

**DOES THE *JUS POST BELLUM* HELP PRACTITIONERS TO IDENTIFY THE  
LAW ON TRANSITIONAL CRIMINAL JUSTICE IN POST-CONFLICT  
COLOMBIA?**

by

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## ABSTRACT

Post-conflict law is an area of law that is a composite of a number of different legal categories. The fragmented nature of post-conflict law leads to a lack of clarity in relation to a number of different issue areas. These have been discussed under the rubric of ‘the *jus post bellum*’ concept which has attracted a considerable amount of attention from international lawyers. Its proponents argue that it is useful in terms of clarifying the law as it applies during transitions.

Several theories of the *jus post bellum* can be identified. This thesis evaluates the practical and theoretical application of two of the most plausible *jus post bellum* theories: (i) the *jus post bellum* as a new Additional Protocol to the 1949 Geneva Conventions (ii) the *jus post bellum* as an interpretive framework. These theories are evaluated in relation to child soldier perpetrators in transitional criminal justice in post-conflict Colombia.

*For my sister, Jude-Marie Eskauriatza, and my parents, Mary Jude and  
Francisco Javier Eskauriatza*

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# CONTENTS

CHAPTER 1: INTRODUCTION AND METHODOLOGY .....	5
1. Introduction .....	5
1.1 Methodology .....	6
1.1.1 The fragmentation of post-conflict law .....	8
1.1.2 Why transitional criminal justice? .....	10
1.1.3 Why child soldiers? .....	13
1.1.4 Why post-conflict Colombia? .....	15
1.2 Structure of the argument .....	16
1.2.1 Overview Part A .....	17
1.2.2 Overview Part B .....	20
1.3. Conclusion.....	23
CHAPTER 2: WHAT IS THE <i>JUS POST BELLUM</i> ?.....	26
2.1 Introduction.....	26
2.1.1. Law or morals?.....	27
2.1.2 The international legal order.....	35
2.2 The <i>jus post bellum</i> as ‘post-war justice’ or ‘justice after war’ .....	42
2.2.1 The <i>jus post bellum</i> as ‘post-intervention’ justice.....	45
2.3 The <i>jus post bellum</i> as a legal concept.....	57
2.3.1. Describing the post-conflict legal framework.....	59
2.3.2. The <i>jus post bellum</i> as a reform proposal.....	61
2.3.3. The <i>jus post bellum</i> as a new law that has already emerged .....	66
2.3.4 Interpretive principles and the <i>lex pacificatoria</i> .....	70
3. Conclusion .....	73
CHAPTER 3: THE <i>JUS POST BELLUM</i> AS A NEW ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS .....	75
3.1 Introduction.....	75
3.2 The dilemmas of transitional criminal justice .....	79
3.2.1 General dilemma: peace vs. justice.....	79
3.2.2 Transitional criminal justice and child soldier perpetrators .....	85

3.3 The Orendian <i>jus post bellum</i> .....	89
3.3.1 Rights Vindication.....	92
3.3.2 Proportionality and publicity .....	92
3.3.3 Discrimination.....	93
3.3.4 Punishment.....	94
3.3.5 Compensation.....	96
3.4 Evaluating Orend.....	97
3.4.1 Is Kant relevant?.....	98
3.4.2 Applicability problems: When is the ‘post-’? .....	103
3.4.2.1 The end of non-international armed conflict.....	104
3.5 Is a new Additional Protocol possible?.....	110
3.5.1 The Minimum Age of Criminal Responsibility .....	111
3.5.2 Other issue areas.....	112
3.5.2.1. Transformative Occupations.....	113
3.6 Is a new Additional Protocol necessary? .....	121
3.6.1 Domestic Law .....	123
3.6.2 International Law: Human Rights.....	124
3.6.3 International Humanitarian Law and International Criminal Law .....	129
3.6.4 Other post-conflict situations.....	132
3.6.5 The Peace Agreement between FARC-EP and Colombian Government .....	134
3.7 Concluding remarks on Orend’s proposals .....	137
PART B.....	142
CHAPTER 4: TOWARDS A DWORKINIAN VERSION OF THE <i>JUS POST BELLUM</i> ?.....	142
4.1 Introduction.....	142
4.2 Gallen’s theory of the <i>jus post bellum</i> .....	147
4.2.1. International Law and Policy.....	149
4.2.2 Legal Foundations for the Engagement of International Actors.....	151
4.2.3 The Context of the Transitional Society .....	153
4.2.4 Summary .....	155
4.2.5 Interdependence in Transitions.....	156
4.2.6 Civic Trust and the Rule of Law.....	158
4.2.7 Gallen’s Principles .....	160
4.3 Reconstructing the <i>jus post bellum</i> as integrity: The basics of Dworkin’s Theory.....	162

4.3.1 Conventionalism.....	164
4.3.2 Pragmatism.....	167
4.3.3 Interpretivism .....	169
4.3.4 ‘Integrity’ .....	173
4.3.5 Summary .....	177
4.4 Threshold objection: Theoretical disagreements in post-conflict Law.....	178
4.5 The opposite of integrity in post-conflict law .....	181
4.6 Conclusion .....	184
CHAPTER 5: CASE STUDY: APPLYING THE <i>JUS POST BELLUM</i> AS INTEGRITY IN POST-CONFLICT COLOMBIA .....	186
5.1 Introduction.....	186
5.1.1 Preliminary Remarks .....	186
5.2 Historical Context: Colombia and Violence .....	191
5.2.2 Context and its relevance for the interpretation of post-conflict law.....	197
5.3 Hypothetical case facts.....	198
5.4. A Dworkinian Approach to Criminal Accountability in Colombia.....	200
5.4.1 Ronalds’s method: review of interpretivism.....	200
5.4.2 The pre-interpretive stage.....	202
5.4.3 The interpretive stage .....	205
5.4.3.1 Five interpretations.....	206
5.4.3.2 Issues of ‘fit’: the principles of maturity and responsibility .....	208
5.4.3.3 Balancing ‘fit’ with ‘justification’ .....	215
5.4.3.4 The principle of local ownership .....	223
5.4.3.5 The principle of proportionality.....	225
5.4.3.6 Integration: the overarching principle of peace.....	228
5.4.3.7 Summary of interpretive stage.....	231
5.4.4 The post-interpretive stage .....	233
5.4.5 Summary of post-interpretive stage .....	236
5.5 Conclusion .....	236
CHAPTER 6: INTERNAL AND EXTERNAL OBJECTIONS TO THE <i>JUS POST BELLUM</i> AS INTEGRITY .....	239
6.1. Introduction .....	239
6.2. Internal objection: The role of integrity in interpretations of law .....	240
6.2.1 Integrity as a constraint .....	242
6.2.1.1 Stages of constraint.....	243



6.2.2 Fish's Critique .....	247
6.2.3 Can Fish and Dworkin be reconciled? .....	252
6.2.4 Schelly's 'middle way' and Bell's constructivism .....	259
6.2.5 Internal objection: conclusion .....	263
6.3 External objection: The role of community morality in interpretations of law .....	266
6.3.1. Dworkinian communities .....	268
6.3.2 Is there an international 'community of principle'? .....	271
6.3.2.1 Associative Obligations .....	271
6.3.2.2. Community among States? .....	275
6.3.2.3 Normative hierarchy .....	280
6.3.2.4 Summary: From 'right answers' to 'expressive integrity' .....	286
6.4 Concluding Remarks .....	288
CHAPTER 7: SITUATING THE <i>JUS POST BELLUM</i> AS INTEGRITY IN THE INTERNATIONAL LEGAL ORDER .....	290
7.1 Introduction .....	290
7.2. Natural Law and the <i>jus post bellum</i> .....	291
7.3 Liberal international law .....	297
7.3.1 Two Liberalisms .....	298
7.4 The <i>jus post bellum</i> as global administrative law .....	306
7.4.1 Legal Pluralism .....	306
7.4.2 International legal pluralism .....	309
7.4.3 The <i>jus post bellum</i> and global administrative law .....	310
7.5 Conclusion .....	312
CHAPTER 8: CONCLUSION .....	316
8.1 Research findings .....	316
8.2 Areas of further study .....	317
8.2.1 The <i>jus post bellum</i> as integrity and the Vienna Convention on the Law of Treaties .....	318
8.2.2 The <i>jus post bellum</i> as integrity and specific issue areas .....	319
8.2.3 The <i>jus post bellum</i> as integrity and national vs international law .....	320
8.2.4 Concluding Remarks .....	320
BIBLIOGRAPHY .....	322

## **CHAPTER 1: INTRODUCTION AND METHODOLOGY**

### **1. Introduction**

Societies attempting to transition from armed conflict to peace face a number of difficult legal challenges.<sup>1</sup> These arise from the special and unique aims inherent in the idea of ‘a transition’. On the one hand, transitions are about ‘moving away’ from a terrible state of affairs. On the other hand, transitions are about ‘moving towards’ a better and more just society. These aims are sometimes in tension.

