the same time, we might contest these views by arguing that such responses only emerge when one conceives regulation as focused on specific objectives- limiting harms caused or holding businesses accountable. If, on the other hand, we accept that regulation has pluralised, both in respect of the actors involved and the methods used, we might also offer the view that objectives of regulation can also expand. In other words, in much the same way that some argue that public procurement is a means to regulate businesses to do no harm, we might also argue that the same forms of regulation are at play under the B-BBEE, albeit for the purposes of achieving different ends.

Moreover, the dichotomy between B-BBEE and the example of standard setting approaches is less 'clear-cut' than it first appears. For instance, while B-BBEE is more concerned with engaging businesses in proactive ways, companies are, in fact, assessed against a defined criteria, as demonstrated by the codes of good practice. That is to say, in order to gain access to government opportunities, businesses are assessed against a set of standards, that are clearly defined and which businesses meet or they do not.

While the intention of examining B-BBEE is to understand how different actors are able to influence businesses, the example raises important conceptual questions regarding to how define regulation. In line with the approach of regulatory pluralism, we might observe that regulation is used for more expansive purposes than limiting harms and offer the narrative that this occurs because of the particular circumstances of the context in question. These circumstances, reflecting the history of marginalisation in South Africa, revolve around needing to address past

inequalities in the context a peace process through more creative forms of regulation. I develop this discussion in due course.

Putting conceptual issues to one side, none of this is to say, of course, that B-BBEE is or should be viewed as a panacea, quite the opposite. Criticisms of B-BBEE have ranged from those that highlight the corruption associated with the framework to those who question its impact. Nevertheless, the achievements of B-BBEE highlight the importance of experimentation and evolution of the framework over time. Moreover, in adopting this particular approach, the government has also sought to achieve a delicate balance of both encouraging rather than deterring investment on one hand, while addressing the past inequalities of the past on the other.

#### **4.5. Co-existing Regulatory Moments**

B-BBEE is the central and driving framework for encouraging business contributions to peacebuilding in South Africa. It is not, however, the only initiative that attempts to engage businesses in these ways. A range of different initiatives also exist in South Africa that focus on shaping business conduct. An important part of the story of how different actors have sought to influence businesses to engage in peacebuilding in South Africa is the interaction of these different initiatives with B-BBEE. Drawing on some other significant moments, the discussion below explores how these interactions have occurred. I focus on those initiatives that reinforce B-BBEE, those that 'gap-fill' for B-BBEE, and those that at times conflict with B-BBEE. As will be taken up in chapter 6, these initiatives and interactions help support the need for and possibilities of coordinating regulatory efforts.

##### **4.5.1. The Interactions of different initiatives**

###### **4.5.1.1. Reinforcement through persuasion and incentives**

Reinforcement refers to those initiatives that contribute to the advancement of the objectives of B-BBEE promoting B-BBEE objectives. In some cases, reinforcement has occurred through legislative efforts. For instance, the Skills Development Act of 1998 encourages companies to help contribute to developing the skills of black South Africans.<sup>95</sup> The stated purpose of the act is to improve the employment

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<sup>95</sup> Skills Development Act, 1998 [No. 97 of 1998].

prospects of persons previously disadvantaged by unfair discrimination and to redress those disadvantages through training and education; and, to ensure the quality of education and training in and for the workplace.<sup>96</sup>

The Preferential Procurement Act of 2000<sup>97</sup> allows government entities conducting a tender process to evaluate tender submissions according to specific criteria. In evaluating a tender submission out of 100 points, 90 of those points have to be allocated to the price submitted by the tenderer. The 10 remaining points are allocated to the categories of preference referred to in the Constitution. The Preferential Procurement Act of 2000 stipulates that state tenders be granted to companies that are as B-BBEE compliant as possible.<sup>98</sup> This takes into account the B-BBEE status of suppliers, as well as whether or not materials are sourced locally. When tender bids are submitted, companies tendering need to submit a certificate calculated in accordance with a scorecard set under the Codes of Good Practice.<sup>99</sup> The certificate presents the bidding organisation's B-BBEE score, as well as their score out of 10 or 20 (depending on the contract value) based on the transformation criteria.<sup>100</sup>

The Mineral and Petroleum Resources Development Act (MPRDA), which was enacted in June 2002, represents a legislative commitment to achieving equitable access to, and the sustainable development of, South Africa's mineral and petroleum resources.<sup>101</sup> Amongst other things, the MPRDA obliges mining companies to convert their old rights under the Minerals Act 50 of 1991 to new rights under the MPRDA condition that they enact suitable B-BBEE deals.

As a final example, Section 72(4) of the Companies Act 2008 expresses that:

“The Minister, by regulation, may prescribe –

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<sup>96</sup> *Ibid.*

<sup>97</sup> Ponte, Roberts and van Sittert, *supra* note 57, at 941; B. Arya, B. Bassi, and R. Phiyega, 'Transformation charters in contemporary South Africa: The case of ABSA Group Limited', *Business and Society Review*, vol. 113, no. 2, 2008., at 232.

<sup>98</sup> The Preferential Procurement Act of 2000 [No. 5 of 2000].

Barclay, C., 'Preferential Procurement in the South African Context', WhosWhoLegal [web blog]. Aug 2012, <http://whoswholegal.com/news/features/article/29829/preferential-procurement-south-african-context> [last accessed 24 June 2016].

<sup>100</sup> *Ibid.*

<sup>101</sup> B. Siyobia, 'Corporate Social Responsibility in South Africa's Mining Industry: An Assessment', Policy Briefing 142, Governance of Africa's Resources Programme, 2014, at 3.

a category of companies that must each have a social and ethics committee [...]

The Regulations referred to above were implemented in 2011 under regulation 43.<sup>102</sup> The purpose of Social and Ethics Committees is to monitor a company's activities having regard to relevant legislation or codes of conduct and to ensure that the company behaves like a responsible corporate citizen.<sup>103</sup> The committee monitors the company's activities with regard to the following five areas of social responsibility: 'social and economic development, good corporate citizenship, the environment, health and public safety, consumer relationships and labour and employment.'<sup>104</sup> Included within the Committees roles is monitoring a company's adherence to B-BBEE. Thus, by requiring that businesses monitor and report on B-BBEE compliance, businesses are encouraged to adhere to the objectives of B-BBEE.<sup>105</sup>

In different ways, these initiatives reinforce B-BBEE through different regulatory approaches. The Skills Development Act (1998), for example, seeks to support the skills development act by linking procurement opportunities to compliance with the legislation. The Preferential Procurement Act (2000) operates on a similar basis. The MPRDA 2002 incentivises businesses to be B-BBEE compliant, by linking compliance with the granting of mining licences. Finally, while it is currently unclear whether a failure to adhere to the requirements of establishing social and ethics committees under the Companies Act leads to sanctions being imposed,<sup>106</sup> an argument can be made that failing to adopt committees and, subsequently, complying with B-BBEE can lead to market losses for businesses.

Along with demonstrating that different forms of influence can be used to engage businesses in peacebuilding efforts, these interactions also suggest that various

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<sup>102</sup> Companies Act, 2008 [No. 71 of 2008], s. 72(4)

See, for discussion, N.L. Joubert, 'Reigniting the corporate conscience: reflections on some aspects of social and ethics committees of companies listed on the Johannesburg Stock Exchange', in C. Visser, and J.P. Pretorius, J.P. (ed.) *Essays in Honour of Frans Malan*, LexisNexis. 2014, at 190.

<sup>103</sup> Deloitte, The Companies Act The Social and Ethics Committee and the management of the Ethics Performance of the Company, [https://www2.deloitte.com/content/dam/Deloitte/za/Documents/governance-risk-compliance/ZA\\_SocialAndEthicsCommitteeAndTheManagementOfTheEthicsPerformance\\_24032014.pdf](https://www2.deloitte.com/content/dam/Deloitte/za/Documents/governance-risk-compliance/ZA_SocialAndEthicsCommitteeAndTheManagementOfTheEthicsPerformance_24032014.pdf), at 1 [last accessed 23 June 2017].

<sup>104</sup> See regulation 43(5).

<sup>105</sup> N. Pandor, 'A guide to Implementing Social & Ethics Committee Requirements', National Business Initiative and Global Compact Network South Africa, 2015, at 22.

<sup>106</sup> KPMG., 'The oversight role of a Social and Ethics Committee', KPMG, 12 May 2013, at 2.



initiatives can help to support each other in pursuance of the objective of engaging businesses in peacebuilding efforts. As I will suggest, thinking about how to integrate and align different efforts in ways similar to this could prove useful when considering how to engage businesses in peacebuilding efforts in other contexts.

#### 4.5.1.2. *Gap Filling Initiatives*

Different efforts can also be seen to gap-fill for B-BBEE. The history of businesses in South Africa underlines the fact that firms can act in detrimental ways. These adverse impacts can occur even when businesses are attempting to contribute to peacebuilding. B-BBEE, as focused on addressing the marginalisation of black South Africans, seeks, for the most part, to engage businesses to go beyond doing no harm. In doing so, however, it mostly overlooks the importance of ensuring that businesses do no harm. To this end, some initiatives gap fill for B-BBEE, by concentrating on curtailing harms that might arise at the behest of businesses.

For instance, labour laws have been at the forefront of the post-apartheid government's determination to remove unfair discrimination. The Promotion of Equality and Prevention of Unfair Discrimination Act (2000) prohibits discrimination in both civil society and in employment practices.<sup>107</sup> Additionally, Schedule 7 of the Labour Relations Act considers unfair discrimination either directly or indirectly as an unfair labour practice.<sup>108</sup> Grounds include race, gender, ethnic origin, sexual orientation, religion, disability, conscience, belief, language and culture. Chapter 2 of the Employment Equity Act prohibits unfair discrimination against designated employees.<sup>109</sup> These include black people, women and employees with disabilities. Regarding gap-filling B-BBEE, Horowitz sums up the argument:

Whereas employment equity legislation focuses mainly on employment opportunity redress in workplace practices, the latter B-BBEE Act was enacted to provide to Black people economic opportunities to “manage, own

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<sup>107</sup> The Promotion of Equality and Prevention of Unfair Discrimination Act 2000 [No. 4 of 2000].

<sup>108</sup> Labour Relations Act, 1996 [No. 60 of 1995].

<sup>109</sup> Employment Equity Act, 1998 [No. 55 of 1998].

and increase financial and managerial control in the South African economy, as well as attain significant decreases in income inequalities.”<sup>110</sup>

These initiatives complement B-BBEE by seeking to ensure that even businesses that attempt to advance the objectives of the framework nevertheless continue to ensure they are not discriminating against individuals when in employment.

A number of corporate governance initiatives also focus on preventing businesses from causing harm. For instance, in the immediate aftermath of the 1994 elections, The Institute of Directors in Southern Africa established the King Committee.<sup>111</sup> In the same year, the King Committee issued an influential and widely circulated report on corporate governance. Published by the DTI, King I set out the potential direction of corporate governance post-apartheid. The report urged a participative corporate governance system, articulating a need for companies to recognise that they no longer acted independently from the society and environment in which they operated.<sup>112</sup> According to Visser, the report was the first global corporate governance code to talk about ‘stakeholders’ and to stress the importance of business accountability beyond the interests of shareholders.<sup>113</sup>

This report was updated in 2002 by the King Report on Corporate Governance for South Africa (‘King II Report’). King II took the ‘inclusive approach’ developed by King I further, recommending the introduction of ‘triple bottom line’ reporting. It reiterated the stance taken in King I, stressing that companies must recognise that they did not act independently from the societies in which they operated.<sup>114</sup> King II also recommends that every company should report annually on their policies and practices on how the interests of stakeholders are met.<sup>115</sup> Implementing the ‘inclusive approach’ meant that companies should define their purpose, identify the

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<sup>110</sup> F.M. Horwitz and H. Jain, ‘An assessment of employment equity and Broad-Based Black Economic Empowerment developments in South Africa’, *Equality, Diversity and Inclusion: An International Journal*, vol. 30, no. 4, 2011, at 302.

<sup>111</sup> In July 1993 the Institute of Directors in South Africa asked retired Supreme Court of South Africa judge Mervyn E. King to chair a committee on corporate governance.

<sup>112</sup> R. Croucher and L. Miles, ‘Corporate governance and employees in South Africa’, *Journal of corporate law studies*, vol. 10, no. 2, 2010, at 374.

<sup>113</sup> W. Visser, ‘Corporate Social Responsibility in Developing Countries’ in A. Crane et al. (ed.) *The Oxford Handbook of Corporate Social Responsibility*, Oxford, Oxford University Press, 2009, at 491.

<sup>114</sup> R. Croucher and Miles, *supra* note 112, at 374, note 29.

<sup>115</sup> *Ibid.*

values by which they carry out their activities and communicate these to stakeholders.

This theme was endorsed in King III (February 2009) which stated that it 'seeks to emphasise the inclusive approach of governance.'<sup>116</sup> King III provides that shareholders do not have a predetermined place of precedence over other stakeholders.<sup>117</sup> Importantly, the best interests of the company should be interpreted within the parameters of the company as a sustainable enterprise and as a responsible corporate citizen. King III advocates a holistic approach to CSR that requires a company to view itself as a corporate citizen motivated by principles of development and sustainability; taking into account all of its stakeholders.<sup>118</sup> Both King II and III required that the fulfilment of companies' obligations to stakeholders must be measured, calculated, audited and reported in the same way as their financial performance.

Despite King III being a voluntary governance code, the Johannesburg Stock Exchange now requires, under regulation 8.63(a), that all-listed companies apply the King III principles.<sup>119</sup> It has accordingly become a *de facto* mandatory requirement for all JSE-listed companies, albeit on an 'apply or explain' basis.<sup>120</sup> The incorporation of King III into the Listing Requirements made the JSE the first exchange globally for mandating companies to move towards integrated reporting or explain why they are not doing so.<sup>121</sup> Because listed companies are expected to be in full compliance with the King Report on Corporate Governance, companies wishing to go public must adhere to the King Codes and are incentivised to do so.

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<sup>116</sup> *Ibid.*, at 374-375.

<sup>117</sup> *Ibid.*, at 375.

<sup>118</sup> *Ibid.*, at 375.

<sup>119</sup> JSE Limited Listings Requirements, 8.63(a), <https://www.jse.co.za/content/JSERulesPoliciesandRegulationItems/JSE%20Listings%20Requirements.pdf>, [last accessed 34 July 2017].

<sup>120</sup> C. du Preez, 'Legal Sanctions for Non-compliance with King III', *Lexis Nexis News* [web blog], 17 May 2016, <http://www.polity.org.za/article/legal-sanctions-for-non-compliance-with-king-iii-2016-05-17>, [last accessed 20 September 2017].

<sup>121</sup> Johannesburg Stock Exchange, 'Communication to Stakeholders', 10 April 2015 (last updated), [http://www.sseinitiative.org/wp-content/uploads/2015/04/JoHan\\_Comm\\_Stake\\_Eng.pdf](http://www.sseinitiative.org/wp-content/uploads/2015/04/JoHan_Comm_Stake_Eng.pdf), at 4 [last accessed 20 September 2017].

#### 4.5.1.3. *Regulatory Conflicts*

As a final example of regulatory initiatives interacting, it is necessary to consider briefly how and when tensions might arise between them. As mentioned in the introductory remarks, the South African TRC focused on the role of businesses during the apartheid era. The TRC was also progressive, however, in issuing recommendations. The TRC recommended, for instance, the imposition of a once-off wealth tax on South African business and industry; and the establishment of a business reconciliation fund to which businesses could contribute to funding small black entrepreneurs.<sup>122</sup> It also recommended reconsideration of the repayment by the new government of the apartheid regimes odious debt.<sup>123</sup> The TRC described its recommendations as based on 'at the very least, a moral obligation [of businesses] to assist in the reconstruction and development of post-apartheid South Africa,'<sup>124</sup> and found that banks in particular, 'played an instrumental role in prolonging apartheid from the time of the debt crisis in 1985 and onwards.'<sup>125</sup>

In 2002, the Khulamani Support Group, a South African victims' organisation, together with 93 of its members, filed a civil complaint under the Alien Tort Statute (ATS) in the Eastern District of New York against 23 multinational corporations and banks for having aided and abetted the apartheid regime. The argument advanced by the plaintiffs included the charge that, amongst others, Swiss and German banks had aided and abetted the former apartheid regime, particularly its security forces, in the commission of gross human rights violations, resulting in many people's injury and death.<sup>126</sup> Along with international banks, other industries, such as arms and ammunition, fuel and transportation, security and military forces, and military technology industries, had equally been complicit in apartheid. Relying on the legal theory of secondary liability for aiding and abetting the apartheid regime, the plaintiffs argued that:

[T]he participation of the defendants, companies in the key industries of oil, armaments, banking, transportation, technology, and mining, was instrumental in encouraging and furthering the abuses, Defendants' conduct

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<sup>122</sup> South Africa TRC Final Report, *supra* note 12, at 143.

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.*, at 143-144.

<sup>125</sup> *Ibid.*, at 146.

<sup>126</sup> Abrahams, *supra* note 69, at 163.

was so integrally connected to the abuses that apartheid would not have occurred in the same way without their participation.<sup>127</sup>

Following a ruling in favour of the defendants, the plaintiffs subsequently narrowed the range of defendants to four specific sectors- armaments, technology, transportation, and banking- that were identified as having been of particular importance for assisting the apartheid regime in its crimes, including apartheid itself; extrajudicial killing; torture; prolonged unlawful detention; and cruel, inhuman, and degrading treatment.<sup>128</sup> The case was subsequently settled out of court.

In both these examples, regulatory initiatives in the post-conflict era have sought to draw on business involvement with the regime.<sup>129</sup> An argument can be made that in doing so these initiatives have helped to persuade businesses to contribute to certain aspects of the B-BBEE framework. For instance, some have drawn attention to the high levels of corporate social investment (CSI) in South Africa. Arguing that CSI is a distinctively South African phenomenon, scholars have suggested that this is a result of the history of business and conflict in South Africa that has driven the level of CSI initiatives.<sup>130</sup> Figg contends, as an illustration, that CSI is used to divert attention from calls on business to redress the results of its historical contribution to the apartheid system.<sup>131</sup>

At the same time, we can also identify tensions between the B-BBEE framework and these accountability mechanisms. Abrahams notes, for example, that the South African government did not implement any of the TC's recommendations. This was because foreign and local private-sector investment was regarded as crucial to the peacebuilding effort, with the imposition of these recommendations regarded as potentially deterring business.<sup>132</sup> He continues that:

Instead of obligating corporations to provide reparations to apartheid victims, the South African government complimented businesses for their voluntary

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<sup>127</sup> Business and Human Rights Resource Centre, Apartheid reparations lawsuits (re So. Africa), <https://business-humanrights.org/en/apartheid-reparations-lawsuits-re-so-africa?page=14> [last accessed 23 July 2017]

<sup>128</sup> *Ibid.*

<sup>129</sup> Hamann et al, *supra* note 45 at 457.

<sup>130</sup> Mersham and Skinner, *supra* note 61, at 240-241

<sup>131</sup> D. Figg, 'Manufacturing amnesia: Corporate social responsibility in South Africa', *International Affairs*, vol. 81, no. 3, 2005, at 601.

<sup>132</sup> Abrahams, *supra* note 69, at 160-162.

contributions to the Business Trust Fund that was established in 1999 as a voluntary initiative by businesses with the purpose of creating jobs, building capacity, and reducing poverty.<sup>133</sup>

Driven in part by the recognition of the South African government that businesses were necessary for economic development, the ANC-led administration argued that these measures could be viewed as discouraging companies from investing. Thus, the South African government also opposed litigation in US courts.<sup>134</sup> In what became known as the Maduna Declaration, the government's opposition was set out in great detail; the main argument was that the litigation interfered with South Africa's sovereignty. Again, the Government was also keen to stress the importance attached to enticing businesses. For instance, paragraph 8.1 states that '[T]he government's policy is to promote reconciliation with and business investment by all firms, South African and foreign, and we regard these lawsuits as inconsistent with that goal.<sup>135</sup>

The Maduna Declaration further noted the following:

The Government's policies of reconstruction and development have largely depended on forging constructive business partnerships. Its 1996 Growth, Employment and Redistribution ("Gear") strategy further acknowledged the importance of the private sector that faster economic growth offers the only way out of poverty, inequality, and unemployment, that such growth is driven by both foreign and local private sector investment, and that government's principal role is to create an enabling environment for such investment. This market-friendly strategy regards business as the engine of economic growth.<sup>136</sup>

Thus, in this case, far from reinforcing each other, the tensions between the government-developed B-BBEE framework and the efforts of the TRC and ATS were in direct contrast. What this suggests is that when different initiatives are not

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<sup>133</sup> *Ibid.*, at 161.

<sup>134</sup> *Ibid.*, at 168.

<sup>135</sup> Ministry Of Justice And Constitutional Development Republic Of South Africa Declaration By Justice Minister Penuell Maduna On Apartheid Litigation In The United States 2003-07-11 Maduna Declaration, at 8.1.

<sup>136</sup> *Ibid.*

aligned, tensions can emerge that arguably undermine efforts to engage businesses in peacebuilding efforts.

#### **4.5.1.4. Discussion**

Given the plurality of actors seeking to influence corporate conduct in South Africa, the study above has sought to briefly draw attention to some of the ways that regulatory initiatives interact. In some cases, these interactions appear positive. By including aspects of the B-BBEE objectives as part of the regulatory objectives of others, efforts can help to reinforce efforts to engage businesses in peacebuilding efforts. In other cases, regulatory initiatives can be understood as gap filling. The importance of this interaction derives in part from the history of business and conflict in South Africa. While companies can make salient contributions to peacebuilding, it is important not to overlook that even well-meaning businesses can do harm. Here, different initiatives can, therefore, gap-fill for more initiatives focused on engaging businesses in more peacebuilding focused ways. Finally, given the plurality of regulatory initiatives that can exist, we must also recognise that tensions can arise.

The purpose and importance of this discussion will become clear in chapter 6. It will be sufficient to note for present purposes that while an essential objective of this thesis is to examine how different forms of influence might be used to engage businesses in contributing to peacebuilding efforts, it is also necessary to consider the ways that a unified framework might also help to support different approaches in post-conflict settings. These discussions tentatively outline both the benefits of doing so and limitations with not.

### **4.6. Findings**

This section focuses briefly on a number of important findings that emerge from the case study of South Africa. For present purposes, I outline these findings briefly before developing them further in chapter 6.

#### **4.6.1. Business Contributions to Peacebuilding**

In South Africa, businesses have contributed to peacebuilding in a range of ways. In line with the requirements of B-BBEE, these contributions have spanned from efforts that attempt empower marginalised blacks through employment to actively procuring

from black-owned companies. Businesses have also sought to contribute to skills development and to contribute to community and socioeconomic development. In other cases and while not technically post-conflict, businesses have been instrumental in contributing to the peacebuilding process and were critical in challenging the apartheid regime and framing some of the central issues of transition. That many of these contributions stem from what might be regarded as a regulatory framework helps to support the relationship between business contributions and regulation and to introduce the case study findings.

#### 4.6.2. Contested views on 'Regulation'

The case study raises a number of conceptual questions regarding what amounts to regulation and how and in what ways regulation can lead to business-based peacebuilding. In some cases, only a tenuous and consequential link exists. For instance, in the khulumani litigation before the US Courts, the approach to regulation is one in line with orthodox regulation. In this case, companies, stood accused of contributing to human rights violations, were brought before authorities to face potential sanctions. While formally, no sanctions were levelled against businesses, some suggest that businesses were inspired to contribute to peacebuilding and developmental efforts in order to 'manufacture amnesia.'<sup>137</sup> Here, it appears that regulation, as normally understood, had the indirect effect of pushing businesses to contribute to peacebuilding.

In other ways, there seems to be a direct link between regulation and business-based peacebuilding. For instance, legislation such as MPRDA (2002) or the Skills Development Act (1998), falls within the contours of orthodox regulation. In contrast to widely held views that regulation is about curtailing harms from being caused, in these examples, legislative efforts are more geared towards promoting more proactive interventions. The MPRDA, while legislation, also sought to inspire proactive contributions on the part of businesses by specifying that obtaining a licence would be subject to whether a business was empowered under the B-BBEE initiative.

In the case of the Sullivan Principles, on the face of it, this appears to be a straightforward case of settings standards and assessing compliance. As suggest in

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<sup>137</sup> Figg, *supra* note 131, at 601.



chapter 3, standards, whether developed by civil society actors or multilateral institutions, are a common way of defining corporate conduct and developing metrics to help identify whether businesses are complying with these standards. However, differing from the vast majority of corporate codes, the Sullivan principles asked businesses to go beyond avoiding causing harm. In this case, the corporate conduct that the principles sought to promote was for businesses to proactively challenge and go against the apartheid regime. In this way, the same methods often regarded as forms of regulation when concerned with limiting the harms that businesses might cause are also used in the case of South Africa to promote more proactive interventions.

The case study also highlights that there are, at least *prima facie*, very different approaches to shaping business conduct, complicating the discussion on what regulation is and is not. For instance, B-BBEE is an approach which has clear developmental objectives. It is not so much about setting specific standards and holding businesses accountable according to these standards, but rather encouraging businesses to participate in development and peacebuilding objectives. Such an approach is different from those initiatives that define standards and metrics, and which hold businesses accountable according to whether they comply with them.

However, as argued in chapter 3, others would suggest that procurement is itself a form of regulation, particularly when linked to, for instance, demands that businesses act in socially responsible ways. In the case of B-BBEE, a form of economic regulation, often used to promote such things as environmental responsibility or fair labour practices, is used to develop more proactive business contributions. Is this then regulation or something else? Moreover, in the case of B-BBEE, while a policy focused on promoting the social and economic development of the black community, businesses were nevertheless assessed according to how they performed in relation to criteria defined in the Codes of Good Practice. That is, corporate conduct was specified in the same manner that would normally be the case in corporate standards. Thus, while appearing to be something other than what we would usually understand regulation, the incentive-based initiative that is B-BBEE is underpinned by a set of standards against which businesses are assessed.

While the purpose of this chapter was to examine how different actors might influence businesses, indirectly, the case study raises a number of conceptual questions regarding what regulation is and what it is not.

#### 4.6.3. Different Forms of Influence

Putting to one side conceptual discussions over whether different initiatives amount to regulation, the case studies demonstrate a range of different ways in which to influence businesses to contribute to peacebuilding. In some cases, business contributions to peacebuilding emerged as consequences of accountability-based initiatives. As suggested, in the case of litigation before US Courts and to some extent the TC findings, businesses were not directly asked to contribute to peacebuilding, but opted to do so to, in the words of David Figg, to ‘manufacture amnesia.’<sup>138</sup> In this way, holding businesses to account for harms committed in the past inspired more proactive contributions in the future.

In other cases, businesses were persuaded to contribute to peacebuilding. For instance, adherence to the King Codes, which include some B-BBEE elements, is reliant on companies complying or explaining why they have not adhered to the criteria defined in the Codes of Practice. Such an approach focuses primarily on businesses reporting on the developments that they have made or reporting why that have not. The logic is that businesses will be persuaded to comply in order to improve their reputation. To this end, accountability-based mechanisms during the era of apartheid added to this persuasion.

Moreover, while businesses were both persuaded and incentivised to act, there was also a growing awareness that the apartheid regime was no longer in the economic self-interests of business. In this way, the use of sanctions not only helped to create a set of circumstances where businesses were being punished economically but, coupled with wider developments in the area of corporate citizenship, other initiatives such as the Sullivan Principles and divestment campaigns were able to draw on business perceptions that change needed to occur.

Businesses were also incentivised to contribute to peacebuilding objectives. In the case of the early in-conflict regulatory moments, a combination of factors helped to

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<sup>138</sup> *Ibid.*

ensure that business involvement. Firstly, such actors as institutional investors, shareholders, and US States made it in the economic self-interests of companies to challenge the apartheid regime. In some cases, the threat of divestment and shareholder resolutions were used to coerce businesses to challenge the apartheid regime or risk losing economic support, if they did not. In other cases, through the allure of government contracts, US States were able to create the reality that challenging the regime offered economic opportunities to companies. This demonstrates the potential of home states to require more proactive contributions. Similarly, in the case of the Sullivan Principles, pressure from shareholders to adopt a more proactive stance in challenging the apartheid regime illustrates the possibilities that shareholders can use their position as owners of a company to direct business activities in ways more proactive than avoiding harm.

The B-BBEE approach offered economic opportunities in the form of government contracts for businesses that were empowered. In adopting this approach, a delicate balance has been attempted: one that seeks to entice businesses to invest and do business in South Africa but also to engage businesses in peacebuilding. This also suggests that states have 'options' that extend beyond conventional command and control-based approaches.

Through the same process, South African Governments have also persuaded businesses to contribute to peacebuilding by creating a marketplace for businesses that are B-BBEE compliant. That is, this policy of incentivising proactive contributions through public procurement also led to the emergence of private procurement as a means of incentivising contributions to peacebuilding. Businesses, by asking and requiring that those within their supply chains were also empowered, incentivised smaller businesses to promote the objectives of the B-BBEE framework. Because businesses are rewarded according to how they are complying with B-BBEE, there is a business case for other, often smaller businesses, to help promote aspects of the B-BBEE agenda. In this sense, businesses arguably perform quasi-regulatory functions, requiring that those businesses with which they contract are also contributing to peacebuilding.

#### 4.6.4. Initiatives Leading to Institutional Change

A further finding from the case study is that while regulation might be targeted directly at businesses, it can also impact on the development of regulation in the

post-conflict era. In South Africa, different in-conflict regulatory initiatives have been instrumental in contributing to developments at the institutional level. The most obvious example of this is B-BBEE, which was driven, in part, by the awareness created by the imposition of economic sanctions and the demands of investors for businesses to challenge the inequities of legislation. It might also be argued that such initiatives as the king codes, the social and ethics committee requirements under the Companies Act 2008, and the wealth of legislative efforts dealing with, amongst other things, fair employment, have all been driven by these in-conflict regulatory efforts.

#### 4.6.5. Peace Moments leading to change in business regulation

Closely related to the above discussion, the case study also highlights that significant peacebuilding moments can lay the foundation for progressive regulatory initiatives that target businesses to contribute in peacebuilding. In South Africa, the progressive constitution of 1996, by prioritising equality, has been an important driver of change in how the regulation of business is approached.

#### 4.6.6 Regulatory Interactions

The case study of South Africa also shows the interactions of regulatory initiatives, the opportunities that can arise from such interactions, and the limitations that exist when initiatives conflict.

Firstly, the case study highlights the potential for regulatory initiatives to reinforce other regulatory initiatives. While the central driving force of business contributions to peacebuilding has been the B-BBEE framework, other initiatives have also helped to reinforce the objectives of engaging businesses in peacebuilding efforts. This highlights that coherency amongst regulators can help to advance the objectives of regulating business.

The case study also suggests that regulatory initiatives can interact in ways that help to gap-fill for regulatory initiatives focused on engaging businesses in more proactive ways. This is important because even well-meaning businesses can cause harms. If not complying with, for instance, human rights norms, any proactive contributions made will be undermined by detrimental activities. Finally, regulatory initiatives can conflict with other initiatives. As I will argue, these interactions help to support the need for coherency among different initiatives.

