

Promoting conflict-sensitive business activity during peacebuilding

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Working Paper

Promoting Conflict-Sensitive Business Activity during Peace- building

Jolyon Ford

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Abstract

This paper considers aspects of the relationship between policies promoting private sector investment and growth, and policies consolidating peace. It covers post-conflict transitions where external authorities play a major role. A core contemporary peacebuilding policy assumption is that stimulating economic recovery is vital to sustaining political settlements and social cohesion. Yet how do we respond when policies to stimulate investment and imperatives to consolidate peace lead to contradictory choices? The paper considers framing investment-promotion activities as quasi-regulatory in nature, given that external actors are shaping and influencing private sector impacts on peacebuilding. It reflects on ideas of ‘transitionalism’ as a distinctive policy mindset during exceptional recovery periods. It addresses three questions: (1) what is distinctive about *transitional* approaches to influencing the ways that business actors may impact peacebuilding (compared with ‘routine’ developmental settings)? (2) What is distinctive about promoting *conflict-sensitive* business activity and investment, and how might this require different priorities? (3) What is the proper balance in transitional policymaking between attracting investment to capital-starved settings, and requiring investment to be responsible?

1

Introduction

Promoting private sector investment and growth has steadily become a more important component of donor and institutional policy on fragile and conflict-affected states and situations. That is, facilitating private sector business (re)entry, (re)emergence, expansion and success is seen as an important component of supporting overall economic recovery, which is itself seen as vital to reducing fragility and vulnerability to conflict, and/or consolidating a sustainable peace. What do we know about reconciling the objective of stimulating investment and growth, with the need to consolidate political settlements? What concepts and principles might guide us in cases where these two goals appear to lead to different policy choices?

This working paper is intended to foster debate in this field. By definition it is only provisional in nature, advancing some 'working assumptions', claims and proposals. 'Transitions' come in all shapes and sizes: this paper tries to limit these propositions to post-conflict settings following serious and sustained armed conflict that are marked temporarily, and in varying degrees, by strong external involvement and oversight. The focus on post-conflict settings is adopted conscious that this paradigm (which itself refers to a very diverse class of situations) is not necessarily relevant to insights on situations of chronic insecurity and violence or complex political crises. The paper starts by briefly noting the policy consensus on investment-promotion and peace paraphrased above. It then reflects on the basic assumption that underpins that policy approach. It does so because it is not always obvious that 'actions promoting investment and growth' necessarily support 'actions promoting peace'. Armed with this reminder, the paper asks the reader to consider adopting, if only for present purposes, an approach that characterises the activities of external peacebuilding agencies as essentially 'regulatory' in nature. It then reflects on generic attributes of what it calls 'transitionalism' – an exceptional, distinct policy approach by external actors working towards a host society's self-sustained stability.

For much-covered reasons of both legitimacy and effectiveness, such external actors should of course have limited ambitions in terms of their ability or mandate for navigating, shaping and transforming complicated conflict-related dynamics in the political economy of host societies. Moreover, any discussion of ideal approaches for outside intervenors in conflict-affected environments can easily be taken to suggest that these approaches involve mainly technical and managerial activities whose impact turns on the agency of external organisations, as if refining these techniques would invariably resolve conflict risk problems. If so, such discussion almost inevitably risks seriously underestimating highly political and contested nature of governance activities. These important basic premises and awareness of these risks should be understood as underlying everything that follows. Nevertheless, implicit in the paper is the suggestion that authorised external governmental actors both can and should attempt to help fragile states to manage and transform patterns of conflict and conflict risk (here, in terms of private investment and its facilitation / promotion).

The paper itself also has limited ambition. It is certainly not offered as a full literature review and does not attempt comprehensive referencing for its own sake. Nor is this paper a set of prescriptions on practices and policies for promoting investment and growth during post-conflict peacebuilding processes. Instead it tries to address three questions. First, what is it that is distinctive about *transitional* approaches to influencing the ways that business actors may impact peacebuilding, compared with approaches during more 'routine' development? Second, what is distinctive about promoting *conflict-sensitive* business activity and investment (as opposed to other attributes one might in theory prioritise in investment, such as its quantity, rapidity or locally-owned nature)? How might privileging conflict risk require different choices? Third, what is the proper balance in transitional periods between setting certain standards on conflict risk (as well as social, environmental and governance impact), without creating further barriers to investment in places that typically struggle to attract investment anyway? The paper concludes by inviting peer discussion on developing a coherent, sound but useful academic and policy research agenda.

2

Reasons for Caution on the 'Prosperity and Peace' Nexus

At least in their policy rhetoric, donors and international institutions working in and on fragile and conflict-affected states have, in recent years, placed increasing emphasis on supporting and stimulating private sector investment and growth. An interested foreign and diaspora private sector and a revitalised local business sector (and links between these) are perceived as significant elements of post-conflict recovery. This emphasis persists amid what many practitioners know is a very difficult process of giving programmatic content to the prevailing development policy directive, in many Western capitals, to 'do more with / on business, including in fragile states'.

This is not the place to analyse what, in a donor-austerity, post-MDGs era, might be driving this policy approach and its greater emphasis on the private sector's potential role in meeting the development agenda (see Ford 2014). The approach exists alongside greater donor and institutional pragmatism on engaging business actors as one manifestation of 'inclusivity' in peacebuilding (Ford 2015b). The approach is exemplified by the emphasis put on 'extractives-led development' whereby donors of countries such as Afghanistan, Somalia and Myanmar have seen the development of oil, gas and mining extraction sectors as a way for fragile states to begin to self-finance their way 'out' of instability (Bailey et al, 2015). This is through a model whereby resources revenues fund inclusive state infrastructure and service-provision and generate employment and other economic effects. Further conceptual and context-based discussion is needed of the 'extractives-led development' idea, including the extent to which analogies would be valid for investment promotion or facilitation in relation to many other non-extractive sectors.

The paper does not attempt to unpack this position further. There is much more work needed on the assumptions, merits, drawbacks and empirics of the 'peace through prosperity' paradigm. For one thing, we do not know enough about how to measure, and attribute to particular investors or investments, the supposed 'peace-positive' effects of commercial activity in fragile and conflict-affected settings (generally and case-by-case) (Bailey et al, 2015: 41-43). This paper does not review experiences and prescriptions in promoting post-conflict economic recovery generally (for a recent overview, see Macintosh and Buckley, 2015); incorporating peacebuilding into economic development, or vice-versa (see recently International Alert 2015); or engaging business in the new post-2015 development agenda (recently Nelson et al, 2015), including how business can contribute to advancing the SDGs by supporting peace (Ernstorfer et al, 2015). While the aim is to explore how peacebuilding authorities can influence conflict-sensitivity in business and investor conduct post-conflict, the paper does not review what we know about conflict-sensitive business practices and their promotion (see recently in this series Graff and Iff, 2014).