Although every transition is different, similar problems arise. How a society ought to deal with the atrocities committed during the conflict is one recurring concern.<sup>2</sup> Yet, despite similar stories of individual and collective suffering, transitional societies have found different ways of dealing with the past so that there is no ‘one-size-fits-all’ approach. The particularities of each transitional society and of each conflict have coloured the legal responses. Neither does international law (especially international humanitarian law, international human rights law and international criminal law) provide easy answers to questions of post-conflict criminal accountability. All of this makes ‘post-conflict law’ an intriguing area of study.

Questions that arise in post-conflict societies have been examined by just war theorists and international lawyers.<sup>3</sup> The discussions have introduced a new term into the

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<sup>1</sup> Christine Bell, *Peace Agreements and Human Rights* (New York, OUP: 2000); Carsten Stahn, ‘Jus ad bellum’, ‘jus in bello’... ‘jus post bellum’? – Rethinking the Conception of the Law of Armed Force’, 17 *EJIL* (2006) 921; Jane Stromseth, David Wippman and Rosa Brooks (eds.) *Can Might Make Rights – Building the Rule of Law After Military Interventions* (New York, CUP: 2006); Carsten Stahn and Jann K. Kleffner, *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008); Carsten Stahn, Jennifer Easterday and Jens Iverson (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014).

<sup>2</sup> Insofar as there is a ‘peace blueprint’, this usually includes a deal on access to power; minority rights provisions; a human rights framework; reform of policing and criminal justice, see Christine Bell, *Peace Agreements and Human Rights* (New York, OUP: 2000), 1.

<sup>3</sup> For just war theory, see Brian Orend, ‘Jus Post Bellum’, 31 *Journal of Social Philosophy* (2000)117; Larry May and Andrew T. Forcehimes, (eds.) *Morality, Jus Post Bellum and International Law*, (New York, Cambridge University Press: 2012); Larry May, *After War Ends*, (New York, CUP: 2012).

respective disciplines – the *jus post bellum*. What is not yet clear, however, is whether and how this new term helps to resolve any of the difficult legal issues. The term ‘*jus post bellum*’ is imprecise.<sup>4</sup> Some contributors have defined it as primarily to do with ‘post-war justice’ and as the third branch in just war theory tradition.<sup>5</sup> Relatively little research has been done to explain whether and how the *jus post bellum* resolves specific post-conflict legal dilemmas.<sup>6</sup>

## **1.1 Methodology**

The evaluation of whether and how the *jus post bellum* is relevant to post-conflict law raises a number of methodological issues. The first relates to the meaning of the *jus post bellum* itself. Several different definitions of the concept exist. Therefore, chapter 2 takes a necessary first step in setting out a chronological review of the different ways the term has been used in the literature. For the purposes of the present study, it identifies two versions of the *jus post bellum* that will be evaluated in relation to their practical use in identifying post-conflict law.

The first version is Brian Orend’s proposal that the *jus post bellum* ought to be a ‘fifth Geneva Convention’ (or more accurately Additional Protocol IV) that sets out the law in relation to post-conflict issues.<sup>7</sup> Orend’s proposal is selected for evaluation owing to the fact that the success of his proposal would be a simple way to secure the future of the *jus post*

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<sup>4</sup> Carsten Stahn, ‘The Future of *Jus Post Bellum*’ in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008), 231, 233.

<sup>5</sup> See Brian Orend, ‘*Jus Post Bellum*’, 31 *Journal of Social Philosophy* (2000)117; Larry May, *After War Ends*, (New York, CUP: 2012). For a review of the just war tradition see James Turner Johnson, *Ideology, Reason and the Limitation of War – Religious and Secular Concepts 1200 – 1740* (New Jersey, Princeton University Press: 1975) and Michael Walzer, *Just and Unjust Wars* (New York, Basic Books: 2006).

<sup>6</sup> For a concise explanation see Charles Garraway, ‘The *Jus Post Bellum*: A Practitioner’s Perspective’, in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008) 153.

<sup>7</sup> Brian Orend, ‘*Jus Post Bellum* – A Just War Theory Perspective’, in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008) 31.

*bellum* as a concept in international law. A new Additional Protocol that dealt with the totality of post-conflict issues would *ipso facto* be ‘post-conflict law’. Whether a new Protocol is a necessary, desirable and possible development in the law of armed conflict will be evaluated in chapter 3.

The second version is James Gallen’s idea that the *jus post bellum* is an interpretive framework based on Ronald Dworkin’s legal theory – ‘law as integrity’.<sup>8</sup> According to Gallen, a Dworkinian version of the *jus post bellum* helps to identify the principles of post-conflict law.<sup>9</sup> These principles help to identify post-conflict law insofar as they explain and justify the rules which apply to discrete post-conflict issues. Dworkin’s legal philosophy was concerned specifically with proving that the law can be identified even when ‘the law books are silent or unclear or ambiguous’.<sup>10</sup> Post-conflict law is a very good example of a situation where the law is silent, unclear or ambiguous. According to a Dworkinian *jus post bellum*, the uncertainty surrounding post-conflict law can be resolved by adopting an interpretive approach that focuses on Dworkin’s principle of integrity.<sup>11</sup> This approach to the *jus post bellum* attempts to respond to one of the main difficulties involving law during transitions: the fragmentation of law. However, whether and how a Dworkinian *jus post bellum* adds anything of value to those tasked with interpreting the law in post-conflict societies has not been investigated. Chapters 4, 5 and 6 introduce and critically evaluate the added value in this more recent formulation of the *jus post bellum*.

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<sup>8</sup> James Gallen, ‘Jus Post Bellum: An Interpretive Framework’, in Carsten Stahn, Jennifer Easterday and Jens Iverson, (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014) 58.

<sup>9</sup> Ronald Dworkin, ‘Law as Interpretation’, 9 *Critical Inquiry* 1 (1982) 179; *Law’s Empire*, (Oxford, Hart Publishing: 2006).

<sup>10</sup> Ronald Dworkin, *Law’s Empire*, (Oxford, Hart Publishing: 2006), vii.

<sup>11</sup> Ronald Dworkin, *Law’s Empire*, (Oxford, Hart Publishing: 2006), 176.

### **1.1.1 The fragmentation of post-conflict law<sup>12</sup>**

The *jus post bellum* as integrity forms the central focus of this research because it is designed to combat the fragmentation of post-conflict law. Fragmentation means that post-conflict law is located at the crossroads of various branches of law. Transitions from conflict to peace are regulated by a number of different domestic and international legal categories.<sup>13</sup> This means that several different legal categories regulate any substantive area of post-conflict peacebuilding.<sup>14</sup> For example, in relation to transitional criminal justice, a number of different rules drawn from international humanitarian law, international criminal law and international human rights law affect the nature and shape of post-conflict justice.<sup>15</sup> Further, domestic legal categories, such as constitutional law and criminal law, are also part of the legal matrix during transitions. Finally, a peace agreement at the end of an armed conflict can be read as a pseudo-constitutional document.<sup>16</sup> At least, peace agreements represent a ‘moment of agreement in a conflict’.<sup>17</sup> The agreement is a source of rights and obligations which sits uneasily in between domestic and international law. They incorporate and are shaped by international law and domestic law. All of these bodies of law are relevant to the identification and implementation of post-conflict law. The law on any issue that arises in post-conflict societies must take all of these different legal categories into account.

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<sup>12</sup> On the fragmentation of international law generally Martti Koskenniemi and Päivi Leino, ‘Fragmentation of International Law? Postmodern Anxieties’, 15 *Leiden Journal of International Law* (2002) 553; Report of the Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, International Law Commission, 58th Session, U.N. Doc. A/CN.4.L.682 (2006).

<sup>13</sup> Vincent Chetail, *Post – Conflict Peacebuilding – A Lexicon* (New York, OUP: 2008), 17.

<sup>14</sup> I define post-conflict peacebuilding as all those activities that take place at the end of armed conflict which aim at the reconstruction of the transitional State in question. The justification for focusing on transitional criminal justice appears below.