#### **4.7. Conclusion**

The discussion on regulatory pluralism in chapter 3 intended to identify different ways through which to influence businesses to understand whether these same approaches might be used to engage businesses in peacebuilding processes. This chapter has demonstrated a number of different ways that various actors have sought to do so. In some instances, proactive contributions arise as consequences of regulation, as in the case of the ATS described above. In this example, proactive contributions flowed consequentially from efforts to hold businesses to account for breaching standards of expected conduct.

At the same time, while we normally consider codes and standards of conduct to be associated with curtailing the harms businesses might cause, the example of the Sullivan Principles demonstrates that standards can require more proactive interventions. Similarly, shareholders and investors can use their influence to require businesses to adhere to more proactive standards, in this case challenging the apartheid regime and pushing forward an agenda based on affirmative action. The case study also demonstrates that legislation can be used to promote proactive contributions. For instance, the MPRDA (2000), the Skills Development Act (1998), the Preferential Procurement Act (2000) are all legislative approaches adopted by the state to engage businesses in more proactive ways.

The B-BBEE framework is, in some ways, different. On the one hand, this initiative seems more focused on promoting development than existing as a form of regulation. It is, in this way, quite distinct from what we might regard as regulation. At the same time, many consider public procurement to be a form of regulation. Approached through this lens, does the fact that objectives shift from preventing harm to engaging businesses to do more, nullify B-BBEE as a form of regulation? The question is complicated by the fact that under B-BBEE, companies are assessed against defined criteria, as demonstrated by the codes of good practice. That is, to benefit from government or private contracts, businesses must meet a set of expected standards in the same way that other regulatory initiatives require. Thus, because many accept that procurement is a form of regulation, we might also suggest the B-BBEE is also a variation of regulation, albeit one, that admittedly pushes conceptual boundaries. Nevertheless, the primary intention of this chapter was to demonstrate that business conduct can be shaped in ways that seek to engage businesses to play positive roles in peacebuilding processes. B-BBEE,

regardless of its conceptual nomenclature, demonstrates a creative and useful example of engaging businesses to make positive contributions to peacebuilding efforts.

The case study also raises a number of other, somewhat unexpected issues. For one, the direct regulation of business can lead to institutional change. For another, significant peacebuilding moments can be relevant to the emergence of other regulatory efforts. Moreover, regulatory initiatives interact in different ways, sometimes positively, other times in ways that conflict. These findings suggest a number of things. Firstly, when considering the roles and responsibilities of the state to promote business involvement in peacebuilding efforts, other initiatives can influence how and whether the state adopts does so. This is particularly important in those settings where states are unable or unwilling to do so. Secondly, while the case study demonstrates that different actors can be involved in influencing businesses, it is important to consider how these different actors might be orchestrated. As outlined above, when interactions are positive, this can help to promote particular objectives. However, when they conflict, different initiatives and forms of influence can undermine other objectives. How and in what ways to facilitate positive and uniform approaches, therefore, is an important issue. Finally and building on from this idea of interactions, while it is a positive development that different actors seek to influence businesses in contributing to peacebuilding, it is also important that businesses do not cause harm and, to that end, that efforts continue to be directed towards ensuring businesses do not act in socially irresponsible ways.

As will be discussed in chapter 6, these findings are particularly useful when considering what a global policy instrument on business and peacebuilding might look like. In particular, this case study helps to support the view that different actors can engage businesses to contribute to peacebuilding efforts but that coherency is required.

### Northern Ireland

This chapter examines how different actors sought to require, induce and persuade businesses to contribute to the peacebuilding effort in Northern Ireland. This chapter also demonstrates how regulatory initiatives interact with others focusing on the ways that they reinforce, support, and/or undermine efforts to include businesses in the peacebuilding effort.

#### 5.1. Introduction

The previous chapter explored a variety of initiatives in South Africa, which have sought and managed, in different ways, to engage businesses in the peacebuilding effort. It was also suggested that the direct regulation of business has indirectly contributed to institutional developments or been driven by significant peacebuilding and that initiatives interact in different ways, sometimes positively, while other times potentially detrimentally. The current chapter explores how different actors have influenced businesses to engage businesses in the peacebuilding process in Northern Ireland. As in the case study on South Africa, I tell this story through significant regulatory moments, which, in the case of Northern Ireland, all revolve around the issue of equality.

The first discussion focuses on the MacBride Principles, a campaign similar to the Sullivan Principles in South Africa. The MacBride Principles were organised and implemented by Irish Americans in an attempt to address the discrimination of Catholics in private sector employment. Through the MacBride campaign, subsidiaries of American companies operating in NI were persuaded and incentivised to adopt fair employment practices. I also examine, as part of this story, how these different in-conflict initiatives led to institutional change in the regulatory environment post-conflict. This change emerged in the form of the Fair Employment

(Northern Ireland) Act 1989<sup>1</sup> and the subsequent Fair Employment and Treatment Order (FETO) of 1998,<sup>2</sup> which were supported by a number of significant peacebuilding moments. The most notable of these was the Good Friday Peace Agreement (GFA) of 1998 and the legal formalisation of this agreement in the Northern Ireland Act (NIA) 1998.<sup>3</sup> The discussion also examines the regulatory approach adopted under FETO, which has been primarily one of co-operation between the Equality Commission of Northern Ireland and businesses to help them progress affirmative action policies.

The second story explores the way in which the European Union (EU), through the EU PEACE programmes, has sought to incentivise businesses to participate in Local District Partnerships (LDPs). These Partnerships were designed as mechanisms to better integrate different sections of the community into the governance of Northern Ireland and were strengthened with the inclusion of businesses. This story highlights the potential for non-state actors, in this case, the EU, to influence businesses in contributing to peacebuilding with creative economic incentives.

The final story offers an example of the limitations of regulation. By focusing on the issue of ex-political prisoner reintegration, a vital component of the transition in Northern Ireland, this discussion highlights the impediments that states can create to the participation of businesses in the peacebuilding effort by adopting legislative measures that act as obstacle to integrating businesses into peacebuilding efforts.

The stories of these regulatory moments converge to offer examples of the different ways that regulation can be used to engage or deter businesses from contributing to peacebuilding efforts. This chapter also illustrates further the potential for indirect contributions that can arise from the direct regulation of companies, in particular, in forcing institutional change, along with the linkages between significant peacebuilding moments and the regulation of business.

This chapter proceeds as follows. Section 5.1.1. touches on the background to the conflict focusing in particular on the relationship of businesses to the conflict. 5.2.

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<sup>1</sup> Fair Employment (Northern Ireland) Act, 1989 (c. 32).

<sup>2</sup> Fair Employment and Treatment (Northern Ireland) Order, 1998.

<sup>3</sup> Ireland, United Kingdom, Northern Ireland, The Agreement Reached in the Multi-Party Negotiations (Good Friday Agreement or Belfast Agreement), 10/04/1998; Northern Ireland Act, 1998 (c. 47).



examines the MacBride Principles before discussing the impacts of the principles at the institutional level. Section 5.3. focuses on FETO and some significant peacebuilding moments. Section 5.4. explores the EU's role in incentivising businesses to contribute to LDPs while section 5.5. outlines how important opportunities to engage businesses in the peacebuilding effort have been missed. Section 5.6. maps out the findings before offering a number of conclusion under section 5.7.

#### 5.1.1. Background to the Conflict

The conflict or 'Troubles' in Northern Ireland refer to a period between 1969 and 1998 fought between Republicans, the British State and Loyalists. During this period almost 3700 people were killed and over 40,000 people injured.<sup>4</sup> McEvoy puts these statistics in perspective:

With a relatively small population of just over 1.7 million people, the scale of the Northern Ireland conflict is appropriately compared to those in Sri-Lanka or Lebanon. If we compare the casualties to what would have happened in England with its population of 50 million people, the equivalent proportion of people killed would have seen 500,000 deaths.<sup>5</sup>

The origins of the Troubles can be traced back to the colonial military conquest of Ireland by England in 1169 and later Elizabethan rule during which time penal codes were part of a calculated scheme to disenfranchise the Catholic minority.<sup>6</sup> Along with the 1607 Ulster Plantation, the industrial revolution, and the modernization of Ulster during the nineteenth century, profound social and economic differences were created between Catholics and Protestants.

A divisive social order between Protestants and Catholics became endemic in Northern Ireland by the 1920s, providing the backdrop for the partition of Ireland by politically severing six counties from the nine-county province of Ulster in 1921.<sup>7</sup> Partition resulted in the 'external territorial caging' of competing nationalist and

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<sup>4</sup> K. McEvoy, 'Prisoners, Resistance and the Law in Northern Ireland: A Paper for Palestinian Activists', Lawyers, Conflict and Transition Research Programme, 2015.

<sup>5</sup> *Ibid.*, at 1.

<sup>6</sup> N.J. Conway, 'Investment Responsibility in Northern Ireland: The MacBride Principles of Fair Employment.' *Loyola of Los Angeles International and Comparative Law Review* vol. 24, no. 1, 2002.

<sup>7</sup> C. Bell, *Peace Agreements and Human Rights*, Oxford University Press, 2003, at 51-53.

territorial demands as ‘the geography of the partition settlement reflected hugely asymmetrical power relationships, the British imperial state and its Ulster Unionist supporters on the one hand, and Irish Nationalists on the other.’<sup>8</sup>

The result of these competing allegiances saw nationalists, the vast majority of which are Catholics, treated as second-class citizens throughout the remainder of the 20<sup>th</sup> century. For instance, under Sections 5 and 8 of the Government of Ireland Act 1920,<sup>9</sup> the Northern Ireland Parliament was prohibited from making any law which would give a preference, privilege or advantage or impose any disability or disadvantage on account of religious belief or ecclesiastical status. However, there existed little legal protection against religious discrimination for the citizens of Northern Ireland. As such and as a wealth of scholarship attests, nationalists were systematically discriminated against in the areas of housing, education, political representation and participation, amongst others.<sup>10</sup>

The movement by Irish Catholics to gain equal footing with their Protestant counterparts began in the 1960s.<sup>11</sup> Protestors engaged in mass marches, influenced by the civil rights struggle in the United States (US) were often met with strong resistance from British forces.<sup>12</sup> Detention, arrest and interrogation, were conducted pursuant to regulations passed under the Special Powers Act of 1922.<sup>13</sup> This statute acted as enabling legislation, allowing the suspension of the procedural and substantive rights of due process and equal protection.<sup>14</sup> The United Kingdom (UK) also derogated from their treaty obligations to protect human rights guaranteed

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<sup>8</sup> S. Byrne et al., ‘The EU Peace II Fund and the International Fund for Ireland: Nurturing Cross-Community Contact and Reconciliation in Northern Ireland’, *Geopolitics* vol. 14, no. 4, 2009, at 630-631.

<sup>9</sup> Government of Ireland Act, 1920 (c .67).

<sup>10</sup> See, as illustrations P. Teague, ‘Northern Ireland: The Political Economy of Peace’, The Senator George J Mitchell Institute for Global Peace, Security and Justice Working Paper Series, IGPSJ WP 01-16, 2016.

L. Wartchow, ‘Civil and Human Rights Violations in Northern Ireland: Effects and Shortcomings of the Good Friday Agreement in Guaranteeing Protections’, *Northwestern Journal of International Human Rights*, vol. 3, no. 1, 2005.

<sup>11</sup> C. McCrudden, ‘Human Rights Codes for Transnational Corporations: What Can the Sullivan and MacBride Principles Tell Us?’ *Oxford Journal of Legal Studies*, vol. 19, no. 2, 1999.

<sup>12</sup> B. O’Leary and J. McGarry, *The Politics of Antagonism: Understanding Northern Ireland*, London, The Athlone Press, 1993.

<sup>13</sup> Special Powers Act, 1922.

<sup>14</sup> *Ireland v. United Kingdom*, 23 Eur. Ct. H.R. (ser. B) at 493 (1976). In 1978, the European Court of Human Rights found the United Kingdom guilty of inhuman and degrading treatment of Irish and Northern Irish citizens subject to interrogation techniques during wholesale arrest and detention conducted by the police and armed forces in Northern Ireland from 1971 to 1975.

under the European Convention of Human Rights (ECHR).<sup>15</sup> Added to this was the resurgence of terrorism from both Protestant and Catholic paramilitary groups, the collapse of the Northern Ireland Government, the suspension of the experiment in devolution, and the imposition of 'direct rule' by the government of the UK in 1972.<sup>16</sup>

After thirty years of violence, and numerous ceasefire agreements, a peace accord, known as the Belfast or GFA, was reached between the Unionist, Loyalist, Nationalist and Republican Parties on 1998. Both the UK and Irish governments acted as guarantors of this agreement.<sup>17</sup>

### 5.1.2. Discrimination in the Private Sector

One of the central areas where marginalisation and discrimination of Catholics occurred in Northern Ireland was in employment. As Professor Christopher McCrudden wrote in 1999:

On almost all socio-economic indicators, Catholics are significantly worse off than Protestants. One of the most dramatic differences, and the one which has attracted significant local and international attention, is the unemployment differential between Catholics and Protestants. On average, a Catholic is around twice as likely as a Protestant to be unemployed, and this differential has remained fairly stable from when such statistics have become publicly available.<sup>18</sup>

This mirrors the findings of others such as Barritt and Carter who, writing in 1962, identified four different types of discriminatory employment practices:

1. Firms that employed members of only one community.

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<sup>15</sup> K. McEvoy and J. Morison, J., 'Beyond the Constitutional Moment: Law, Transition and Peacemaking in Northern Ireland', *Fordham International Law Journal*, vol. 26, no. 4, 2002.

<sup>16</sup> McCrudden, *supra* note 11, at 179.

<sup>17</sup> E. Bates et al., 'The legal implications of a repeal of the Human Rights Act 1998 and withdrawal from the European Convention on Human Rights', Working Paper, Social Science Electronic Publishing, 2015, at 13;

A. Smith, M. McWilliams and P. Yarnell, 'Does Every Cloud Have a Silver Lining? Brexit, Repeal of the Human Rights Act and the Northern Ireland Bill of Rights', *Fordham International Law Journal*, vol. 40, no. 1, 2016;

C.L.G. Murray, A. O'Donoghue and B.T.C. Warwick, 'The Place of Northern Ireland within UK Human Rights Reform', Working Paper, Social Science Electronic Publishing, 2015.

<sup>18</sup> McCrudden, *supra* note 11, at 180.

2. Protestant-owned firms that employed Catholics only in lower paid jobs, and not in any administrative or supervisory capacity.
3. Firms employing both Protestants and Catholics, but segregating them by departments.
4. Firms that mixed the two communities within departments.<sup>19</sup>

These disparities were continually documented throughout and before the troubles. For instance, as a consequence of the unrest during the early years of the Civil Rights campaign, the then Governor of Northern Ireland appointed a Commission headed by Lord Cameron to inquire into the causes of the disturbances. The Cameron Commission's Report was published in 1969.<sup>20</sup> The evidence from the investigation which it carried out showed that injustices in the fields of housing and public employment, in particular, were significant contributory factors to the upsurge of violence and that the Roman Catholic population felt resentful and frustrated at not having been afforded greater protection against such practices. The Cameron commission further concluded that 'complaints are now well documented in fact, of discrimination in making local government appointments at all levels, but especially in senior posts to the prejudice of non-Unionists and especially Catholic members of the community, in some Unionist controlled authorities.'<sup>21</sup>

In 1980, a Fair Employment Agency study also concluded that during the period of direct rule by Britain, the gap between Catholics and Protestants "was widening" and would worsen in the "foreseeable future."<sup>22</sup> In 1987, a report by the Standing Advisory Commission on Human Rights (hereafter 'the Commission') found that '[h]igh unemployment is experienced by both sections of the community but there is a greater degree of disadvantage within the Catholic section of the community.'<sup>23</sup> It continued that: 'The unemployment rate for male Catholics is two and a half times that for male Protestants. This has shown no improvement in the last decade [...].'<sup>24</sup>

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<sup>19</sup> D.P. Barritt, and C.F. Carter, *The Northern Ireland Problem: A Study in Group Relations*, Oxford, Oxford University Press, 1962, 100–08, at 100., cited in K. MacNamara, *The Sullivan Principles: Irish America Strikes Back*, Liverpool, Liverpool University Press, 2012, 'Introduction', at 7.

<sup>20</sup> Cameron, (Honourable Lord), D.S.C., *Disturbances in Northern Ireland: Report of the Commission*, Belfast, Her Majesty's Stationary Office, 1969.

<sup>21</sup> *Ibid.*, at 39.

<sup>22</sup> D.R. Lowry, 'Keeping Catholics in their place', *COMMONWEAL*, July 16, 1982, at 400, cited in Conway 2002, at 5 note 33.

<sup>23</sup> Standing Advisory Commission on Human Rights, *Employment Equality: Building for the Future* Cm 3684, 1997.

<sup>24</sup> *Ibid.*, at 15.2

Research carried out by the Policy Institute (PSI) in 1991 further highlighted the extent of inequality between the two communities in NI.<sup>25</sup> According to the PSI study, for instance, Catholic male unemployment, then at 35 percent, was two and a half times that of Protestant male unemployment, and continued at this level despite there being over 100,000 job changes a year.<sup>26</sup> A study by Murphy and Armstrong in 1994<sup>27</sup> reached similar findings, as did Smith and Chambers.<sup>28</sup>

Because of the high levels of discrimination in the area of employment, entrenching the inequalities that subsequently contributed to the emergence of conflict in the region, various attempts were made to address disparities between Catholics and Protestants in the workplace. For instance, the Northern Ireland Constitution Act of 1973 prohibited discrimination on religious and/or political grounds.<sup>29</sup> It provided that any discriminatory legislation passed by the Northern Assembly was void. After three years with virtually no improvement in the pattern of discriminatory hiring, the Parliament passed the Fair Employment (Northern Ireland) Act 1976.<sup>30</sup> This outlawed job discrimination on the grounds of religion and political opinion in both public and private employment; and it provided for the establishment of a Fair Employment Agency (FEA) with advisory, research, investigative and enforcement functions, which was established one year later.

From the outset, however, the legislation was criticised as ineffective. McCrudden considers that the legislation was unclear and ambiguous, along with being insufficiently enforced.<sup>31</sup> Similarly, MacNamara outlines that:

From the outset, the FEA was under-resourced and was hampered by the hostility of Unionist politicians, officials in the DED [Northern Ireland Department of Economic Development] and direct interference by ministers [...]<sup>32</sup>

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<sup>25</sup> D. Smith and G. Chambers, *Inequality in Northern Ireland*, Oxford, Clarendon Press, 1991,

<sup>26</sup> C. McCrudden, *Buying Social Justice: Equality, Government Procurement & Legal Change: Equality, Government Procurement, and Legal Change*, Oxford, Oxford University Press, 2007, at 72.

<sup>27</sup> A. Murphy and D. Armstrong, 'A Picture of the Catholic and Protestant Male Unemployed', Belfast, Central Community Relations Council, 1994.

<sup>28</sup> P. Dixon, *Northern Ireland: The Politics of War and Peace*, Palgrave MacMillan, (2<sup>nd</sup> ed.), 2008, at 24.

<sup>29</sup> The Northern Ireland Constitution Act 1973 (c. 36).

<sup>30</sup> Fair Employment (Northern Ireland) Act 1976 (c. 25).

<sup>31</sup> McCrudden, *supra* note 11, at 180.

<sup>32</sup> MacNamara, *supra* note 19, 'Introduction', at 10.

The FEA was circumscribed by the legislation creating it. It never received the resources it was promised, and was hamstrung by the political hostility and indifference to it displayed by the Northern Ireland establishment. [...]<sup>33</sup>

Other weaknesses observed included inadequacies in its procedures, the fact that few of the complaints came from the private sector, and its inability to deal with indirect discrimination.<sup>34</sup>

The limitations of a command and control-based approach are important when considering how different methods of regulation have been used to promote affirmative action in the post-conflict era. We return to this discussion in due course.

For now, it is enough to note that the background of discrimination in the private sector, the weaknesses of the fair employment legislation, and the reluctance of employers to change their recruiting patterns, all led Irish-Americans to embark upon the MacBride campaign, a discussion to which we now turn.

## **5.2. The MacBride Principles**

The MacBride Principles were drawn up in 1984 by Irish civil rights activists in the US. The purpose was to address job discrimination in Northern Ireland. They were a direct response to the aforementioned marginalisation and discrimination of Catholics in the workforce.

The nine fair hiring practice principles were named after and sponsored by Sean MacBride. MacBride was a controversial Irish political leader who had been chief of staff of the Irish Republican Army (IRA) during the 1930s, Minister of Foreign Affairs in the Irish Republic, founder of Amnesty International, and recipient of the Nobel Peace Prize in 1974. The MacBride Principles were fashioned to encourage corporations doing business in Northern Ireland to take positive actions to implement equal hiring practices and ensure the security and safety of employees in the workplace. Through the MacBride Principles, American companies with subsidiaries in Northern Ireland were invited to commit themselves to a series of

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<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

non-discrimination and affirmative action principles in their operations in Northern Ireland. They included, among other things:

Increasing the representation of individuals from underrepresented religious groups in the workforce, including managerial, supervisory, administrative, clerical and technical jobs;

[ensuring that] job openings should be publicly advertised and special recruitment efforts should be made to attract applicants from under-represented religious groups; and

[abolishing] job reservations, apprenticeship restrictions and differential employment criteria, which discriminate on the basis of religion or ethnic origin [...].<sup>35</sup>

From the perspective of understanding how different actors were able to influence businesses to adopt the principles, some methods can be identified.

Firstly, efforts were made to incentivise businesses to adhere to the principles by threatening divestment. For example, several large pension funds in the US controlled by state and local government embraced the Principles and put pressure on American parent company through shareholder resolutions.<sup>36</sup> Shareholder resolutions were submitted to companies' annual meetings from 1985, with growing numbers and support emerging each year during the 1980s. The first shareholder resolution on Northern Ireland was organized by the Interfaith Center on Corporate Responsibility to General Motors in 1985.

Similarly, since 1989, successive city Comptrollers of New York have pushed companies to adopt the principles by leveraging their position as critical institutional investors. Indeed, some have argued that the immediate genesis of the MacBride Principles was the decision of the Comptroller at that time, Harrison Goldin, to ask his staff to 'generate a Sullivan-type proposal'.<sup>37</sup> As in the case of Shareholder

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<sup>35</sup> McCrudden, *supra* note 11, at 173.

<sup>36</sup> See generally, C. McCrudden, 'Using Public Procurement to Achieve Social Outcomes', *Natural Resources Forum*, vol. 28, no. 4, 2004.

<sup>37</sup> A comptroller is a management level position responsible for supervising the quality of accounting and financial reporting of an organization. A financial comptroller is a senior-level executive who acts as the head of accounting and oversees the preparation of financial reports, such as balance sheets and income statements.

resolutions above, the Comptroller has utilized the position as an important institutional investor to persuade businesses to comply with the Principles. For instance, the New York City Pension Funds, the umbrella group that includes the pension funds for city police officers, teachers, members of the fire department and other employees, is a significant investor in equities. The Comptroller leveraged its position as a shareholder in many companies that have operations in Northern Ireland to encourage those firms to accept the MacBride Principles.

Another technique adopted by the MacBride campaign was to incentivise businesses to comply with the principles through the allure of government contracts.<sup>38</sup> A forerunner of the MacBride campaign lay in the activities of church-related groups and the Irish National Caucus (INC), 'a lobbying group in Washington, DC with a strongly nationalist perspective on the Northern Ireland question.'<sup>39</sup> Using this lobby, along with the New York City Comptroller's Office, Irish-American-related trade union groups, and several religious groups, attempts were made to promote the Principles at the state and local levels.

For instance, the MacBride campaign appealed to state legislatures to require compliance with the principles as a precondition to government business. As McCrudden notes, from around 1989, selective purchasing, 'emerged as the major new plank of the MacBride campaign. As illustrations, Cleveland, Chicago, and New York City, among others, had passed legislation linking contract eligibility to companies'.<sup>40</sup> According to MacNamara, by the end of the twentieth century, 17 states had passed MacBride legislation, covering the majority of the US population and involving more than 50 percent of public pension monies.<sup>41</sup> Thirty-one municipalities had passed laws or legally binding resolutions, and fifteen had passed resolutions, proclamations or memorials expressing support. There were also 88 corporate agreements accepting the MacBride Principles.<sup>42</sup>

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<sup>38</sup> McCrudden, *supra* note 36, at 263.

<sup>39</sup> McCrudden, *supra* note 11, at 181.

<sup>40</sup> For instance, Local Law No. 34 of 1991 became effective on September 10, 1991 and added Section 6- 115.1 to the Administrative Code of the City of New York. The local law provides for certain restrictions on City Contracts to express the opposition of the people of the City of New York to employment discrimination practices in Northern Ireland and to encourage companies doing business in Northern Ireland to promote freedom of work place opportunity.

<sup>41</sup> MacNamara, *supra* note 19, Conclusion, at 206.

<sup>42</sup> *Ibid.*



The MacBride Principles and campaign were also able to build on the discontent of businesses and to persuade businesses to act through highlighting their discriminatory actions. In regards to the former, companies began to assess that, according to Wennmann, economic development in Northern Ireland was contingent upon the end of the conflict and called for greater economic integration with the Ireland and the European Common Market.<sup>43</sup> Because discrimination lay at the heart of the conflict, businesses were cognisant of the need for legislative change. Moreover, businesspeople became aware of new global and regional economic opportunities for the region that would materialise only if violence was significantly reduced.<sup>44</sup> Thus, like in South Africa, broader developments meant that businesses viewed conflict and repression as economically detrimental.

### 5.2.1. Impacts of the MacBride Campaign on Individual Businesses

The Principles arguably helped to raise the consciousness of business owners in Northern Ireland.<sup>45</sup> For instance, in 1996 the Northern Ireland office of the Confederation of British Industries (CBI) joined with six other trade and business organisations to create the Group of 7. It included the CBI, the Hospitality Association for Northern Ireland, the Institute of Directors, the Northern Ireland Chamber of Commerce and Industry, the Northern Ireland Growth Challenge, the Northern Ireland Economic Council, and the Northern Ireland Committee of the Irish Congress of Trade Unions. This organisation promoted the objective of peace in Northern Ireland by lobbying other businesses to campaign for an end to the Troubles. Businesses also made material contributions to the peace process by spelling out the economic consequences of conflict to rival leaders and introducing

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<sup>43</sup> A. Wennmann, 'Economic dimensions of peace processes: The private sector as a strategic partner for peacemaking', in M. Prandi, and J.M. Lozano, (ed.) *CSR in conflict and post-conflict environments: from risk management to value creation*, School for a Culture of Peace (UAB) / Institute for Social Innovation (ESADE), 2010, at 83.

<sup>44</sup> G. Ben-Porat, 'Between Power and Hegemony: Business Communities in Peace Processes', *Review of International Studies*, vol. 31, no. 2, 2005, at 344.

<sup>45</sup> See, as examples, G. Ben-Porat, 'Between Power and Hegemony: Business Communities in Peace Processes', *Review of International Studies*, vol. 31, no. 2, 2005, at 325; S. Tripathi and C. Gündüz, 'A Role for the Private Sector in Peace Processes? Examples, and Implications for Third-Party Mediation', Center for Humanitarian Dialogue, 2008, at 20-21, 22-23, and 25; International Alert, 'The Confederation of British Industry and the Group of Seven: a marathon walk to peace in Northern Ireland', in *local business local peace*, London, International Alert, 2006; A. Iff et al. 'Money Makers as Peace Makers? Business Actors in Mediation Processes', *Swisspeace Working Paper 2*, 2010; R. Mullan, 'The Role of the Business Community in Northern Ireland', in L. Reyhler and T. Paffenholz (ed.) *Peace-Building: A Field Guide* London, Lynne Rienner Publishers, 2001.

the possibility of a 'piece dividend' into the local political vocabulary<sup>46</sup> and participated in media campaigns focused on ending the conflict and bringing the two communities together.<sup>47</sup>

### 5.2.2. Impacts of the MacBride Campaign on Institutional Change

The more significant consequences of the MacBride campaign, however, was in how it forced institutional change. The MacBride Principles were initially opposed by the British Government, which defined its opposition to the MacBride Campaign as one involving its ability to defeat what it saw as an Irish Republican based campaign against itself in the US.<sup>48</sup> The British government also suggested that the MacBride Principles: discouraged companies from investing in Northern Ireland; impeded the progress of equal opportunity employment because of their ambiguity; and called for reverse discrimination, which was also illegal.<sup>49</sup>

However, pressure to maintain good relations with the US was an important catalyst for legislative developments in the area of affirmative action. Against the background of the MacBride campaign, by 1985 the Secretary of State had already directed the Department of Economic Development (DED) to review the whole question of equality of opportunity in employment. The outcome was a comprehensive Consultative Paper, issued in 1986.<sup>50</sup> This not only confirmed previous research on Roman Catholic disadvantage but proposed for discussion a range of possible measures which might be taken to remedy the situation. Final confirmation of the Government's determination to adopt a firmer stance on equality of employment opportunity came in the White Paper, Fair Employment in Northern Ireland.<sup>51</sup>

Thus, while targeting businesses, the MacBride campaign indirectly led to important changes at the institutional level. As McCrudden contends:

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<sup>46</sup> Wennmann, *supra* note 43, at 83.

<sup>47</sup> N. Killick, V.S. Srikantha, and C. Gündüz, 'The Role of Local Business in Peacebuilding', in M. Fischer, H. Gießmann, and B. Schmelzle, B., (ed.) *Berghof Handbook for Conflict Transformation*, Berlin, Berghof Research Center for Constructive Conflict Management, 2005, at 12.

<sup>48</sup> See, for discussion, MacNamara, *supra* note 19, at 84-128.

<sup>49</sup> K. P. Lundy, 'Lasting Peace in Northern Ireland: An Economic Resolution to a Political and Religious Conflict', *Notre Dame Journal of Law Ethics and Public Policy*, vol. 15, no. 2, 2001, at 729.

<sup>50</sup> Department of Economic Development, *Equality of Opportunity in Employment in Northern Ireland — Future Strategy Options: A Consultative Paper*, DED, Belfast, 1986.

<sup>51</sup> See C. McCrudden, 'The Northern Ireland Fair Employment White Paper: a Critical Assessment', *Industrial Law Journal*, vol. 17, no. 1, 1988.

Partly as a result of the MacBride campaign [...], the British Government initiated a process of reconsideration of the adequacy of the government's policies dealing with discrimination and equality between the two communities, particularly due to the UK's sensitivity to bad publicity in the USA about its role in Northern Ireland.<sup>52</sup>

This is reiterated by MacNamara in the conclusion of his book on the MacBride Principles:

Irish-Americans used their electoral power to wield the ultimate peaceful capitalist weapon – the power of the dollar – to achieve social and economic reform in Northern Ireland. They used it to remedy a situation about which UK governments were either in denial or to which they turned a blind eye.<sup>53</sup>

In the section that follows, I focus on some of these institutional developments, which, in different ways, have made important contributions to engaging businesses in the peacebuilding effort in Northern Ireland in the post-conflict era.