Instead it is enough, in setting up the issue for working discussion, to note here that during post-conflict periods, one role assumed by external governance and donor authorities is promoting / controlling private sector

business and investment activity. The assumption is that doing so will invariably promote peace. Yet it would seem fairly obvious that new or renewed business and investment activity is not a peace panacea because it might itself be or become a source of conflict risk. Sometimes this will be the case despite every best conflict-sensitive practice and precaution taken by a business operation (and by those with regulatory or commercial influence over it). It follows that there may be cases where privileging 'economic recovery' leads to different choices to those involved in 'building peace'. Critical scholars have long cautioned against assumptions that 'development brings peace' so that all that is required is more and faster development after conflict (see e.g. Uvin 2002). The same is surely true in relation to facilitating investment and business activity after conflict. To deal with this point about the conflict risk that may exist *because of* not *despite* renewed economic activity, it will not always be enough to simply add the reassuring term 'inclusive' (growth, investment or development).

For the present purposes of framing the exploratory discussion of 'transitionalism' in fostering post-conflict investment and influencing its responsible social impact, it suffices to have made clear the observation that there is probably *no necessary connection* between (a) facilitating greater commercial interest and activity, and (b) building sustainable peace. This basic insight or proposition is central to the discussion, below, of why external actors need to be more responsive to the particular dynamics of individual settings if they are to seek to ensure that actions to promote prosperity also promote peace. Before doing so, it is necessary to reflect on the essential nature of the role assumed by external authorities when they work to promote responsible investment and business in post-conflict settings.

Framing External Peacebuilding as ‘Transitional Regulation’

When peace operations and other external actors or authorities attempt to influence and shape the trajectory of peace consolidation in a post-conflict setting, they can be understood as exercising a form of regulatory power (Ford, 2015). Now, even when very explicitly mandated to help govern post-conflict territory and situations, most organisations today would flinch at the suggestion that they are ‘regulators’ of peacebuilding or that they thereby assume ‘regulatory’ functions, responsibilities and impacts. This is partly because the term ‘regulation’ is associated with sophisticated schemes with corresponding specialist institutions. It is also partly because the regulatory function is so governmental in connotation that it is seen as something inappropriate for external actors to undertake in other societies.

Yet if we define ‘regulation’ as intentional acts by a public authority to shape subjects’ behaviour by reference to certain standards, there can be little doubt that external peacebuilding authorities and agencies are engaged *in fact* in a form of regulatory activity (Ford, 2015: 250-254). This is at very least one way to understand their role. For instance, if regulators are public authorities intentionally influencing subjects’ activities, then UN peace operations routinely act -- in effect but certainly not in name -- as temporary ‘regulators’ of electoral processes, security sector reform, justice systems, etc. In varying degrees of intensity and intention, external authorities act at least as co-regulators of the local political economy of post-conflict transitional states. This sort of activity is clearly not limited to those rare situations (East Timor, Kosovo) of plenary international territorial administration. Obviously there is considerable diversity in terms of how much formal and *de facto* regulatory influence different external bodies have in different post-conflict settings. Policies and activities that address private sector engagement in fragile states may influence and shape how private sector actors might affect post-conflict peacebuilding, and are thus regulatory in effect. Such policies represent a purposive exercise of public power by external governmental actors, and are thus also basically regulatory in nature.

The idea of calling these sorts of activities ‘transitional regulation’ is intended not to ascribe new onerous roles but to ensure analytical clarity and reduce institutional denial about the nature of the external intervenors’ role in post-conflict recovery. Accepting that external actors seek systematically to influence outcomes in what amounts to a regulatory enterprise allows us to properly analyse these activities by reference to a theorised account of what external actors are doing (or see themselves as doing). Use of the term ‘regulation’ is also important as a reminder that those wielding such influence are often in denial about the extent and nature of their power to shape process and outcomes in other societies (e.g., Chandler, 2006). Of course, ‘normal’ developing countries not undergoing any special transition period are routinely directly and indirectly subject to the regulatory impulses and influences of international and external actors. Their governments’ regulatory terrain on any number of topics is invariably heavily criss-crossed with the regulatory footprints of many external financial, creditor, donor, and other institutions. Once we acknowledge this truth, there is no great leap in accepting that those

agencies involved - often so intimately - in supporting post-conflict recovery are clearly exercising a form of regulatory function, typically alongside conflict-affected host institutions. Perhaps a term such as 'governance' or 'assistance' feels less intrusive and more acceptable to those sensitive to legitimacy concerns. Yet it is difficult to deny that in many respects what is involved is regulatory in nature and effect.

During post-conflict recovery periods of the sort considered here, the core assumption is that the high degree of external governance and engagement is transitory and is intended to enable the society to resume a 'normal' developmental path that is less obviously or directly saturated with external governmental and other influence. Of course, whether it is appropriate, legitimate or indeed effective for outsiders to assume these exceptional influential shaping (regulatory) roles in post-conflict societies is a different question. Such considerations, on the justification for intrusive governance and the overall notion of external peacebuilders as 'transitional regulators', have been extensively developed elsewhere (Ford, 2015: Ch. 6). Instead the remainder of this paper is given over to exploring the implications, for policy posture and programme design, of the *temporary* nature of outsiders' regulatory functions in post-conflict societies, in this case in relation to promoting responsible business activity and investment. The question becomes *how* to ensure an appropriate transitionalism in regulatory interventions in host societies. This is what the paper focuses on. There is of course a closely related *why* question, because the way in which external bodies might promote responsible, conflict-sensitive post-conflict business practices takes its shape from the rationale both for undertaking such governance and oversight roles, and for reducing that role by largely exiting the scene in favour of capacitated and legitimate local regulatory institutions. That is, transitionalism is 'appropriate' because it is self-consciously temporary and geared to gradually reducing external influence and empowering legitimate local governance.