<sup>15</sup> I define post-conflict justice as that part of post-conflict law that deals with criminal justice via trials in post-conflict tribunals.

<sup>16</sup> See the ‘Final Agreement for the End of Conflict and the Construction of a Stable and Long Lasting Peace’, (hereafter the peace Agreement) signed on 24 November 2016 and ratified by Congress 1 December 2016. The full text of the peace agreement is available at: <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf>.

(I will use my translations from Spanish to English throughout).

<sup>17</sup> Christine Bell, *Peace Agreements and Human Rights* (New York, OUP: 2000) 20.

It is not only the fragmentation of legal rules that makes post-conflict law a difficult subject to understand. The fragmentation of post-conflict law is also compounded by other factors. A post-conflict situation can involve a number of different actors and different legal regimes and provisions apply to them. For example, the UN is heavily involved in most post-conflict situations but it enjoys absolute immunity from legal suit in the States where it operates.<sup>18</sup> Also, a post-conflict legal framework incorporates the domestic legal framework. Colombia has recently signed a peace agreement with the main opposition armed group, *Las Fuerzas Armadas Revolucionarias de Colombia – Ejercito del Pueblo* (FARC-EP).<sup>19</sup> The peace agreement requires an array of implementing legislation to be passed by the government. However, Colombian law requires that the Constitutional Court revises each legislative proposal so that a fast-track legislative procedure is not feasible. This institutional framework is in stark contrast to the post-conflict situation after the 2003 Gulf War in Iraq. The Coalition Powers worked relatively untrammelled to transform the Iraqi State into a more ‘Western shape’.<sup>20</sup>

These three factors (various rules, various actors, different States) make it difficult to identify post-conflict law in relation to any substantive issue. It means that questions about what post-conflict law requires must be answered by adopting an interpretive approach which refers to a number of different legal rules. At first glance, then, this makes Gallen’s suggestion of a Dworkinian approach to the *jus post bellum* appear very useful. The whole point of Dworkin’s theory of law is to find the best interpretation of the law in situations where the law is unclear. However, the requirement of ‘integrity’ in Dworkin’s theory needs

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<sup>18</sup> UN General Assembly, Convention on the Privileges and Immunities of the UN, (adopted 13 February 1946, entered into force 17 September 1946) available online: <http://www.refworld.org/docid/3ae6b3902.html> (last accessed 12 September 2017); on challenges to that immunity based on human rights see Rosa Freedman, ‘UN Immunity or Impunity? A Human Rights Based Challenge’, 25 *EJIL* (2014) 1.

<sup>19</sup> A great deal of information on the FARC-EP is available online: <https://www.farc-ep.co/> (last accessed 30 August 2017)

<sup>20</sup> Michael J. Kelly, ‘Iraq and the Law of Occupation: New Tests for an Old Law’ 6 *Yearbook of International Humanitarian Law* (December 2003) 127; Kristen Boon, ‘Legislative Reform in Post-Conflict Zones: *Jus Post Bellum* and the Contemporary Occupant’s Law-Making Powers’, 50 *McGill Law Journal*, (2005) 285.

to be examined in more detail. Chapter 4, 5 and 6 are dedicated to this task and they form the basis of the original contribution of this research to the *jus post bellum* scholarship.

### **1.1.2 Why transitional criminal justice?**

There are many different areas of law that are uncertain in post-conflict situations. It would be impossible to evaluate the impact of the *jus post bellum* on every area of practice. As such, this thesis evaluates the usefulness of the *jus post bellum* in relation to one area of post-conflict law: transitional criminal justice. If the *jus post bellum* is to be a useful addition to the body of international law then it ought to help to identify the rules that apply to transitional criminal justice.<sup>21</sup>

Transitional criminal justice is a good example of the uncertainty of post-conflict law. It provides a good ‘testing ground’ for the *jus post bellum* theories advanced by Orend and Gallen. Individuals committing war crimes have been tried and punished for as long as rules regulating warfare have existed.<sup>22</sup> However, it is also true that punishment for war crimes has been the exception rather than the rule. This is owing to the fact that transitional criminal justice raises very difficult questions for post-conflict societies.<sup>23</sup> Transitions release a general tension between a forward-looking desire for a less violent and more peaceful society and a backwards-looking desire for accountability, truth and punishment for atrocities committed during the conflict. On the one hand there is a ‘trend towards an expanding notion of individual criminal responsibility’.<sup>24</sup> On the other hand, the prospect of criminal

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<sup>21</sup> See generally Ruti Teitel, *Transitional Justice* (New York, OUP: 2000); Christine Bell, *Peace Agreements and Human Rights* (New York, OUP: 2000), 259; Vincent Chetail, *Post – Conflict Peacebuilding – A Lexicon* (New York, OUP: 2008), 368.

<sup>22</sup> For a brief history see, Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge, CUP: 2005) 9.

<sup>23</sup> Ruti Teitel, *Transitional Justice* (New York, OUP: 2000) 27; Christine Bell, *Peace Agreements and Human Rights* (New York, OUP: 2000), 259; Vincent Chetail, *Post – Conflict Peacebuilding – A Lexicon* (New York, OUP: 2008), 368.

<sup>24</sup> Christine Bell, *Peace Agreements and Human Rights* (New York, OUP: 2000), 260; Christine Bell, Colm Campbell and Fionnuala Ní Aoláin, ‘Justice Discourses in Transition’, 13 *Social and Legal Studies* (2004) 305, 306.

punishment is unlikely to make combatants lay down their weapons and work towards the rebuilding of peace.<sup>25</sup> Thus, transitional criminal justice is unlike ordinary criminal justice. This is owing to its practical role in securing a peaceful solution to armed conflict while laying the foundations for a society which upholds the human rights of its citizens. These combined tensions have created compromise solutions which are based on the ‘limited criminal sanction’.<sup>26</sup> In Colombia, a new Special Jurisdiction for Peace is being set-up which will provide for ‘alternative sentences’ in exchange for confession, truth, reparations and commitments to non-repetition.<sup>27</sup> Yet, the implementation of this agreement is likely to run into difficulties and there are still ambiguities in the agreement itself.

The difficulties in finding the balance between the requirements of peace and justice are considerable. Perhaps understandably, the law on transitional criminal justice has not been codified and Orend’s proposal for a new Additional Protocol to the Geneva Conventions suggests that it could be and ought to be. Chapter 3 critically evaluates Orend’s arguments on point. On the other hand, Gallen suggests that the dilemmas of transitional criminal justice can be resolved by relying on the principles of post-conflict law in pursuing integrity. A Dworkinian approach to the *jus post bellum* suggests that integrity is helpful in guiding interpreters of the law towards the right answers in the law of transitional criminal justice. Of course, Dworkin’s legal theory was not designed with post-conflict situations in mind. Therefore, this thesis also makes an original contribution in that it evaluates whether its theoretical and practical scope may be extended.

There may be certain benefits to thinking in Dworkinian terms about the transitional moment. In Dworkin’s theory, integrity plays a civic role in justifying why a citizen of a

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<sup>25</sup> Anonymous, ‘Human Rights in Peace Negotiations’ 18 *Human Rights Quarterly* (1996) 249.

<sup>26</sup> Ruti Teitel, *Transitional Justice* (New York, OUP: 2000) 28.

<sup>27</sup> Part 5, ‘Final Agreement for the End of Conflict and the Construction of a Stable and Long Lasting Peace’, (hereafter the Peace Agreement) signed on 24 November 2016 and ratified by Congress 1 December 2016. The full text of the peace agreement is available at: <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf>. (I will use my translations from Spanish to English throughout).