### 5.2.3. Discussion

The above discussion offers some insights into the possibilities of using different forms of regulation to push businesses to engage in peacebuilding efforts. Firstly, the genesis of the MacBride Principles lay in civil society campaigns. Using leverage and moral arguments, civil society actors, such as the INC, were able to influence institutional actors, shareholders and state departments to leverage their respective positions to put pressure on businesses to alter how they conducted their operations in Northern Ireland. This highlights the importance of different actors in pushing would-be regulators to challenge business activities in the first place.

The example of the MacBride Principles also highlights how codes of conduct can be used to promote positive interventions. Similar to the case of the Sullivan Principles, this suggests that while we normally think of corporate codes of conduct in terms of preventing businesses from causing harm, they can also be used to encourage interventions of a more proactive nature. Similarly, the case also demonstrates how different actors can incentivise businesses through economic

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<sup>52</sup> McCrudden, *supra* note 11, at 193.

<sup>53</sup> MacNamara, *supra* note 19, Conclusion, at 206.

opportunities, such as through procurement, to contribute to peacebuilding. In other cases, actors can threaten economic sanctions, such as threats of divestment or the use of shareholders resolutions to influence corporate conduct. While like the in-conflict regulatory initiatives in South Africa, these initiatives are not post-conflict *per se*, they are nevertheless relevant, not least in highlighting different approaches to regulation and leading to developments in the post-conflict regulatory landscape.

The discussion also shows the limitations of command and control. In the case of Northern Ireland, one of the reasons for adopting the more progressive and creative regulatory framework discussed below stems from the limitations of the Fair Employment Act of 1976. By contrast, the approaches adopted under the Fair Employment Act of 1989<sup>54</sup> and the Fair Employment and Trade Order 1998 are particularly progressive, involving more collaborative efforts between the state and business. Similar to the example of South Africa, these discussions demonstrate that different forms of regulation can be used to influence businesses in different ways and that these efforts can inspire broader change at the institutional level. It is with this latter issue that I expand upon below.

### **5.3. FE (NI) Act (1989) and FETO (1998)**

The MacBride campaign helped to forge change at the institutional level. The eventual outcome of the UK's appraisal of existing regulation, catalysed by the MacBride campaign, was the promulgation of the FE Act 1989, which took effect in January 1990. This Act placed affirmative action on a statutory footing for the first time with new statutory duties being on employers. For instance, and by way of comparison, the regulatory approach to securing equality of opportunity adopted in NI differs significantly from that in the rest of the UK.<sup>55</sup> In the UK, the central approach to combating discrimination is to prohibit certain forms of conduct, in particular by placing employers and others under a non-discrimination requirement.<sup>56</sup> In Northern Ireland, by contrast, the approach has been more proactive or affirmative in nature. Northern Ireland has since 1989 had a 'remarkable

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<sup>54</sup> Fair Employment (Northern Ireland) Act, 1989 (c. 32). See generally, A. Hegarty, 'Examining Equality: The Fair Employment Act (NI) 1989 and Its Review', *Web Journal of Current Legal Issues*, 1995, 2 Web JCLI, 1-10.

<sup>55</sup> C. McCrudden, R. Ford and A. Heath, 'Legal Regulation of Affirmative Action in Northern Ireland: An Empirical Assessment', *Oxford Journal of Legal Studies*, vol. 24, no. 3, 2004, at 365.

<sup>56</sup> *Ibid.*, at 363.

and innovative programme of affirmative action' that aims to use legal enforcement measures to ensure that both communities in Northern Ireland - Catholics and Protestants - enjoy "fair participation" in employment.<sup>57</sup>

The FETO, 1998, which amended the FE Act 1989, demonstrates the proactive approach adopted in Northern Ireland. Under the FETO approach, employers have several duties that go beyond those set out in most of the other anti-discrimination law applicable in Northern Ireland and Great Britain. The affirmative action provisions allowed by the FETO include:

- the encouragement of applications for employment or training for people from under-represented groups;
- recruitment from those not in employment;
- targeting training in a particular area or at a particular class of person;
- the amendment of redundancy procedures to help achieve fair participation; and
- the provision of training for non-employees of a particular religious belief, following approval by the Equality Commission.<sup>58</sup>

There are two broad approaches used to facilitate compliance. Firstly, businesses can be punished through a loss of economic opportunities. That is, employers, who are in default of the legislation through failure to register with the Equality Commission (ECNI), or for not submitting monitoring returns, face penalties as well as economic sanctions such as the loss of government grants and exclusion from public procurement contracts.<sup>59</sup>

Alternatively, there is also a more collaborative approach between businesses and the ECNI. As touched upon above, the command and control-based approach to non-discrimination under the FE Act of 1976 was perceived as inadequate. Most notably, it failed to address the discrimination of Catholics in employment or to help rebalance the levels of Catholics in employment. The major tool available under the

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<sup>57</sup> C. McCrudden, et al, 'Affirmative Action without Quotas in Northern Ireland', *The Equal Rights Review* 4, 2009, at 7.

<sup>58</sup> Equality Commission for Northern Ireland, Fair Employment in Northern Ireland Code of Practice, Belfast, ECNI (date unspecified).

<sup>59</sup> McCrudden, *supra* note 36, at 262.

legislation to the principal legal enforcement agency- from 2000 the ECNI- is to select regulated employers for investigation and, where deemed necessary, to establish agreements to improve the representation of the under-represented group.<sup>60</sup> That is, although technically a command and control-based form of regulation, the primary methods adopted have been collaborative forms of regulation between the ECNI and business. The latter approach involves the ECNI working alongside companies to develop how best to improve employment practices. In doing so, the ingenuity of affirmative legislation has been supported through the creative use of partnerships between the ECNI and businesses. While the ECNI can move towards legally binding agreements in practice, the great majority of the agreements (around two-thirds) have been voluntary ones. In other words, while ultimately these legally binding agreements are supported by the possibility of sanctions although in practice the Commission has primarily employed persuasion rather than enforcement.<sup>61</sup>

Amongst other findings, McCrudden and colleagues conclude that agreements were positively associated with improvements in fair employment, both those designed to improve Catholic representation and those designed to improve Protestant representation [...].<sup>62</sup> For instance, by the year 2000, the Catholic share of the monitored full-time workforce rose from [34.9%] to [39.6%], an increase of 4.7 percentage points. There was a corresponding fall in the Protestant share. Numerically, the number of Catholic full-time employees rose by 32,339 (28.2%), compared with an increase of 10,777 (5.0%) in the Protestant count.<sup>63</sup> Similarly, compared with 1992, by 2010 the number of monitored Catholic full-time employees had increased by almost 49,000, a rise of 37 percent. In contrast, the Protestant count fell by over 16,000 (7.0%) over the same period.<sup>64</sup>

FETO is, therefore, a legislative initiative that directly tries to address the history of discrimination in the business sector. Recognising the limitations of previous approaches, both FE Act and FETO included an affirmative action approach, which

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<sup>60</sup> McCrudden et al, *supra* note 57, et al, at 8.

<sup>61</sup> *Ibid.*, at 9.

<sup>62</sup> *Ibid.*, at 11.

<sup>63</sup> R.T. Russel, 'Fair Employment in Northern Ireland: the decades of change (1990 – 2010)', Research and Information Service Research Paper, 121/12, 2012, at 6.

<sup>64</sup> *Ibid.*, at 3.

include creative co-operation between businesses and the ECNI to advance these objectives.

### 5.3.1. Significant Peace Building Moments

In contributing to the reform of employment legislation, the MacBride Principles also indirectly influenced certain aspects of the broader peacebuilding effort. For instance, when the GFA was signed and subsequently approved in a referendum, addressing the inequalities in Northern Ireland formed a major component of the peace settlement struck. Along with the creation of a power-sharing political settlement between Nationalist, Unionist and other political parties, the GFA focuses heavily on the importance of protecting human rights and the principle of equality. These issues were subsequently put on a statutory basis through the NIA, 1998. The drive to do so was aided, at least in part, by the attention on inequality garnered by the MacBride campaign. This has also contributed to further protections in the area of persons with different religious beliefs, political opinion and racial group.<sup>65</sup>

In turn, significant peacebuilding moments have also been important for the furtherance of equality in the private sector. For instance, the formalisation of equality at the governmental level was an influential driver of the amended FETO.<sup>66</sup> It provided the broader statutory basis upon which to advance equality in the economic as well as legal, political and social spheres. Secondly, the GFA led to the creation of the ECNI, which is constituted formally under the NIA, 1998. As suggested above, the ECNI plays a critical role in promoting affirmative actions among businesses. Finally, section 75, coupled with the incorporation of ECHR, has also contributed to the emergence of other equality legislation that complements more proactive measures. These include non-discrimination and equality legislation in the areas of disability,<sup>67</sup> sexual orientation,<sup>68</sup> special needs,<sup>69</sup> and age,<sup>70</sup> as examples.

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<sup>65</sup> Equality Commission Northern Ireland. Section 75 of the Northern Ireland Act 1998 A Guide for Public Authorities', Belfast, ECNI, April 2010.

<sup>66</sup> See, for instance, Northern Ireland Act 1998, s. 75.

<sup>67</sup> See, Equality (Disability, etc.) (Northern Ireland) Order 2000 (No. 1110); Disability Discrimination (Northern Ireland) Order 2006 (No. 312).

<sup>68</sup> See Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003 (No. 497); The Equality Act (Sexual Orientation) Regulations (Northern Ireland), 2006 (No. 439).

<sup>69</sup> Special Educational Needs and Disability (Northern Ireland) Order 2005 (No. 1117).

<sup>70</sup> Employment Equality (Age) Regulations (Northern Ireland), 2006 (No. 261).

### 5.3.2. Discussion

The discussion above helps to demonstrate different forms that regulation can take, various actors that can be involved in regulating, and the different impacts that can arise from the direct regulation of business. Early initiatives such as the MacBride Principles and the roles played by such actors as shareholders, investors and US States using public procurement, demonstrate the possibilities for different actors to shape business conduct in conflict-affected settings.

These significant regulatory moments also illustrate the somewhat complex ‘chicken and egg’ trajectory of regulation in Northern Ireland. In one way, business-focused in-conflict regulatory initiatives helped contribute to change institutionally, in the form of FE Act of 1989. This, in turn, had at least a contributory role in pushing forward the equality agenda, which is enshrined politically in the GFA and formalised legally in the NIA of 1998. In doing so, the equality agenda provided the basis for FETO and the creation of the ECNI.<sup>71</sup> To this end, the approach adopted under the FETO demonstrates a degree of ingenuity. Recognising the failures of previous legislative efforts, coupled with the practical difficulties of enforcing affirmative action legislation, a different regulatory method was adopted. Here, the ECNI works collaboratively with businesses in helping to push the equality agenda forward with a co-operative approach to regulating business.

Thus, like the example of South Africa, the discussions above help to show that possibilities exist for engaging businesses in contributing to peacebuilding efforts. From states to investors, civil society to shareholders, different actors using methods of persuasion, collaboration, command and control and incentives, can help to engage businesses in peacebuilding efforts. The discussion also demonstrates that these efforts can have impacts that extend beyond shaping business behaviour. In particular, they show that different actors can indirectly force change at the institutional level and in particular, at the level of the post-conflict regulatory landscape.

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<sup>71</sup> See Northern Ireland Act 1998, Section 73, 74 Sch 8 and 75 Sch 9.



#### 5.4. The EU PEACE Programme

International actors have been involved in the peace process in Northern Ireland in various ways.<sup>72</sup> For instance, along with the involvement of Irish Americans through the MacBride Principles, American businesses as participants and contributors to such foundations as the Ireland Funds,<sup>73</sup> and American Philanthropies, have donated millions of dollars in support of peace.<sup>74</sup> Throughout different stages of the peace process, international actors, from Bill Clinton to Richard Haas, have played instrumental roles in helping to broker peace.

Similarly, following the Anglo-Irish Agreement in 1986, the International Fund for Ireland (IFI) was founded 'to tackle the underlying causes of sectarianism and violence and to build reconciliation between people and within and between communities throughout the island of Ireland.'<sup>75</sup> The IFI was made possible by the contributions of the US which initially donated \$50 million USD in 1986 and by 1996 had donated a total of \$500 million USD,<sup>76</sup> with contributions also including those from the EU, Canada, Australia and New Zealand. The EU, in its own individual right, has also been highly influential in the Peace Process, not least with the introduction of the EU PEACE funds which continue to operate until this day.<sup>77</sup>

##### 5.4.1. The EU PEACE Funds

The EU PEACE programme was established with the purpose to, amongst other things, 'make a positive response to the opportunities presented by developments in the Northern Ireland peace process during 1994, especially the announcements of cessation of violence by the main republican and loyalist paramilitary

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<sup>72</sup> See generally for early interventions, R. MacGinty, 'American Influences on the Northern Ireland Peace Process', *The Journal of Conflict Studies*, vol. XVII, no. 2, 1997.

<sup>73</sup> See Ireland Funds, <https://irelandfunds.org/> [last accessed 16 July 2017].

<sup>74</sup> See, for instance, C. Knox and P. Quirk, *Philanthropy and Peacebuilding in Northern Ireland*, London, Palgrave Macmillan UK, 2016, at 84; The Atlantic Philanthropies, 'The Atlantic Philanthropies in Northern Ireland' (1991-2014), July 2015.

<sup>75</sup> See, International Fund for Ireland, <https://www.internationalfundforireland.com/> [last accessed 14 August 2017].

<sup>76</sup> S. Byrne, C. Irvin and E. Fissuh, 'The Perception of Economic Assistance in Northern Ireland and Its Role in the Peace Process', in D. Sandole (ed.) *Handbook in Conflict Analysis and Resolution*, London, Routledge, 2009, at 472–492.

<sup>77</sup> K. Bush and K. Houston, 'THE STORY OF PEACE: Learning from EU PEACE Funding in Northern Ireland and the Border Region', International Conflict Research Institute Research Paper, 2011, at 20.

organisations.<sup>78</sup> The EU Peace Programme to date has consisted of four separate programmes. Under PEACE I, the European Commission adopted a proposal for a Community Initiative under the Structural Funds from 1995 to 1999, with €500 million in total provided, 80 per cent of which went to Northern Ireland and 20 per cent to the Border Counties. Additional government funding of €167 million brought the total to €667 million.<sup>79</sup> The strategic aim of the programme was ‘to reinforce progress towards a peaceful and stable society and to promote reconciliation by increasing economic development and employment, promoting urban and rural regeneration, developing cross-border cooperation and extending social inclusion. These aims and objectives were to be achieved through a number of priorities (containing 24 sub-measures), namely: (1) Employment, (2) Urban and Rural Regeneration, (3) Cross-Border Development, (4) Social Inclusion, (5) Productive Investment and Industrial Development, and (6) District Partnerships (Northern Ireland only), all supported by (7) Technical Assistance.

Peace II was essentially a continuation of Peace I. The EU provided a further €531 million for five years (2000–2004) with the national governments adding €304 million to bring the total to €835 million.<sup>80</sup> In February 2005, a two-year extension was announced to the end of 2006, providing a further €160 million (€78 million from the EU and €82 million national funding). Peace I was a new Community Initiative devised as a stand-alone programme within a new structural funds programming period (1994–1999). Peace II, by contrast, was integrated as an Objective 1 Operational Programme within the Community Support Frameworks of both Northern Ireland and the Republic (one of two Operational Programmes in Northern Ireland and one of seven in the Republic of Ireland).

The PEACE III programme 2007–13 was introduced as a distinctive programme part-funded by the European Union (€225million from the EU with further national contributions of €108million), through its Structural Funds programme. The main aims of the PEACE III Programme are to reinforce progress towards a peaceful and

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<sup>78</sup> Special EU Programmes Body, *Peace III – EU Programme for Peace and Reconciliation 2007–2013 Northern Ireland and the Border Region of Ireland: Operation Programme*, Belfast: SEUPB, [http://www.seupb.eu/Libraries/PEACE\\_III\\_Reports\\_Pubs/PEACE\\_III\\_Operational\\_Programme.sflb.ashx](http://www.seupb.eu/Libraries/PEACE_III_Reports_Pubs/PEACE_III_Operational_Programme.sflb.ashx) [last accessed 21 July 2017].

<sup>79</sup> S. Buchanan, *Transforming conflict through social and economic development: practice and policy lessons from Northern Ireland and the Border Counties*, Manchester, Manchester University Press, 2014, at 393.

<sup>80</sup> *Ibid.*, at 393.

stable society and to promote reconciliation by assisting operations and projects, which help to reconcile communities and contribute towards a shared society for everyone. The programme was divided into two main priorities: reconciling communities and contributing to a shared society. These priorities are delivered according to various objectives such as building positive relations at the local level, acknowledging the past, creating shared public spaces, and developing institutional capacity for a shared society.<sup>81</sup>

Finally, PEACE IV (2014-2020) was officially launched on 14 January 2016, with a strong emphasis on investment targeted at children and young people.<sup>82</sup> It builds upon two main priorities (reconciling communities and contributing to peace) and four main objectives for the 2014-2020 programming period: shared education; helping children and young people; creating shared spaces and services; and, building positive relations at a local level.<sup>83</sup>

A detailed overview of the PEACE programmes is beyond the confines of this chapter. Instead, the specific intention of the discussion below is more confined. Firstly, I seek to show how businesses helped contribute to peacebuilding through their participation in LDPs. Secondly, I suggest that an international organisation, such as the EU, can incentivise businesses to engage in peacebuilding efforts.

#### 5.4.1.1. *Partnerships, Business and EU PEACE Funds*

As suggested, the GFA constituted the formal end of the approximately thirty-year conflict in Northern Ireland. As was also noted, this peace agreement served as the basis for the NIA, 1998 which represented a new constitutional settlement for Northern Ireland.<sup>84</sup> The NIA provided for the creation of a devolved Northern Ireland Assembly, Northern Ireland Ministers, an Executive Committee and Northern Ireland Departments. Under a power-sharing framework, the Executive is led by a First Minister and Deputy First Minister. Members of the Executive are elected based on

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<sup>81</sup> Northern Ireland Council for Voluntary Action, A Review of PEACE III and Considerations for PEACE IV (date unspecified), [http://www.nicva.org/sites/default/files/d7content/attachments-resources/peace\\_iv\\_report\\_-\\_final\\_1\\_4.pdf](http://www.nicva.org/sites/default/files/d7content/attachments-resources/peace_iv_report_-_final_1_4.pdf) [last accessed 10 September 2017].

<sup>82</sup> See European Parliament, Fact Sheets on the European Union', [http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU\\_5.1.9.html](http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_5.1.9.html) [last accessed 23 March 2017].

<sup>83</sup> *Ibid.*

<sup>84</sup> The provisions of the GFA were enacted by the UK Parliament in the NIA – the preamble to the NIA states that it is 'for the purpose of implementing' the GFA.

a complex voting system intended to reflect cross-community interests and party strength as demonstrated in the elections to the Northern Ireland Assembly.<sup>85</sup> Political arrangements such as these are often employed in the aftermath of political violence to ensure a form of group accommodation in which elites share power. In the case of Northern Ireland, the power-sharing framework was a partial response and attempted solution to the intractable constitutional question of its position within the UK and the island of Ireland.<sup>86</sup>

However, one of the central criticisms that has been levelled against power sharing arrangements is that they are divisive, cementing societal divisions and perpetuating 'us and them' tendencies. Byrne, for instance, has suggested that the powersharing approach to ending conflict has not worked in producing a more deferential mass in Northern Ireland.<sup>87</sup> Scholars such as Dixon advocated from early on that as an accompaniment to the political peace process in Northern Ireland, a civil society peacebuilding model that promoted intergroup contact was needed to offer a way out of the political zero-sum elite negotiation process.<sup>88</sup>

Against this backdrop, central to the objectives of PEACE I was facilitating inclusion from the bottom-up, to help support the more top-down political settlement. Peace I focused, therefore, on the concepts of local ownership, participative democracy and partnership. On one level, achieving these objectives was about bringing sections of the community together to co-operate functionally to identify and resolve local problems. In this way, the space and necessity for cross-community and cross-sector contact and co-operation were created – aided by the availability of significant funding for local area initiatives.<sup>89</sup> Regarding the actors included, Racioppi and O'Sullivan note that the Programme sought to draw in those who might be at the margins of political life (women, youth, the aged, ethnic minorities, rank-and-file

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<sup>85</sup> Northern Ireland Act, Para 31. See also J. McGarry and B. O'Leary, 'Consociational Theory, Northern Ireland's Conflict, and its Agreement Part 2. What Critics of Consociation Can Learn from Northern Ireland',

*Government and Opposition*, vol. 41, no. 2, 2006; S. Byrne, 'Consociational and Civic Society Approaches to Peacebuilding in Northern Ireland', *Journal of Peace Research*, vol. 38, no. 3, 2001.

<sup>86</sup> C. Knox, 'The European model of service delivery: a partnership approach in Northern Ireland', *Public Administration and Development*, vol. 18, no. 2, 1998, at 151.

<sup>87</sup> See Byrne, *supra* note 85.

<sup>88</sup> Compare, for instance, D. Horowitz, D. *Ethnic Groups in Conflict*, California, University of California Press, 1985, chapters 3-5, and A. Lijphart, 'Constitutional Design for Divided Societies', *Journal of Democracy*, vol. 15, no. 4, 2004.

<sup>89</sup> Bush and Houston, *supra* note 77, at 40.

paramilitary members, the poor, and the disabled).<sup>90</sup>As Racioppi and O'Sullivan state further:

Its logic has been to engage them in the peace process by generating opportunities for them to design and implement projects for their communities, by encouraging their involvement in cross-community interaction and cooperation, and by providing training and skills for employment and political participation.<sup>91</sup>

On another level, the approach adopted sought to integrate the private and the public spheres to strengthen accountability, participation and effectiveness. As noted by Hughes, for instance, the injection of EU funding on such a massive scale contributed to a redefinition of the political landscape in Northern Ireland by empowering civil society and weakening state control over the 'community relations' agenda.<sup>92</sup> LDPs were regarded as the most visible expression of a marriage between representative and participatory democracy.<sup>93</sup>

LDPs functioned under the oversight of the Northern Ireland Partnership Board (NIPB). This is an executive body comprising representatives, one-third each, from local authorities; voluntary/community sectors; business, trade unions, rural and farming which has full responsibility to agree on plans within the resources available for each District Partnership. These coalitions also involved representatives of various sectors within that area: one-third of the representatives were elected councillors, one-third were community and voluntary sector representatives and one-third represented the private sector, trade unions and other interests. The function of these coalitions was to identify and fund local development initiatives seeking to contribute to peace and reconciliation. The intention was to pursue the EU's objectives by 'providing local economic and social actors with resources to translate developments into a lasting peace, and to facilitate ongoing progress

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<sup>90</sup> L. Racioppi and K. O'Sullivan, 'Grassroots Peace-Building and Third-party Intervention: The European Union's Special Support Programme for Peace and Reconciliation in Northern Ireland', *Peace and Change*, vol. 32, no. 3, 2007, at 371.

<sup>91</sup> *Ibid.*, at 371.

<sup>92</sup> J. Hughes, 'EU conflict management policy: comparing the security-development model in the 'sui generis' cases of Northern Ireland and Kosovo', Paper Presented at: European Consortium for Political Research general conference, 10 - 12 September 2009, Potsdam, Germany, at 7.

<sup>93</sup> C. Knox et al., *Partnership Governance in Northern Ireland: The Path to Peace*. Dublin: Oak Tree Press, 1998, at 64.

towards reconciliation.<sup>94</sup> This strategy reflected the view of the Commission that at the local level, actors such as local authorities, business, trade unions and voluntary associations, should be involved in shaping and implementing the programme.<sup>95</sup>

That a partnership approach was adopted emerged for a number of reasons. Alongside the view that the political peace process should be supported by bottom-up initiatives, approach coincided with the post-Maastricht Treaty (1992) policy framework of the EU. This framework emphasized social inclusion as an objective and the role of civic organizations as a means towards addressing that objective and it had been embodied in the Third Poverty Programme that ran from 1989 to 1994.<sup>96</sup> Thus, when it came to designing the particular framework that the PEACE projects were to adopt, Williamson et al. suggest that both a shift in thinking at the European Commission level coupled with the impressive record of voluntary community-based initiatives within Northern Ireland were influential in the design of the PEACE.<sup>97</sup>

The story of the LDPs highlights the role of businesses as effective participants in governance. Under a framework of collaboration, the private sector, along with other business interests, was a key player in a tripartite approach to governance that sought to not only respond to the limitations of local governance but also to utilise the very process of collaborations as a conflict resolution tool. For Birrell and Gray, the valuable contributions that businesses brought were management expertise, entrepreneurial skills and access to resources.<sup>98</sup> In much the same way that scholars have noted the important roles that businesses can play in helping to broker peace, the inclusion of the private sector in the LDPs shows the potential and importance of including business, particularly local businesses, in helping to govern

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<sup>94</sup> Bush and Houston, *supra* note 77, at 38.

<sup>95</sup> Commission of the European Communities, 'Communication from the Commission to the Council and the European Parliament – A Special Support Programme for Peace and Reconciliation in Northern Ireland – COM 94/607 Final' [Online] Archive of European Integration, University of Pittsburg, 1994, <http://aei.pitt.edu/2865/> [last accessed 24 June 2017].

<sup>96</sup> N. Acheson and C. Milofsky, 'Peace Building and Participation in Northern Ireland: local social movements and the policy process since the 'Good Friday' Agreement', *Ethnopolitics*, vol. 7, no. 1, 2008., at 72.

<sup>97</sup> A. Williamson, D. Scott and P. Halfpenny, 'Rebuilding civil society in Northern Ireland: the community and voluntary sector's contribution to the European Union's Peace and Reconciliation District Partnership Programme' *Policy and Politics*, vol. 28, no. 1, 2000; C. McCall and A. Williamson, 'Fledgling social partnership in the Irish border region: European Union "Community Initiatives" and the voluntary sector', *Policy and Politics*, vol. 28, no. 3, 2000, pp. 397-410.

<sup>98</sup> D. Birrell and A.M. Gray, 'Partnership Boards in Northern Ireland: An Administrative Innovation in Active Citizenship of Another Quango', in L. Rouben, *Citizens and the New Governance – Beyond New Public Management*. IIAS Monograph Series Vol.10 (European Group for Public Administration), IOS Press, Amsterdam., 1999, at 134-135.

in the post-conflict phases. Through their involvement in the LDPs, businesses were directly involved in helping to realise important peacebuilding objectives. These objectives included bringing previously at-war communities together, developing the socioeconomic conditions of those previously marginalised and complementing the broader, more elite-driven peace process.

Regarding impact, the overall usefulness of the LDP model is suggested by the fact that its structure was retained and developed further throughout subsequent PEACE programmes. Furthermore, the proportion of PEACE funding disbursed through the District Partnership model increased from 14% to 24% within the PEACE I Programme. Indeed, in PEACE III, partnerships evolved into Local Peace Action Clusters.<sup>99</sup> Moreover, and while not without controversy,<sup>100</sup> a number of analyses into the PEACE programmes have highlighted not only the important impacts of the PEACE programmes but also the centrality of participation to it. This retention highlights the overall usefulness of the LDP model.<sup>101</sup>

#### 5.4.1.2. *Incentivising Participation?*

Why did businesses participate in these partnerships? In answering this question, it is important to keep in mind the broader economic context of the time. As scholars like Andersson et al. note:

Northern Ireland's economic infrastructure [was] poor and underfunded. The conflict hampered private investment and government funds were largely focused on direct measures to provide security and combat the IRA and associated paramilitary groups.<sup>102</sup>

The constant threat of bombings, the high cost of security, and lack of a stable internal market made plant openings unattractive and drove away large

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<sup>99</sup> Bush and Houston, *supra* note 77, at 38.

<sup>100</sup> See, for instance, B. Harvey, 'Review of the Peace II Programme', York, Joseph Rowntree Charitable Trust, 2003.

<sup>101</sup> Bush and Houston, *supra* note 77, at 40.

<sup>102</sup> J.J. Andersson, T. Evers, and G. Sjöstedt, 'Private Sector Actors and Peacebuilding: A Framework for Analysis', The Swedish Institute of International Affairs and International Council of Swedish Industry, 2011, at 22.

manufacturers in great numbers.<sup>103</sup>In short, the economy in post-conflict Northern Ireland was weak. Businesses, as economic actors, depend on a strong economy.

Against these realities, it is necessary to understand the influence of LDPs over economic policy. In terms of operation, each LDP was invited to bid against the allocation for its area through a plan of action. This plan detailed the actions/projects which, in the opinion of the partnership, were best calculated to advance the aims and objectives of the initiative in its area. To this end, the economy was identified as a key priority. Under PEACE I, for instance, EU PEACE funds had to go to projects for social inclusion, employment, urban/rural regeneration, and productive investment and industrial development. Within these general parameters, LDPs could set their own strategies for grant-making. The partnerships awarded over £61 million to more than 3,000 projects; the average grant was £18,687.

Similarly, under Peace II, five priority areas receive designated percentages of total funding: economic renewal; social integration; locally based regeneration and development; outward- and forward-looking region; and cross-border cooperation. Peace II's objectives were to promote reconciliation to forge a peaceful society by addressing the legacy of conflict in areas most impacted by conflict and to take advantage of opportunities arising from peace focusing on cross-border cooperation, economic renewal, inclusion, locally based regeneration and development, outward and forward-looking region, and social integration.<sup>104</sup>

Through LDPs, businesses were able to shape economic policy. That is, as direct participants, businesses were able to identify important areas for reform, including developing and supporting local businesses, and improving infrastructure necessary for business logistics. The EU Funds provided an incentive for businesses to engage in those processes by offering businesses the opportunity to become involved in shaping the economic agenda in NI. Against this backdrop and as will be developed, we can begin to think about other ways that, for instance, those financing businesses can shape business interventions in post-conflict contexts.

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<sup>103</sup> L. Hancock, 'Northern Ireland: Troubles Brewing', <http://cain.ulst.ac.uk/othelem/landon.htm> [last accessed 27 April 2016].

<sup>104</sup> O. Skarlato et al., 'Economic Assistance to Peacebuilding and Reconciliation Community-Based Projects in Northern Ireland and the Border Counties: Challenges, Opportunities and Evolution', *International Journal of Politics, Culture and Society*, vol. 29, no. 2, 2016, at 162.



#### 5.4.1.3. *Discussion*

The discussion above is relevant for a number of purposes. Firstly, from the perspective of businesses contributing to peacebuilding efforts, the example outlines some context-relevant interventions. While politically, through a power-sharing framework, Northern Ireland was moving towards a more co-operative society, on the ground these realities were less visible. The LDPs were viewed as a complement to top-down measures by seeking to integrate both communities through a collaborative, bottom-up process. The inclusion of businesses as participants in the LDCs, illustrates that companies can be involved in governance, community reconciliation efforts and socioeconomic development, in ways that extend beyond 'doing no harm' or a 'business as usual' approach. Secondly, the EU was able to incentivise businesses to participate in the LDPs by creatively offering the opportunity to engage in governance and economic reform processes. This shows the possibilities not only external actors to influence companies to contribute to peacebuilding but also the importance and usefulness of doing so creatively.