One very important parallel issue can be put aside at this point. This is done even though it is somewhat artificial to distinguish regulatory intentions and impacts of external actors in relation to post-conflict transitional settings (specifically directed to governance in that setting), and what these governments do in / from their own regulatory space (but with transnational effects, including on post-conflict states). There may often be an overlap in the identity of states influencing international peacebuilding efforts and the home states of firms investing in fragile host states. That issue relates to the earlier observation about how global and transnational governance and regulatory schemes, both public and private in nature, are visible on any mapping of most less-developed countries' regulatory domains. There seems to be an open research agenda on the nexus of regulating responsible business conduct abroad, and promoting investment during peacebuilding and/or in fragile states. This paper addresses the intersection of externally-supported 'in-country' peacebuilding activities with policies to revitalise business and investment. That is, it relates mostly to what outside bilateral and multilateral

agencies and authorities do within host post-conflict states' territorial and regulatory domains.¹ Yet much of the positive, peace-enhancing influence that external states and organisations might have on the business-peace nexus may come from what they do in their own regulatory spheres. The higher-capacity regulatory 'home' states in these scenarios - that are exporting both investment capital and post-conflict governance assistance - may have a duty, responsibility or opportunity to exercise public power to influence the impact on conflict risk and human rights, in post-conflict settings, of transnational investors and businesses who fall within their jurisdiction.²

This 'home state advantage' (Simons and Macklin, 2014) in regulatory influence may be very important in relation to how foreign firms conduct themselves in weakly regulated post-conflict settings. However, an approach steeped in the ethics and practicalities of transitionalism would insist that scholars proposing home-state regulation as the solution to the governance gap on conflict-sensitive / rights-compliant business activity in fragile states should also factor in an element of building the capacity of host states to regulate these issues themselves. The idea of networked transnational co-regulation (by home / investor-sending states and in-country transitional peacebuilding authorities) of responsible business conduct in post-conflict settings, with an explicit element of building host capacity to influence business responsibility, is considered elsewhere (Ford 2015).

1 Also put to one side here are more profound debates about the intersection of regulation, external governance and investment flows in relation to 'structural' elements of crises, or states to some extent trapped in structural 'chronic crisis'. The paper does not address the macro-level patterns that constrain the ability of some polities and economies to graduate from chronic under-development, under-investment and insecurity. Such issues are significant to assumptions about 'resumed normality' post-crisis.

2 *Guiding Principles on Business and Human Rights, A/HRC/17/31*, 21 March 2011, endorsed by UN HRC Resolution 17/4 of 16 June 2011, [7] (conflict-affected areas). A somewhat related issue is the incorporation of provisions relating to social impact in investment and trade instruments, and investment contracts, to the extent that these are negotiated or renegotiated during the transition (Ford, 2015c; Ford, 2015: 159-162).

‘Transitionalism’: General Propositions

This paper is concerned with influencing conflict-sensitive business practices in post-conflict situations where external authorities have assumed various peacebuilding and statebuilding roles.³ Of particular interest to the discussion below about ‘transitionalism’ is a proposition that has attracted considerable policy consensus in this millennium. This is that there is, or ought to be, something distinctive about policy approaches in post-conflict settings (del Castillo, 2003: 12-16; Junne and Verkoren, 2004; Collier, 2008: 103).⁴

The idea of distinctive policies during an early post-conflict ‘window of opportunity’ (for external actors to attempt to foster conditions for sustainable peace) pervades current policy approaches and the peacebuilding literature. This window, and its related notion of policy distinctiveness, explains for example the existence of specialized units within international institutions and governments (for example, USAID’s ‘Office of Transitional Initiatives’). Often, the ‘window’ idea is made explicit. For instance, UN Peacekeeping Guidelines note that ‘opportunities lost during this period are hard to regain’ (DPKO, 2008: 62).⁵ Mostly, the idea of temporary, transiting roles where responsibility is progressively handed over and capacity built locally is implicit in all these sorts of endeavours, even where they drag on for a decade or more. Moreover, scholars have premised their prescriptive contributions on ideas of the ‘opportunity’ or ‘critical threshold’ for outside authorities to catalyse transformation of conflict risk patterns during this period (e.g. Junne and Verkoren, 2004: 307; Goodhand, 2006, 297; Call, 2008: 9).

Collier has likewise argued that the ‘break in the political equilibrium’ represented by a post-conflict political settlement makes attempts to introduce innovative policies and catalyse significant reform somewhat easier than similar attempts to engineer change in stable, not post-conflict developing countries (Collier, 2008: 103-9; 2007: 18). Collier argues that the chances of a ‘quantum improvement’ in governance and policymaking in the first decade after a major conflict are much higher than for stable developing countries, partly due to higher levels of pro-reform ‘social capital’ and partly due to external actors’ presence balancing out local vested interests who in ‘normal’ development scenarios might block reform efforts (2008: 108-9).

We must attempt to unpack the idea of ‘transitionalism’ a little if one is to maintain the conventional suggestion that there is something distinctive, for policy formation and execution purposes, about transitional post-conflict periods or phases. In this context, ‘transitionalism’ as used here refers to exceptional measures and mindsets, in the aftermath of serious violent political upheaval, adopted and implemented before the resumption of ‘normal’ governance and development under the rule of law, but which are intended to enable a society to ‘arrive’ at that more routine developmental path. During these periods the assumption is that external assistance / intervention is at its most significant in helping to create conditions for appropriate local authorities to assume or resume substantial and effective control (UNDG 2004). Of course transitions can vary in degrees of formality and explicitness: the temporary plenary international administration of

3 Many peacebuilding activities can also be described as early ‘statebuilding’ roles (see Call, 2008: 12; Whaites, 2008: 4), but definitional debates here are beyond this working paper’s scope.

4 Definitional issues about the term ‘post-conflict’ are beyond this paper’s scope, while recognizing that there is no one kind of ‘post-conflict’ setting, and that outsiders’ roles vary in intensity, duration, formality, etc.

5 See also for example UN Doc. A/63/881-S/2009/304, 11 June 2009, [3].

territory (such as in East Timor between 1999 and 2002) is very rare relative to typical transitions marked by less definitive legal dispensations.