State ought to be coerced by the legal order.<sup>28</sup> This appears, at least *prima facie*, relevant for the parties to the Colombian peace agreement as they attempt to reconstitute their relationship under the rule of law. Equality before the law is at the core of the idea of integrity. Integrity, for Dworkin, arises out of a personal obligation that ‘commands that no one be left out, that we are all in politics together for better or worse, that no one may be sacrificed, like wounded on the battlefield, to the crusade of justice for all’.<sup>29</sup>

This research discovers what this may mean in relation to a specific issue that arises in transitional criminal justice: the criminal accountability of child soldier perpetrators. In all post-conflict societies, child soldiers have usually been considered only victims of the armed conflict.<sup>30</sup> Therefore, consistency would seem to require that no child soldier perpetrators are prosecuted in Colombia. However, integrity requires more than principled consistency in the interpretation of law. Sometimes, integrity requires that a legal system depart from a blind allegiance to precedent. This is because interpretation, in Dworkin’s theory, is a balancing act between questions of ‘fit’ and questions of ‘substance’ (or ‘justification’). The point is that precedent can be departed from if and when there is a sufficient justification for doing so.<sup>31</sup> The example Dworkin uses is the professional liability of barristers.<sup>32</sup> For many years, and for no principled reason, barristers were held to different professional liability standards. Thus, according to Dworkin, integrity required that English law of tort break with tradition to impose the standards of professional negligence on barristers which were applied to all the other professions. Of course, the professional liability

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<sup>28</sup> Ronald Dworkin, *Law’s Empire*, (Oxford, Hart Publishing: 2006), 178.

<sup>29</sup> Ronald Dworkin, *Law’s Empire*, (Portland, Oregon, Hart Publishing: 2006) 213.

<sup>30</sup> UNICEF, Coalition to Stop the Use of Child Soldiers, ‘UN Guide to the Optional Protocol on the Involvement of Children in Armed Conflict’ (UNICEF, New York: 2003); Mark Drumbl, *Reimagining Child Soldiers in International Law and Policy* (New York, OUP: 2012); ‘Child Soldiers, Transitional Justice, and the Architecture of *Post Bellum* Settlements’, in Larry May and Andrew T. Forcehimes, (eds.) *Morality, Jus Post Bellum and International Law* (CUP, New York: 2012), 139.

<sup>31</sup> See in relation to customary international law, Anthea Roberts, ‘Traditional and Modern Approaches to Customary International Law’, 95 *American Journal of International Law* (2001) 757.

<sup>32</sup> See discussion Ronald Dworkin, *Law’s Empire*, (Oxford, Hart Publishing: 2006) 219.

of barristers in a common law legal order and the criminal accountability of child soldiers in post-conflict Colombia are radically different issues in legal, moral and political terms. Further, as a matter of law, post-conflict Colombia is not bound to follow the law as interpreted in other post-conflict situations. As such, the transposition of the principle of integrity into post-conflict territory admittedly is ambitious. This thesis examines whether and how integrity is a useful aid to resolving theoretical disagreements in post-conflict law.<sup>33</sup> The post-conflict criminal accountability of child soldiers suspected of serious international crimes is presented as capable, sometimes, of producing the kinds of theoretical disagreements with which Dworkin's theory is concerned.

### **1.1.3 Why child soldiers?**

In order to provide a more specific picture of the usefulness of the *jus post bellum* one specific kind of case has been chosen from within the general area of transitional criminal justice: child soldier accountability for the commission of international crimes. In Colombia, one of the most complicated areas of transitional criminal justice is the law as it applies to child soldiers. Since 2013, UNICEF has estimated that, at least, 1,000 children have been recruited into non-State armed groups.<sup>34</sup> A recent study has identified that 47% of FARC-EP combatants were recruited as child soldiers.<sup>35</sup> Logically, many children and adolescents that participated in the armed conflict will be implicated in the commission of international

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<sup>33</sup> 'Theoretical disagreements' are Dworkin's term for the interpretive differences held by different legal officials in relation to the law, see discussion of cases in Ronald Dworkin, *Law's Empire*, (Oxford, Hart Publishing: 2006), 15. These kinds of disagreements are common in post-conflict law and specifically in transitional criminal justice (see chapter 4).

<sup>34</sup> UNICEF, 'Childhood in the Time of War: Will the children of Colombia know peace at last?' (March 2016), available [http://reliefweb.int/sites/reliefweb.int/files/resources/UNICEF\\_Colombia\\_Child\\_Alert\\_March\\_2016\\_FINAL.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/UNICEF_Colombia_Child_Alert_March_2016_FINAL.pdf) accessed 18 January 2017, ('UNICEF Childhood in Time of War: Colombia')

<sup>35</sup> See report in *Semana*, 29 October 2017, citing a study by Luis Andrés Fajardo, 'Reclutamiento de niñas y niños como crimen internacional de las FARC en Colombia', (Universidad Sergio Arboleda: 2014) <http://www.semana.com/nacion/articulo/el-47-de-los-integrantes-de-las-farc-fueron-reclutados-siendo-ninos/407422-3>

crimes. The end of conflict raises difficult questions in terms of the reintegration of these former child soldiers into their previous communities. These communities may have suffered directly from the actions of child soldiers during the armed conflict. As such, the dilemmas of peace vs. justice are reproduced at the local level when post-conflict societies must decide what to do with child soldier perpetrators.

On the one hand, they may be seen as victims of the conflict. The particular nature of child soldier perpetration may raise difficult due process issues that tend against their prosecution. Further, criminal punishment may simply be unsuited to achieving some important aims of post-conflict societies, especially national reconciliation, rehabilitation and reintegration of former fighters. On the other, their acts may have contributed directly to the victimization of innocent civilians. Addressing the needs of victims and survivors appears to require some measure of accountability. This may also be necessary in order to ‘provide new political arrangements with legitimacy’ and avoid the perception of impunity which undermines the political legitimacy of the new constitutional order.<sup>36</sup> All of this suggests that, in some cases, there may be good reasons to involve child soldier perpetrators in transitional criminal justice mechanisms.

For the purposes of this thesis, a specific focus on child soldier perpetrators permits a specific demonstration of the fragmentation of post-conflict law. It allows for an investigation of the *jus post bellum* as proposed by Orend. Whether a post-conflict Protocol could be agreed by States in order to deal with this problem runs into major problems. In the first place, the issues of content and temporal applicability (see section 3.3). Also, States do not agree on the minimum age of criminal responsibility (see section 3.4.1). Further, there is also a great deal of law that regulates the particular issue. A new Protocol would need to be clear on how its provisions were meant to interact with already existing legal categories. This

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<sup>36</sup> Christine Bell, *Peace Agreements and Human Rights* (New York, OUP: 2000) 271.

suggests that an interpretive approach to the law may be a better approach. Whether a version of the *jus post bellum* that proposes integrity as the ‘disciplining rule’ is useful is the central issue in this thesis.<sup>37</sup>

#### **1.1.4 Why post-conflict Colombia?**

There are a number of different post-conflict societies that could have formed the basis of this study. Many of these have had issues with the accountability of children in transitional criminal justice. This research focuses on post-conflict Colombia. In the first place, Colombia has recently signed a peace agreement with very detailed and innovative provisions for transitional criminal justice.<sup>38</sup> However, in relation to the criminal accountability of child soldiers the agreement is very vague. The legal texts to be interpreted are clear but how they ought to be interpreted and what the law actually is in this context is unclear and gives rise to different interpretations. This provides an example of a ‘theoretical disagreement’ in Dworkinian terms. Those children between the ages of 14-18 are in a legal limbo where their specific situation ‘will be studied at a later date’.<sup>39</sup> Further, the 2016 Amnesty Law attached to the peace agreement states that it is up to the prosecutor at the Special Jurisdiction for Peace to ‘decide whether those who were under 18 at the moment of the commission of international crimes incapable of amnesty, will be exempted from criminal prosecution...(my

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<sup>37</sup> On ‘disciplining rules’ and constraint see Owen Fiss, ‘Objectivity and Interpretation’, 34 *Stanford Law Review* (1982) 739; Stanley Fish, ‘Fish v. Fiss’, 36 *Stanford Law Review* (1984) 1325.

<sup>38</sup> See Part 5 of the ‘Final Agreement for the End of Conflict and the Construction of a Stable and Long Lasting Peace’, (hereafter the Peace Agreement) signed on 24 November 2016 and ratified by Congress 1 December 2016. The full text of the peace agreement is available at: <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf>.

(I will use my translations from Spanish to English throughout).

<sup>39</sup> See Joint Communiqué #70, Havana, Cuba, 15 May 2016, (Agreement on Minors) available at: <http://www.altocomisionadoparalapaz.gov.co/mesadeconversaciones/PDF/comunicado-conjunto-70-version-ingles-1-1463432344.pdf> (last accessed 21 June 2017).

translation)<sup>40</sup> This provides an opportunity to test the practical usefulness of the *jus post bellum* as integrity. If the *jus post bellum* can help practitioners in post-conflict Colombia make decisions in relation to the post-conflict accountability of child soldiers then the academic interest in the subject will have been justified. It will also mean that the *jus post bellum* as integrity might be relevant in identifying the law in other areas of post-conflict peacebuilding. If the *jus post bellum* does not help to identify the law in relation to the post-conflict criminal accountability of child soldiers in Colombia then this will provide some evidence that ‘the value of the concept and discourse must be called into question’.<sup>41</sup>

It would have been impossible to evaluate the impact of the *jus post bellum* on every area of practice and in relation to every post-conflict State. As such, answering the research question depends on making some methodological choices. This section has attempted to justify these choices. The rest of this introduction sets out the overall structure of the thesis.