At the same time, the example of the EU PEACE program is distinct from other approaches, such as FETO. An argument can be made that pursuant to the latter, businesses were regulated to contribute to peacebuilding, through both the threat of legal sanctions for non-compliance and, in most cases, promoting collaboration between the ECNI and businesses. It is harder to advance the same argument for the EU PEACE programme. Incentivising businesses to contribute to the peacebuilding effort through participation in the LDPs demonstrates creativity and a degree of lateral thinking. It helps to highlight that those capable of influencing businesses can adopt approaches that succeed in aligning peacebuilding objectives with business interests. However, these approaches are not and should not be regarded as regulation. Differing from B-BBEE, which arguably has some regulatory components, the approach of the EU Peace program is something different; a smart approach to leveraging influence, but not quite regulation.

### **5.5. Legislative Barriers: The Issue of Political Prisoner Reintegration**

The final story identifies an area in which businesses could make a significant contribution to the ongoing peacebuilding effort but which, partly because of legislation in place, has yet to do so- the issue of prisoner reintegration. In Northern

Ireland, the reintegration of former political prisoners back into society has been a fundamental component of the peace process.<sup>105</sup> The passing of Emergency Provisions Act of 1973, which applied exclusively inside Northern Ireland and to the Prevention of Terrorism Act of 1974, which applied to the whole of the United Kingdom increased the amount of political prisoners in Northern Ireland.<sup>106</sup> The result was that at the time of brokering a peace deal, a significant number of former combatants were or had been incarcerated within the British penal system. Shirlow and McEvoy, for instance, estimate that 15,000 Republicans and between 5,000 and 10,000 loyalists were imprisoned during the conflict.<sup>107</sup> Others argue that the number was around 25,000.<sup>108</sup>

When it came to negotiating the political settlement, prisoner release was viewed as a critical component of the deal. Under the GFA, for example, the British and Irish governments pledged ‘to recognise the importance of measures to facilitate the reintegration of prisoners into the community by providing support both before and after release, including assistance directed towards availing of employment opportunities, retraining and/or re-skilling, and further education’.<sup>109</sup> Eight years later, the St Andrew’s Agreement stressed that the British ‘government will work with business, trade unions and ex-prisoner groups to produce guidance for employers which will reduce barriers to employment and enhance re-integration of former prisoners’.<sup>110</sup>

Notwithstanding the importance attached to prisoner reintegration, however, McKeever notes that less attention has been paid to implementing prisoner-related aspects of these agreements.<sup>111</sup> For example, the vast majority of the 300 ex-prisoners surveyed by Shirlow et al. – 93% of republicans and 84% of loyalists – had experienced financial difficulties when first released and 48% of loyalists and 64% of

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<sup>105</sup> B. Rolston, ‘Review of literature on republican and loyalist ex-prisoners’. Transitional Justice Institute, University of Ulster Research Paper, 2011.

<sup>106</sup> See M. Flaherty, ‘Human Rights Violations Against Defense Lawyers: The Case of Northern Ireland’, *Harvard Human Rights Journal*, vol. 7, no. 1, 1994.

<sup>107</sup> K. McEvoy and P. Shirlow, ‘Re-imagining DDR Ex-combatants, leadership and moral agency in conflict transformation’, *Theoretical Criminology*, vol. 13, no.1, 2009, at 33.

<sup>108</sup> B. Gormally, *Conversion from War to Peace: Reintegration of Ex-Prisoners in Northern Ireland*, Bonn: Bonn International Centre for Conversion, 2001, at 41.

<sup>109</sup> Ireland, United Kingdom, Northern Ireland, The Agreement Reached in the Multi-Party Negotiations (Good Friday Agreement or Belfast Agreement), Annex B, point 5, 10/04/1998.

<sup>110</sup> Ireland, United Kingdom, Northern Ireland, St Andrew’s Agreement, 13/10/2006, Annex B.

<sup>111</sup> G. McKeever, ‘Citizenship and Social Exclusion: The Re-Integration of Political Ex-Prisoners in Northern Ireland’, *The British Journal of Criminology*, vol. 47, no. 3, 2006, at 423.

republicans continued to have such difficulties.<sup>112</sup> Jamieson and Grounds found that for the republican 18 ex-prisoners they contacted employment was the single greatest obstacle to successful resettlement.<sup>113</sup>

One particular aspect that is increasingly identified is the barriers that face political prisoners in gaining employment. For instance, under the terms of the GFA, ex-prisoners were released on licence- the GFA did not grant an amnesty. Under the Rehabilitation of Offenders (NI) Order 1978, convictions of more than two and a half years can never be spent.<sup>114</sup> Additionally, under the aforementioned Fair Employment and Treatment (NI) Order 1998 it is legal to refuse employment to someone who's political opinions 'approve or accept the use of violence for political ends.' Article 2(4) of the 1998 Order states the following:

In this Order any reference to a person's political opinion does not include an opinion which consists of or includes approval or acceptance of the use of violence for political ends connected with the affairs of Northern Ireland, including the use of violence for the purpose of putting the public or any section of the public in fear.<sup>115</sup>

According to groups focused on the rights of prisoners, this aspect of employment legislation has had the effect of impeding ex-political prisoners of gaining access to employment.

A leading case on the issue is *McConkey and Jervis v the Simon Community*.<sup>116</sup> McConkey was jailed in 1986 for murder, possessing a firearm and belonging to a proscribed organisation. He was released on licence in 1997. Marks, another applicant, in this case, served a prison sentence for possessing explosives and conspiracy to murder. He was released in 1998. Both were turned down for jobs at Simon Community hostels in Belfast and Newry on the basis of Article 2(4).

According to the Irish News:

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<sup>112</sup> P. Shirlow et al., 'Politically Motivated Former Prisoner Groups: Community Activism and Conflict Transformation', Belfast, Northern Ireland Community Relations Council, 2005, at 6.

<sup>113</sup> R. Jamieson and A. Grounds, 'Facing the Future: Ageing and Politically Motivated Former Prisoners in Northern Ireland and the Border Region', Monaghan: EXPAC, 2008.

<sup>114</sup> Rolston, *supra* note 105, at 37.

<sup>115</sup> FETO, *supra* note 2, Article 2(4)

<sup>116</sup> [2009] UKHL 24 20 May 2009.

The Simon Community were bolstered in their employment ban by the Fair Employment Tribunal, the refusal of a judicial review and a ruling by five judges in Britain's Supreme Court. The court's ruling relied on the ironically named 'Fair Employment Treatment Order' 1998 (FETO) which legally approves discrimination against former prisoners. It states that a convicted person with a political opinion who supported armed struggle can be lawfully discriminated against even though in the McConkey/Marks case both stated they supported the peace process. In effect FETO is a VETO. It means that former prisoners can be legally discriminated against.<sup>117</sup>

In a similar case, the Belfast High Court ruled that a Stormont department unlawfully stopped an ex-prisoner working as a groundskeeper with a conservation charity even though he had held the job for 18 years. The judge also held that Peter Robinson, as the Finance Minister when Martin Neeson lost his job, broke the ministerial code by not consulting his Executive colleagues and in fact 'made a decision he had no power to make' when he "disapplied" the guidance for employing political former prisoners accepted by the North's Civil Service.<sup>118</sup>

These leading cases do not involve businesses per se. However, numerous publications and organisations have noted that legislative provisions under FETO have prevented ex-political prisoners from obtaining employment in the private sphere.<sup>119</sup> In contrast to the notion that the state and its agencies can promote business engagement in peacebuilding processes, a thus far overlooked reality emerges; the state can erect barriers that subsequently prevent businesses from doing so.

According to John Loughran:

It is evident that despite explicit commitments in the Good Friday Agreement (1998) and latterly the St Andrews Agreement (2006) little progress has been

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<sup>117</sup> J. Gibney, 'Former prisoners should benefit from peace process'. The Irish News 14 October 2015.

<sup>118</sup> An Phoblacht, 29 July 2016, [video resource], <https://issuu.com/anphoblacht/docs/ap-july-2016-med-res> For case see, In The High Court Of Justice In Northern Ireland Queen's Bench Division (Judicial Review) Neeson's (Martin) Application [2016] Nib 58 In The Matter Of An Application By Martin Neeson For Judicial Review And In The Matter Of A Decision Of The Department Of Finance And Personnel.

<sup>119</sup> C. C. Joyce and O. Lynch, "'Doing Peace': The Role of Ex-Political Prisoners in Violence Prevention Initiatives in Northern Ireland", *Studies in Conflict & Terrorism*, 2017; J. Loughran, 'Another elephant in the room', EamonMallie.com, (October 15 2015).

made to remove the barriers [...] for political ex-prisoners. [...] The Neeson case evidences that the discrimination of ex-political prisoners and their denial to full and equal citizenship is acceptable – and communicates more generally that in certain instances discrimination will be tolerated.<sup>120</sup>

Bringing this discussion back to the issue of regulation, a counter to the argument that peacebuilding moments can help to create the broader conditions for engaging businesses in the peacebuilding effort arises. While the argument suggested above that peace moments can contribute to important regulatory moments, in this case, the two appear in tension: the former highlights the importance of prisoner reintegration, including economic integration, while the latter works against this objective. In the coming chapter, I will suggest that one response to these tensions is to better orchestrate efforts focused on engaging businesses in peacebuilding efforts, in such a way that these tensions do not arise. This might be achieved by thinking more holistically about aligning the efforts of those that seek to influence businesses to contribute to peacebuilding

#### 5.5.1. Discussion

The last story is used as an illustration to highlight that in certain circumstances, the important roles that businesses might play in contributing to peacebuilding are either ignored or overlooked. Given the particular circumstances of Northern Ireland and the high levels of prisoners that must be reintegrated back into society, businesses, as key economic players, could be important actors in helping to facilitate this particular aspect of the peacebuilding process. However, because of existing limitations, namely legislation in place, businesses have been less willing to employ those previously involved in the conflict. As I will suggest, it is arguably the case that through a coordinated approach where the potential contributions that businesses might make are identified and promoted, missed opportunities can be prevented. I return to this discussion in chapter 6.

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<sup>120</sup> *Ibid.*

## **5.6. Findings**

This section briefly summarises a number of important findings from the case study, which will be developed further in chapter 6.

### **5.6.1. Business Contributions to Peacebuilding**

The Northern Ireland case study demonstrates different ways that businesses can contribute to peacebuilding. In some cases, businesses have been instrumental in putting pressure on government to enact change. They have done this through opposing repressive policies and campaigning for peace. By adopting affirmative action policies, businesses have also played a key role in helping to address the past, particularly by integrating previously marginalised sections of society into the economy. This can be seen as supporting the political process, which resulted in a power-sharing executive as well as helping to give life to the realisation of equality on the ground. Businesses have also been important players in committees designed especially to help address the marginalisation of Catholics and to compensate for the perceived inadequacies of local government. I also argued that businesses have at least the potential to integrate former combatants back into society, the importance of which stems from the high level of political ex-prisoners in the context. In different ways, the contributions and potential contributions that businesses can make are directly linked to the context-specific realities of the peacebuilding process in the region.

### **5.6.2. Contested views on 'Regulation'**

As suggested in the case study on South Africa, the purpose of exploring different approaches to regulation in chapter 3 was to examine a number of different ways in which various actors influence business conduct. I then sought to examine, through this case study, how different actors might use these forms of influence and perhaps variations of regulation, to require, induce or encourage businesses to contribute to peacebuilding in Northern Ireland.

However, the case study raises some conceptual questions regarding whether we might look beyond the different forms of influence being used to ask whether these businesses were regulated to contribute to peacebuilding. In some cases, the initiatives examined fall outside of any definition of regulation. For instance, the EU

PEACE approach demonstrates a creative way of involving businesses in the peacebuilding process by incentivising them. The incentive emerged in the form of access to important decision-making processes and to use this position to steer projects in ways that might benefited them. This is a creative approach, which demonstrates a useful way of incentivising businesses to play a more 'hands on' role. It should not be regarded, however, as a form of regulation.

In other cases, whether initiatives amount to regulating businesses for peacebuilding depends on how one defines regulation more generally. For instance, if we accept the premise that such actors as institutional investors and shareholders, through different forms of economic pressure, are types of regulators, then we might suggest that regulation can be used to encourage peacebuilding. In the case of investors, such entities as the NY can be seen as leveraging businesses to challenge anti-discrimination practices, one of the underlying causes of conflict in the region. In this sense, in much the same that we might accept such an approach to be regulation when it attempts to limit the harms that businesses cause, we might also argue that adopting the same approach, albeit for different ends, can still be regarded as regulating.

In other areas still and again similar to the South African study, the link seems even stronger. Through legislative efforts such as the FETO 1998, which fall squarely within the definition of orthodox regulation, we might suggest that businesses are being regulated to contribute to peace. Under this approach, companies were commanded to adopt affirmative action policies and faced sanctions if they did not adhere to them. While in most cases, collaborations between businesses and the ECNI has helped to advance the objectives of this legislation, the example nevertheless raises interesting questions about what regulation is and is not and whether different forms of regulation can be used to push businesses beyond 'doing no harm.' While the purpose of this chapter was to examine how different actors might influence businesses, indirectly, the case study raises a number of conceptual questions regarding what regulation is and what it is not.

### 5.6.3. Different Forms of Influence

Putting to one side conceptual discussions, the more important point to be made is that the case of Northern Ireland highlights that a range of different actors can influence business contributions to peacebuilding. The State has been instrumental,

both during and in the aftermath of the conflict in adopting affirmative action policies. It has been progressive not only in adopting affirmative action legislation but also in thinking creatively about how to ensure that affirmative action requirements are adhered to. While as outlined above, a command and control-based approach underpins the FETO legislation, the primary method of influence has been the use of voluntary agreements between businesses and the ECNI, a statutory organisation under the NIA, 1998. This highlights the potential for collaborations to advance business-based peacebuilding. Moreover, in some cases, procurement has been used to further support these efforts, with contracts being won or lost based on the basis of a business's employment practices. This approach seeks to incentivise businesses to adopt affirmative action policies. Read together, the example of FETO suggests that businesses can be required, persuaded or incentivised to contribute to certain aspects of a peace process.

The US has also been instrumental in engaging businesses to contribute to peacebuilding in various ways. The NY Comptroller, for instance, as an institutional investor, was able to leverage its position to demand change. The example suggests that investors can use their influence to shape corporate conduct, in this case, pushing against repressive state-legislation, which marginalised a particular section of society. Shareholders in companies that had operations in Northern Ireland did the same. In the case of the MacBride Principles, for instance, the position of institutional investors and shareholders, as part owners of companies, enabled economic pressure to be levelled against businesses to enact and demand change.

Civil society actors, such as the IAC, have also been instrumental in exerting moral pressure on these different actors to demand change in the first place. To this end, the links between business and conflict have also been critical. By identifying businesses as essential constituents in contributing to the continuation of discriminatory policies and subsequently to conflict, different actors were able to draw on these connections and avail of the opportunities to challenge discriminatory legislative provisions. This helps to show the importance of 'getting to regulation', with civil society constituents playing salient roles in identifying opportunities to lean on those capable of shaping business conduct.



Through the EU Peace Funds, businesses were offered incentives to help participate in community-level partnerships by the prospect of involvement in helping to shape the domestic economy. Amongst other factors, capital flight during the zenith of the violence had left the economy mostly dependent on the public sector, which adversely impacted business performance. Through a creative process, the EU was able to draw on these concerns to engage companies in peacebuilding activities. This again suggests that actors can influence businesses through various forms of economic leverage and opportunities.

#### 5.6.4. Initiatives Leading to Institutional Change

The Northern Ireland case study also highlights a number of interesting patterns that flow from the direct exertion of influence over business. A case in point is MacBride Principles. While ultimately directed towards American businesses, the MacBride Principles had the impact of forcing the British government to alter its employment policies. In this sense, both institutional developments in the form of the FE Act and FETO are directly linked to the in-conflict regulatory moment that was the Sullivan Campaign.

Similarly, while inequality was a much more extensive part of the conflict in Northern Ireland, we might also conclude that in some senses, discrimination in the private sector, helped contribute to the strong equality provisions of the GFA and the NIA, 1998. Indeed, for McCrudden, these comparatively older regulatory systems relating to equality in employment between the two communities in Northern Ireland pioneered the more progressive approach to equality constituted through the NI Act. The case study illustrates that the direct regulation of businesses can drive other regulatory developments, further demonstrating the indirect contributions that can flow from directly targeting business's involvement in discriminatory regimes.

#### 5.6.5. Peace Moments leading to change in business regulation

At the same time, it is necessary to recognise the importance that moments in the peacebuilding process have had on the discussion on regulation of business. Firstly, the GFA and NIA provided the basis upon which the FETO was enacted. These peacebuilding moments were regarded as essential in furthering the broader objectives of equality as laid down in these foundational documents. In this sense,

NIA is similar to the case of South Africa where the B-BBEE framework sought to give effect to the equality provisions in the 1996 constitution.

Secondly, the Equality Commission, which plays a central role in the collaborative and experimental approach under FETO, owes its origins to these significant peacebuilding moments. Finally, the approach adopted through the EU Peace funds directly builds on the equality agenda. On the one hand, the LDPs are a form of community integration where different sections of the community participate in a consultative bottom-up way of governance. On the other hand, the decision that these committees made had a direct impact on the process of giving life to the equality provisions in both the GFA and NIA. Thus, peacebuilding moments can be important aspects of engaging businesses through regulation by providing the foundations for other actors upon which to do so.

#### **5.6.6. Regulatory Interactions**

While far less limited than the South African case study, there are also some different interactions between regulatory initiatives. In some senses, these have already been discussed and relate to the various ways that different regulatory initiatives have built on from others. To this, we might also add how different regulatory efforts have supported others. For instance, while affirmative action attempts to break with the past by integrating previously marginalised sections of society, other legislative initiatives have emerged to ensure that other groups are not subsequently discriminated against.

Less progressively, while reintegrating former ex-political prisoners is recognised as a significant component of the peacebuilding effort, aspects of FETO appear to conflict with these peace agreement goals. This discussion highlights the fact that not only can barriers be created, which limit the willingness of businesses to become involved in the peacebuilding effort but, more importantly, opportunities for using firms in peacebuilding efforts can be missed.

#### **5.7. Conclusion**

The discussion on regulatory pluralism in chapter 3 intended to identify different ways through which to influence businesses. By identifying these various forms of influence, the intention was to understand whether these same approaches might be

used to engage businesses in peacebuilding processes. This chapter has shown that not only can businesses be involved in the peacebuilding effort in different ways but also that different actors can influence how and when businesses do.

While we normally consider codes and standards of conduct to be associated with curtailing the harms businesses might cause, the example of the MacBride Principles demonstrates that standards can require more proactive interventions. Similarly, shareholders and investors can use their influence to incentivise businesses to challenge discriminatory employment practices, pushing forward an agenda based on affirmative action. In this way, the case study helps to highlight that different actors can strengthen business adherence to standards through various forms of economic pressure. A similar reality exists in the context of institutional investors which, as demonstrated through the example of NY's comptroller, can leverage businesses to pursue peacebuilding objectives.

The case study also demonstrates that legislation can be used to promote proactive contributions. The FETO, for example, directly requires that businesses adopt affirmative action policies, in doing so responding to the historical marginalisation of Catholics in the workforce. To this end, the NI example also shows the possibility of experimentation and the opportunities for actors to think outside the box. This is particularly evident in the case of the more collaborative approaches around FETO, between businesses and the ECNI. In these examples, exploring how, what many consider to be different forms of regulation, can shape business conduct, helps to locate different types of influence that can be exerted on businesses and the various actors that can be involved in these processes.

The example of the EU PEACE program, by contrast, suggests that while not amounting to regulation, different players on the peacebuilding scene can nevertheless use economic incentives in ways that include businesses in peacebuilding efforts. In this instance, businesses were incentivised to contribute to efforts focused on community reconciliation, social peacebuilding, and collective governance.

The study has also suggested that efforts targeting businesses directly can indirectly lead to institutional developments of the regulatory environment. FETO, for example, emerged partially in response to the pressure exerted via the MacBride campaign.

To this end, the MacBride campaign owed its origins to the work of civil society actors, highlighting the importance of putting pressure on those capable of influencing the conduct of businesses. It was also noted that peacebuilding moments are often crucial in setting the broad agenda for change, providing the basis for the development and reinforcement of other initiatives post-conflict.

These discussions all suggest that there exists a number of opportunities not only for influencing businesses to engage businesses in peacebuilding efforts but also in pressurising other actors to alter their policies. At the same time, the case study also suggests that there are coordination problems and opportunities. The example of political reintegration reminds us that tensions can arise between peacebuilding goals and regulatory possibilities.

As will be discussed in chapter 6, these findings are particularly useful when considering what a framework on business and peacebuilding. In particular, this case study helps to support the view that different actors can engage companies to do more; that other sources can drive those assuming regulatory responsibilities; and that opportunities exist for different initiatives interacting. I develop these arguments further in chapter 6.

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## **A Global Policy Instrument on Business and Peacebuilding?**

The previous chapters have demonstrated that different actors, employing a range of methods, can influence businesses to contribute to peacebuilding. While in the vast majority of instances, we look to these different forms of influence, whether legal or softer in nature, to prevent businesses from causing harm or holding businesses accountable, the case studies suggest that businesses can also be influenced to contribute to peacebuilding efforts. From post-conflict states to civil society organisations, home states to institutional investors, various actors can require, persuade and induce businesses to contribute to peacebuilding. I also suggested that initiatives can interact in different ways, sometimes supporting the objective of engaging businesses in processes of peacebuilding, while at other times stifling the realisation of this aim. In some instances and depending on how one understands the concept of regulation, we might even go so far as to suggest that businesses are being regulated to contribute to peacebuilding.

Despite these possibilities, there is currently little discussion on the different ways that other actors might influence business contributions to peacebuilding. How then might we build on the case study findings? This chapter will argue that a global policy instrument on business and peacebuilding, which attempts to include different actors in promoting businesses to make more proactive contributions in peacebuilding processes, might be one potential solution.

### **6.1. Introduction**

The case studies on South Africa and Northern Ireland have demonstrated that different actors can shape business conduct in various ways and that in some instances; these different forms of influence can be used to engage businesses in contributing to peacebuilding. From post-conflict states to civil society organisations, home states to institutional investors, various actors can require, persuade and

induce businesses to play more proactive roles in transitions from conflict to peace. How though might these findings be relevant elsewhere and what possibilities exist for advancing the discussion beyond the confines of both the case studies and this thesis? I suggest that considering what a global policy instrument on business and peacebuilding might look like can act as a catalyst for further discussions and research on the connections between various forms of influence and business-based peacebuilding. In advancing this argument, I will draw on the United Nations Guiding Principles on Business and Human Rights (UNGP)- the principle framework on business and human rights- for two primary reasons.<sup>1</sup>

### **6.1.1. The UNGP are a Conversation Starter**

Firstly, although, as will be developed below, the UNGP have had some success in promoting the business and human rights agenda, and in improving respect for human rights, they have faced a number of criticisms. Amongst these are that they do not reflect differences across industries, that they fail to adequately protect the rights of such groups as women and children, and that they are not representative of the true position of international human rights law, for instance, in the context of extraterritorial obligations of states.

However, approached from the perspective of progressing a discussion on the roles that other actors can play to engage businesses in peacebuilding efforts, I suggest that these limitations demonstrate how a policy instrument can be a conversation starter. When Professor John Ruggie, the author of the UNGP, presented this policy instrument to the Human Rights Council (HRC) in 2011, he stated that he was ‘under no illusion that the conclusion [of his] mandate will bring all business and human rights challenges to an end. But Council endorsement of the Guiding Principles will mark the end of the beginning.’<sup>2</sup> He has since elaborated that by this he meant that the UNGP would provide a solid foundation on which to build. They

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<sup>1</sup> UN Human Rights Council, Protect, Respect and Remedy: A Framework for Business and Human Rights, 2008 Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. A/HRC/8/5. 7 April [hereinafter the UNGP, the Guiding Principles or the ‘Principles’]. While specific terms and names are abbreviated throughout this thesis, I include the full names again for ease of reference when each previously abbreviated word is mentioned.

<sup>2</sup> ‘Presentation of Report to United Nations Human Rights Council, Professor John G. Ruggie, Special Representative of the Secretary-General for Business and Human Rights’, Geneva 30 May 2011, [www.ochcr.org/Documents/Issues/TransCorporations/HRC%202011\\_Remarks\\_Final\\_JR.pdf](http://www.ochcr.org/Documents/Issues/TransCorporations/HRC%202011_Remarks_Final_JR.pdf)

were intended to ‘trigger an evolution, not [to be] the final work on the subject.’<sup>3</sup> Because of the perceived limitations of the UNGP, a boom in scholarship and thinking on the issue of business and human rights has since emerged. The pushback against the UNGP has led to important discussions regarding how to further the business and human rights agenda and how to address the various shortcomings of the policy instrument that was presented.

I suggest that the trajectory of the business and human rights debate following the UNGP shows how a policy instrument can inspire debate and interdisciplinary discussions, with the aim of progressing the ultimate objective of improving corporate conduct in a particular regard. In this light, the UNGP has been a conversation starter; one which has led to more significant efforts to progress how and in what ways to forward the business and human rights agenda, and, importantly, the role of different actors in this effort. Thus, as an area of research, which has yet to attract significant discussions, I suggest that a policy instrument, however provocative or limited, might serve a similar function in progressing discussion and debate regarding the linkages between the influence of different actors and business-based peacebuilding.

#### **6.1.2. The UNGP are a Useful Template**

Secondly, I will argue that the UNGP offer a useful template for considering the form that a global policy instrument on business and peacebuilding might take. On the face of it, contemplating what such an instrument could look like might appear a confusing and uncertain task. Where would we begin to think about such an instrument and what would its parameters look like?

I will argue that the UNGP offer some basis for considering the structure and primary components of a policy instrument on business and peacebuilding.<sup>4</sup> Before proceeding, however, it is necessary to qualify and to differentiate an instrument on business and peacebuilding from that of the UNGP. Elements of the UNGP reflect

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<sup>3</sup> J. G. Ruggie, ‘Incorporating human rights: lessons learned, and next steps’, in D. Baumann-Pauly and J. Nolan (ed.) *Business and Human Rights: From Principles to Practice*, Routledge, New York, 2016, at 64.

<sup>4</sup> UN Human Rights Council, Protect, Respect and Remedy: A Framework for Business and Human Rights, 2008 Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. A/HRC/8/5. 7 April [hereinafter the UNGP or the ‘Principles’].

the position of international human rights law. The UNGP reiterate, for example, that states have legal obligations to protect against human rights, with much of the substance of the UNGP outlining and identifying how states might go about executing these duties. A business and peacebuilding policy instrument would have no such legal basis. States do not have obligations to engage businesses in peacebuilding processes, nor have such arguments been advanced. I suggest simply that the particular structure of the UNGP is instructive in helping to inform the broad parameters of a policy instrument on business and peacebuilding. As a template and only as a template, are the UNGP useful in providing a reference point for thinking about a policy instrument on business and peacebuilding.

Their relevance stems from their ability both to draw on the roles that different actors can play in shaping corporate conduct and in galvanising other actors to assume these responsibilities. The UNGP consist of three pillars: the state duty to protect human rights; the corporate responsibility to respect rights; and the remedy pillar. The state duty to protect human rights requires states to employ a range of measures to ensure that businesses are not undermining the enjoyment of human rights. Reflecting the plurality of regulatory options available to the state, this includes adopting command and control-based approaches, alongside measures that incentivise and persuade businesses to respect rights. Secondly, under pillar 2 and elements of pillar three, the UNGP serve as a set of guidelines directed towards businesses to help inform companies as to how to go about respecting rights in the contexts in which they operate. This includes, amongst other things, asking businesses to undertake human rights due diligence, which stresses the importance of context-sensitive approaches to human rights. Finally, both implicitly and explicitly, the UNGP draw on a range of actors that can help to promote business responsibilities to respect rights. Explicitly, this includes reflecting the plurality of actors and methods in the formal text of the UNGP. Implicitly, the UNGP have helped to garner extensive support, with a diverse range of actors seeking to incorporate due diligence requirements into their functions.

As I will develop further below, the UNGP are useful in showing that a policy instrument can help to align different actors around a common objective; in this case, reducing the extent to which businesses undermine the enjoyment of rights and in some cases providing remedies to victims when harms occur. They do this by harnessing the potential of different actors to influence corporate conduct, both by



focusing on the direct measures that states can take on one hand, and by developing and engaging other actors to promote the process of due diligence, on the other.

Similar to the UNGP, a global policy instrument on business and peacebuilding should involve different actors putting pressure or incentivising businesses to contribute to peacebuilding processes. Most importantly, it should respond to the limitations of relying solely on the individual decisions of companies as to when and how to intervene. The first port of call, in this regard, should be post-conflict states. Such an instrument, recognising the various difficulties that often face states transitioning from conflict to peace, should outline the broad range of possibilities and methods that the state could employ. In other words, the state-limb of a global policy instrument should reflect the plurality of options that state's can use. At the same time, the realities are often such that, despite these various options, states will be unwilling and/or unable to assume these roles. For this reason, a global policy instrument should also speak to businesses. That is, an instrument should seek to inform businesses as to how they might identify ways to make proactive, positive contributions to peacebuilding efforts. At this point, there is perhaps an obvious limitation: how might a global instrument be contextually applicable? As this thesis has argued throughout, there are numerous difficulties associated with making broad statements about how businesses can contribute to peace. Most notably, because post-conflict contexts are complex, businesses contributions to peace in one setting might have little impact in another. Moreover, in some cases, these contributions might exacerbate the situation. For these reasons, the business limb of a business and peacebuilding policy instrument should focus on outlining processes that businesses should adopt to identify how to engage in post-conflict settings.

The final limb of a policy instrument on business and peacebuilding arises in response to the potential failures of both orthodox and self-regulation. In the absence of states, relying solely on businesses to follow a set of guidelines is, in some senses, to bring us back to the start of this thesis. That is, we would be left to assume that businesses would decide when to adhere to these guidelines, thus leaving us stagnated in the aforementioned state of optimistic uncertainty. For this reason, pillar 3 of a policy instrument on business and peacebuilding should attempt to include different actors that might be able to influence business contributions to peacebuilding. A further difficulty arises. How can actors, other than states, define

peacebuilding objectives? Moreover, is it even wise for them to do so? I suggest that pillar 3 of any instrument on business and peacebuilding should focus more on promoting adherence to pillar 2 guidelines. That is, adopting a responsive-regulatory type approach, such actors as investors, financiers and civil society, as examples, should seek to promote adherence to the guidelines set.

In short, the UNGP are useful, therefore, in two, perhaps contradictory ways. Firstly, the broader context of the trajectory of the business and human rights debate post-UNGP offers hope that such an approach can galvanise debates, thinking and argumentation over how best it might proceed. Secondly, the UNGP provide a template for considering the form that such an instrument might take.