More generally, in describing a set of special approaches for transitional periods we must acknowledge the artificiality, often, in distinguishing post-conflict transitions from development-as-usual. For one thing, external governance intrusiveness in net terms may be just as pervasive relation to Malawi (an aid-dependent largely stable state not physically hosting any external authorities) as in Mali (a post-conflict, post-coup 'fragile' state with an obvious external presence). Since neither conflict nor peace are static concepts or situations, it is difficult to define when a transition is underway, let alone when it is complete (Kleffner 2008). Not only are all societies in some constant state of flux, but many perceived transitions continue for a decade or more. Moreover, terms such as 'post-conflict' and 'transition' have political relevance, and it will for example often be expedient for host or intervening authorities to define situations as transitional for various political and policy reasons. Finally these settings are of course not regulatory 'clean slates' or vacuums awaiting external regulatory initiatives. This point is relevant since a teleological approach to 'transitionalism' can (wrongly) seem to suggest that post-conflict societies will not have plural sources of and institutions for formal and informal governance influence, some of which will co-opt, resist or distort well-intentioned external efforts. In relation to 'the private sector', there are no neat distinctions between the main political and the main economic actors in many societies of the sort under consideration.

All these sorts of considerations do undermine the coherence of a distinctive notion of transitionalism, understood as a set of 'interventions' (assistance techniques and approaches and philosophies). Nevertheless, the concept is arguably coherent enough to ground some insights into the temporary governance or regulatory roles assumed by external agencies post-conflict. The position developed below does not, on one view, represent a dramatic leap from conventional peacebuilding understanding and practice.⁶ That is, transitional approaches to moderating any conflict risk relating to investment activities are not necessarily different in nature, difficulty or significance to the transitionalism that marks external involvement in post-conflict justice, constitution-making, electoral support or security sector reform. Inherent in ideas of 'transitional justice' is the notion that exceptional measures that would not be justified in a 'normal' rule-of-law dispensation (such as amnesties from criminal prosecution) are not only justifiable but sometimes necessary if a divided, conflict-affected society is to resume or move towards that idealised more 'routine' dispensation. Despite pleas in the literature to move beyond its dichotomy, the difficult 'peace vs. justice' balance essentially informs the need for such exceptional and sequential approaches.⁷ Likewise the argument in the following section is that in relation to post-conflict business and investment activities (and their promotion), a similar transitional approach may be warranted in order to balance (a) the need to stimulate economic development activity, with (b) the imperative for new investment and reinvestment, from whatever source, to be socially and environmentally

6 Ford 2015 explores in detail how, even if the idea of 'regulating business for peace' were seen as desirable and do-able, at present no single institution across the UN and World Bank Group / Bretton Woods systems sees itself as bearing operational responsibility (cf. the UN Global Compact) for informing and influencing conflict-sensitive business practices during peacebuilding.

7 It is unnecessary to traverse the huge transitional justice literature. Work on the political economy of transitions to market economies and /or democracy (e.g., Roland, 2002) contains few insights for the role of in-country external actors considered here.

responsible, conflict-sensitive, while (c) not impairing efforts to instil responsive, inclusive and legitimate local public governance.

The idea of graduated and sequential policy activities and postures in crisis and 'post'-crisis situations is, of course, not a new one. At the intersection of the humanitarian response and development assistance spheres, the notion of a continuum from 'relief to development' has a long pedigree now (Ross et al, 1994; Smillie 1998). That notion was about a need for coordinated and synergistic approaches that, over time and in response to changing scenarios, aim to shift short-term emergency responses (justifiable and necessary, but not sustainable for various reasons) to more long-term sustainable development programming. Indeed, in its ideal form the seeds of longer-term practices and processes are planted during the exceptional / emergency phase. A 'rehabilitation' phase bridges the 'relief' and 'development' phases, in this idealization. Given that the reality of post-conflict recovery in particular belied the smooth, neat linear sequencing connoted by the 'continuum' idea, policymakers began from the 2000s to move beyond it (Macrae and Hammer, 2004). For this reason now, some approach the notion in terms of the relief-rehabilitation-development 'contiguuum' (e.g., EU, 2012). This is suggestive of greater pragmatism in using simultaneous approaches, trading-off competing considerations, and responsiveness to the effectiveness of interventions irrespective of the presumed 'phase' at the time. Nevertheless, inherent in the basic idea of a responsive continuum of approaches is something with some enduring conceptual appeal in terms of conflict transformation. This is so for practical reasons too, since external actors do need some working plan and orienting schema to guide their complex activities in host societies and ensure appropriate local 'ownership'. This is so even if they are not (and should not be) rigidly wedded to that schema because they are (or should be) acutely conscious that they can by no means smoothly control and sequence a process of shifting a society from patterns of conflict to a more peaceable sustainable development path.

External peacebuilding authorities might conceivably adopt various policy objectives (from ensuring justice to inclusive growth) as the overall purposive guide to decision-making and planning. 'Transitionalism' as it is developed here posits that the consequences of renewed social and political violence are normally so severe that the singular priority in an early post-conflict period is ensuring stability and maintaining the political settlement. If so, all post-conflict policymaking needs to be assessed from the perspective of whether or not it will reduce the risk of conflict (del Castillo, 2003: 12-16; Collier, 2008: 104). Thus everything in the immediate post-conflict phase is viewed through a 'conflict lens', so that not every objectively valuable social goal is treated equally. The priority is preventing renewed conflict and so transitionalism (as conceived here) is relatively pragmatic about how to do that. Transitional regulation is responsive, involves risk-taking, allows for unusual decision-maker discretion, and privileges flexibility over consistency, at least in the immediate post-settlement period.

However, along with being characterised by pragmatism and a conflict lens, the approach is also infused with notions of gradualism. Here the supposedly discredited 'continuum' idea still has clear utility. This is because as circumstances change and as the postures of various players and peace stakeholders change, those leading peacebuilding coordination efforts might shift or adapt their approach, consistent with notions of transitioning. For one thing, there is an inherent tension between 'maintaining stability' (generally heavily status quo) and 'fostering transformation' (possibly disruptive or threatening to some interests). Gradualism is needed so that the conflict lens does not overly privilege stability if stability conditions suggest that things can be moved on a bit. Without being rigid or linear, the approach may be understood as a continuum of sequential overall objectives, where raw peace-maintenance preferences gradually give way to more orthodox rule of law and developmental strategies. Thus transitional regulation requires progressively giving weight to other goals as conflict risk recedes and local capacity grows. It also involves helping to build and avoid crowding-out that capacity. This manifest basic democratic principles, because as time goes on it will normally become more important that local authorities regulate poorly than that transitory external agencies regulate very well.