## **1.2 Structure of the argument**

This thesis is divided into two parts.

Part A (chapters 2 - 3) has three aims. Firstly, it sets out the ‘story so far’ in the historical development of the *jus post bellum* as a moral and legal concept. This is important insofar as legal and moral concepts cannot be understood in isolation from the social and historical contexts in which they emerge.<sup>42</sup> Part A culminates in the evaluation of one obvious way that the *jus post bellum* might influence post-conflict law, i.e. by the negotiation

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<sup>40</sup> Amnesty Law, Article 27, Point 10, chapter 4, ‘Final Agreement for the End of Conflict and the Construction of a Stable and Long Lasting Peace’ signed on 24 November 2016 and ratified by Congress 1 December 2016. The full text of the peace agreement is available at: <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf>

<sup>41</sup> James Gallen, ‘*Jus Post Bellum*: An Interpretive Framework’, in Carsten Stahn, Jennifer Easterday and Jens Iverson, (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014) 58, 61.

<sup>42</sup> See Alasdair MacIntyre, *A Short History of Ethics* (New York, Macmillan: 1966), 1; David Kennedy, ‘David Kennedy, ‘Primitive Legal Scholarship’ 27 *Harvard Journal of International Law* (1986) 1.

and agreement of a new Additional Protocol to the Geneva Conventions for post-conflict peacebuilding (chapter 3).

Part B (chapter 4 – 8) introduces and evaluates a more sophisticated approach to finding the normative relevance of the *jus post bellum* for post-conflict law. This is by imagining that it provides an ‘interpretive framework’ of principles that help practitioners to decide how to interpret the law in the face of the fragmentation of legal categories. Whether this is a useful development is considered in relation to the case-study of the criminal accountability of child soldiers in post-conflict Colombia. The thesis concludes with a consideration of where the *jus post bellum* scholarship ought to be situated in the international legal scholarship. Chapter 7 identifies how the *jus post bellum* as integrity fits into different approaches to the nature of international law. Chapter 8 summarizes the conclusions of the thesis and sets out a few areas for further research.

### **1.2.1 Overview Part A**

Chapter 2 sets out the different possible meanings of the *jus post bellum*. As will be seen, it is an area of scholarship which has tended to encourage interdisciplinary approaches. While this may (or may not) give rise to important insights it clearly has led to some analytical imprecision. As Friedrich Kratochwil has argued, interdisciplinary projects often result in contributors talking ‘at each other’.<sup>43</sup> They can also simply rephrase ‘well-known problems in the new language or methodology’.<sup>44</sup> The creation of a new interdisciplinary language does not always result in problems being resolved. Of course, in one sense, everything we know or say is interdisciplinary in some way. Our knowledge and perspective is a mixture of

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<sup>43</sup> Friedrich Kratochwil, *The Status of Law in World Society – Meditations on the Role and Rule of Law* (New York, CUP: 2014), 31; see also

<sup>44</sup> Friedrich Kratochwil, ‘How Do Norms Matter?’, in Michael Byers (ed.) *The Role of Law in International Politics* (New York, OUP: 2000) 35.

different things we have learned from a variety of different disciplines. More specifically, new or emerging problems can be understood as ‘out of bounds’ in the sense that they do not fit into the old disciplinary boundaries.<sup>45</sup> Thus, new discourses are created which capture the new knowledge.

This dynamic has been very much in evidence in the *jus post bellum* scholarship. The starting point for most proponents of the *jus post bellum* has been to identify a number of ‘post-conflict problems’ which arise owing to existing disciplinary ‘gaps’.<sup>46</sup> Examples include: the law on the use of force in post-conflict States; the issue of transformative occupations; post-conflict detention and, as dealt with in this thesis, transitional criminal justice.<sup>47</sup> Once these gaps in the law have been identified, one tendency has been to argue that they can be ‘filled’ by relying on a conception of the *jus post bellum* that sometimes owes more to particular interpretations of just war theory than law.<sup>48</sup>

An alternative approach is to describe the *jus post bellum* as an ‘emerging’ area of law which is evidenced by recent developments in State practice.<sup>49</sup> In this more sophisticated conception, there are some similarities between the *jus post bellum* as integrity and earlier work by Christine Bell on the ‘*lex pacificatoria*’.<sup>50</sup> The similarity is most clear in the descriptive aspects of these legal theories. Each argues that a set of norms (or principles) have emerged around the practice of transitions. These principles can be discerned by

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<sup>45</sup> Friedrich Kratochwil, *The Status of Law in World Society – Meditations on the Role and Rule of Law* (New York, CUP: 2014), 49.

<sup>46</sup> Carsten Stahn, ‘*Jus ad bellum*’, ‘*jus in bello*’... ‘*jus post bellum*’? – Rethinking the Conception of the Law of Armed Force’, 17 *EJIL* (2007), 921; Brian Orend, ‘*Jus Post Bellum* – A Just War Theory Perspective’, in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008), 31.

<sup>47</sup> Charles Garraway, ‘The Relevance of *Jus Post Bellum*: A Practitioner’s Perspective’ in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008), 153.

<sup>48</sup> In particular, see Brian Orend, ‘*Jus Post Bellum* – A Just War Theory Perspective’, in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008), 31.

<sup>49</sup> Carsten Stahn, ‘*Jus Post Bellum* – Mapping the Discipline(s)’ in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008), 93.

<sup>50</sup> On the *lex pacificatoria* see, Christine Bell, *Peace Agreements and Human Rights* (New York, OUP: 2000); *On the Law of Peace – Peace Agreements and the Lex Pacificatoria* (New York, OUP: 2008) and ‘Of *Jus Post Bellum* and *Lex Pacificatoria* – What’s in a Name?’, in Carsten Stahn, Jennifer Easterday and Jens Iverson, (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014), 181.

looking at the practice of post-conflict States and the way that peace-making has become ‘an international affair’.<sup>51</sup> In relation to post-conflict criminal justice, some of the relevant norms could be accountability (eliminating impunity and blanket amnesties) and reconciliation (in the sense of restorative justice processes, such as truth commissions).<sup>52</sup> The point is that it is the way that post-conflict justice has been carried out that provides the clues as to what is required in new post-conflict justice situations. Thus, for Bell, the *lex pacificatoria* grows incrementally around a consistent practice that must also respond to the particular requirements of transitional States.<sup>53</sup> A Dworkinian approach is attached to the idea that post-conflict principles are, and have always been, the explanation and justification for the rules that have been agreed. The difference in the accounts lies in the normativity of the norms/principles from a legal perspective. Bell does not emphasize the legal character of *lex pacificatoria* norms, whereas, for a Dworkinian approach, post-conflict principles *are* post-conflict law. This will be explained in more detail in chapter 4.

In the course of these discussions, Gallen and others have argued that a new discipline has been identified which blurs the boundary between just war theory and international law. For some, this is a case of resuscitating a concept that has considerable historical pedigree (as a matter of just war theory and international law). Orend provides the best example of this approach.<sup>54</sup> Chapter 3 deals with the issue of historical pedigree and evaluates whether this is relevant to the discussions for the reform of the present law of armed conflict. Part A concludes by considering in detail whether this new *jus post bellum* ought to form the basis of

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<sup>51</sup> Carsten Stahn, ‘*Jus Post Bellum*: Mapping the Discipline(s) in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008), 93, 100.

<sup>52</sup> Christine Bell, *On the Law of Peace – Peace Agreements and the Lex Pacificatoria* (New York, OUP: 2008), 249.

<sup>53</sup> Christine Bell never claims the new *lex pacificatoria* is law in the way international lawyers usually understand the term.

<sup>54</sup> See Brian Orend, ‘*Jus Post Bellum*’, 31 *Journal of Social Philosophy* (2000), 117. Although many contributors have asserted the historical pedigree of the *jus post bellum*, see generally, Carsten Stahn and Jann K. Kleffner, (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008).



a new Additional Protocol to the Geneva Conventions that deals with transitional criminal justice and the issue of child soldier accountability in particular.