The remainder of this chapter is set out as follows. Section 6.2. examines two existing global initiatives on business and peacebuilding: the UN Business for Peace Platform (B4P) and the Sustainable Development Goals (SDGs). While both are welcomed developments in the area of business and peacebuilding, the discussion helps to illustrate the lack of thinking on the role that other actors might play in promoting business-based peacebuilding. Section 6.3. analyses the UNGP. I begin by dissecting the UNGP, examining the different ways in which the UNGP endeavour to address the business and human rights problem. This involves unpacking the state duty to protect human rights (6.3.1.1.) and the corporate responsibility to respect human rights (6.3.1.2.). Also included in this discussion is an examination of the ways that the UNGP, based on and reflecting the pluralisation of regulation, attempt to integrate different actors and methods to promote the corporate responsibility to respect rights (6.3.1.3 and 6.3.2.). I then examine a number of criticisms levelled against the UNGP (6.3.3.) and explain how these criticisms have helped to inspire a wealth of discussions and ideas about how to progress the business and human rights agenda (6.3.4.) I conclude by reiterating the relevance of these discussions to a global policy instrument on business and peacebuilding.

Section 6.4 considers what a policy instrument on business and peacebuilding might look like. Drawing on the findings of the case studies and based on the state pillar of the UNGP, I begin by considering the different ways that states might attempt to require, induce or encourage businesses to contribute to peacebuilding in context-sensitive ways (6.4.1.1.). I also suggest that state-based initiatives can help to

support the emergence of other initiatives (6.4.1.1.1.) before focusing on how states might be pressured to adopt such measures (6.4.1.1.2) and how other actors might help to inform how they go about doing so (6.4.1.1.3.). I conclude by considering the merits of a state limb (6.4.1.1.4.).

Drawing on the due diligence guidelines in the UNGP, the next section considers what a set of guidelines on business and peacebuilding might look like (6.4.1.2.). To do so, I draw on a document produced by the UNGC in collaboration with CDA Collaborative Learning Projects. I then consider how different actors might seek to influence businesses to adopt these guidelines (pillar 3- s. 6.4.1.3.). For different reasons, I suggest that for actors other than states, a process-oriented approach, which focuses on promoting compliance with the guidelines is the best model for seeking to engage businesses in contributing to peacebuilding in ways that are not only context relevant, but which do not conflict with state-based peacebuilding objectives. I conclude this section by reflecting upon the limitations of this policy instrument, while at the same time considering its potential for inspiring wider debate (6.4.2.). I offer a number of conclusions in the final section (6.5.2.).

## **6.2. Existing Attempts at a Global Approach to Business and Peacebuilding**

One of the reasons for considering the emergence of a global policy instrument on business and peacebuilding is that such an instrument might help to inspire a range of actors to consider using their influence over businesses to engage them in peacebuilding processes. As suggested, the drive for doing so derives from the limited levels of thinking regarding the roles that different actors might play, limitations that are reflected in and by existing policy efforts on business and peacebuilding.

For instance, the B4P platform emerged as a sub-initiative of the United Nations Global Compact (UNGC).<sup>5</sup> Like the UNGC, the approach under B4P has been one of information sharing, encouraging businesses to share best practices in the area of business and peacebuilding. The B4P initiative does not define how businesses might go about engaging in peacebuilding per se, but rather seeks to harness

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<sup>5</sup> See UN Global Compact, 'Business for Peace', <https://www.unglobalcompact.org/take-action/action/peace>, [last accessed 28 August 2017].

lessons regarding the ways that businesses might contribute to peace or have contributed to peace in the past. As an offshoot of the broader UNGC initiative, commitment to B4P relies on the voluntary participation of businesses in the Platform.

A second initiative is that of the SDGs.<sup>6</sup> The SDGs are the follow-on project of the UN Millennium Development Goals (MDGs).<sup>7</sup> Similar to their predecessor, the SDGs are a global and concerted plan of action for people, planet and prosperity. Among the various goals set in the SDGs, goal 16 focuses on peace, justice and strong institutions. The SDG's explicitly recognise the importance of businesses in helping to achieve the objectives, including the realisation of peace. SDG 16 defines peacebuilding as a broad objective that businesses should seek to help realise.<sup>8</sup> Like the approach of the UNGC, businesses are encouraged to contribute to peace through arguments that there are potential economic benefits associated with acting as peacebuilding agents.

These initiatives are important movers in the area of business and peacebuilding. In particular, one of the outputs of a collaboration between the B4P, the SDG project and the CDA Collaborative Learning Project, has been the development of a document that outlines a process for businesses wishing to contribute to peacebuilding.<sup>9</sup> This will form an important part of the discussion on pillar 2 regarding the possibility for developing guidelines that target businesses.

At the same time, these initiatives are indicative of the current stalemate in thinking on the relationship between business and peacebuilding. In both examples, little attention is directed towards the possibility that different actors can help to drive business contributions to peacebuilding. Instead, they depend on businesses arriving at the conclusion that they should do so. Thus, these efforts perpetuate in policy the existing limitations of much of the literature: there is little certainty or predictability as to why and when businesses might contribute to peacebuilding. The

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<sup>6</sup> See United Nations Department of Economic and Social Affairs, Sustainable Development Knowledge Platform, <https://sustainabledevelopment.un.org/>, [last accessed 29 August 2017].

<sup>7</sup> See United Nations Development Programme, Sustainable Development Goals, [http://www.undp.org/content/undp/en/home/sdgooverview/mdg\\_goals.html](http://www.undp.org/content/undp/en/home/sdgooverview/mdg_goals.html) [last accessed 15 September 2017]

<sup>8</sup> See United Nations Department of Economic and Social Affairs, SDG Business Forum, <https://sustainabledevelopment.un.org/hlpf/SDGBusinessForum> [last accessed 24 July 2017]. See also

<sup>9</sup> Ernstorfer, et al., 'Advancing the Sustainable Development Goals by Supporting Peace: How Business Can Contribute', UN Global Compact, Business for Peace, and CDA Collaborative Learning Projects, 2015.

intention of the case studies was to understand and illustrate how different actors might require, induce, and/or encourage businesses to contribute to peacebuilding processes to push beyond the current stalemate. A global policy instrument on business and peacebuilding, or at least initiating a discussion on such an instrument, could help to encourage actors in the future and in other contexts to use their capabilities to engage businesses in peacebuilding processes elsewhere. As I elaborate directly below, the UNGP offer a number of useful insights when considering what such an instrument might look like and why it could be a useful conversation starter.

### **6.3. The United Nations Guiding Principles on Business and Human Rights**

The UNGP are widely recognised, for better or worse, as the main global standard on business and human rights.<sup>10</sup> They were developed following a multi-stakeholder consultative process undertaken and led by Professor John Ruggie,<sup>11</sup> the then Special Representative to the UN Secretary-General (SRSG) on the Issue of Business and Human Rights.<sup>12</sup> The Guidelines operationalise a tripartite framework on business and human rights and consist of three pillars.<sup>13</sup> The first pillar is the state duty to protect human rights. The second is the business responsibility to respect human rights, while the third pillar outlines the duties and responsibilities of states and businesses respectively to ensure that victims are remedied when breaches occur. Within these pillars, the Guiding Principles (GP) comprise thirty-one principles, each with commentary elaborating on its meaning and implications for law, policy, and practice. Although touching upon the remedy component of the UNGP, for the purposes of viewing this framework as a template for a global policy

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<sup>10</sup> For an overview of the UNGP, see J.H. Knox, 'The Ruggie Rules: Applying Human Rights Law to Corporations', in R. Mares (ed.) *The UN Guiding Principles on Business and Human Rights*, Martinus Nijhoff Publishers, 2011; L.C. Backer, 'On the Evolution of the United Nations' Protect-Respect-Remedy' Project: The State, the Corporation and Human Rights in a Global Governance Context', *Santa Clara Journal of International Law*, vol. 9, no. 1, 2011.

<sup>11</sup> Human Rights Council Res. 2005/69, U.N. DOC. E/CN.4/RES/2005/69 (Apr. 20, 2005).

<sup>12</sup> See for discussion on the process of establishing the UNGP, K. Buhmann, 'Navigating from 'Train Wreck' to Being 'Welcomed': Negotiation Strategies and Argumentative Patterns in the Development of the UN Framework' in D. Bilchitz and S. Deva (ed.) *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect*, Cambridge, Cambridge University Press, 2013; K. Buhmann, 'Business and Human Rights: Analysing Discursive Articulation of Stakeholder Interests to Explain the Consensus-based Construction of the "Protect, Respect, Remedy UN Framework"', *International Law Research*, vol. 1, no. 1, 2012; Backer, *supra* note 10.

<sup>13</sup> UNGP, *supra* note 1.

instrument on business and peacebuilding, I focus primarily on those GP's that attempt to curtail businesses from causing harm.

### 6.3.1. Three Components of the UNGP

#### 6.3.1.1. *Regulatory Pluralism at the State Level*

Pillar 1 of the UNGP addresses the state duty to protect human rights. The Principles reflect the fact that, under international law, obligations for regulating businesses fall on states and that in an ideal world, the state duty to protect and remedy is the best way to regulate the activities of businesses.

In some provisions, the UNGP promote orthodox approaches to regulation and in particular the use of command and control-based forms of influence. For example, GP 1 stresses that:

States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.<sup>14</sup>

The importance of orthodox approaches to regulation is also stated in the Commentary to GP 3:

The failure to enforce existing laws that directly or indirectly regulate business respect for human rights is often a significant legal gap in State practice. Such laws might range from non-discrimination and labor laws to environmental, property, privacy and anti-bribery laws. Therefore, it is important for States to consider whether such laws are currently being enforced effectively, and if not, why this is the case and what measures may reasonably correct the situation.<sup>15</sup>

Moreover, by underlining the importance of avenues to formal legal recourse for victims, the UNGP reiterate the control-based element of command and control-based approaches to regulation. As is noted in GP 23's Commentary: 'Unless States

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<sup>14</sup> *Ibid.*, Principle 1.

<sup>15</sup> *Ibid.*, Commentary to Principle 3.

take appropriate steps to investigate, punish and redress business-related human rights abuses when they do occur, the State duty to protect can be rendered weak or even meaningless.’<sup>16</sup>

At the same time, the plurality of options available to the state is also explicitly recognised throughout the UNGP. The Commentary to GP 3 outlines that ‘States [...] should consider a *smart mix* of measures [...] to foster business respect for human rights.’<sup>17</sup> These include, as examples, persuasive approaches such as corporate reporting,<sup>18</sup> and the use of guidelines,<sup>19</sup> along with conditionality-based regulatory influences, such as public procurement.<sup>20</sup>

For example, GP 6 stipulates that ‘States should promote respect for human rights by business enterprises with which they conduct commercial transactions.’<sup>21</sup>

Similarly, the Commentary to GP 4 alludes to the fact that:

[a] range of agencies linked formally or informally to the State may provide support and services to business activities. These include export credit agencies, official investment insurance or guarantee agencies, development agencies and development finance institutions.<sup>22</sup>

The plurality of regulatory approaches that the state might employ is also referenced in GP 7; a principle directly addressed to conflict-affected settings. This GP asserts that states should help to ensure that business enterprises operating in conflict-affected contexts are not involved in human rights violations. Amongst other things, the Principles encourage ‘[e]ngaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships.’<sup>23</sup> They also stress the salience of ‘[e]nsuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses.’<sup>24</sup>

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<sup>16</sup> *Ibid.*, Commentary to Principle 23.

<sup>17</sup> *Ibid.*, Commentary to Principle 3 [italics added].

<sup>18</sup> *Ibid.*, Principle 3 (d).

<sup>19</sup> *Ibid.*, Principle 2.

<sup>20</sup> *Ibid.*, Commentary to principle 6.

<sup>21</sup> *Ibid.*, Principle 6.

<sup>22</sup> *Ibid.*, Commentary to Principle 4.

<sup>23</sup> *Ibid.*, Principle 7(a).

<sup>24</sup> *Ibid.*, Principle 7(d).

The UNGP are important in demonstrating how such an instrument is able to underline the fact States have the primary roles and responsibilities for shaping business conduct. As Anita Ramasastry notes:

[T]he UNGPs are an important articulation of BHR [business and human rights] because they underscore the role of the state as a regulator and enforcer of laws. BHR [...] contemplates an explicit and essential role for the state. BHR focuses first and foremost on the role of governments in supervising their corporate citizens.<sup>25</sup>

One question that arises, however, is how a state should identify where to make improvements to existing regulatory frameworks. Different states are likely to face different human rights challenges. For instance, the risks associated with countries that are heavily reliant on extractive companies will raise different issues than a country dependent on the apparel industry. In the context of states adopting approaches focused on engaging businesses in peacebuilding efforts, ensuring that the policies are context-relevant is of critical importance.

To address this issue of context, various governments have adopted National Action Plans (NAPs).<sup>26</sup> These documents outline a plan of action for the future protection of human rights in different contexts. The Business and Human Rights Resource Centre (BHRRC) currently identifies eight countries that have produced and published NAPs: Colombia, Denmark, the United Kingdom, Finland, Lithuania, Norway, Sweden and the Netherlands.<sup>27</sup> Various African states such as Kenya, Ghana,

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<sup>25</sup> A. Ramasastry, 'Corporate Social Responsibility versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability', *Journal of Human Rights*, vol. 14, no. 2, 2015, at 246.

<sup>26</sup> See A. Graf, 'Developing National Action Plans on Business and Human Rights', Swisspeace, Essential 04/2013.

<sup>27</sup> BHRRC, 'National Action Plans', <https://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans>. Some examples of NAPs published include: Government of the United Kingdom, 'Good Business: Implementing the UN Guiding Principles on Business and Human Rights', 4 Sept. 2013, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/236901/BHR\\_Action\\_Plan\\_-\\_final\\_online\\_version\\_1\\_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/236901/BHR_Action_Plan_-_final_online_version_1_.pdf); Government of the Netherlands, National Action Plan for Human Rights and Business: 'Knowing and Showing', 20 Dec 2013, <http://business-humanrights.org/sites/default/files/documents/netherlands-national-action-plan.pdf>; Government of Denmark, Danish National Action Plan: Implementation of the UN Guiding Principles on Business and Human Rights, March 2014, ([http://www.ohchr.org/Documents/Issues/Business/NationalPlans/Denmark\\_NationalPlanBHR.pdf](http://www.ohchr.org/Documents/Issues/Business/NationalPlans/Denmark_NationalPlanBHR.pdf)). Government of Finland, Action Plan for the Implementation of the United Nations Guiding Principles on Business and Human Rights, Oct 2014, [http://www.tem.fi/files/41214/TEMjul\\_46\\_2014\\_web\\_EN\\_21102014.pdf](http://www.tem.fi/files/41214/TEMjul_46_2014_web_EN_21102014.pdf).



Mauritius, Morocco, Mozambique, Nigeria, Tanzania, Uganda, and South Africa are in the process of developing NAPs. So too are other countries like Argentina, Ireland, Italy, Jordan, Spain and France.<sup>28</sup>

There is growing awareness about the need for and importance of NAPs. In Europe, for instance, a catalyst for the development of NAPs came when the Council of Europe's (CoE) Committee of Ministers (CoM) called on Member States *inter alia*, to take appropriate steps to protect against human rights abuses by business enterprises.<sup>29</sup> It further outlined that Member States should formulate and implement policies and measures to promote measures that ensure all business enterprises respect human rights, as defined in the UNGP.<sup>30</sup> The Working Group on Business and Human Rights now asks that states implement the Principles through developing NAPs.<sup>31</sup> Different organisations have also developed guidelines outlining how to do so.<sup>32</sup> For example, the International Service for human rights and the International Corporate Accountability Roundtable (ICAR), two Non-Governmental Organisations (NGOs), have developed detailed guidelines, which seek to help states improve their abilities to protect human rights, by devising and implementing NAPs.<sup>33</sup>

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Government of Italy Foundations of the Italian Action Plan on the United Nations "Guiding Principles on Business and Human Rights, Mar 2014, <http://business-humanrights.org/sites/default/files/media/documents/foundations-ungps-nap-italy.pdf>).

Government of Lithuania, Lithuania's Action Plan on the Implementation of the United Nations Guiding Principles on Business and Human Rights', Feb 2015, [http://www.ohchr.org/Documents/Issues/Business/NationalPlans/Lithuania\\_NationalPlanBHR.pdf](http://www.ohchr.org/Documents/Issues/Business/NationalPlans/Lithuania_NationalPlanBHR.pdf)).

<sup>28</sup> C. Pitts, 'The United Nations 'Protect, Respect, Remedy Framework and Guiding Principles', in D. Baumann-Pauly and J. Nolan (ed.) *Business and Human Rights: From Principles to Practice*, Routledge, New York, 2016, at 58

<sup>29</sup> CoM, Recommendation CM/Rec(2016)3 of the Committee of Ministers to member States on human rights and business (*Adopted by the Committee of Ministers on 2 March 2016 at the 1249th meeting of the Ministers' Deputies*),

[https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Rec\(2016\)3&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Rec(2016)3&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true)

<sup>30</sup> Council of Europe, Declaration of the Committee of Ministers on the UN Guiding Principles on business and human rights, 16 April 2014, <https://wcd.coe.int/ViewDoc.jsp?id=2185745&Site=CM>, [last accessed 23 June 2016]

<sup>31</sup> UN Working Group on Business and Human Rights, 'Guidance on National Action Plans on Business and Human Rights, Geneva, November 2016. See also UN Working Group on Business and Human Rights (UNWG)

'Open Consultation on the Strategic Elements of National Action Plans in the Implementation of the UN Guiding Principles on Business and Human Rights', 2014.

<sup>32</sup> Institute for Human Rights and Business, 'Lessons Learned on Building Better National Action Plans on Business and Human Rights', 2016 (Joint publication between IHRB and Nairobi Process).

<sup>33</sup> C.M. O'Brien et al, 'National Action Plans on Business and Human Rights: A Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks', 2014 (joint publication of The Danish Institute for Human Rights (DIHR) The International Corporate Accountability Roundtable (ICAR)).

A particularly important part of the NAP process, when considered from the perspective of developing context-specific policies, is baseline assessments.<sup>34</sup> A baseline assessment is a study conducted at the start of an intervention to analyse current conditions in a given context.<sup>35</sup> The purpose of doing so is to 'strengthen the effectiveness of NAPs by providing information on commitment- compliance gaps and raising awareness of business and human rights issues across government agencies.'<sup>36</sup> Baseline assessments assist a country to ensure that they reflect those business and human rights-related issues that are pertinent in that setting.<sup>37</sup> In concentrating efforts towards constructing NAPs and baseline assessments, various actors have, therefore, galvanised around the UNGP by attempting to strengthen the state duty to protect rights, focusing, in particular, on the salience of adopting context-specific policies and laws.

Thus, the state pillar provides a useful example of how a policy instrument can outline how states can and should attempt to shape corporate conduct. This includes legal measures along the lines of orthodox regulation, but also more incentive and persuasion-based approaches. Moreover, the developments around NAPs and baseline assessments also demonstrate different approaches that states can adopt to ensure that any policies promoted are context-relevant. As I will argue, states could also adopt a range of measures to help promote businesses to make context-sensitive contributions to peacebuilding, as illustrated in the case of South Africa's Broad-Based Black Economic Empowerment (B-BBEE).

#### 6.3.1.2. *The Due Diligence Requirements*

The above discussion has examined how the UNGP outline different ways that states can directly attempt to regulate businesses as their operations relate to human rights. Nevertheless and in spite of this, in some contexts, it is also the case that states lack both the political will and capacity to assume these responsibilities. For this reason, the UNGP also develop guidelines for businesses, to help inform

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<sup>34</sup> See C. Kaufmann et al, Depok, Indonesia, 'Business and Human Rights in ASEAN: A Baseline Study', Human Rights Resource Centre, 16 May 2013.

<sup>35</sup> O'Brien et al, *supra* note 33, at 31.

<sup>36</sup> D. De Felice and A. Graf, 'The Potential of National Action Plans to Implement Human Rights Norms: An Early Assessment with Respect to the UN Guiding Principles on Business and Human Rights', *Journal of Human Rights Practice*, vol. 7, no. 1, 2015, at 53.

<sup>37</sup> UN Human Rights Council, 'Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises', A/HRC/23/32. 14 March 2013, at 21, para 71(b).

companies as to how to go about respecting rights, again stressing the importance of context.

Differing from state duty to protect, under pillar 2 of the UNGP, businesses are said to have responsibilities to respect rights rather than obligations. GP 11 outlines, for example, that businesses 'should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.'<sup>38</sup> The rights to be respected are internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's (ILO) Declaration on Fundamental Principles and Rights at Work.<sup>39</sup> The commentary to GP 12 goes on to stipulate that '[d]epending on circumstances, business enterprises may need to consider additional standards including United Nations instruments which have elaborated further on the rights of indigenous peoples; women; national or ethnic, religious and linguistic minorities to name a few.'<sup>40</sup>

A defining feature of the corporate responsibility to respect human rights is the inclusion of the concept of Due Diligence (DD). At the core of this concept is a process that businesses should undertake to improve their approach to human rights. As GP 17 states:

In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:

(a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;

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<sup>38</sup> UNGP, *supra* note 1, Principle 11.

<sup>39</sup> *Ibid.*, Principle 12.

<sup>40</sup> *Ibid.*, Commentary to Principle 12.

(b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and *context* of its operations;

(c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.<sup>41</sup>

The inclusion of the DD process is an attempt to inform businesses as to how to better identify potential adverse impacts that they might have in those contexts in which they operate. Given that businesses can all affect the enjoyment of rights in different ways, the DD requirements reflect the fact that adhering to all rights in all ways is neither possible nor practical. The DD approach, therefore, is more concerned with helping businesses to identify those areas and issues that are most pertinent to the business in question. In this way, it resembles the context-sensitive approach promoted through NAPs and baseline assessments, which focus on developing context-specific policies and procedures at the state level.

As guidance, provide by the UN High Commissioner for Human Rights, states:

It is through human rights due diligence that an enterprise identifies the information it needs in order to understand its specific human rights risks at any specific point in time and in any specific operating context, as well as the actions it needs to take to prevent and mitigate them.<sup>42</sup>

The Commentary to GP 23 also identifies that some operating environments, such as conflict-affected areas, may increase the risks of enterprises being complicit in gross human rights abuses committed by other actors (security forces, for example).<sup>43</sup> It affirms that 'in complex contexts such as these, business enterprises should ensure that they do not exacerbate the situation.'<sup>44</sup> Thus, '[i]n assessing how best to respond, [businesses] will often be well advised to draw on not only expertise and cross-functional consultation within the enterprise, but also to consult externally

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<sup>41</sup> *Ibid.*, Principle 17.

<sup>42</sup> UN High Commissioner for Human Rights, 'The Corporate Responsibility to Respect Human Rights: An Interpretive Guide', HR/PUB/12/02, United Nations, 2012, at 31.

<sup>43</sup> UNGP, *supra* note 1, Commentary to Principle 23.

<sup>44</sup> *Ibid.*, Commentary to Principle 23.

with credible, independent experts, including from Governments, civil society, national human rights institutions and relevant multi-stakeholder initiatives.<sup>45</sup> For Davis, 'Principle 23 directs companies' attention to ensuring that they have the appropriate processes in place to address particular operating contexts.'<sup>46</sup> To develop this awareness of context, the UNGP also identify that businesses should engage with local populations through stakeholder consultations. The Commentary to Principle 18, for instance, instructs that:

[...] To enable business enterprises to assess their human rights impacts accurately, they should seek to understand the concerns of potentially affected stakeholders by consulting them directly in a manner that takes into account language and other potential barriers to effective engagement. In situations where such consultation is not possible, business enterprises should consider reasonable alternatives such as consulting credible, independent expert resources, including human rights defenders and others from civil society.<sup>47</sup>

For Graf and Iff, due diligence, like context-sensitivity, includes the basic steps of identifying impacts, taking measures to address the impacts identified, and subsequently evaluating the measures taken.<sup>48</sup> Thus, while the corporate responsibility to respect rights stands as the general objective under pillar 2 of the UNGP, through DD requirements, particular attention is directed towards the importance of context and in understanding how businesses impact on and in different settings. In doing so, the UNGP offer a useful example of how a global policy instrument, applicable irrespective of context, can nevertheless be locally relevant. It achieves this by promoting processes to help identify context-specific risks and in developing specific aspects of this process, such as engaging with locals and experts.

As I will develop, including a process-based component in a global instrument on business and peacebuilding is important, not only to help inspire business

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<sup>45</sup> *Ibid.*, Commentary to Principle 23.

<sup>46</sup> R. Davis, 'The UN Guiding Principles on Business and Human Rights and conflict-affected areas: state obligations and business responsibilities', *International Review of the Red Cross*, vol. 94, no. 887, 2012, at 977.

<sup>47</sup> UNGP, *supra* note 1, Commentary to Principle 18.

<sup>48</sup> Although these authors also outline some important differences. See A. Graf and A. Iff, 'Respecting Human Rights in Conflict Regions: How to Avoid the Conflict Spiral', *Business and Human Rights Journal*, vol. 2, no. 1, 2017, at 120.

contributions to peacebuilding in the absence of state-based efforts, but also because it can help promote context-sensitive interventions.

#### 6.3.1.3. *The Roles of Other Actors*

If understood in isolation, the corporate responsibility to respect human rights under the UNGP might be regarded as another voluntary initiative. Indeed, in spite of pillar 1, because many states are often unwilling and unable to assume their human rights obligations to protect, pillar 2 of the UNGP might well be regarded as yet another code of conduct. Similar to many of the guidelines discussed in chapter 3, in cases where states are unable or unwilling to regulate businesses, the UNGP could be interpreted, therefore, as a useful set of guidelines capable of directing business activities, but which are nevertheless voluntary, and, therefore, largely discretionary.

The UNGP offer a response to this by reflecting the plurality of other actors and different methods that might be used to encourage business compliance with the UNGP. The UNGP refer, for instance, to the roles of multilateral institutions;<sup>49</sup> home states;<sup>50</sup> multi-stakeholder initiatives,<sup>51</sup> and civil society organisations;<sup>52</sup> in pushing forward the business and human rights agenda. As an example, the importance of multilateral institutions is reflected in GP 10, where it is stipulated that:

States, when acting as members of multilateral institutions that deal with business-related issues, should:

Encourage those institutions, within their respective mandates and capacities, to promote business respect for human rights and, where requested, to help States meet their duty to protect against human rights abuse by business enterprises, including through technical assistance, capacity-building and awareness-raising.<sup>53</sup>

GP 2 also refers to home states, outlining that they 'should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction

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<sup>49</sup> UNGP, *supra* note 1, Principle 10 and Commentary to Principle 10.

<sup>50</sup> *Ibid.*, Principle 2.

<sup>51</sup> *Ibid.*, Principle 23.

<sup>52</sup> *Ibid.*, Principles 18 and 23.

<sup>53</sup> *Ibid.*, Principle 10.

respect human rights throughout their operations.’<sup>54</sup> Similarly, as part of the responsibility to provide remedies, GP 30 also notes that ‘industry, multi-stakeholder and other collaborative initiatives that are based on respect for human rights-related standards should ensure that effective grievance mechanisms are available.’<sup>55</sup>

Moreover, the Principles recognise that businesses have, in some circumstances, roles to play in limiting the adverse impacts that might be caused throughout their supply chains. For example, GP 13 specifies that along with ensuring that businesses do not negatively impact on the enjoyment of rights through their own activities,<sup>56</sup> they must also endeavour to ‘prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.’<sup>57</sup> They thus recognise the potential for businesses to act as regulators of other companies within and throughout their supply chains.

By including different actors and methods, some describe the UNGP as a polycentric policy instrument that seeks to integrate and orchestrate different methods, incentives, and actors associated with influencing business conduct around a defined issue and defined set of responsibilities.<sup>58</sup> Perhaps part of the reason that the UNGP draw on such a constellation to help advance the business and human rights agenda reflects the fact ‘any attempt to deal with human rights infractions by corporations needs to offer a strategy that addresses this complexity.’<sup>59</sup> The significance for current purposes is that alongside the roles and responsibilities assigned to states in promoting the corporate responsibility to respect and remedy, the UNGP also draw on a number of actors, that can employ a range of different methods, to help promote adherence to the Principles.

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<sup>54</sup> *Ibid.*, Principle

<sup>55</sup> *Ibid.*, Principle 30.

<sup>56</sup> *Ibid.*, Principle 13.

<sup>57</sup> *Ibid.*, Principle 13.

<sup>58</sup> See generally, J. Ford, ‘Business and Human Rights: Emerging Challenges to Consensus and Coherence?’, Chatham House Briefing, 2015; K. McPhail and J. Ferguson, ‘The past, the present and the future of accounting for human rights’, *Accounting, Auditing & Accountability Journal* vol. 29, no. 4, 2016; M. Addo, ‘The Reality of the United Nations Guiding Principles on Business and Human Rights’, *Human Rights Law Review*, vol. 14, no. 1, 2014; J. G. Ruggie, ‘Global Governance and “New Governance Theory”: Lessons from Business and Human Rights’, *Global Governance* vol. 20, no. 1, 2014.

<sup>59</sup> S. Wheeler, ‘Global production, CSR and human rights: the courts of public opinion and the social licence to operate’, *The International Journal of Human Rights*, Vol. 19, No. 6: Corporate Power and Human Rights, 2015, at 758.

### 6.3.2. Coherency through the UNGP?

As touched upon in the case studies, coherency is essential when there are different actors and methods involved in regulating or influencing businesses, both to prevent clashes from occurring and to ensure that various initiatives support each other. In the case studies on Northern Ireland and South Africa, it was suggested that coherence among different actors can significantly help to promote a defined objective. For instance, while the B-BBEE framework is the primary driver for business contributions to peacebuilding in South Africa, subsequent pieces of legislation have helped further this objective. Similarly, in Northern Ireland, while the government has developed legislation around positive discrimination, such actors as the Equality Commission Northern Ireland has helped to translate this legislation into practical effect through productive partnerships with businesses.

The UNGP also reflect the importance of coherency. At the state-level, for instance, GP 8 notes that:

States should ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the State's human rights obligations when fulfilling their respective mandates, including by providing them with relevant information, training and support.<sup>60</sup>

In other words, while states might adopt different approaches to regulation to promote the corporate responsibility to respect human rights, the UNGP instruct the need for coherency between state-based approaches. As Rachel Davis notes: '[The Principles] spell out the policy implications of states' existing duties under international human rights law when it comes to protecting against business-related human rights harms. They place particular stress on the need for greater policy coherence between states' human rights obligations and their regulatory and other actions with respect to business.'<sup>61</sup>

Coherency is even more relevant when the multitude of different actors that might influence businesses is considered, something at the forefront of Ruggie's mind

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<sup>60</sup> UNGP *supra* note 1, Principle 8.