The next section explores these ideas in relation to transitional business regulation, but they are arguably generic concepts whatever the subject-matter or actors sought to be influenced. Moreover, this responsive approach to achieving regulatory goals accords with existing policy consensus on aid effectiveness in fragile situations, which emphasises innovation, flexibility, risk-taking, and preparedness to put aside rigid frameworks.⁸ Under the OECD approach (OECD, 2007) on 'good' international engagement in fragile situations, Principle 9 is 'act fast' and Principle 4 is 'prioritise prevention', while OECD-DAC Guideline 8 (OECD, 2001) is 'act in timely and flexible ways.' Since a decade ago, flexibility, realism, selectivity and 'systematic adaptability' were core themes of the World Bank-recommended approach to fragile situations (World Bank, 2005; also UNDG and World Bank, 2005: 3).⁹ For instance, a high degree of 'fluidity' and changing project strategy is seen as a responsive virtue rather than a departure from policy (World Bank, 2005).

These general comments are intended to contextualise the more specific discussion in the next section, where the attributes of transitionalism (and transitional regulation, here of responsible business) are given more content. The ideas are fairly familiar to scholars and practitioners, in terms of the special trade-offs sometimes required in exceptional circumstances, provided there is a gradual shift over time in the emphasis. An example is the trade-off between flexibility and integrity in governance procedures, where more weight may be given to discretion and responsiveness in decision-makers in an immediate post-conflict emergency, than is given to the procedural safeguards required for sustained good governance in future.

Before moving on, caution is of course required because some use of the term 'transitional' might ironically promote unresponsive and formulaic

8 Roundtable 7 to the 3rd High Level Forum on Aid Effectiveness (Accra, 2-4 September 2008), especially 5, 8-9, 12; Accra Agenda for Action, 3rd High Level Forum (Accra, 4 September 2008), [21](d).

9 See the emphasis on 'flexibility and adaptability' in peacebuilding: A/63/881-S/2009/304, 11 June 2009, [22].

policy. Like 'continuum', the term can be misleading, suggesting that transitional governance efforts or situations are smooth, logical and linear automatic progressions towards stable development, and are uncontested, with local actors passively carried along. The fallacy of this explains why scholars such as Carothers (2002) and Bhuta (2009), for example, have memorably and rightly criticized the 'transition paradigm' and 'transitology'. Ideas of regulating or steering other stakeholders' conduct imply a high degree of control over events which will not necessarily be realistic. Such levels of control may not be advisable or legitimate even if they exist. This paper's ideas of a role and methodology for external actors in regulating the peacebuilding impacts of business are advanced conscious of the need to avoid a managerial approach, since peacebuilding, statebuilding and regulation of course are not apolitical technical exercises where local actors have no agency (Macrae and Hammer, 2004: 3, 9).

Accepting these cautions, this paper now turns to flesh out ideas of transitional business regulation by transitory peacebuilding authorities acting alongside various local authorities and others. It draws on notions of responsive regulation as applied to post-conflict settings (Ford 2015). This is on the basis that efforts to influence ('regulate') how investors and businesspeople impact on peace and security should be responsive both (a) to businesses' varying capacities to self-manage conflict risk within their sphere, and (b) to the changing conflict risk level which may suggest more or less stringency in terms of insisting on conflict-sensitive business practices. Thus for example in their multi-year 'Peacebuilding Compared' project, Braithwaite and others have considered how transitionalism – an inherent responsiveness and flexibility, but steering towards a more secure phase – is vital in managing the dynamics of peace consolidation. This is because at different points, various actors' motivational postures towards cooperating in peacebuilding might change, from resistance, to capitulation, game-playing to disengagement, or (ideally) commitment to a transformed or renewed normative order (Braithwaite et al, 2010: 435).

What then is distinctive about *transitional* approaches to influencing the ways that business actors may impact peacebuilding (compared with 'routine' developmental settings)? Elsewhere I have considered at length the attributes of one approach by temporary external authorities to influencing conflict-sensitive business activity, in terms of ensuring that investment-promotion in such scenarios is both responsive (including to businesses' own capacities to make regulatory contributions) and responsible (among other things, giving effect to protective standards) (Ford, 2015: 195-224). Section 2 above briefly discussed the policy parameters justifying such a regulatory role (see more generally Ford, 2015: 264-269). Section 5 below considers how, assuming they have some influence, external peacebuilders might position a framework that attracts investment and stimulates for-profit activity while also insisting on certain social impact and governance standards. In what follows there is no particular effort to distinguish between various business and industry sectors, which like individual enterprises vary hugely in their conflict-relevant

attributes, capacities and impacts. This approach is adopted conscious that ideas for influencing conflict-sensitive practices are far more satisfying when attuned to the realities of sectoral variation within what we tend to generalise as 'the private sector'.¹⁰ This paper is not particularly directed to the informal sector(s), although the bulk of commercial activity will probably occur there, as will some donor efforts to link informal enterprises into the labour and supply-chains of more formal enterprises.

¹⁰ Many large-scale post-conflict investors may be public in the sense of state-owned, even if 'for-profit'.

5

Might a Peacebuilding Lens Result in Different Choices on Fostering Investment?

What is distinctive about promoting *conflict-sensitive* business activity and investment, and how might this require different priorities? It is helpful to contrast two hypothetical extremes during transitions of this sort: an investor 'no-go' zone and an investment free-for-all. At one end, external authorities attempt to isolate entirely a vulnerable post-conflict society from the potentially destabilising and distorting effect of an inflow of new investment and business activity. At the other extreme, external actors take no action or position on renewed local and foreign business activity or entry, no matter how filled it might be with conflict risk through corruptive, exploitative, dangerous or damaging practices. The first 'no-go' idea is not a million miles away from UN Security Council powers related to economic embargoes. However, it suffers of course from practical enforceability problems and from an indefensible external paternalism that would not survive contact with principles of sovereign local control over economic destiny especially in relation to finite natural resources. The second extreme is indefensible seen through the 'conflict lens' as well as through the prism of the 2011 UN Guiding Principles on Business and Human Rights ('UNGPs') and other frameworks.