### **1.2.2 Overview Part B**

Part B begins with the presupposition that if the *jus post bellum* is to be useful for practitioners and scholars it ought to be because it helps to address the problem of fragmentation in post-conflict law. Chapter 4 explains why a Dworkinian approach may be relevant to the *jus post bellum*. In short, whether post-conflict law permits or requires the prosecution of child soldiers implicated in international crimes is a theoretical disagreement. Several legal categories are relevant to the decision. In Colombia these are clearly identifiable. They include domestic criminal law, international humanitarian law, international human rights law, international criminal law and the peace agreement itself. However, how the law ought to be interpreted, how these different bodies interact is not clear. The law is open to different interpretations. Thus, a Dworkinian approach that favours a focus on integrity in interpretation appears *prima facie* relevant.

Gallen's version of the *jus post bellum* is oriented towards the coordination of 'post-intervention' law and policy.<sup>55</sup> In his view, the *jus post bellum* as integrity can explain and justify why different post-intervention situations demonstrate different interpretations of law and policy.<sup>56</sup> He argues that, within one transition, the *jus post bellum* could also be useful for practitioners who must decide how to best distribute resources. Chapter 4 reorients this version of the *jus post bellum* and links Gallen's ideas about integrity in post-intervention reconstruction more closely to a specific issue area – transitional criminal justice and child

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<sup>55</sup> I distinguish 'post-intervention' situations from those which are 'post-conflict'. In short, many post-conflict situations, such as Colombia, lack a significant foreign military intervention. Most of the *jus post bellum* scholarship has dealt with 'post-intervention' situations, i.e. Iraq and Afghanistan.

<sup>56</sup> James Gallen, 'Jus Post Bellum: An Interpretive Framework', in Carsten Stahn, Jennifer Easterday and Jens Iverson, (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014) 58.

soldiers. It argues that the decision of whether or not to prosecute child soldiers in Colombia will be one for the chief prosecutor (to be appointed). Thus, in being confronted with different possible interpretations of the law, chapter 4 suggests that the chief prosecutor could adopt a Dworkinian approach based on integrity in order to find the best interpretation of the law. The difference between Gallen's account and the one evaluated here is the evaluation of whether and how integrity urges the prosecutor to look 'outside' of Colombia at other post-conflict situations. Gallen was discussing integrity in relation to law 'inside' one post-intervention situation. A prosecutor in Colombia is under no legal obligation to make their interpretation coherent with other post-conflict situations. These are different legal systems. However, there may still be merits in focusing on how an interpretation of post-conflict law in Colombia fits with an interpretation of law in other post-conflict situations.

Chapter 5 provides an example of the Dworkinian framework in action. It applies the *jus post bellum* as integrity to a specific (though hypothetical) issue of child soldier violence. Whether the prosecution of the child soldier perpetrator at the Special Jurisdiction for Peace is required, permitted or prohibited is unclear and provides a good opportunity to test the practical relevance of the Dworkinian *jus post bellum*. Chapter 5 begins by providing some historical context to the conflict in Colombia. It then provides a set of hypothetical facts that might be presented to the chief prosecutor. Finally it applies the Dworkinian method of interpretivism to the facts as an example of the *jus post bellum* as integrity.

Chapter 6 sets out the challenges to the *jus post bellum* as integrity. It focuses on two arguments. The first is an 'internal' challenge. The focus is on Stanley Fish's argument that even if Dworkin is correct about the nature of law as interpretive, the concept of integrity cannot guide interpreters towards the right answers.<sup>57</sup> This is owing to the fact that integrity

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<sup>57</sup> See Stanley Fish, 'Working on the Chain Gang: Interpretations in the Law and in Literary Criticism' 9 *Critical Enquiry – The Politics of Interpretation* (1982), 201; 'Wrong Again' 62 *Texas Law Review* (1983) 299; 'Still Wrong After All These Years', 6 *Law and Philosophy – Dworkin's Law's Empire* (1987) 401.

itself is a matter of interpretation. That is, judges, prosecutors, and others, can always be described as aiming at integrity. They do so *automatically* in their respective roles *qua* judges, prosecutors or officials. Thus, the point is that there is actually little ‘normative’ bite in Dworkin’s theory because the concept of integrity is already embedded into the interpretive practice concerned. Integrity, for Fish, is not a ‘disciplining rule’ of interpretation that can guide interpretations in the way Dworkin suggests because it is *itself* a matter of interpretation.<sup>58</sup> The second is an ‘external’ objection. The *jus post bellum* as integrity may presuppose an international community. This is necessary because on Dworkin’s account, any interpretation of the law must be justified according to a community morality. Insofar as post-conflict law includes international law there appears to be a need to reconcile the interpretations of post-conflict law in Colombia and the international legal order society of States. This section evaluates the extent to which there is a Dworkinian ‘community of principle’ among States. The challenge to the Dworkinian *jus post bellum* is to find a coherent set of ‘international values’ that are evidence for an ‘international community’. On a Dworkinian account, these values are then relied upon to provide the right interpretations of international law. Chapter 6 concludes that a focus on the *jus post bellum* as integrity illuminates the debate that surrounds whether or not child soldiers ought to be accountable for their crimes in transitional criminal justice mechanisms. It does not identify what decision the prosecutor ought to make in a simple mechanical way. Instead, the *jus post bellum* as integrity urges a certain attitude that is founded around a set of questions. This provides an interesting and useful methodology, or lens, with which to think about the issues at hand and how post-conflict law ought to be interpreted.

Chapter 7 situates the *jus post bellum* as integrity in international legal scholarship and argues that its relevance depends on a prior decision to take a particular theoretical

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<sup>58</sup> On ‘disciplining rules’ and constraint see Owen Fiss, ‘Objectivity and Interpretation’, 34 *Stanford Law Review* (1982) 739; Stanley Fish, ‘Fish v. Fiss’, 36 *Stanford Law Review* (1984) 1325.

approach to international law.<sup>59</sup> There are a variety of theoretical approaches to the law in international legal scholarship. However, a traditional approach is discernible and defensible which equates ‘law’ with that which States have agreed to. In this sense, international law depends on the traditional sources of law – international treaties, customary international law and the general principles of law recognized by civilized nations. If this approach to law is adopted, then no amount of academic enthusiasm for the *jus post bellum* can secure its legal nature. This chapter demonstrates how different theoretical lenses portend different paths for the future development of the *jus post bellum*.

Chapter 8 sets out some concluding thoughts on the *jus post bellum* as a new Additional Protocol and as integrity. It also sets out some possible future avenues of research. Most obviously, the methodology adopted in this thesis could be applied to other specific post-conflict issue-areas where the law is unclear. Thus, the interpretive *jus post bellum*, as a concept, could contribute to debates aimed at clarifying the law as it applies to several different areas of practice.

### **1.3. Conclusion**

This research attempts to provide a comprehensive evaluation the *jus post bellum* by looking at two of its proposals. One of its main proponents has admitted that, at this stage of its development, it really is ‘more of a metaphor than a fully developed moral and legal concept’.<sup>60</sup> In so far as law is concerned, this research agrees and holds out some optimism for its future development notwithstanding some considerable challenges. In relation to

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<sup>59</sup> Neil Walker, ‘Mapping the Global Disorder of Normative Orders’, 6 *International Journal of Constitutional Law* (2008) 373; Andrea Bianchi, *International Law Theories – An Inquiry into Different Ways of Thinking* (New York, OUP: 2016).

<sup>60</sup> Carsten Stahn, ‘The Future of *Jus Post Bellum* in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008), 231, 233.

morality, it appears that already the *jus post bellum* has been incorporated into the work of contemporary just war theorists.

Legal solutions to the end of conflict are shaped simultaneously by the past and the future.<sup>61</sup> In negotiating answers to these questions, post-conflict societies do not proceed in isolation from the ‘outside world’. International law and international society play a crucial role in constructing the normative parameters for what is possible.<sup>62</sup> Evidence for this has arisen recently in relation to the changes made to the peace agreement by the Colombian Congress. The Prosecutor of the International Criminal Court, Fatou Bensouda, has made it clear that should Colombia be found ‘unwilling or unable’ to prosecute those most responsible for committing international crimes then her office will consider intervening.<sup>63</sup> Yet, whether and how child soldier perpetrators ought to participate in transitional criminal justice processes has received only limited attention in the literature.<sup>64</sup> This thesis provides a contribution to that debate through the theoretical and practical application of the *jus post bellum*. It also extends the *jus post bellum* scholarship into post-conflict Colombia and non-international armed conflict more generally. Finally, the thesis evaluates whether it is useful to adopt a Dworkinian approach outside of the traditional *locus* of Anglo-American constitutional law.<sup>65</sup> International lawyers have not paid much attention to Dworkin’s

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<sup>61</sup> Christine Bell, *Peace Agreements and Human Rights* (New York, OUP: 2000) and *On the Law of Peace – Peace Agreements and the Lex Pacificatoria* (New York, OUP: 2008).