<sup>61</sup> Davis *supra* note, 46, at 963.



throughout his mandate. When Ruggie began his work as SRSR, there existed a range of approaches all attempting to regulate the human rights impacts of businesses. Many of these, such as the UNGC, the Organisation for Economic Co-operation and Development (OECD) Guidelines, and different multistakeholder initiatives, were discussed in Chapter 3. There was, however, a 'lack of an authoritative standard guiding the business and human rights discussion,'<sup>62</sup> and a 'patchwork of uncoordinated schemes competing vigorously for adherents, resources, legitimacy, and public notice.'<sup>63</sup> Ruggie evaluated that what was needed was 'a new regulatory dynamic under which [...] governance systems become better aligned in relation to business and human rights; add distinct value; compensate for one another's weaknesses and play mutually reinforcing roles out of which cumulative change can evolve.'<sup>64</sup> Ruggie explicitly recognised, therefore, that opportunities can arise when different initiatives are pulling in the same direction.

To a certain extent, following the adoption of the UNGP, different actors and organisations have attempted to support or integrate various aspects of the global policy instrument into their operations. For instance, the OECD Guidelines on MNEs have incorporated the UNGP into their own normative standards.<sup>65</sup> The website on guidance for the UNGC's human rights principles (Principles 1 and 2) was updated to refer to the UNGP,<sup>66</sup> while the UN Office of the High Commissioner for Human Rights has issued guidelines on the corporate responsibility to respect and remedy.<sup>67</sup> At the international level, the Principles have influenced the current design of International Organization for Standardization (ISO) 26000.<sup>68</sup> Following the endorsement of the UNGP, in 2011, the International Petroleum Industry Environmental Conservation Association (IPIECA) launched a three-year business

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<sup>62</sup> *Ibid.*, at 962.

<sup>63</sup> K.W., and D. Snidal, 'Taking responsive regulation transnational: Strategies for international organizations', *Regulation & Governance*, vol. 7, no. 1, 2013, at 11.

<sup>64</sup> Ruggie, *supra* note 58, at 9. See also J. G. Ruggie, *Just Business: Multinational Corporations and Human Rights*, New York, W. W. Norton, 2013, at 91.

<sup>65</sup> See, J. G. Ruggie and T. Nelson, 'Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges', Corporate Social Responsibility Initiative Working Paper No. 66, 2015.

<sup>66</sup> UN Global Compact. 'Human Rights Tools and Resources', <https://www.unglobalcompact.org/library/2>, [last accessed 26 August 2017].

<sup>67</sup> UN High Commissioner for Human Rights, 'The Corporate Responsibility to Respect Human Rights: An Interpretive Guide', HR/PUB/12/02, United Nations, 2012.

<sup>68</sup> See for discussion, S. Adler, 'The Impact of the United Nations Secretary-General's Special Representative and the UN Framework on the Development of the Human Rights Components of ISO 26000', Corporate Social Responsibility Initiative Working Paper No. 64. Cambridge, MA: John F. Kennedy School of Government, Harvard University, 2011.

and human rights project, which has since served as an authoritative reference body for the oil and gas industry on business and human rights issues.<sup>69</sup>

The International Finance Corporation (IFC) has also updated its Performance Standards making direct reference to Ruggie's due diligence recommendations.<sup>70</sup> The International Bar Association (IBA) went so far as to issue official guidance on what the UNGPs mean for law firms as businesses in their own right, and in their role as wise counsel to clients,<sup>71</sup> while FIFA, the governing body of international football, has endorsed the UNGPs.<sup>72</sup> Conglomerates like Nestlé have partnered with organisations such as the Danish Institute for Human Rights (DIHR) to conduct a human rights gap analysis of its corporate policies and procedures.<sup>73</sup> Moreover, other organisations are using the principles as the basis upon which to develop further guidelines for business. Efforts in this respect have included those undertaken by such organisations as Shift and Oxfam. In the case of Shift, this has involved, amongst other things, developing reporting frameworks to help inform companies as to how to relate the efforts that companies are making to stakeholders,<sup>74</sup> while Oxfam has detailed its position on how best to advance the UNGP.<sup>75</sup> The Centre for Research on Multinational Corporations (SOMO) has also developed guidelines for civil society to provide concrete support, guidance and a consistent reference point for civil society organisations (CSO) to use the UNGP.<sup>76</sup>

Thus, regardless of the fact that numerous actors can be involved in influencing how and whether businesses respect human rights, the UNGP can be regarded as

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<sup>69</sup> See [www.ipieca.org/system/files/uploads/Business\\_and\\_human\\_rights\\_project\\_2014\\_07\\_screen.pdf](http://www.ipieca.org/system/files/uploads/Business_and_human_rights_project_2014_07_screen.pdf) [last accessed 20 February 2016].

<sup>70</sup> See IFC Performance Standards on Environmental and Social Sustainability, January 2012, [http://www.ifc.org/wps/wcm/connect/115482804a0255db96bffd1a5d13d27/PS\\_English\\_2012\\_Full-Documents.pdf?MOD=AJPERES](http://www.ifc.org/wps/wcm/connect/115482804a0255db96bffd1a5d13d27/PS_English_2012_Full-Documents.pdf?MOD=AJPERES)

<sup>71</sup> IBA, 'Practical Guide on Business and Human Rights for Business Lawyers' (2016), available at <https://www.ibanet.org/LPRU/Business-and-Human-Rights-for-the-Legal-Profession.aspx> [last accessed 23 June 2017].

<sup>72</sup> See J. G. Ruggie, 'The Social Construction of the UN Guiding Principles on Business and Human Rights', Corporate Responsibility Initiative, Harvard Kennedy School June 2017, Working Paper No. 67, at 19-20.

<sup>73</sup> Nestlé and Danish Institute for Human Rights, 'Talking the Human Rights Walk: Nestlé's Experience Assessing Human Rights Impacts in Its Business Activities 2013', [http://www.nestle.com/asset-library/documents/library/documents/corporate\\_social\\_responsibility/nestle-hria-white-paper.pdf](http://www.nestle.com/asset-library/documents/library/documents/corporate_social_responsibility/nestle-hria-white-paper.pdf) [last accessed 20 June 2017].

<sup>74</sup> See SHIFT and Mazers, 'UN Guiding Principles: Reporting Framework with Implementation Guidance', 2015, <https://www.ungpreporting.org/>, [last accessed 21 September 2017]

<sup>75</sup> See R. Wilshaw, B. Timms and S. Niven, 'Business and Human Rights: An Oxfam Perspective on the UN Guiding Principles', Oxfam Technical Briefing June 2013.

<sup>76</sup> M. Van Huijstee, V. Ricco and L. Ceresna-Chaturvedi, 'How to use the UN Guiding Principles on Business and Human Rights in company research and advocacy: A guide for civil society organisations', Amsterdam, SOMO, 2012.

providing a common reference point through which different actors have been able to galvanise around a common aim- improving corporate respect for human rights. Not only does the text of the principles directly reference other actors capable of playing regulatory roles, as an authoritative reference point, the Principles provide other actors with a basis from which to inform and develop their own approaches. In short, the UNGP at least help to strengthen the corporate responsibility to respect rights by aligning different actors around a common set of standards. This is useful when considering how a policy document can attempt to draw on a range of actors and forms of influence to pursue specific objectives.

#### 6.3.2.1. *Discussion*

The discussion about has suggested that the UNGP are insightful in showing how a global policy instrument can include different actors in pursuance of shaping corporate conduct. They reflect the centrality of the state but also acknowledge the limitations of relying only on states to shape the behaviour of businesses. This is expressed in the plurality of hard and soft options available to the state, the importance of providing guidelines to business, and the salience of drawing on other actors with capabilities to influence business decisions. Moreover, reflecting the difficulties of developing a global instrument that remains locally relevant, the UNGP underline the importance of process-focused guidelines through the concept of DD, while also benefitting from other initiatives, such as NAPs and baseline assessments that seek to ensure state approaches are equally context-specific.

Nevertheless, despite the substantial contributions that the UNGP have made to the business and human rights debate, it is equally important to acknowledge that few regard them as a panacea. As the discussion below will suggest, a host of criticisms have emerged against the UNGP. I examine some of these concerns below before illustrating how these limitations have helped to progress many facets of the conversation about business and human rights.

#### 6.3.3. The Limitations of the UNGP

The literature identifies a range of constraints associated with the UNGP. Some argue, for example, that the principles are too narrow in the objectives they seek to

achieve. David Bilchitz<sup>77</sup> and Florian Wettstein,<sup>78</sup> for instance, suggest that Ruggie failed to reflect the position of international law by asking only that businesses respect rights. The UNGP have also been criticised for being too vague and weak, allowing businesses too much leeway with terms such as 'should' in place of 'shall'.<sup>79</sup> This is particularly pertinent in contexts where, as outlined, states are unwilling or unable to assume their obligations to protect human rights. Moreover, others note that the loose language of corporate responsibility rather than obligation implies an acceptance of a 'world where companies are encouraged, but not obliged, to respect human rights'.<sup>80</sup> Some argue, therefore, that the UNGP still 'lack sufficient scale to truly move markets'.<sup>81</sup> Some blame the lack of wider consultation when formulating the UNGP for these failures,<sup>82</sup> others state inactivity.<sup>83</sup>

Bonnitcha and McCorquodale's main issue with the UNGP is alleged confusion and uncertainty about the extent of businesses' responsibility to respect human rights and about how that relates to the responsibility to provide remedy.<sup>84</sup> Confusion is a recurring theme throughout the business and human rights literature. For Lagouette, for instance, by associating corporate social responsibility discourse and actual legal obligation in the same instrument, it becomes more difficult to distinguish the

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<sup>77</sup> See, S. Bilchitz, 'A chasm between 'is' and 'ought'? A critique of the normative foundations of the SRSG's Framework and the Guiding Principles', in S. Deva and D. Bilchitz (ed.) *Human Rights Obligations of Business Beyond the Corporate Responsibility to Respect?*, Cambridge, Cambridge University Press, 2013.

<sup>78</sup> See, F. Wettstein, 'CSR and the Debate on Business and Human Rights: Bridging the Great Divide', *Business Ethics Quarterly*, vol. 22, no. 4, 2012.

<sup>79</sup> C. Jochnick, 'Making Headway on Business and Human Rights', [web blog] Oxfam America, *The Politics of Poverty*, 11 February 2011, <https://politicsofpoverty.oxfamamerica.org/2011/02/making-headway-on-business-and-human-rights/> [last accessed 20 February 2018], cited in J. Nolan, 'Refining the Rules of the Game: The Corporate Responsibility to Respect Human Rights', *Utrecht Journal of International and European Law*, vol. 30, no. 78, 2014, at 44, note 77.

<sup>80</sup> A. Ganesan, 'UN Human Rights Council: Weak Stance on Business Standards', [web blog] Human Rights Watch, 16 June 2011, <https://www.hrw.org/news/2011/06/16/un-human-rights-council-weak-stance-business-standards> [last accessed 23 February 2016].

<sup>81</sup> Pitts, *supra* note 28, at 59.

<sup>82</sup> S. Deva, 'Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles', in S. Deva and D. Bilchitz (ed.) *Human Rights Obligations of Business Beyond the Corporate Responsibility to Respect?*, Cambridge, Cambridge University Press, 2013, 96–7.

<sup>83</sup> S.A. Aaronson and Higham, I., 'Putting the Blame on Governments Why Firms and Governments have Failed to Advance the Guiding Principles on Business and Human Rights', Institute for International Economic Policy Working Paper Series Elliott School of International Affairs The George Washington University, June 2014

<sup>84</sup> J. Bonnitcha and R. McCorquodale, 'The concept of 'due diligence' in the UN Guiding Principles on business and Human Rights', *European Journal of International Law*, Vol. 28, no. 3, 2017. For a general discussion on extraterritorial obligations of States see D. Augenstein, 'State Responsibilities to Regulate and Adjudicate Corporate Activities under The European Convention on Human Rights', Submission to the SRSG on the issue of Human Rights and Business, April 2011.

mandatory elements from the voluntary ones within the field of human rights and business.<sup>85</sup> McCall-Smith and Rühmkorf suggest that while the reinforcement of existing commitments by the UNGP is welcomed, it does little to resolve the barriers of applying public international law due to the limited international legal personality of Transnational Corporations (TNCs) and the principle of extraterritoriality.<sup>86</sup> This critique draws on the persisting limitations associated with relying on a state-centric approach to business and human rights when businesses are increasingly global in nature. Some contend that the linkages between the UNGP and due diligence are too frail. Human Rights Watch has argued, for example, that human rights due diligence should be mandatory.<sup>87</sup>

For others, the UNGP do not reflect the position of international human rights law as regards the extraterritorial obligations of states.<sup>88</sup> This aspect of the UNGP is viewed as problematic, particularly in areas of weak governance. As Albin-Lackey notes:

Weakly governed developing countries like Papua New Guinea, Bangladesh, Mozambique, and Guinea continue to welcome massive new foreign investment in industries with an immense potential for environmental destruction and human rights abuse. If companies are not going to get meaningful human rights oversight from the governments of the countries in which they operate, they need to get it somewhere else.<sup>89</sup>

Others argue that notwithstanding the contemporary position of international law when the UNGP were drafted, an opportunity was missed to further human rights protections by not mandating extraterritorial regulatory obligations.<sup>90</sup>

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<sup>85</sup> S. Lagoutte, 'The UN Guiding Principles on Business and Human Rights: A Confusing 'Smart Mix' of Soft and Hard International Human Rights Law', In S. Lagoutte, T. Gammeltoft-Hansen and J. Cerone (ed.) *Tracing the Roles of Soft Law in Human Rights*. Oxford Scholarship Online, 2017.

<sup>86</sup> K. McCall-Smith and A. Rühmkorf, 'Reconciling Human Rights and Supply Chain Management through Corporate Social Responsibility', in V.R. Abou-Nigm, K. McCall-Smith and D. French (ed.) *Linkages and Boundaries in Private and Public International Law*. Hart, 2017, at 8 [page number according to a pre-publication version of the chapter].

<sup>87</sup> C. Albin-Lackey, 'Without Rules: A Failed Approach to Corporate Accountability', Human Rights Watch, <https://www.hrw.org/world-report/2013/country-chapters/global-0>.

<sup>88</sup> D. Augenstein and D. Kinley, 'When Human Rights "Responsibilities" become "Duties": The Extra-Territorial Obligations of States that Bind Corporations,' in D. Bilchitz and S. Deva (ed.) *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect*, Cambridge, Cambridge University Press, 2013.

<sup>89</sup> Albin-Lackey, *supra* note 87

<sup>90</sup> J. Nolan, 'Mapping the movement: the business and human rights regulatory framework', in D. Baumann-Pauly and J. Nolan (ed.) *Business and Human Rights: From Principles to Practice*. Routledge, New York, 2016, at 43.

There are those consider that state obligation to protect is diluted under the UNGP, particularly in regards to the obligation to provide remedies.<sup>91</sup> In Albin-Lackey's view:

[W]ithout any mechanism to ensure compliance or to measure implementation, they cannot actually require companies to do anything at all. Companies can reject the principles altogether without consequence- or publicly embrace them while doing absolutely nothing to put them in practice.<sup>92</sup>

The failure of the UNGP to provide adequate remedies and justice to victims is a significant limitation.<sup>93</sup> As a final example, except for the case of project finance, where the direct relationship between the financier and the specific project is straightforward and resembling complicity, others suggest that the talk seems to be more about roles rather than responsibilities.<sup>94</sup>

There are, therefore, numerous limitations associated with the UNGP. However, as I develop below, when pushing the idea of a policy instrument on business and peacebuilding, the ability of any proposed instrument to galvanise these sorts of debates is to be welcomed. In particular, the UNGP illustrate that, based on the limitations of an existing approach, numerous responses and ideas emerge as regards what to do better.

#### 6.3.4. Responding to these Limitations

While only scraping the surface of a significant body of critical scholarship on the UNGP, it is evident that the Principles have invoked a range of perspectives regarding the merits and demerits of the policy instrument. As was noted, Ruggie himself acknowledged that the Principles were the end of the beginning. By igniting wide-ranging discussions on business and human rights, however, the UNGP serve as the reference point for more in-depth debates regarding how best to advance the

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<sup>91</sup> See J.M. Amerson, "The End of the Beginning?": A Comprehensive Look at the U.N.'s Business and Human Rights Agenda From a Bystander Perspective', *Journal of Corporate & Financial Law*, vol. 17, no. 4, 2012.

<sup>92</sup> Albin-Lackey, *supra* note 87.

<sup>93</sup> See R.C. Blitt, 'Beyond Ruggie's Guiding Principles on Business and Human Rights', *Texas International Law Journal*, vol. 48, no. 1, 2012.

<sup>94</sup> R. Mares, 'Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progression' in R. Mares (ed.) *The UN Guiding Principles on Business and Human Rights – Foundations and Implementation*, Martinus Nijhoff Publishers, Leiden, Boston 2012, at 32.

business and human rights agenda and the numerous actors and issues involved in promoting human rights-compliant corporate behaviour. As such, Van der Ploeg and Vanclay assert that ‘the endorsement and publication of the UNGP have activated much high-level policy debate amongst government, academic, NGO and corporate actors interested in human rights.’<sup>95</sup>

For instance, given the limitations of the relying on the state to protect human rights, particularly in fragile or conflict-affected settings, scholars have debated the possibility of expanding the functions of National Human Rights Ombudsman Offices.<sup>96</sup> Some look to widening the roles of National Human Rights Institutions.<sup>97</sup> Noting what some consider to be the limited guidance on the corporate responsibility to respect human rights in the UNGP, others have sought to develop more in-depth understandings about the roles and responsibilities of multilateral institutions,<sup>98</sup> international financial institutions,<sup>99</sup> and civil society actors in promoting socially responsible business.<sup>100</sup> There are those who elaborate on the potential linkages between procurement and human rights,<sup>101</sup> the role of Export Credit Agencies, in promoting human rights-compliant corporate conduct,<sup>102</sup> while others have considered how best to develop and improve state-based due diligence

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<sup>95</sup> L. van der Ploeg and F. Vanclay, ‘A tool for improving the management of social and human rights risks at project sites: The Human Rights Sphere’, *Journal of Cleaner Production*, vol. 142, no. 4, 2017, at 4073. See also

C.M. O’Brien, and S. Dhanarajan, ‘The corporate responsibility to respect human rights: a status review’, *Accounting, Auditing & Accountability Journal*, vol. 29, no. 4 2016.

<sup>96</sup> L. C. Reif, ‘The UN Guiding Principles on Business and Human Rights and Networked Governance: Improving the Role of Human Rights Ombudsman Institutions as National Remedies’, *Human Rights Law Review*, vol. 17, no. 4, 2017.

<sup>97</sup> G. Kaya, Niebank, J.C., and Utlu, D., ‘Closing protection gaps in the human rights and business context: what transnational cooperation between the National Human Rights Institutions of Germany and Colombia has achieved’, Berlin, Information / Deutsches Institut für Menschenrechte 14, 2017.

<sup>98</sup> M. Natenson, ‘The World Bank Group’s human rights obligations under the United Nations Guiding Principles on Business and Human Rights’, *Berkeley Journal of International Law*, vol.33, no. 2, 2015.

<sup>99</sup> M. Dowell-Jones, ‘Financial Institutions and Human Rights’, *Human Rights Law Review*, vol. 13, no. 3, 2013.

<sup>100</sup> J. Kweitel, ‘Regulatory Environment on Business and Human Rights: Paths at the International Level and Ideas about the Roles for Civil Society Groups’, in C. Rodríguez-Garavito (ed.) *Business and Human Rights: Beyond the End of the Beginning*, Cambridge University Press, 2017; C. Jochnick and L. Bickford, ‘The role of civil society in business and human rights’, in D. Baumann-Pauly and J. Nolan (ed.) *Business and Human Rights: From Principles to Practice*, Routledge, New York, 2016.

<sup>101</sup> See C. M. O’Brien, N.V. Meulen, and A. Mehra, ‘Public Procurement and Human Rights: A Survey of Twenty Jurisdictions’, International Learning Lab on Public Procurement and Human Rights, Danish Institute for Human Rights, The International Corporate Accountability Roundtable and The Harrison Institute of Public Law, 2016.

<sup>102</sup> N. Bernaz, *Business and Human Rights: History, Law and Policy - Bridging the Accountability Gap*, London, New York, Routledge, 2017, at 248-252

requirements.<sup>103</sup> These scholarly contributions all attempt to flesh out the roles and responsibilities of different actors and initiatives to advance the business and human rights agenda.

Others stress the importance of applying pressure to different groups to continue to monitor how businesses address human rights concerns, while at the same time, thinking creatively about how to promote the business and human rights agenda.<sup>104</sup> Such arguments explicitly build on the importance of a pluralisation of methods and actors that can influence businesses. As Nolan assesses:

Reasserting the role of the state in improving workplace conditions does not necessarily mean, as one commentator puts it ‘a return to traditional command control regulation [as] the limits of that approach are well known.’<sup>105</sup> What is needed, is some level of involvement by the state to harden the ‘societal expectations’ foisted on some companies....: a blending of public and private regulation or re-regulation.<sup>106</sup>

Some have taken up the challenge to think creatively further. For instance, McCall-Smith and Rühmkorf argue for the development of a ‘hybrid regulatory approach to the promotion of CSR, which transcends the limitations of public and private international law in supply chain management.’<sup>107</sup> Based on the difficulties associated with regulating global supply chains and in the absence of an international binding framework on business and human rights, they suggest that the strategic use of domestic law can particularly rely on corporate criminal law and transparency regulations.<sup>108</sup> These authors suggest that the model of the UK Bribery Act, which makes the failure of a commercial organisation to prevent bribery by a person associated with it a criminal offence,<sup>109</sup> could be used for severe human rights violations in global supply chains, such as forced labour, child labour and the

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<sup>103</sup> O. De Schutter et al., ‘Human Rights Due Diligence: The Role of States’, The International Corporate Accountability Roundtable, the European Coalition for Corporate Justice, the Canadian Network on Corporate Accountability, 2012.

<sup>104</sup> A. Mehra, ‘Always in All Ways: Ensuring Business Respect for Human Rights’, in C. Rodríguez-Garavito (ed.) *Business and Human Rights: Beyond the End of the Beginning*, Cambridge University Press, 2017.

<sup>105</sup> R. M. Locke, *The Promise and Limits of Private Power*, Cambridge, 2013, cited in Nolan, *supra* note 90, at 15 note 59.

<sup>106</sup> Nolan, *supra* note 90, at 15.

<sup>107</sup> McCall-Smith and Rühmkorf, *supra* note 86, at 1.

<sup>108</sup> *Ibid.*, at 9

<sup>109</sup> The Bribery Act 2010 (c.23), s 7(1).



exposure to very unsafe working conditions.<sup>110</sup> In some respects, this approach mirrors that of mandating due diligence through legal instruments, albeit in a more complex context of regulating businesses throughout global supply chains and extraterritorially. It also offers a useful way of thinking for those who have critiqued the relatively limited use of procurement for the purposes of extraterritorial regulation.<sup>111</sup> Some respond to the weak stance taken under the UNGP regarding extraterritorial obligations by focusing on specific sectors, examining how home states might close governance gaps for specific industries.<sup>112</sup> Surya Deva, for his part, develops an ‘integrated theory of regulation’ in which multiple regulatory measures are employed in a *cumulative* and *coordinated* manner so that different initiatives could counter each other’s limitations.<sup>113</sup> Others contemplate the scope for regional human rights courts to address corporate human rights violations.<sup>114</sup>

Substantively, scholars also look to how the UNGP can be extended to cover such groups as refugees,<sup>115</sup> women,<sup>116</sup> children,<sup>117</sup> and indigenous peoples.<sup>118</sup> Others adopt a more targeted approach in regards to promoting business and human rights in different sectors and industries. What has followed is discussions about business

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<sup>110</sup> McCall-Smith and Rühmkorf, *supra* note 86, at 19-22.

<sup>111</sup> See O. Martin-Ortega, ‘Public Procurement as a Tool for the Protection and Promotion of Human Rights: a Study of Collaboration, Due Diligence and Leverage in the Electronics Industry’, *Business and Human Rights Journal*, vol. 3, no. 1, 2018.

<sup>112</sup> P. Simons and A. Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage*, (Routledge Studies in Governance and Change in the Global Era) London, Routledge, 2014.

<sup>113</sup> S. Deva, *Regulating Corporate Human Rights Violations: Humanizing Business*, Oxon, Routledge, 2012.

<sup>114</sup> S. Khoury and D. Whyte, ‘New Mechanisms of Accountability for Corporate Violations of Human Rights’, University of Liverpool, 2015.

<sup>115</sup> S. Goethals, et al., ‘Business Human Rights Responsibility for Refugees and Migrant Workers: Turning Policies into Practice in the Middle East’, *Business and Human Rights Journal*, vol. 2, no. 1, 2017.

<sup>116</sup> B. Meyersfeld, ‘Business, human rights and gender: a legal approach to external and internal considerations’, in S. Deva and D. Bilchitz (ed.) *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?*, Cambridge, Cambridge University Press, 2013.

<sup>117</sup> M. Boersma, ‘Changing Approaches to Child Labour in Global Supply Chains: Exploring the Influence of Multi-Stakeholder Partnerships and the United Nations Guiding Principles on Business and Human Rights’ (Business and Human Rights: The Limits of the Law), *University of New South Wales Law Journal*, vol. 40, no. 3, 2017.

<sup>118</sup> UN Global Compact, ‘A Business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples’, UNGC 2013.

and human rights in such sectors as oil and gas,<sup>119</sup> apparel,<sup>120</sup> tourism,<sup>121</sup> agriculture,<sup>122</sup> and the electronics industry.<sup>123</sup> To this end, others have discussed metrics for measuring business performance in the context of respecting and remedying human rights.<sup>124</sup> As Michael Posner notes:

The Guiding Principles must be our foundation but must develop practical application in having industry-specific content and substantive standards.... We need to define responsibility to respect in the extractive industries, in the manufacturing sector. We need to come up with benchmarks, key performance indicators. It is not acceptable for every company to define these individually. No more pilot projects, no more go it alone; there has to be a collective response in each industry. This challenges companies because they seek to avoid risk to reputation or additional resources.<sup>125</sup>

Such metrics, some argue, 'can help firms link the conceptual discussion about human rights to actual implementation.'<sup>126</sup> In particular, noting the lack of definable benchmarks in the UNGP, these efforts seek to progress how we might improve the extent to which human rights are respected across different industries and sectors.

As a final illustration of how the business and human rights debate has blossomed since the UNGP, there are those who debate the possibility of constructing alternative frameworks. On 25 June 2014, the HRC passed a resolution that establishes 'an intergovernmental working group on a legally binding instrument on

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<sup>119</sup> T. Lambooy, A. Argyrou, and M. Varner, 'An analysis and practical application of the Guiding Principles on providing remedies with special reference to case studies related to oil companies', in S. Deva and D. Bilchitz (ed.) *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?*, Cambridge, Cambridge University Press, 2013.

<sup>120</sup> S. Labowitz and D. Baumann-Pauly, 'Business as Usual Is Not an Option: Supply Chains & Sourcing after Rana Plaza', New York University (NYU) Stern Centre for Business and Human Rights, 2014.

<sup>121</sup> The Institute for Human Rights and Business, 'Frameworks for Change: The Tourism Industry and Human', Rights, 29 May 2012, The Institute for Human Rights and Business and Tourism Concern, <https://www.ihrb.org/pdf/2012-05-29-Frameworks-for-Change-Tourism-and-Human-Rights-Meeting-Report.pdf>

<sup>122</sup> M. Posner, 'Standard setting for agriculture', D. Baumann-Pauly and J. Nolan (ed.) *Business and Human Rights: From Principles to Practice*, Routledge, New York, 2016.

<sup>123</sup> M. Samway, 'The Global Network Initiative: how can companies in the information and communications technology industry respect rights', in D. Baumann-Pauly and J. Nolan (ed.) *Business and Human Rights: From Principles to Practice*, Routledge, New York, 2016.

<sup>124</sup> D. de Felice, 'Business and Human Rights Indicators to Measure the Corporate Responsibility to Respect: Challenges and Opportunities', *Human Rights Quarterly*, vol. 37, no. 2, May 2015.

<sup>125</sup> M. Posner, 'Business & human rights: a commentary from the inside', *Accounting, Auditing & Accountability Journal*, vol. 29 no. 4, 2016, at 710.

<sup>126</sup> Aaronson and Higham, *supra* note 83, at 359.

transnational corporations and other business enterprises with respect to human rights.<sup>127</sup> It was sponsored by Ecuador and South Africa-both of whom have historical experiences with business violating fundamental rights within their states- and garnered 20 votes in favour, 13 abstentions, and 14 votes against it. Since then, scholars have considered the potential breadth and depth of such a treaty.<sup>128</sup> For instance, Rodríguez-Garavito considers the possibility of a binding treaty addressing specific violations of human rights by corporations. Among several other options for the treaty, this author considers a binding agreement regarding corporate involvement in gross human rights violations and extraterritorial jurisdiction.<sup>129</sup> Others question what lessons can be learned from other areas of law to help inform the substance of a treaty on business and human rights.<sup>130</sup> In other cases, new ideas around the possibility of a world tribunal on business and human rights, have emerged.<sup>131</sup>

The discussion could go on. Although some criticisms levelled against the UNGP are somewhat suspect,<sup>132</sup> the primary point is that, as Ruggie predicted, the UNGP did constitute the end of the beginning. This beginning, however, is one where the UNGP has proved to be the catalyst for detailed discussions and debates regarding how and in what ways to move the debate forward. Therefore, as César Rodríguez-Garavito has stated, we should evaluate the UNGP, 'not as a static text, but also in their dynamic dimension (such as their capacity to push the development of new norms and practices that go beyond the initial content...).' <sup>133</sup> From the perspective of developing a policy instrument on business and peacebuilding, the ability of an instrument to invoke these sorts of responses is to be welcomed on two levels.

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<sup>127</sup> Human Rights Council, 'Elaboration of an internationally legally binding instrument on transnational corporations and other business enterprises with respect to human rights' A/HRC/26/L.22/Rev.1 (25 June 2014).

<sup>128</sup> D. Bilchitz, 'The Necessity for a Business and Human Rights Treaty', *Business and Human Rights Journal*, vol. 1, no. 1, 2016. See also O. de Schutter, 'Towards a new treaty on business and human rights', *Business and Human Rights Journal*, vol. 1, no. 1, 2016.

<sup>129</sup> C. Rodríguez-Garavito, 'Business and Human Rights: Beyond the End of the Beginning', in C. Rodríguez-Garavito (ed.) *Business and Human Rights: Beyond the End of the Beginning*, Cambridge University Press, 2017.

<sup>130</sup> A. Y. Vastardis and R. Chambers, 'Overcoming The Corporate Veil Challenge: Could Investment Law Inspire The Proposed Business And Human Rights Treaty?', *International and Comparative Law Quarterly*, vol. 1, no. 1, 2017.

<sup>131</sup> C. Cronstedt and R.C. Thompson, 'An International Arbitration Tribunal on Business and Human Rights', Working Paper, *Version 5, Tribunal Working Group and Advisors to the Project*, Apr. 14, 2015

<sup>132</sup> Such as, for instance, claims that the process of forming the UNGP was not inclusive. Cf. Buhmann, (2012 paper), *supra* note 12.

<sup>133</sup> Rodríguez-Garavito, *supra* note 129, at 11.