In between these extremes is a difficult balance. On the conventional assumption that encouraging post-conflict business activity and related job-creation, tax-paying, etc., also helps consolidate peace, some workable medium seems necessary to resolve issues where the 'growth' imperative conflicts with the 'conflict prevention' one, in relation to business actors and activity. Transitional business regulation is advanced as one approach. In this sense it involves viewing investor and business conduct through a 'conflict lens' when deciding upon a suitable strategy for controlling, promoting, facilitating ('regulating') that conduct. It suggests a readiness to 'trade off' other objectives and temporarily prefer choices that consolidate peace over actions to illustrate or implement the rule of law or other related values or goals. Regulating these other priorities will mostly have positive peacebuilding effects and no trade-off will be needed. But in early periods the pursuit of ideal legal and law enforcement frameworks is not always compatible with the maintenance of peace and security.

Regulating businesses *for peace* will involve different decisions from regulating for revenue, investment and growth, the rule of law, or (in exceptional cases) human rights. Post-conflict business regulation finds analogies in transitional constitutionalism, transitional justice, and states of emergency. Transitional regulation succeeds partly by having a strategy for gradually giving competing social goals due weight. Consider an analogy. A decision to postpone elections after a peace agreement affects the right to vote. However, premature elections might greatly elevate conflict risk. A transitionalist approach would be quite prepared to postpone voting: delaying 'democracy' to ensure a more sustainable democratic outcome. Likewise in transitional justice foregoing criminal justice is sometimes the price for securing commitment to a peace deal. Likewise too a transitional economic regulator, looking at things through the conflict lens, would allow political stability concerns to trump economic efficiency ones, at least in the early post-settlement days. The pragmatic 'conflict lens' of transitional regulation involves hierarchies of

objectives, whereas orthodox peacebuilding at least in the UN system sometimes displays a 'resistance to prioritization'.¹¹ Orthodox doctrine attempts to give equal attention to issues that may not hold significant conflict risk at least in early stages.

How might a transitional business regulation approach look? Routine rule of law perspectives would view economic activity as either 'licit' or 'illicit'. Transitionalism by contrast would adopt a 'peaceful' or 'not-peaceful' categorisation in the early phases. This is because a rules-based enforcement strategy based on neat categories of 'licit' and 'illicit' behaviour risks not only overlooking potential sources of livelihood and social cohesion but also deepening informal shadow economies of organised crime and extortion. Transitional business regulation draws from ideas of inclusive post-conflict 'spoiler management' in terms of economic activity (Cockayne and Pfister, 2008). The transitional regulatory posture is accommodating to all peaceable business activities, formal and informal. The issue is not the legality of for-profit activity but a group's capacity to build or spoil peace and social cohesion. Former combatants may crave new social identities and recognition through more mainstream business activities. A respectful inclusive approach recognising the potential of these actors to become licit businesspeople may greatly contribute to peacebuilding and crime prevention (see for example Reno 2008; Kreidler 2009). Viewing such groups through a law enforcement lens may mean missed opportunities. Later, greater emphasis can be placed on ensuring legal rights and parameters are respected. This is vital for longer-term conflict mitigation, but an overly strict rule-of-law approach to for-profit activity early on may have negative conflict risk implications.

Transitional regulatory mindsets (equipped with a conflict lens) mean preparedness in the interim period to focus on a few particular business sites or risks and largely ignore others. Transitional regulation might make some 'hard calls' that would be indefensible in ordinary circumstances. For example, if the 'regulatory' priority is asserting the rule of law, this might require peacebuilding authorities (such as a peace operation) to remove a group unlawfully but peaceably occupying and operating a sawmill business. Business regulation through a transitional and conflict lens looks different. Early on, the group might be left alone. The strategic regulatory priority is peace consolidation, use of force has unpredictable consequences, so the rule-of-law concern is temporarily subsumed to the peace imperative. Later, as part of signalling normalcy and the rule of law, the sawmill occupants will be encouraged or rewarded to leave. Applying the conflict lens does not mean that no action is taken early on to signal the rule of law.

Yet it must be noted that if regulation is to remain responsible and not lose its way, its pragmatism needs to be guided by principle. Thus if the conflict lens suggests allowing ex-fighters to continue illegally operating a sawmill, the human rights unit in a peace operation or some networked civil society group might conduct a rights impact analysis. Likewise if an external authority with influence over the transition turns a blind eye to instances of

¹¹ A/63/881-S/2009/304, 11 June 2009, [22].

corruption involving business actors in order to bed down a fragile peace, it must still look for opportunities to begin 'raising the bar' on anti-corruption standards. The business must at least be warned about and commit to receiving future anti-corruption assistance measures.

Thus compromises aimed at mitigating conflict risk must be the exception. Trade-off decisions must also sow the seeds for enjoying subsumed rights without such compromises once conflict risk subsides. At some point, exceptional interim means begin to compromise the long-term rule of law and human rights objectives that are important both intrinsically and for long-term conflict prevention. Goal-focussed regulation is transitional in that it recognises that as peace consolidates, the goals may change. As time passes the transitional regulator (alongside state authorities) can more confidently address other objectives, making less stark trade-offs and gradually privileging law and justice choices over peace ones.

Gradualism and keeping an eye out for early opportunities to plant seeds for long-term transformation of regulatory or business cultures is vital if transitional regulation is to retain its integrity. The theory of transitional business regulation posits that temporary external peacebuilding authorities ('regulators' of peace) should look for and respond to peacebuilding strengths in business actors, not just seek to control problems related to these actors. It suggests mainly drawing on the self-regulatory capacities of business actors, given business self-interest in conflict risk reduction and given capacity constraints on peacebuilders who have other mandated tasks. This strategy involves deliberately inviting and requiring business to exercise conflict-sensitivity within its sphere; the 'self-regulation' is conditional on business ability or willingness to do this. By engaging in this task of influencing ('regulating'), the private sector is encouraged to reflect on relevant conflict and peace risks and opportunities and to seek appropriate help if needed. Along with local authorities, in theory the 'regulatory-minded' peacebuilder (Ford, 2015: Ch. 8) can pull strings to release actors' potential or to constrain undesirable behaviour, identifying and managing business 'bottlenecks' to peace. In so doing and in addressing the ways in which business activity might impact upon the process of rebuilding societies after conflict, external agencies with an in-country footprint can act as transitional business regulators directly and alongside the (re-)emerging state apparatus.