<sup>62</sup> Hedley Bull, *The Anarchical Society – A Study of Order in World Politics* (Palgrave Macmillan, Basingstoke: 2012).

<sup>63</sup> See ‘El acuerdo de paz de Colombia demanda respeto, pero también responsabilidad’, (in Spanish) available at: <http://www.semana.com/nacion/articulo/deseo-corte-penal-internacional-justicia-transicional-en-colombia/512820> (last accessed 2 August 2017).

<sup>64</sup> See Mark Drumbl, *Reimagining Child Soldiers in International Law and Policy* (New York, OUP: 2012); ‘Child Soldiers, Transitional Justice, and the Architecture of *Post Bellum* Settlements’, in Larry May and Andrew T. Forcehimes, (eds.) *Morality, Jus Post Bellum and International Law* (CUP, New York: 2012), 139; Brittany Ursini, ‘Prosecuting Child Soldiers: The Call for an International Minimum Age of Criminal Responsibility’, 89 *St. John’s Law Review* (2015) 1023.

<sup>65</sup> See Stephen Breyer, ‘Introduction: The “International” Constitutional Judge’ in Scott Hershovitz (ed.) *Exploring Law’s Empire – The Jurisprudence of Ronald Dworkin* (Oxford, OUP: 2012) 1, 3; Ronald Dworkin, ‘A New Philosophy for International Law’, 41 *Philosophy and Public Affairs* (2013) 1.

theory.<sup>66</sup> In problematizing the issue of integrity in post-conflict law it evaluates the obstacles to its application in the field of international law.<sup>67</sup> Overall, the hope is that engaging with different theoretical approaches to international law will help to solve practical problems. The point is that, whatever the definitional difficulties, the best way to secure the relevance of the *jus post bellum* concept is to remain focused on the practical problems that it is supposed to address.

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<sup>66</sup> Though see Anthea Roberts, 'Traditional and Modern Approaches to Customary International Law', 95 *American Journal of International Law* (2001) 757.

<sup>67</sup> Basak Çali 'On Interpretivism and International Law', 20 *EJIL* (2009), 805.

## **CHAPTER 2: WHAT IS THE *JUS POST BELLUM*?**

### **2.1 Introduction**

This thesis evaluates whether and how the *jus post bellum* helps to identify the law of transitional criminal justice as it relates to child soldier perpetrators in post-conflict Colombia. Therefore, as a necessary first step, this chapter analyses the different versions of the *jus post bellum* which can be identified in the recent academic literature. It categorizes the literature into three ‘waves’ although it is admitted that other categorizations detailing the historical development and conceptual nature of the *jus post bellum* are possible.<sup>1</sup>

Section 2.2 introduces the ‘first wave’ of the *jus post bellum* scholarship. Scholars such as Brian Orend, Michael Walzer and Larry May have defined the concept as ‘post-war justice’ or ‘justice after war’.<sup>2</sup> Section 2.3 discusses the ‘second wave’ – the *jus post bellum* as ‘post-conflict law’. Kristen Boon and Jean Cohen were the first scholars to discuss the *jus post bellum* as a legal concept.<sup>3</sup> The *jus post bellum* as post-conflict law was then further explored by Carsten Stahn and others at the ‘*Jus Post Bellum* Project’ at the University of Leiden in the Netherlands.<sup>4</sup> The *jus post bellum* as ‘law’ has been strongly criticised by many

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<sup>1</sup> In particular, many contributors to the debate claim significant historical pedigree for the *jus post bellum*. Whether or not it is possible to identify a historical *jus post bellum* is not of central importance for the task in hand. However, chapter 3 discusses briefly the origins of the *jus post bellum* in the political philosophy of Immanuel Kant.

<sup>2</sup> Brian Orend, ‘Kant’s Just War Theory’ 37 *Journal of the History of Philosophy*, 2 (April 1999) 323; ‘Justice After War’, 16 *Ethics and International Affairs* (2002) 2, 43; ‘*Jus Post Bellum* - A Just War Theory Perspective’, in Carsten Stahn and Jann K. Kleffner (eds.), *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008), 31; Michael Walzer, *Arguing About War*, (New Haven, Yale University Press: 2004); Larry May and Andrew T. Forcehimes (eds.), *Morality, Jus Post Bellum and International Law*, (New York, Cambridge University Press: 2012); Larry May, *After War Ends* (New York, CUP: 2012).

<sup>3</sup> Kristen Boon, ‘Legislative Reform in Post-Conflict Zones: *Jus Post Bellum* and the Contemporary Occupant’s Law-Making Powers’, 50 *McGill Law Journal*, 285; Jean L. Cohen, ‘The Role of International Law in Post-Conflict Constitution-Making: Towards a *Jus Post Bellum* for ‘Interim Occupations’ 51 *New York Law School Law Review* 2006-07), 497.

<sup>4</sup> See two edited collections, Carsten Stahn and Jann K. Kleffner (eds.), *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008); Carsten Stahn, Jennifer Easterday and Jens Iverson (eds.) *Jus Post Bellum – Mapping the*

international lawyers.<sup>5</sup> This has caused a new ‘third wave’ of *jus post bellum* scholarship which has attempted to respond to these criticisms. As such, section 2.4 focuses on one new conceptualization that has emerged – the *jus post bellum* as an ‘interpretive framework’ based on Ronald Dworkin’s theory of ‘law as integrity’.<sup>6</sup>

### **2.1.1. Law or morals?**

Moral and legal concepts cannot be understood outside of their social and historical context.<sup>7</sup> As Alasdair MacIntyre has argued, it would be a mistake to think that Plato, Hobbes, and Bentham were all engaged in a ‘single task of analysing the concept of [...] justice’.<sup>8</sup> Writing in different times and against a backdrop of different political and social contexts, any similarities in their prescriptive efforts are likely to be ‘false friends’.<sup>9</sup> The same point has been made by David Kennedy in relation to international legal scholarship.<sup>10</sup> Therefore, this chapter adopts a chronological approach to the taxonomy of the *jus post bellum*. This approach clarifies that the first and second waves of the *jus post bellum* arose in the context of the 2003 Iraq War. As a result, most contributors were concerned with the rights and obligations of States after foreign military intervention.<sup>11</sup> Relatively little attention was paid

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*Normative Foundations* (New York, OUP: 2014). For information on the ‘*Jus Post Bellum* Project’ see <http://juspostbellum.com/> (last accessed 24 May 2017).

<sup>5</sup> See Robert Cryer, ‘Law and the *Jus Post Bellum*: Counselling Caution’, in May and Forcehimes, *Morality, Jus Post Bellum and International Law*, (New York, Cambridge University Press: 2012) 223; Antonia Chayes, ‘Chapter VII ½ : Is a *Jus Post Bellum* Possible?’ 24 *EJIL* 291; Eric de Brabandere, ‘The Concept of *Jus Post Bellum* in International Law’, in Carsten Stahn, Jennifer Easterday and Jens Iverson (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014) 123, and in the same volume, Roxana Vatanparast ‘Waging Peace – Ambiguities, Contradictions, and Problems of a *Jus Post Bellum* Legal Framework’, 142; Fionnuala Ní Aoláin and Dina Francesca Haynes, ‘The Compatibility of Justice for Women with *Jus Post Bellum* Analysis’, 161.

<sup>6</sup> James Gallen, ‘*Jus Post Bellum*: An Interpretive Framework’, in Carsten Stahn, Jennifer Easterday and Jens Iverson, (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014) 58.

<sup>7</sup> Alasdair MacIntyre, *A Short History of Ethics* (New York, Macmillan: 1966), 1.

<sup>8</sup> Alasdair MacIntyre, *A Short History of Ethics* (New York, Macmillan: 1966), 1.

<sup>9</sup> Robert Cryer, ‘Law and the *Jus Post Bellum*: Counselling Caution’, in Larry May and Andrew T. Forcehimes, *Morality, Jus Post Bellum and International Law*, (New York, Cambridge University Press: 2012) 223, 226.