Firstly, the driving force behind this study was not simply that we should look to the role of other actors in requiring, persuading or incentivising businesses to engage in peacebuilding processes. It was also borne by the fact that at present, few are considering the ways that different actors might do so. In other words, we have not even begun to have this debate. The trajectory of the discourse on business and human rights post-UNGP suggests that a global policy instrument, however, flawed, can serve to galvanise interdisciplinary discussions, among academics and practitioners, from different industries, countries, occupations, and points of view, as to how to develop the agenda going forward. Indeed, to a certain extent, some believe that UNGP have already shaped the business and peacebuilding discussion. Graf et al. note, for instance, that:

The dynamism in the business and human rights debate created by the United Nations Guiding Principles on Business and Human Rights (UNGPs) and subsequent implementation processes by states and businesses has generated heightened interest in responsible business conduct in conflict-affected areas.<sup>134</sup>

Secondly, and in some ways directly linked to the above point, it is entirely correct and necessary that any such instrument is challenged. Not only does push back help to develop any subsequent instrument that might be adopted but the limits of the case study findings require such opposition. In the discussion that follows, I use the findings of the case studies of South Africa and Northern Ireland to develop a number of ways in which different actors might give life to a policy instrument on business and peacebuilding. Nevertheless, these contexts, as the methodology section suggested, are often far different from that of other settings. Similarly, the case studies did not address differences across and within industries, and a host of other issues. Thus, it is necessary that others join the conversation and contest it.

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<sup>134</sup> A. Graf, A. Iff, and R. Alluri, 'The Business of Conflict Sensitivity', in S. Handschin, E. Abitbol and R. Alluri (ed.) *Conflict Sensitivity: Taking it to the Next Level*, Swisspeace, Bern, 2016, at 42.

### 6.3.5. Discussion

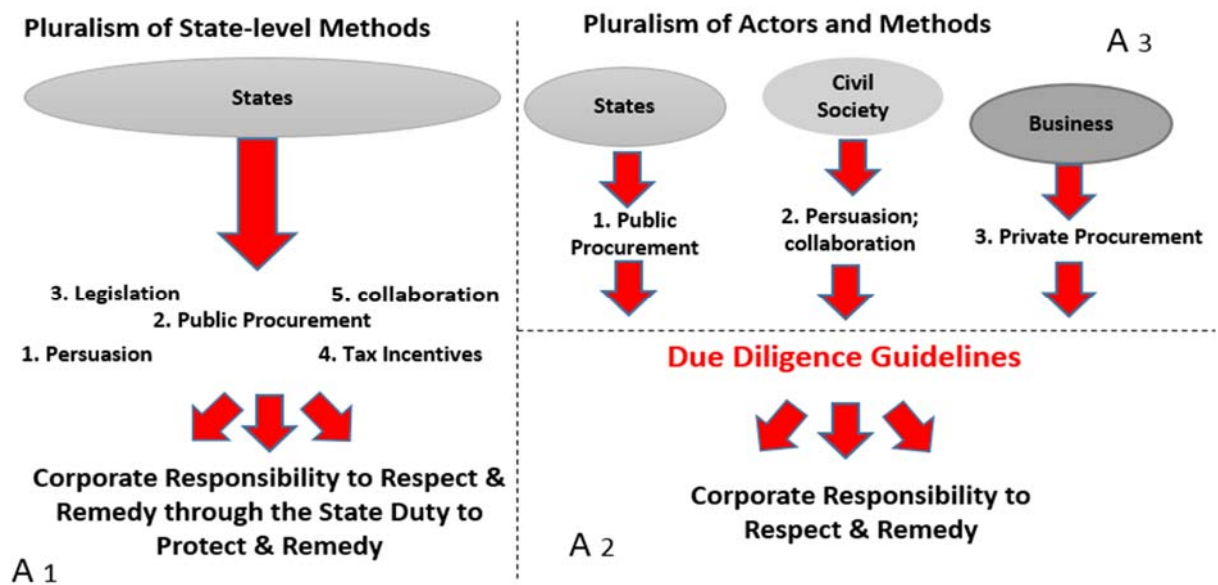


Figure 1: Overview of the UNGP

Above, I presented the argument that the UNGP are a useful reference point for considering what form a policy instrument on business and peacebuilding might take. Firstly, they define and elaborate on the role of the state and the possibility of adopting different regulatory methods when attempting to pursue a particular set of objectives (A1 of the diagram above).<sup>135</sup> They also reflect the importance of states taking context-specific approaches, an effort supported by the work of others on NAPs and baseline assessments. At the same time, the UNGP also reflect the limitations of states by promoting guidelines for business. The concept of due diligence takes centre stage in these guidelines and underpins the importance of companies developing context-sensitive approaches (A2 of the diagram above).

Alongside reflecting the possibility of pluralised regulatory methods at the state level, the UNGP also echo the importance of other actors in promoting these guidelines (A3 of the diagram above).<sup>136</sup> This aspect is more process-oriented, asking that actors attempt to require, persuade and/or incentivise businesses to develop due

<sup>135</sup> Included are examples of different approaches to regulation that a state might use.

<sup>136</sup> Included are examples of different approaches to regulation that states and other actors might use to promote adherence to a set of guidelines.

diligence processes. Moreover, the UNGP have managed to achieve a degree of consensus, which has led to subsequent developments with such organisations as the OECD incorporating the UNGP into their own policies and procedures. Thus, as a template, the UNGP have much to offer any effort to develop a policy instrument on business and peacebuilding that attempts to integrate different actors, as regulators, through a 'smart-mix' approach.

At the same time, there are limitations. The UNGP are not and should not be regarded as a panacea for business and human rights. They have received significant criticism, most of which is well grounded and only a fraction of which is discussed above. Nevertheless, there are arguably successes in the limitations of the UNGP, most notably the degree of debate and discussions that the UNGP have managed to invoke. Given the nascent and early conceptual nature of thinking about a policy instrument on business and peacebuilding, these discussions highlight what can be achieved from a public discourse perspective from a somewhat lacking global policy instrument.

#### **6.4. A Global Policy Instrument on Business and Peacebuilding?**

Based on the above discussions, below I consider what a global policy instrument on business and peacebuilding might look like. Drawing on the case study findings, I suggest that there is scope for contemplating a policy instrument along the same lines as the UNGP.

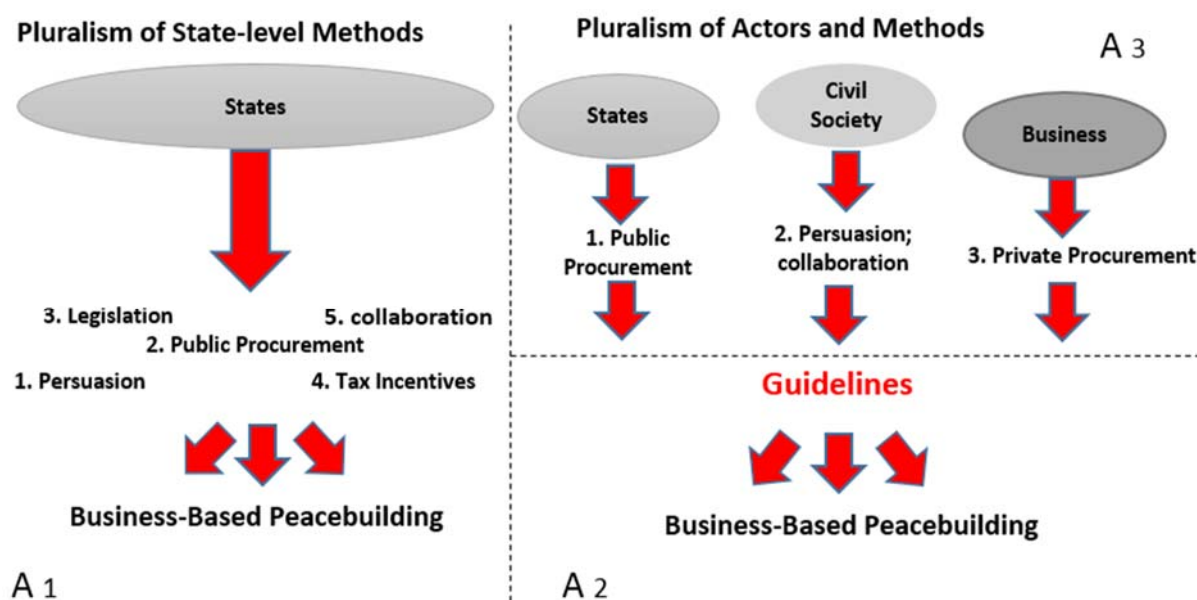


Figure 2: Overview of Business and Peacebuilding Policy Instrument

#### 6.4.1. Three Pillars of a Policy Instrument on Business and Peacebuilding

Drawing on the template provided by the UNGP, I outline three pillars that could potentially serve as the skeleton of a policy instrument on business and peacebuilding. Such an instrument could have a state-focused pillar, outlining different ways in which states could promote business-based peacebuilding (A1 of the diagram below) and a set of guidelines geared towards business (pillar 2) (A2 of diagram below). These guidelines should seek to inform businesses as to how to contribute to peacebuilding efforts in context-sensitive ways. Pillar 3 of the UNGP is primarily concerned with remedying victims of company-based human rights violations. By contrast, pillar 3 of a policy instrument on business and peacebuilding could focus on attempting to encourage different actors to promote business contributions to peacebuilding by adhering to the guidelines under pillar 2 (A3 of the diagram below).

##### 6.4.1.1. Pillar 1: State Roles in Promoting Business-Based Peacebuilding

Under the UNGP, the state duty to protect rights requires that states adopt various measures geared towards improving the overall regulatory framework. In the context of promoting business-based contributions to peacebuilding, pillar 1 should focus on how states can and could adopt approaches in pursuance of promoting business-

based peacebuilding. The case studies suggest that there are various different approaches that might be adopted.

For instance, states can incentivise businesses to contribute to aspects of a peacebuilding process. A useful example is the B-BBEE framework in South Africa. In this case, the government of South Africa identified salient issues that could contribute to peace in the context, such as promoting the integration of black people into the workforce, empowering black-owned businesses, and improving the skill set of the same population of people marginalised under the system of apartheid. The components of this instrument, such as promoting ownership in companies and empowering black workers, were direct responses to the legacy of marginalisation and discrimination against black South Africans. To promote these objectives, the South African Government sought to incentivise businesses by linking procurement opportunities to how businesses implemented the criteria defined in the Codes of Good Practice.

In doing so, the approach adopted in South Africa is reflective of industrial policy planning elsewhere.<sup>137</sup> As Sen notes:

Industrial policies are used by governments to alter the structure of production towards the sectors that offer the best prospects for sustained economic growth based on innovation and structural transformation. Industrial policies, through which the state creates (and withdraws) opportunities for profitable investments in certain activities, are shaped by state-business relations, and the ability of the public sector to work with the private sector for a common purpose, without being captured by the latter.<sup>138</sup>

Often, governments develop these policies to promote inclusive economic growth.<sup>139</sup> Ranieri and Ramos suggest that inclusive growth considers the impact of the growth process among different ethnic and gender groups and across geographical

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<sup>137</sup> See J.Y. Lin, 'New structural economics: A framework for rethinking development and policy', Washington, DC: World Bank, 2012.

<sup>138</sup> K. Sen, 'State-business relations: Topic guide', Birmingham, UK: GSDRC, University of Birmingham, 2015, at 7.

<sup>139</sup> J. Stiglitz and S. Yusuf, 'Rethinking the East Asian miracle', Washington, DC: World Bank, 2001; P. Evans, *The challenge of 21st century development: Building capability enhancing states* (Global Event Working Paper). New York: UNDP, 2010.



regions.<sup>140</sup> This understanding of inclusive growth incorporates the concept of horizontal inequality, or inequalities between culturally formed groups, in addition to vertical inequality, which is inequality among households or individuals. In the context of pillar 1 of a policy instrument on business and peacebuilding, states, having identified areas that businesses could help to address, could develop policies focused on addressing historical inequalities in the economic sphere.

A few further examples expand upon these possibilities. For instance, in the context of gaining access to mineral resources, states could require that businesses contribute to specific objectives. This is the basis, for example, of the Mineral and Petroleum Development Act (MPRDA) 2002 in South Africa, which sought to link the granting of licences to the B-BBEE criteria. In other contexts, the same process of incentivising businesses is readily identifiable. For example, in post-conflict Zimbabwe, mining projects must comply with Indigenization Policies established to empower local communities.<sup>141</sup> This includes the Community Share Ownership Trusts, which attempt to encourage the provision of employment opportunities to residents, project and company ownership and benefits sharing.<sup>142</sup> Because gaining mining contracts is subject to the extent to which businesses have complied with these requirements, this approach arguably creatively induces companies into contributing to elements of the peacebuilding processes, such as empowering those previously marginalised.<sup>143</sup>

Similarly, the Government of Peru requires mining projects to establish a Social Trust Fund, jointly administered by the company and the government. The required amount of investment in the trust fund is based on a percentage of the purchase price of the mining concession, rather than a percentage of the production or earnings.<sup>144</sup> Guinea's mining code has introduced the obligation to contribute to a local development fund up to 0.5% of the turnover for permits covering bauxite and

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<sup>140</sup> R. Raniere and R. Ramos, 'Inclusive growth: Building up a concept', (Working Paper number 104). Brasilia: International Policy Centre for Inclusive Growth, 2013.

<sup>141</sup> Indigenisation and Economic Empowerment Act, 2007.

<sup>142</sup> S. Sarkar et al., 'Mining Community Development Agreements', Practical Experiences and Field Studies Vol. 3, Washington D.C., World Bank, 2010, at 19.

<sup>143</sup> Although some suggest that these are fraught with legal vagueness and weak accountability mechanisms. See, Publish What You Pay Zimbabwe, 'Position Paper on Key Mining Reforms in Zimbabwe', Harare 2015 (Joint publication of Publish What You Pay Zimbabwe and Zimbabwe Environmental Law Association).

<sup>144</sup> See E. Wall and R. Pelon, 'Sharing Mining Benefits in Developing Countries', Washington D.C., World Bank, 2010, at 24.

iron ore and 1% of the turnover for licences covering other substances.<sup>145</sup> In other cases, tax incentives are offered to businesses that act in a socially responsible manner. Perhaps one of the best examples of this approach can be seen in Malaysia. While not a post-conflict context, Malaysia, like many post-conflict settings, suffers from high levels of horizontal inequalities. To engage businesses in helping to address these inequities, the Malaysian Government indirectly provides tax incentives to businesses that implement broad CSR programmes.<sup>146</sup>

The Northern Ireland case study also demonstrates the possibility for using orthodox approaches to regulation to require business contributions to peacebuilding. Reflecting the historical marginalisation of Catholics, in particular in the private sector, an affirmative action approach was adopted and pursued. While, as developed below, it is primarily through collaborations that this objective has been achieved, the example nevertheless highlights the possibilities for using hard law as a means through which to require business contributions to peacebuilding. In other contexts, states could, in theory, promulgate similar legislation that requires businesses to positively engage in promoting equality in the workplace.

As suggested, based primarily on two case studies, the possibilities are somewhat limited. However, and drawing back to the UNGP, the purpose of considering a policy instrument on business and peacebuilding, and in particular, the ways that states could promote business contributions to peacebuilding could raise further discussions. While both procurement and command and control-based methods are traditionally understood in the context of preventing harms from being caused, the case studies demonstrate that similar approaches can be utilised in pursuance of more proactive contributions. This raises the question, therefore, as to how and in what other ways states might develop strategies focused on doing so.

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<sup>145</sup> Norton Rose Fulbright, 'West Africa's wave of mining reform', January 2014, <http://www.nortonrosefulbright.com/knowledge/publications/111317/west-africas-wave-of-mining-reform> [last accessed 23 August 2017].

<sup>146</sup> J. Kasipillai and S. Rachagen, 'Tax Incentives and Social Corporate Responsibility', International Congress on Innovation and Regional Economic Development, Heifei City, Republic of China, 3 December, 2012.

#### 6.4.1.1.1. Inspiring further initiatives

As was suggested, despite the significant limitations raised by various scholars and practitioners in regards to the UNGP, there is evidence of a substantial degree of their uptake by a range of different actors. The importance of coherency is that, notwithstanding the numerous ways that businesses might be influenced, different actors and methods can pull in the same direction. Another benefit of the post-conflict state taking the lead on developing policies focused on engaging companies in peacebuilding efforts is that similar levels of convergence can occur.

For example, in the context of South Africa, it was argued that the B-BBEE framework serves as the basis for other regulatory developments. This is the case, for instance, with regards to legislation such as the Skills Development Act 1998 and the Preferential Procurement Act 2000, which both build on early attempts at promoting Black Economic Empowerment. Similarly, the Social and Ethics Committee requirements under the Companies Act 2009 include adherence to and promotion of B-BBEE, as do listing requirements under the JSE, with companies also asked to report on how they are implementing B-BBEE under the King Codes.

In Northern Ireland, the work of the Equality Commission Northern Ireland (ECNI) around assisting businesses to implement the requirements stipulated under FETO is further evidence of how a centralised strategy can help other actors promote business-based peacebuilding. In this case, while the ECNI is mandated to sanction non-complying businesses, it has adopted, in most cases, a more collaborative approach.

There are additional possibilities. As suggested, in some cases, states can adopt deliberate approaches to engage businesses in peacebuilding efforts. In other cases, however, the existence of a broad policy can have indirect consequences in other areas. For instance, it was suggested in the context of South Africa that some authors perceive efforts on the part of businesses to engage in B-BBEE as attempts to manufacture consent. For such authors as Figg,<sup>147</sup> the linkages between businesses and the apartheid regime, and thus the negative publicity which businesses attracted, has been a significant factor in pushing businesses to engage in corporate social investment (CSI), a crucial component of B-BBEE. Nevertheless,

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<sup>147</sup> See D. Figg, 'Manufacturing amnesia: Corporate social responsibility in South Africa', *International Affairs*, vol. 81, no. 3, 2005.

we can understand accountability-based mechanisms such as the unsuccessful litigation before US Courts, as serving an important purpose- persuading businesses to do more. In cases like this, state-based policies can provide objectives for firms to work towards in ways that define the types of roles that businesses could undertake, irrespective of their motivation.

At the same time, when such an approach is not adopted, the case studies also illustrate the possibilities of conflicts between initiatives and non-action. In regards to the latter, despite the fact that the St Andrew's Agreement specifies that the Northern Ireland executive should seek to involve businesses in helping to integrate former political prisoners, the state has thus far not only made little effort to do but, through legislative barriers, has weakened the willingness of businesses to assume these roles. The result is that important opportunities to contribute to peacebuilding through reintegrating former ex-prisoners are missed. Identifying and adopting policies geared towards building on the capacities of businesses to contribute to peacebuilding could help to ensure that salient peacebuilding opportunities are not lost.

#### 6.4.1.1.2. Motivating States

When considering the efforts that States might adopt, two additional factors emerge. One relates to persuading a post-conflict state to pursue objectives focused on integrating businesses into peacebuilding efforts and the second relates to how states might develop context specific policies.

In regards to the former issue, it would be naïve and incorrect to assert that states will always adopt approaches that seek to involve businesses in peacebuilding efforts. As the discussion in chapter 3 suggested, states are often unwilling and unable to engage in regulatory improvements. Thus, 'getting to regulation' is often a barrier to overcome. Again, however, the case studies offer some useful insights into how different actors can influence regulatory developments at the level of the state.

Firstly, the case studies suggested that different actors played important roles in pressurising both the Northern Ireland and South African Governments to adopt legislation. For instance, in the case of Northern Ireland, there are those that would argue that pressure from the US, institutional investors, and shareholders, had a profound impact on legislative changes in this setting. In turn, that these actors were

galvanised to advocate for change was the result of civil society campaigns focused on ending the discrimination of Catholics in Northern Ireland. In South Africa, similar trajectories emerged. For instance, some consider that the Sullivan Principles, consumer boycotts, and sanctions were also instrumental in raising the need to confront economic inequalities. These examples demonstrate a range of actors that can influence the decisions of states to adopt measures.

Another vital component in galvanising the state to adopt policies focused on integrating businesses into peacebuilding efforts was that of peace agreements. In the case of Northern Ireland, for instance, it was suggested that the Good Friday Agreement (GFA), as a significant peacebuilding moment, was instrumental in the subsequent promulgation of the FETO. Underpinning the importance and centrality of equality to the peacebuilding process, FETO can, in turn, be understood as a logical addition to the regulatory landscape in Northern Ireland. In South Africa, the 1996 peace agreement Constitution was also salient in putting equality firmly on the peacebuilding agenda. One can argue that the inclusion of equality principles, coupled with the efforts of others to highlight economic inequities, was an essential driver in the development of B-BBEE.

In other cases, we can identify examples of peace agreements helping to highlight the potential for peace agreements to serve as the basis for inspiring states to integrate businesses into the peacebuilding fold in ways that are more direct. For instance, along with the provisions of the 1996 peace agreement Constitution, the 1991 peace agreement stresses that '[t]he National Peace Committee shall appoint a chairperson and vice-chairperson, who shall be drawn from the religious and business communities.'<sup>148</sup> In this case, the peace agreement outlines that businesses have roles to play in the peacebuilding effort. Similarly, in Somalia, the *Decision on the High Level Committee, Djibouti Agreement* expresses '[a]n intention by the Parties to reach out to those who are outside the process ... including ... business community...'<sup>149</sup> In Myanmar, *The Nationwide Ceasefire Agreement (NCA) between The Government of the Republic of the Union of Myanmar and the Ethnic Armed Organizations (EAO)* stipulates that '[t]he participation of ethnic representatives, civil society organizations, scholars, dialogue will be discussed and

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<sup>148</sup> South Africa, National Peace Accord, 14/09/1991, at 27.

<sup>149</sup> Somalia, Decision on the High Level Committee, Djibouti Agreement, 25/11/2008.

determined during the drafting of the Framework for Political Dialogue.<sup>150</sup> Similarly, in Guatemala, the *Basic Agreement for the Search for Peace by Political Means* ('Oslo Agreement') outlines that:

The National Reconciliation Commission shall, by mutual agreement with URNG, create the mechanisms required for the convening, preferably in June 1990, of the necessary meetings between the Unidad Revolucionaria Nacional Guatemalteca and representatives of the country's popular, religious and business sectors, as well as other politically representative entities, with a view to finding ways of solving the nation's problems.<sup>151</sup>

Peace agreements, therefore, can be necessary not only in setting the foundations upon which more progressive regulation can arise but also by directly including businesses in the peacebuilding effort.

When thinking about how states might adopt policies and processes to engage businesses in peacebuilding processes, it is often necessary for other actors and initiatives to put pressure on businesses to do so. The case studies raise numerous possibilities in this regard.

#### 6.4.1.1.3. Informing Regulatory Efforts

On the assumption that states are willing and able to adopt measures that attempt to integrate businesses into peacebuilding processes and notwithstanding the fact that there are different ways that they might do so, how is the state to identify what issues to address? As suggested, in the context of the UNGP, states are asked to adopt measures that respond to issues of salience or gaps in their regulatory systems. To facilitate these processes and to promote changes that are context-reflective, NAPs and baseline assessments have been offered as a particularly useful measure to adopt.

Following on, we might suggest that states seek to identify salient issues to address through similar processes in the context of promoting business contributions to peacebuilding. For instance, baseline assessments could be undertaken by states to

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<sup>150</sup> Myanmar, The Nationwide Ceasefire Agreement (NCA) between The Government of the Republic of the Union of Myanmar and the Ethnic Armed Organizations (EAO), 15/10/2015, at 10.

<sup>151</sup> Guatemala, Basic Agreement for the Search for Peace by Political Means ('Oslo Agreement'), 30/03/1990, at pages 2-3.

identify the causes of conflict and to locate specific contributions that businesses might make to peacebuilding. In South Africa, B-BBEE evidences an approach, which not only seeks to address past inequalities, but also one that builds on the ways that businesses might best contribute to peacebuilding processes. For instance, that employment practices are targeted under the Codes of Practice reflects the fact that through their core business activities, this is an area where businesses can make a significant contribution.

As has been suggested, truth commissions (TCs or TRCs) seek to provide a narrative of the causes and consequences of conflict. TRCs can also identify the roles that businesses have played and, in some cases, specify areas for reform. The TRC in Liberia, for example, recommended that corporations play a role in providing reparations.<sup>152</sup> Amongst other things, the TRC endorsed the establishment of a reparations truth fund to compensate victims of economic crimes.<sup>153</sup> It suggested further that rather than paying into this on a voluntary basis, funds should instead be received from civil and criminal 'judgements against economic criminals.'<sup>154</sup> The recommendations included:

- (1) Recovering tax arrears from timber, mining, petroleum and telecommunications companies that evaded tax liability under the Taylor regimes;
- (2) obtaining funds from economic criminals that are sentenced by Liberian courts to pay restitution or other fees; and
- (3) utilising criminal and civil confiscation schemes in foreign jurisdictions to repatriate Liberian assets.<sup>155</sup>

The Liberian TRC also recommended that the Government of Liberia aggressively seek restitution from individuals and corporate actors that perpetrated economic crimes.<sup>156</sup> According to Liberian law, convicted criminals, whether individuals or corporations, can be fined double their illicit gains.<sup>157</sup>

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<sup>152</sup> Republic of Liberia Truth and Reconciliation Commission, Volume Two, Title VI, Section 17.

<sup>153</sup> Republic of Liberia Truth and Reconciliation Commission, Volume Three, Title III, at 43.

<sup>154</sup> *Ibid.*, at 43.

<sup>155</sup> *Ibid.*

<sup>156</sup> *Ibid.*

<sup>157</sup> *Ibid.*

Similarly, the final report of the Commission for Reception, Truth and Reconciliation in Timor-Leste asserted that corporations have a legal obligation to provide reparations to victims<sup>158</sup> and recommended that this obligation is fulfilled through corporate contributions to a domestic reparations programme.<sup>159</sup> This was a more explicit reference to the fact that businesses responsible for human rights were liable to pay reparations and can be distinguished from the Liberian approach of requiring companies to contribute to the programme of reparations.<sup>160</sup> It further suggested that the scheme should be jointly funded by a number of actors, including state and privately owned Indonesian business, as well as international and multinational corporations that 'profited from war and benefitted from the occupation' and that profited from selling weapons to Indonesia.<sup>161</sup> Drawing on the past, these respective Commissions have sought to include businesses in reparations programmes.

We might also suggest that TRCs could be more proactive in the recommendations issued. Indeed, scholars have also argued to this effect. Nelson Camilo Sanchez, in a chapter in Michalowski's *Corporate Accountability in the Context of Transitional Justice*, promotes a transformative justice approach to the issue of corporate accountability and TC recommendations.<sup>162</sup> As summarised by the author, 'this concept is an effort to combine the dominant concept of reparations, which in current legal theory is backward looking and founded in corrective justice, with the concept of distributive justice, which is forward-looking and takes into consideration current needs of the population.'<sup>163</sup> Given that TRCs focus on understanding the root causes of conflict and in some cases in identifying the roles that businesses play before and during conflict, it is possible that they could help to inform state-based policies through their findings and recommendations.

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<sup>158</sup> *Chega! Final Report of the Commission for the Reception, Truth and Reconciliation in East Timor, Part 11, Recommendations*, 2006, at 42.

<sup>159</sup> *Ibid.*

<sup>160</sup> C. Sandoval and G. Surfleet, 'Corporations and Redress in Transitional Justice Processes', in S. Michalowski (ed.) *Corporate Accountability in the Context of Transitional Justice*, Oxon; New York: Routledge, 2013, at 104.

<sup>161</sup> *Chega! supra note 29*, at 208; See also Sandoval, C., and Surfleet, G. 'Corporations and Redress in Transitional Justice Processes' in Sabine Michalowski (ed.) at 105.

<sup>162</sup> See N.C. Sánchez, 'Corporate Accountability, Reparations, and Distributive Justice in Post-Conflict Societies' in S. Michalowski (ed.) *Corporate Accountability in the Context of Transitional Justice*, Oxon; New York: Routledge, 2013.

<sup>163</sup> *Ibid.*, at 119.



A second option might be to consider involving businesses in the development of state-based policies. As the example of the EU Funding approach suggests, businesses can and are often willing to engage in governance-related issues. Moreover, as the discussion in Chapter 3 suggested, numerous regulatory and governance initiatives have been developed with the involvement of business participation. Businesses are often highly apt at identifying areas that require reform. Consider, for instance, the above discussion on industrial policy. One of the driving factors for government intervention in the economy is the reality of market failures. As suggested, one such market failure is that of negative externalities, which require states to intervene to correct these failures. At the same time, the primary argument against government intervention is that it can lead to government failure. This often arises in contexts where governments lack the knowledge and information to guide and direct interventions. As Alberto Lemma, and Dirk Willem te Velde note, 'Governments can fail, as they are unlikely to have perfect information and perfect foresight, suffer from moral hazard problems or are captured by elites.'<sup>164</sup>

For this reason, a body of scholarship has, in recent years, took a closer look at state-business relations (SBRs).<sup>165</sup> Along with measuring when state-business relations contribute to economic growth, authors suggest that certain underlining characteristics define effective SBRs.<sup>166</sup> One example is the presence of effective, transparent, and accountable lines of communication between public and private actors. In particular, authors suggest that these lines of interaction can help private actors inform government policy. Rodrik argues, for instance, that the right model for industrial policy is one of strategic collaboration between the private sector and the government, with the aim of uncovering where the most significant obstacles to restructuring lie, and what type of interventions are most likely to remove them.<sup>167</sup> As an example, some countries such as Ghana, Tanzania and Senegal in 2002, and in

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<sup>164</sup> A. Lemma, and D. Willem te Velde, 'State-business relations as drivers of economic performance', United Nations University, WIDER Working Paper 2015/098, at 3.

<sup>165</sup> M. Cali, S. Mitra and P. Purohit, 'Measuring state-business relations within developing countries: An application to Indian states,' *Journal of International Development*, vol. 23, no. 3, 2011 pp. 394-419; M. Cali and K. Sen, 'Do effective state business relations matter for economic growth? Evidence from Indian states', *World Development*, vol. 39, no. 9, 2012, pp. 1542-1557; D.W. Te Velde, 'Introduction and overview', in D. W. te Velde (ed.) *State-business relations and industrial policy: current policy and research debates*, London: ESRC DFID Growth Research Programme, 2013.

<sup>166</sup> For synthesis, see Sen, *supra* note 138.

<sup>167</sup> D. Rodrik, Second-best institutions, *American Economic Review*, vol. 98, no. 2, 2008

Mali and Uganda in 2004, have developed Presidential Advisory Councils (PACs).<sup>168</sup> The primary purpose behind the establishment of the councils is to enable presidents and governments to talk with experienced business leaders to identify obstacles to investment, generate recommendations for concrete action, and accelerate continuing policy reforms to improve the overall investment climate. By drawing on the expertise and inputs of businesses, governments could identify important areas of the economy on which to focus reforms. At the same time, the involvement of businesses could help develop future relationships on which to build more proactive contributions to peacebuilding on the part of business.