In some transitional settings businesses may be a negligible source of peacebuilding risk or opportunity. But intentionally engaging businesses in conditional self-regulation on mostly shared conflict risk concerns gives peacebuilding authorities one less thing to worry about. It can also help to catalyse new ways of doing and regulating business in a fragile society. A relevant peacebuilding authority should communicate broad expectations and minimum standards for business behaviour apparatus. Ideally, transitional business regulation should stimulate interest, excellence and habit in business self-regulation of conflict-sensitive and protective practices. It should set an early example and tone for responsive regulation by state

agencies (Whaites 2008). It should rely on and develop plural regulatory networks of oversight and support. 'Success' in transitional regulation might include whether the peace operation uses the opportunities presented during the 'window of opportunity' soon after it arrives, to promote a culture of socially-responsible business practices and catalyse networks devoted to regulating this.

6

How do we Promote ‘Good Enough’ Standards without Deterring ‘Good’ Firms?

The bulk of analysis in this paper may place too strong an assumption on the idea that external actors involved in post-conflict peacebuilding are well-coordinated, interested enough in the conflict-sensitivity of business actors, and capable of influencing outcomes by shaping expectations and steering behaviours. On that assumption, what is the appropriate balance, in transitional business regulation, between attracting investment to capital-starved settings, and requiring that investment to be responsible? In particular, in shaping an investment environment is there an inevitable balance between ensuring certain social impact standards are met (in a vulnerable setting) versus not setting too high a standard (in a setting that business finds risky enough without the extra burden of onerous standards).

This idea seems to warrant further analysis because at first glance it might be argued that post-conflict settings struggle so hard to attract capital that the policy priority is to attract local and diaspora re-investment, and foreign investment. Those arguing this would say that peacebuilders should be worrying more about the quantity of commercial activity than its quality. Such views would relate to the ‘peace through prosperity’ paradigm discussed in section 2 above. However, transitionalism’s ‘conflict lens’ would suggest that there may be a difficult balance between attracting and generating private sector business and activity, and ensuring that it does not undermine peacebuilding. The focus should be on quality of activity in terms of its conflict risk or capacity for conflict-sensitive business practices.

Transitional business regulation should have three attributes in terms of how it seeks to balance promoting investment with managing conflict risk and protective standards. These three are somewhat idealised notions for the sake of this working paper. They might arise to the extent (in any one setting) that transitory peacebuilding authorities perceive business-sourced conflict risk potential as significant, and to the extent that they have some influence, alongside local authorities, in setting the tone of the new investment and business climate.

6.1 Simple, stable standards capable of evolution over time

Responsible regulation of business requires fostering business respect for universal values. As noted, the self-regulation promoted here is not ‘pure’ or voluntary. It is enforced, conditional, or accountable self-regulation: regulated self-regulation (Ford 2015). The essential message to business in transitional regulation is ‘do no harm’ (OECD 2007, Principle 2; OECD-DAC 2001, Guideline 2), even if more sophisticated, detailed and demanding normative requirements exist both in the national laws of the post-conflict state (and investor-origin ‘home’ states) and in evolving international law (the UNGPs).¹² Transitional business regulation posits that in an early post-settlement period, when peacekeepers and peacebuilders are severely swamped with competing priorities, business actors should at very least be explicitly held to the ten

¹² Post-conflict settings may have enforcement vacuums, but are not legal or normative vacuums.

clear, basic human rights, labour, environmental precaution, and anti-corruption norms of the UN Global Compact. These have legitimacy and the utility of being easily-understood, easily communicated basic ideas about minimum acceptable business conduct for provisional / transitional regulatory purposes. Breach of these will tend to result in unreasonable levels of conflict risk, relative to the merits of resumed business activity. Standards can become more sophisticated over time: as things normalise, existing features in the national law can be relied upon, enforced, and reformed. The UNGPs apply in these settings in any event.

The reason for suggesting that the message to business actors be somewhat simplified is that in post-conflict and crisis recovery situations, asserting a detailed, supervision-intensive regulatory code will not necessarily address the transitional regulatory goal of preventing renewed conflict. Asserting some new, off-the-shelf 'model code' will not necessarily reassure serious investors. The highly detailed US-modelled Commercial Code enacted by the Coalition Provisional Authority in Iraq (Order 64 of 29 February 2004) may have seemed wonderfully comprehensive, but did not necessarily meet the overall transitional regulatory goals either of attracting or reassuring investment or (importantly) moderating its conflict risk. Post-conflict transitional business regulation should be more about communicating expectations, sensitising business and developing a shared understanding, than about imposing detailed rules. Especially where the political economy of business activities was a major part of the conflict dynamic, seeding such a business culture early on may be of enduring significance in transforming patterns of conduct and increasing overall possibilities for peace.

During the transition, broad values should be communicated and businesses encouraged and enabled to meet them. Regulatory messaging ought to be undertaken in a vocabulary of broad 'good enough' governance principles that later come to be institutionalised as (reformed) national laws. Because it is only provisional, a post-conflict business regulation strategy requires principles that are stable but designed to evolve. Regulation against simple, general principles must be capable of being 'ratcheted-up' as state-building allows greater normative and regulatory sophistication. One might draw relevant analogies here from the design of post-conflict tax systems (Gupta et al, 2007: 11). For example, in relation to the local private security industry, early post-conflict peacebuilders and local authorities should hold these actors to basic international standards. When time allows they then should begin a dialogue on a provisional code of conduct, and begin seeding the first discussions towards later reform of formal legal regulation of the industry to institutionalise the mitigation of conflict risk.

6.2 Social impact standards that do not deter good investors

Regulatory uncertainty compounds the political and security risks in post-conflict settings. To the extent outsiders can influence the local business environment (in the way that they routinely seek to influence, ie regulate, the local political environment...), the transitional ideal is not to create regulatory demands on new business and investment that cannot be met. Some might argue that post-conflict business regulation in investment-starved places should not be too fussy about who comes along prepared to invest. However, quality matters: the 'conflict lens' does not see protective standards as incompatible with attracting good investment.

Serious firms and enterprises may not desire extensive regulatory attention, but they are also unlikely to find a regulatory vacuum appealing. Larger reputable firms in particular need to assure their insurers, financiers and others back home that they are not operating in a standards-free setting. The most significant risk for post-conflict investors is major changes to the 'rules of the game.' A regulatory approach must 'level the playing field' for all investors. Where it raises social responsibility standards transitional regulation should do so equally for all like players. However, it should also avoid creating the perception of that international peacebuilding assistance and attention has created such a demanding social impact protective regime that good investment is deterred. It is difficult enough to attract good firms to risky places without creating new reputational risks (Bray, 2003). Thus transitional business regulation standards need only be tight enough for their context: realistic basic protections, not the gold standard. Over time, standards can rise and gain nuance. This is an area calling for further research especially of an empirical nature. However, while we can survey investors in post-conflict settings we will never know what other investment chose not to go, and what dissuaded them.