Thus, alongside TCs, developing productive relationships between post-conflict states and businesses is another possible avenue for identifying not only the issues to address but also understanding how and to what extent businesses might participate in peacebuilding efforts.

#### 6.4.1.1.4. Discussion: Merits of a state-based Limb?

There are, it follows, different benefits associated with developing a state-based component in a policy instrument on business and peacebuilding. Firstly, states, as central authorities, should bear the primary responsibility for integrating businesses into peacebuilding efforts. As the discussion has suggested, this can be achieved in different ways. From legislative approaches to incentive-oriented policies, persuasive mechanisms to developing guidelines, states can employ a range of different approaches to engage businesses in peacebuilding processes. Moreover, when states take the lead in developing such programmes, alignment of different regulatory methods and actors can occur.

However, getting businesses to do so is no small feat. For this reason, the discussion also considered a number of ways that states might be persuaded to do so. This can include pressure from stakeholders, as well as writing in such requirements in peace agreements. A further difficulty is defining the specific areas to address. In both South Africa and Northern Ireland, examples such as B-BBEE and FETO demonstrate the possibilities of using regulatory approaches to address what can be considered important elements of these peacebuilding processes. It is

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<sup>168</sup> See J. Page, 'Industrial Policy in Practice: Africa's Presidential Investors' Advisory Councils', The Brookings Institution WIDER Conference "Learning to Compete: Industrial Development and Policy in Africa" Helsinki, Finland 24-25 June 2013.

necessary that in other contexts, states seek to ensure that they are adopting context-relevant measures. Thus, along with the possibility of taking a baseline assessment of areas that businesses could contribute to, other methods such as drawing on the findings and recommendations of truth commissions, asking truth commissions to adopt more proactive-focused recommendations, and engaging in constructive dialogue with businesses, are all possibilities. Of course, these possibilities are somewhat limited, drawing only on two case studies. Nevertheless, the purpose is to inspire thinking about different ways to construct and deepen a state-based limb to any policy instrument on business and peacebuilding.

#### 6.4.1.2. *Pillar 2: Localising the Global: The Advancing the SDGs Document*

While the discussion above suggested a number of ways in which states could attempt to involve businesses in peacebuilding efforts, it is also often the case that states, despite efforts to persuade them otherwise, will remain unable or unwilling to adopt efforts to engage businesses in peacebuilding processes. Moreover, as early discussions on Black Economic Empowerment (BEE) suggest, it is perhaps often undesirable to rely on states, given the potential for corruption to occur. For this reason, it is necessary to consider what the second limb of a policy instrument on business and peacebuilding might look like. The discussion on the UNGP showed that the due diligence guidelines are directed towards businesses. They seek to outline processes that businesses should adopt to ensure that they are not causing harm. One of the primary reasons for these guidelines is to help ‘fill governance gaps’ when states are unable or unwilling to do so.

Pillar two of a policy instrument on business and peacebuilding should speak directly to businesses. As touched upon, one of the difficulties in thinking about a global instrument on business and peacebuilding is how to make sure it is locally relevant. The UNGP attempt to do this through the concept of due diligence which, as outlined in the text of the Principles, asks businesses to adopt approaches to help identify and mitigate against risks in the contexts in which they are operating. To this end, in this section, I examine a document produced through a collaboration between the UNGC, B4P and the CDA Collaborative Learning Projects, entitled ‘Advancing the Sustainable Development Goals by Supporting Peace: How Business Can Contribute’.<sup>169</sup> The document produced ‘complements existing

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<sup>169</sup> Ernstorfer et al, *supra* note 9

materials such as the UN Global Compact's Guidance on Responsible Business in Conflict-Affected and High-Risk Areas with a new perspective on deliberate contributions to peace by companies.<sup>170</sup> The stated purpose of the document is 'to advance the discussion on how the private sector can make positive contributions to peace in conflict-affected and high-risk areas around the world and, as a result, help to the realization of SDG16.'<sup>171</sup> I suggest that this document acts as a useful illustration of some of the crucial components that a set of guidelines might include. The usefulness stems from the fact that the document outlines a process that businesses could adopt to help inform how to go about making positive contributions to peacebuilding processes. Moreover, reflecting the realities of contextual differences, they concentrate specifically on developing a process that businesses should undertake in order to intervene in context-sensitive ways. For ease of reference, I refer to this document interchangeably as the 'Advancing the SDGs document' or 'Advancing the SDGs'.

#### 6.4.1.2.1. Overview of the Advancing the SDGs Document

The Advancing the SDGs document describes business-based peacebuilding as 'deliberate measures undertaken by business actors to (i) end violence and address the key driving factors of conflict, and (ii) forge alliances and partnerships to coordinate and advocate for comprehensive and multi-sectoral strategies to promote peace.'<sup>172</sup> To inform how businesses might contribute to peacebuilding, the guidelines outline five steps businesses should take. These steps are namely: commit, assess, define, implement, and communicate.

Committing to peacebuilding is the first step that businesses are required to take. This process includes 'understanding why contributing to peace is important for business.'<sup>173</sup> After committing to contributing to the peacebuilding processes, businesses are asked to adopt conflict analysis to help 'determine how to make a positive contribution to peace.'<sup>174</sup> The purpose is to help pinpoint underlying causes

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<sup>170</sup> *Ibid.*, at 5. See UN Global Compact, 'Doing Business While Advancing Peace and Development', New York, United Nations Global Compact, 2010.

<sup>171</sup> *Ibid.*, Ernstorfer et al, at 5.

<sup>172</sup> *Ibid.*, at 5.

<sup>173</sup> *Ibid.*, at 5.

<sup>174</sup> *Ibid.*, at 5.

and drivers of violence and tension.<sup>175</sup> Key drivers of conflict are described, in turn, as those factors that influence heavily the existence and nature of the conflict. These can include grievances, resources and capacities to wage violent conflict, relationships and attitudes, and structures (social, economic, political and cultural) that drive conflict or peace, and the dynamics among them.<sup>176</sup>

To this end, the Advancing the SDGs document outlines questions to help direct the conflict analysis process. In some respects, these questions pertain to understanding the broader context and include:

What is the general socio-economic and socio-political context? What are important regional, cross-border and international dynamics that influence the situation? What areas/regions/communities are particularly affected by violent conflict?<sup>177</sup>

Businesses are also asked to better understand the structural underpinnings of conflict, conflict drivers and triggers. Questions helping to drive these efforts include:

What are deep-rooted structural causes of violent conflict? Which events and conflict triggers could further exacerbate tensions? What are the patterns of behavior and strategies that fuel violence? What is the relationship between different conflict factors, how do they interrelate?<sup>178</sup>

The essence of the 'assess' phase of the process is that businesses are asked to understand the contexts in which they operate.

It is in the 'define' component that Advancing the SDGs can be distinguished from other similar documents. It was suggested in the introductory chapter that context-sensitivity is perceived by some to be in itself a peacebuilding contribution. Those advancing this position suggest that by acting in a context-sensitive manner, the externalities that can arise when businesses are not sensitive to the context in which they are operating can be avoided.<sup>179</sup>

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<sup>175</sup> *Ibid.*, at 5.

<sup>176</sup> *Ibid.*, at, 12-13.

<sup>177</sup> *Ibid.*, at 29.

<sup>178</sup> *Ibid.*, at 29.

<sup>179</sup> J. Katsos and J. Forrer, 'Business practices and peace in post-conflict zones: Lessons from Cyprus', *Business Ethics: A European Review*, vol. 23, no. 2, 2014, at 157.

In 'Advancing the SDGs', by contrast, context-sensitivity is not viewed as a contribution to peace but as the basis upon which to inform how a business might choose to intervene in more proactive ways. In other words, it is based on the knowledge accumulated via conflict analysis that businesses decide how best to contribute to peace subsequently. The distinction is explained by Chigas and Woodrow who assess the following:

[Context sensitivity] is a fundamental principle of good and responsible practice that is applicable to ALL programs. In this way, it is most useful in an adjectival form: "conflict sensitive," rather than as a noun, which implies that it is a type of programming in its own right. As an adjective, it can (and should) be applied to humanitarian assistance, development efforts, peacebuilding, peacekeeping operations, human rights advocacy, security sector reform, demobilization of combatants, work with women and youth, and so forth.<sup>180</sup>

Context-sensitivity, in other words, is the process of accumulating knowledge necessary to determine how best to intervene. While in contexts where states assume the responsibility of developing frameworks, in those cases where they do not, this approach is useful in helping businesses identify how to make context-specific interventions.

Based on the knowledge accumulated by the conflict analysis, businesses are then asked to adopt a 'theory of change.'<sup>181</sup> A theory of change is an 'explanation of how and why an action is believed to be capable of bringing about its planned objectives, i.e. the changes it hopes to create through its activities, thereby revealing underlying assumptions.'<sup>182</sup> Amongst other things, the guidelines suggest that 'a clear theory of change helps to articulate the logical flow from the starting point (analysis) to the action (goal) to the change the company wants to make.'<sup>183</sup>

As in the case of the assessment phase above, guiding questions are offered to help direct business approaches. These include:

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<sup>180</sup> P. Woodrow and D. Chigas, 'A Distinction with a Difference: Conflict Sensitivity and Peacebuilding', CDA Collaborative Learning Projects Research Paper, 2009, at 11.

<sup>181</sup> Ernstorfer et al, *supra* note 9, at 20.

<sup>182</sup> *Ibid.*

<sup>183</sup> *Ibid.*

What drivers of conflict or peace is the business aiming to influence—through specific core business operations, social investment, government relations or stakeholder relations? In other words, what is the goal in relation to peace? Is it clear, concrete and grounded in the context? How will the business policies, practices, operational and social investment activities and relationships lead to the desired change? In other words, what is the theory of change of how the activities will contribute to peace?<sup>184</sup>

The distinguishing feature and thus the progressiveness of Advancing the SDGs is that they do not merely seek to prevent businesses from causing harm, but rather to identify a process that companies should undertake to decide how and in what ways to contribute positively to peacebuilding. The fourth phase of the process focuses on implementation. This involves monitoring and evaluating programme effectiveness and peace effectiveness. Finally, businesses should communicate which means reporting on impact and progress towards peace. Companies are encouraged, therefore, to build into their communication and reporting to stakeholders the effects of their actions and contributions to peace.

#### 6.4.1.2.2. Discussion

The Advancing the SDGs document is a particularly forward-looking addition to the broad range of existing guidelines that attempt to shape business behaviour in post-conflict settings. They push beyond ‘do no harm’ or limited approaches to developing ‘context-sensitivity.’ Instead, reflecting the growing attention directed towards business and peace and the possibilities identified by scholars and policymakers alike, ‘Advancing the SDGs’ seeks to inform businesses as to how they might go about ‘doing peace’ or ‘doing peacebuilding.’ Moreover, reflecting the fact that all conflict-affected settings are in some ways unique, the focus on process rather than objective standards attempts to ensure that any contributions that businesses might make are context-relevant. Thus, they take what might be regarded as a global or abstract objective of contributing to peacebuilding and attempt to make interventions locally applicable by developing a process centred on accumulating context-specific knowledge. This document serves as a useful

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<sup>184</sup> *Ibid.*

example of what form a set of guidelines under pillar 2 of a policy instrument on business and peacebuilding might look like.

Nevertheless, Advancing the SDGs is also limited in one fundamental respect. When considering why it is that businesses would assume these responsibilities, the present document does not engage with the possibility that other actors have roles to play in promoting their uptake. For instance, among the only justifications offered for why businesses would assume these roles is the statement that '[c]onflict and instability not only impact people and the environment; they also pose risk to all parts of the business sector.'<sup>185</sup> It is also noted further that:

Peaceful and stable operating environments are conducive for business; they feature more and better investment opportunities, and reduce operational and security costs and risks. Companies operating in conflict-affected contexts require a solid understanding of conflict dynamics to create shared value, recognizing that societal needs ultimately define markets.<sup>186</sup>

In other words, 'Advancing the SDGs' requires that businesses commit, assess, define, implement, and communicate the guidelines solely on their own accord. In some cases, businesses might opt to adhere to these guidelines on their own accord. However, relying solely on businesses to assess the impacts of conflict or a sense of moral or social responsibility to do more is limited in a number of ways. As I have argued, these urgings presume, amongst other things, that conflict affects all business equally and that all companies are inspired to contribute to peacebuilding. They also take for granted that irrespective of the particular efforts that businesses are being asked to make, similar arguments are often different in terms of the persuasive pull that they exert.<sup>187</sup>

Against these limitations, I suggest that a third pillar should focus on the role of other actors in promoting the uptake of these guidelines.

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<sup>185</sup> *Ibid.*, at 16.

<sup>186</sup> *Ibid.*, at 16.

<sup>187</sup> See Chapter 1., Section 1.4.



#### 6.4.1.3. *Pillar 3: Including other Actors*

The third pillar is one, which should focus more on how different actors can improve the uptake of the guidelines. In this sense, it is similar to a type of responsive approach to regulation. Regulation that is responsive promotes 'active' (positive) rather than 'passive' (negative) responsibility, clearly signalling to businesses that the onus is on them to identify and avoid or mitigate risks or to rectify harms once occurred.<sup>188</sup> According to Doorey, responsive regulation 'involves... the regulation of the 'contextual conditions' of self-regulation, or the 'regulation of self-regulation,' but with the instrumental intent of achieving state objectives.'<sup>189</sup> Rather than setting out the agenda and issues that are to be addressed, the process-driven approach would concentrate on ensuring that businesses adhere to the peacebuilding guideline process.<sup>190</sup> Again, whether or not the influence that different actors exert on business amounts to regulation is a complex conceptual issue. Nevertheless, the example of responsive regulation helps to frame the type of process-focused influence that different actors might exert on business.

There are also some advantages to this approach, which should be briefly highlighted. Firstly, in those contexts where states are unable or unwilling to develop full programmes or policies on business-based peacebuilding, other actors can step in to promote business-contributions to peacebuilding. At the same time, there are difficulties associated with doing so. For example, in the context of prosecuting extraterritorially, it was suggested that courts often defer to states where a human rights violation or tort occurred, in part out of respect for the sovereignty and competences of host states. The notion that a home state would and should stipulate peacebuilding outcomes in another country, something, which pushes well beyond assessing whether states are protecting rights adequately in their own jurisdiction, is highly contentious. In the context of societies attempting to transition from conflict to peace, for example, the degree of intervention and policy shaping by other countries could significantly undermine the legitimacy of the new political order, keen to re-establish its authority. A process-based approach, by contrast, is more concerned with ensuring that businesses adopt processes rather than

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<sup>188</sup> J. Ford, *Regulating Business for Peace: The United Nations, the Private Sector, and Post-Conflict Recovery*, New York, Cambridge University Press, 2015, at 189.

<sup>189</sup> D.J. Doorey, 'Who Made That? Influencing Foreign Labour Practices through Reflexive Domestic Disclosure Regulation', *Osgoode Hall Law Journal*, vol. 43, no. 1, 2005, at 666.

<sup>190</sup> Ford *supra* note 188, at 188.

outcomes. That is and linking the discussion to the peacebuilding guidelines, such an approach would see other actors, using a range of methods, to promote the practices and processes identified in the guidelines.

Secondly, this allows a more flexible approach to be adopted. It is not always helpful to set an agenda. Such is the dynamism and fluidity of post-conflict contexts, that change is a constant. A process-oriented approach allows businesses to respond to these changes over time. By outlining how different actors could help to promote this process, a policy instrument could help to move the peacebuilding guidelines from those whose implementation is reliant on the whims of business, to instead guidelines that are supported by other actors requiring, incentivising or persuading companies to adhere to the process defined in them. Below, I consider how different actors might promote processes.

#### 6.4.1.3.1. Promoting Processes

The examples of South African and Northern Ireland illustrate how such actors as shareholders and investors can influence positive contributions from businesses. In these cases, pressure was put on businesses, primarily through threats of divestment, to alter their conduct in these respecting settings. In other cases, the influence came from institutional investors. In both case studies, it was suggested that various actors are able to use their influence to shape corporate conduct. While the focus was on altering employment practices, it is equally possible that the same actors could ask businesses to adopt processes like those identified in the guidelines.

Similarly, the example of the EU PEACE programmes demonstrate that sub-regional organisations can incentivise businesses to pursue particular objectives. In this case, companies were incentivised to play proactive roles in Local District Councils (LDCs) to gain access to decision-making processes regarding the allocation of funds. Broadly stated, there was a perceived economic self-interest for businesses to participate in these collaborations. It is again wholly possible that businesses could be incentivised to comply with a set of guidelines.

Perhaps a better example of the possibilities of other actors to promote adherence to processes is that of the IFC's Social and Environmental Standards. While the standards are primarily concerned with limiting adverse harms that businesses borrowing from the IFC might cause, the example illustrates the use of process-

oriented regulation. As suggested, in order for businesses to access finance from the IFC, they are required to identify any risks and to remedy them accordingly. This entails process specifications that businesses undertake social and environmental impact assessments. Similar processes are asked of companies that benefit from the granting of export credits and in some cases, public procurement. Again, the examples demonstrate the possibility that businesses can be influenced to follow specific processes. It is wholly conceivable that these actors could also demand or incentivise compliance with peacebuilding guidelines.

A question that necessarily follows is why these actors would do so. One answer is that there might be a sense of moral responsibility. Alternatively, we might suggest that promoting business-based peacebuilding is an essential component of the broader agendas of these groups. The IFC, for example, is part of the World Bank Group, which seeks to promote development in less-developed contexts. Similarly, ECA's, as state-based agencies, could be regarded as development-promoting organisations, particularly when understood in the context of a state's foreign policy objectives. Given that conflict can undermine development, there is arguably a justification for these actors requiring that businesses follow the peacebuilding guidelines.

There is, however, a stronger reason. Whether it is shareholders, investors, export credit agencies or financiers, it is often in the economic self-interests of actors to resolve conflict. For instance, political risk insurers are entities that provide insurance to businesses operating in often politically high-risk contexts. A difficulty associated with providing insurance is moral hazard, which occurs when someone or entity increases their exposure to risk when insured. Businesses might be less concerned with ensuring that they are not adversely affecting the setting in which they operate because it is not their money at stake. Given that approaches to 'doing no harm' can in some cases nevertheless contribute to harm, there is an economic self-interest to ask that businesses actively do more. Thus, for those providing financial support to firms, there is often a clear business case for ensuring that businesses positively contribute to peacebuilding, to reduce political risk exposure.

Building on, we can think of other creative possibilities. For example, truth commissions could recommend that businesses adhere to the guidelines. So too could MSIs. Indeed, MSIs could form around the peacebuilding guidelines. For instance, there could be collaborations between businesses and civil society,

focused on developing programmes aimed at peacebuilding initiatives. Civil society actors could also use the principles as the basis to demand that businesses, particularly those which have operated in a socially irresponsible manner, repair harm caused by engaging in some particular peacebuilding objective. Alternatively, businesses could be asked to report on how they have or are attempting to implement the principles. This could be mandated under legislation or form part of a set of conditions for access to public contracts. Additionally and building on the creativity of McCall-Smith and Rühmkorf, home states could require that businesses report on how they are attempting to integrate the guidelines into practice. This could lead to the possibility that larger, more powerful businesses, will require that companies throughout the supply chain in conflict-affected settings adopt some measures to this end. As mentioned, one of the underlying strengths of a process-based approach is that, as in the case of due diligence under the UNGP, businesses must adopt processes focused on identifying context-specific strategies that they might adopt.

Thus, inspired by the UNGP, we can begin to think creatively about the possibility of a global policy instrument on business and peacebuilding. The starting point must be with the state, which can, through a range of instruments and initiatives, promote business contributions to peace. It should also include a business limb, one that reflects the fact that post-conflict states will often not assume such a role. These guidelines should focus on process to ensure that interventions are context-specific. As discussions on self-regulation often suggest, relying solely on business can be limited. To this end, a policy instrument should also seek to draw on other actors, capable of influencing businesses in a range of ways. The primary focus of the third limb should be on promoting uptake of the guidelines.

#### 6.4.2. Unanswered Questions

The above discussion has presented aspects of what could amount to the development of a policy instrument on business and peacebuilding. This multi-pronged approach would engage the state, businesses, and other actors in promoting business contributions to peacebuilding.

However, numerous questions emerge. For instance, it is not clear how a policy instrument on business and peacebuilding would sit alongside other initiatives focused on preventing harm. The case studies show how different regulatory

initiatives in South Africa and Northern Ireland ‘gap fill’ for more proactive approaches. As an illustration, the King Committee Codes attempt to promote socially responsible behaviour, adopting a reporting-based approach. Similarly, legislation such as the Promotion of Equality and Prevention of Unfair Discrimination Act (2000) and the Employment Equity Act (1998) attempt to ensure that businesses are not discriminating against employees, even when promoting B-BBEE objectives. By existing alongside the more progressive B-BBEE, they help to ensure that even more proactive businesses are not causing harm. In Northern Ireland, similar approaches have been adopted in the form of legislative initiatives like Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003 and Special Educational Needs and Disability Order (Northern Ireland) 2005. At present, how and in what ways a global policy instrument would interact with other approaches is unclear. For instance, would adherence to the UNGP suffer because of a policy instrument on business and peacebuilding?

Secondly, how would we monitor compliance with such an instrument? Should we develop vectors and indicators for adherence to the guidelines or the impacts of state-based approaches? Following on, how do we learn from positive approaches adopted or negative outcomes, which emerge? For example, using the B-BBEE framework as an example of a useful way of thinking about how states might seek to include businesses in peacebuilding, should not be interpreted as claiming that this approach is an outright success. Indeed, B-BBEE has been plagued with issues of corruption and ineffectiveness from the outset. However, it is still a useful example to invoke. For one, it reiterates that any interactions between states and businesses have the potential to turn corrosive. As such, at the forefront of the mind when further developing any such policy instrument on business and peacebuilding must be monitoring and regulating these relationships. Secondly, for all its flaws, the B-BBEE framework does highlight that improvements can be made over time, and that ongoing monitoring and feedback is important.

Thirdly, while both state-based approaches and process-oriented approaches might contribute to coherency, what about when these two conflict? For instance, how would we resolve a situation wherein the state adopts a particular policy focused on promoting economic inclusion of one section of society but businesses, based on their own appraisal of a context, determine that another group should be prioritised? How important is a dialogue between different constituents for any such instrument and how is this to be facilitated? Coupled with these queries, other, perhaps more

pressing concerns, include how and in what ways different businesses might contribute to peace, in different settings and how do we operationalise process requirements in practice.

There are, in other words, a whole host of limitations and unanswered questions associated with developing a global policy instrument on business and peacebuilding. Recognising the difficulties and limitations of any policy instrument on business and peacebuilding is essential. However, it is here that we must draw attention back to the UNGP. Despite its many limitations, UNGP have invoked difficult questions regarding the relationship between business and human rights. The many shortcomings of the UNGP have created a cacophony of discussions regarding, for instance, the development of metrics, the roles that other actors can play, how to improve business respect for human rights in different contexts, and for different industries. In some senses, the limitations of the UNGP have been one of their most significant successes. In much the same way, a policy instrument on business and peacebuilding raises difficult issues, only some of which are touched upon above. Moreover, the true extent of difficulties and indeed, perhaps the unworkability of such an instrument are as of yet, unknown. In many senses, this is the point.

The purpose of thinking broadly about a global policy instrument on business and human rights is simply that, to think about it. The intention of putting it out through the channels of scholarship is to attempt to generate a discussion and further research about its potential possibilities, both negative and positive. If nothing else, the UNGP illustrate the power and usefulness of discontent.

## **6.5. Conclusion**

This thesis set out to examine how different actors might influence businesses to engage businesses in contributing positively to peacebuilding efforts. The driving force behind this study was a growing body of literature that continues to explore the ways that businesses might play more proactive roles in transitions from conflict to peace. These scholars and practitioners are recognising that addressing many of the ills of the day requires the participation of business. Discussions on business and peace are, therefore, part of a much larger conversation that touches on how businesses might actively contribute to development, state building, and the protection and realisation of human rights, as just a few examples.

In ways, however, the discourse is suspended in a state of 'optimistic uncertainty'. On one level, the potential for businesses to make more proactive contributions is touted widely. On the other, it is not clear precisely if, why, when, and how companies might opt to engage positively in peacebuilding processes. It is in this space of optimistic uncertainty that this thesis explored the possibilities that different actors might require, persuade or incentivise businesses to contribute to peacebuilding. The intention was to illustrate the opportunities for progressing the discourse from one that is mostly driven by and reliant on the whims of business to instead one that might be shaped by other actors.

To do this, I drew on the pluralisation of regulation. As I have argued, regulation is a dynamic concept, which some suggest emerges in different forms and through various actors. These discussions on regulation pluralism illustrate that different actors can influence businesses in a range of ways. Based on the initial mapping of different forms of regulation and key regulatory initiatives, I illustrated that this influence can emerge from such initiatives as public and private procurement, guidelines, truth commission reports and recommendations, multistakeholder initiatives, shareholders and investors and civil society organisations, as just a few examples. This plurality of influences, while primarily approached from the twin tests of efficiency- how they prevent harms from occurring and hold businesses accountable when they do- might also be used for more proactive ends.

To this end, the case study chapters asked how different actors have attempted to influence business contributions to peacebuilding in Northern Ireland and South Africa. In some instances, businesses were required to contribute positively to peacebuilding. In other cases, businesses were persuaded to do so. Still again, the case studies suggested that businesses can also be incentivised through economic instruments. These can include public and private procurement as well as financial penalties in the form of shareholder resolutions, again as just a few examples.

Different factors dictate the particular approach adopted. In South Africa, for instance, tensions between socioeconomic transformation objectives and the need for market growth led to the B-BBEE experimentation, an initiative that seeks to achieve a delicate balance between the two aims. Similarly, in Northern Ireland, the more collaborative in nature approach under FETO attempted to respond to the limitations of the Fair Employment Act (FE Act) (1989). In both cases, as is relevant

elsewhere, what particular regulatory approach is adopted cannot be defined in the abstract but must be sensitive and applicable in the context.

Along with identifying different possibilities regarding how different actors might influence businesses, other findings emerged from the case studies. Firstly, direct regulation of companies can lead to institutional change. That is, in directing regulatory attention towards the deleterious activities of businesses, governments can be pressurised to alter the regulatory environment. Similarly, in 'getting to regulation' different trajectories emerge. In some cases, the pressure from civil society groups can be used to engage such actors as investors and shareholders to assume regulatory-type roles. In turn, these actors can leverage businesses to contribute to conflict transformation efforts. Moreover, significant peacebuilding moments, often in the form of peace agreements, can be important in setting broader agendas upon which regulation directed towards business can be developed.

The case studies arguably succeed in showing that different actors can shape the decisions of businesses as to when and how to intervene in peacebuilding processes. How, though, might findings be relevant to other settings? While the discussions in South Africa and Northern Ireland are illuminating, it has also been stated repeatedly throughout the journey of this thesis that post-conflict contexts are usually unique. In peacebuilding contexts, given the variations that exist across conflict divides, how can or could these findings be of relevance?

To this end, I considered what a global policy instrument on business and peacebuilding might look like. As outlined, the type of device envisioned is one that seeks to involve other actors to put pressure or incentivise enterprises to contribute to peacebuilding processes. It should respond to the limitations of relying solely on the individual decisions of companies as to when to intervene and how to do so. The first port of call, in this regard, should be post-conflict states. Such an instrument, recognising the various difficulties that face those transitioning from conflict to peace, should outline the broad range of possibilities and methods that the state could employ. In other words, the state-limb of a global policy instrument should reflect the plurality of options available to the state. Pillar two, the business limb of a business and peacebuilding policy instrument, should focus on outlining processes that businesses should adopt to identify how to engage in post-conflict settings, not what to do. The final limb of a policy instrument should attempt to include different



actors that might be able to influence business contributions to peacebuilding. I suggested that pillar 3 of any instrument on business and peacebuilding should focus more on promoting adherence to pillar 2 guidelines. That is, adopting a responsive regulatory-type approach, such actors as investors, financiers and civil society, as examples, should seek to promote adherence to the guidelines set.

I argued that the UNGP offer a useful template for thinking about a global policy instrument on business and peacebuilding. That is, they provide a valuable example of how a policy instrument can achieve these different objectives. I also argued that the UNGP is helpful in another way. The trajectory of the business and human rights debate following the UNGP illustrates how a policy instrument can inspire debate, and interdisciplinary discussions, with the aim of progressing the ultimate objective of improving corporate conduct. In this light, the UNGP has been a conversation starter; one which has led to more substantial efforts to advance how and in what ways to forward the business and human rights agenda, and the role of different actors in this effort. As an area of research, which has yet to attract significant discussions, a policy instrument, however provocative or limited, might serve a similar function of galvanising the debate. Thus, this chapter and thesis are offered as an example of a potential solution to the current stalemate in the business and peacebuilding debate, one that is admittedly far from perfect and unrepresentative of the vast majority of peacebuilding environments. Nevertheless, it is, hopefully, the start of a conversation.

Finally, while not the focus of this thesis, underlining this research is a conceptual matter, one which continues to resurface but which is difficult to adequately address- what do we mean by regulation and how far can the boundaries of regulation extend? In one way, there is a significant risk and difficulty in suggesting the initiatives discussed in this thesis are 'regulation.'

In some cases, the examples discussed above cannot be regarded as regulation. For example, the EU PEACE initiative demonstrates the possibility for creative thinking and shows that businesses can be leveraged in ways that promote active contributions to peacebuilding processes. While useful for the purposes of developing discussions around the possibilities for different actors to influence business contributions to peace, we cannot intelligibly argue that such approaches amount to regulating businesses for peacebuilding.

In other cases, the distinction is less clear-cut. If one embraces the argument of regulatory pluralists that there are numerous forms and approaches to regulation, can we then argue that this pluralisation might extend beyond doing no harm? If one agrees, for instance, that public procurement is a form of regulation that emerges, partially, in response to the failures of orthodox regulation, what then do we term it when procurement is used to promote developmental objectives? In this example, actors normally regarded as regulators- the state, employing a method understood by some to be a form of regulation- procurement, simply alters the objectives from limiting harm to promoting another, albeit more progressive objective. Is this to push 'regulation' too far, or is it a necessary consequence of the gradual pluralisation of regulation more generally? That is, in much the same way that regulatory actors and methods of regulation have expanded, perhaps so too have the objectives of regulation?

Complicating this matter further is the fact that, as is the case of the B-BBEE, processes well recognised as falling under 'regulation', such as standard setting, are also incorporated into these mechanisms. In the case of B-BBEE, this emerges in the form of criteria, according to which, businesses are assessed. Much like other regulatory initiatives, business conduct is judged according to defined criteria. Whether businesses avail of economic opportunities is determined according to the extent to which these standards are met.

This thesis, as largely concerned with how different actors might influence businesses, has not fully addressed these questions. Attempting to do so would have detracted from the central purpose of this thesis, which was to consider how different actors might influence businesses to contribute to peacebuilding. However, it is important to recognise that underneath the discussions on influence is a deeper, more complicated facet that pertains to how we define regulation more generally. How these approaches should be termed remains uncertain and the subject of much debate.

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