6.3 Using private law ends to public law means

Much of the relevant business conduct potentially affecting conflict risk, in particular existing major natural resource projects, will be covered by private law instruments and contracts. For example, mining firms may have contractual entitlements to operate their own security force, which may have broadly defined powers. So-called 'stabilisation' clauses may have 'frozen' national laws on social and environmental issues, quarantining these projects from law reform or higher standards. Where a company is undermining peacebuilding or could enhance it, transitional business regulation would suggest that legitimate persuasion or pressure should be brought to bear to encourage or assist the company to honour (or exceed) its contractual obligations. In this respect, there is a role for home states in regulating the human rights impact (and so, generally, the conflict risk) of 'their' private sector firms and funds operating in fragile and conflict-affected settings, consistent with the UNGPs.

Where major contracts are negotiated during the transitional period, external actors arguably have a 'regulatory' role in appropriately influencing the negotiation process where there is the potential for this to have a direct impact on peacebuilding. It might be highly significant for future peace consolidation that built into major contracts negotiated at this time are provisions (enforceable through private law means) that touch on issues typically heavy with conflict risk, such as land and water access and use, local private security forces, etc. In general, while UN peace operations and other external authorities have been mandated in effect to 'regulate' or co-regulate transitional justice, transitional elections, transitional security sector reform, transitional constitution-making, etc., they have not seen themselves as similarly influential or responsible when it comes to regulating conflict risk issues (short and long term) present in the process and terms on which transitional local authorities bind the post-conflict state to significant commercial contracts (Ford 2015). This is an unreasonable and arbitrary practice of non-regulation, regulatory neglect, or denial of one's power. It partly flows from the perception that such issues are not the responsibility of peacekeeping and peacebuilding actors. Yet major resource investment contracts in particular can directly impact 'peace and security' (the core mandate of these actors); their revenue provisions can impact the overall fiscal viability of the new post-conflict dispensation and so the potential to ever transition out of fragility to a more stable developmental state. How is negotiation of these deals seen as too political and beyond the scope of peacebuilders' responsibilities and yet these same institutions routinely help negotiate constitutions, elections, etc.?

7

Scoping a Further Research Agenda

This final section is brief since it constitutes mainly an invitation for discussion on some of the themes raised in this working paper. One way to proceed is to conceive of a possible research agenda addressing practical problems and dilemmas for policymakers and practitioners, while also ensuring a degree of satisfactory conceptual robustness capable of underpinning serious real-world engagements over time. What do we not know, or not know enough about, at the nexus of post-conflict transitions, peacebuilding, and the promotion of responsible investment and business? The challenge is partly empirical (the need for contextualised studies), partly conceptual (who do we mean by 'business', what is unique about 'transitions', etc.), partly normative (what are the standards against which responsible business and its regulation should be judged during post-conflict recovery), and partly institutional (who exactly is to carry out these regulatory responsibilities). In addition, there is a need to integrate 'regulation' in terms of influencing business actors' impact on peace and security, with 'regulation' in terms of post-conflict economic policy on investment-promotion, taxation, business climate, and so on. An ideal approach to the economic dimensions of peacebuilding will seek to balance imperatives for growth and investment with conflict risk and protective considerations; an ideal approach to the political and security dimensions of peacebuilding will see business actors as relevant stakeholders and indeed 'regulatees'.

Of these issues, and in practical policy terms, perhaps the one needing the most development relates to institutional responsibilities. Who exactly are the transitional regulators of business impact on peacebuilding? Which international organisation leads in coordinating these issues? Do they 'belong' to bodies with a peace and security mandate, or are they economic development issues - or is this a false dichotomy? Arguably, in places where they are deployed UN peace operations or similar entities will be the peak 'regulators' of peace even if they share that role with local transitional or elected authorities, donor bodies, and others. Influencing how business actors help or do not hinder peacebuilding is clearly within their conceivable mandated role, if not already implicit in most complex operations' mandates (Ford 2015, Ch. 3). But what of post-conflict situations where there is no clear peak entity, and how useful is transitional business regulation (or whatever one might call it) to that wider set of situations of fragility that are not, as such, clear 'post-conflict' settings with an obvious mandated temporary international presence?

We may have to accept that the regulation of responsible business in post-conflict settings, whatever the technique applied, is in institutional terms a 'mixed bag'. There is a governance gap in these places and on this issue, but it is not a governance vacuum. An aggregate of home and host state regulatory possibilities exists alongside the private governance schemes of insurers, industry groups and others. Together these more transnational, piecemeal forces may have more significance than any in-country efforts to shape either particular investors' behaviour, or to set the tone for new post-conflict investment. One challenge is to link what in-country peacebuilding authorities might do to these plural sources of legitimate influence, while also

remaining engaged with business actors and responsive to their legitimate concerns and contributions. Meanwhile, sometimes business-sourced conflict risk will not be a major issue in some settings; in others larger firms or the local business community may be well ahead of the authorities in terms of (self-)regulating the social, environmental and governance impacts on peacebuilding.

Finally, this paper acknowledged at its outset a discomfort with, or at least awareness of, the suggestion that external agencies might be capable of exercising the proposed 'regulatory' influence. That is, ideas about transitional business regulation can tend to suggest the existence of an all-knowing, all-seeing, capable external or transitional authority. It may tend to assume the existence of an agency or network of agencies able and willing to devote scarce time and attention during post-conflict recovery to deftly and expertly steer and shape the ways that commercial activity may affect the peacebuilding mandate or imperative. The paper has recognised, but not dwelt on, the vital role and possible resistance of local sources of regulatory power and influence. As McEvoy notes, awareness of post-conflict complexity can prompt one to adopt idealised ordering measures in the hope of rendering problems 'legible' (2007: 421-4). In conclusion, transitional business regulation is advanced as a set of ideas because we might crave some ordering, orienting framework for how to approach the in-country promotion of conflict-sensitive business and investment after conflict. However, it is under no illusions about the limits of managerialism and the complex problems of legitimacy and effectiveness that affect all well-intentioned peacebuilding activities by outsiders.

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