<sup>10</sup> David Kennedy, ‘Primitive Legal Scholarship’ 27 *Harvard Journal of International Law* (1986) 1, 5.

<sup>11</sup> The ‘case – study’ examples in these early contributions were usually Kosovo, East Timor, Afghanistan and Iraq.



to situations that lacked a significant foreign intervention element.<sup>12</sup> Most of the early *jus post bellum* scholarship, therefore, ought really to be understood as concerned with ‘post-intervention justice’ and ‘post-intervention law’. The most assertive theory in relation to post-intervention law has been presented by Brian Orend. Whether Orend’s theory helps to identify the law of transitional criminal justice in relation to child soldiers in post-conflict Colombia will be evaluated in chapter 3.

For present purposes, the important point is that the interventions in Kosovo, Afghanistan and Iraq, along with the various post-conflict measures, led to discussions and debates about post-conflict peacebuilding that were located at the intersection between morality and law.<sup>13</sup> For this reason, perhaps, Carsten Stahn has argued that it is ‘wrong to construe a ‘moral’ and a ‘legal’ *jus post bellum* in isolation from each other’.<sup>14</sup> The implicit suggestion is that a ‘cross-disciplinary’ approach to the *jus post bellum* helps international lawyers to identify the rules of post-conflict law. In Stahn’s view, the distinction between morals and law in international law is not always as ‘clear-cut as it seems’.<sup>15</sup> According to Stahn, this rests on the fact that international law sometimes incorporates value judgments into its normative framework. As an example Stahn cites the targeting of civilians which is only prohibited by international humanitarian law if it is ‘intentional’.<sup>16</sup> For Stahn, therefore,

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<sup>12</sup> The ‘Foreword’ to the main edited collection during this period States that the *jus post bellum* is significant to situations ‘following modern armed conflict, irrespective whether of an interState or intraState nature’, however, the actual contributions are mostly relevant to the former, see Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008), v.

<sup>13</sup> Tony Blair’s speech to the Chicago Club in 1999 is an example, available here: [http://www.pbs.org/newshour/bb/international-jan-june99-blair\\_doctrine4-23/](http://www.pbs.org/newshour/bb/international-jan-june99-blair_doctrine4-23/) (last accessed 23 May 2017). See also the NATO Press Statement by Javier Solana, Secretary – General of NATO, available at: <http://www.nato.int/docu/pr/1999/p99-040e.htm> (last accessed 21 June 2017); Ronald Dworkin, ‘A New Philosophy for International Law’, 41 *Philosophy and Public Affairs* (2013) 1.

<sup>14</sup> Carsten Stahn, ‘The Future of *Jus Post Bellum*’ in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008), 231, 232.

<sup>15</sup> Carsten Stahn, ‘The Future of *Jus Post Bellum*’ in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008), 231, 232.

<sup>16</sup> This is known as the ‘principle of distinction’ and is widely recognised as forming part of customary international law binding on all States, see Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. I. Rules, (Cambridge, CUP: 2005), chapter 1, Rule 1, available online at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home> (last accessed 21 June 2017).

there is no problem in accepting the mixture of moral and legal considerations in identifying the new *jus post bellum*.

In relation to the *jus post bellum*, many lawyers have queried whether what is morally ‘good’ ought to be considered as instructive for the identification of the law.<sup>17</sup> Perhaps, for this reason Stahn’s argument is also ambiguous. He has argued that a turn to ‘policy’ in post-conflict law is ‘shaky from a normative point of view’.<sup>18</sup> Further, (though in relation to the *jus ad bellum*) he states, ‘[o]ne may even argue that the use of concepts such as ‘illegal, but legitimate’ runs counter to the very purpose of the law since it may actually weaken the normative prohibition of the use of force or the constraints in warfare’.<sup>19</sup> Thus, what Stahn means by the possible ‘isolation’ of law and morals in the *jus post bellum* is left relatively unclear.

The underlying issue is a matter of legal philosophy. There are different philosophical approaches to identifying the so-called ‘grounds of law’ (i.e. the sources from which the content of the law can be identified).<sup>20</sup> For some, law is a question of finding a social source of law, an empirical social fact.<sup>21</sup> This view is associated with H. L. A. Hart’s positivism which argued that the law was a combination of different types of rules, all

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In relation to non-international armed conflicts, the rule is codified in Article 13(2) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (AP II), (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609.

<sup>17</sup> Robert Cryer, ‘Law and the *Jus Post Bellum*: Counselling Caution’, in Larry May and Andrew T. Forcehimes, *Morality, Jus Post Bellum and International Law*, (New York, Cambridge University Press: 2012) 223; Roxana Vatanparast, ‘Waging Peace – Ambiguities, Contradictions, and Problems of a *Jus Post Bellum* Legal Framework’, in Carsten Stahn, Jennifer Easterday and Jens Iverson, (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014) 142.

<sup>18</sup> Carsten Stahn, ‘*Jus Post Bellum*: Mapping the Discipline(s) in in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008), 93, 109.

<sup>19</sup> Carsten Stahn, ‘The Future of *Jus Post Bellum*’ in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008), 231, 232.

<sup>20</sup> For a recent review of the general debate between positivists and non-positivists see Liam Murphy, ‘Law Beyond the State: Some Philosophical Questions’, 28 *EJIL* 203.

<sup>21</sup> Liam Murphy divides the philosophical debate into ‘positivists’ and ‘non-positivists’, see Liam Murphy, ‘Law Beyond the State: Some Philosophical Questions’, 28 *EJIL* 203; see also Andrea Bianchi, *International Law Theories – An Inquiry into Different Ways of Thinking* (New York, OUP: 2016) 21.

capable of location in a social source.<sup>22</sup> The result, in the international context, is that the international system of ‘interlocking’ legal norms depends on identifying the sources of those norms in the acts of States.<sup>23</sup> Thus, treaties between States are considered the ‘primary’ source of law because they are easily identifiable evidence of the acceptance of legal obligations by States.<sup>24</sup> Nevertheless, the content of these rules is not always easy to define. Thus, for non-positivists, law must be interpreted and, therefore, it is always a ‘moral reading’ of legal texts.<sup>25</sup> This opens the door to a view of international law that accepts that political and/or moral principles are relied upon to identify the law. For Dworkin, for example, the law at any given time is the best it can be consistent with the legal materials from which it must be interpreted and the political morality of the relevant community.<sup>26</sup> Thus, arguments about law which is ‘emerging’ (such as the *jus post bellum*) hide and reproduce deeper underlying philosophical debates about the nature of international law.<sup>27</sup>

It is not necessary to ‘resolve’ this broad debate here. Sometimes, it may not be necessary to decide whether a positivist or non-positivist approach ought to be adopted before interpreting what the law requires in any given question.<sup>28</sup> The point is simply that the ambiguity produced by Stahn’s approach to the *jus post bellum* reflects competing (and sometimes incompatible) tensions about the nature of law. He accepts that if post-conflict law is to become international law, then it is States that must consent to the rules that have emerged. This would see the *jus post bellum* become as much a part of the law of armed

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<sup>22</sup> See H. L. A. Hart, *The Concept of Law*, (New York, OUP: 1997).

<sup>23</sup> On the concept of ‘interlocking norms’ see Report of the Study Group of the International Law Commission, ‘Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law’, 58th Session, A/CN.4/L.682, (13 April 2006).

<sup>24</sup> See Article 38 (1) (c) of the Statute of the International Court of Justice, UN Charter, chapter XIV, (signed 26 June 1945, adopted 24 October 1945) UNTS 1 XVI, available at: <http://www.refworld.org/docid/3ae6b3930.html>, last accessed 20 June 2017).

<sup>25</sup> See Ronald Dworkin, *Law’s Empire*, (Portland, Oregon, Hart Publishing: 2006); ‘A New Philosophy for International Law’, 41 *Philosophy and Public Affairs* (2013) 1.

<sup>26</sup> This is a brief statement of Dworkin’s legal theory which will be developed in more detail in chapter 4.

<sup>27</sup> See Frédéric Mégret, ‘International Law as Law’ in James Crawford and Martti Koskeniemi, (eds.) *The Cambridge Companion to International Law* (Cambridge, CUP: 2012), 64.

<sup>28</sup> Liam Murphy, ‘Law Beyond the State: Some Philosophical Questions’, 28 *EJIL* 203.

conflict as the *jus in bello*. However, if States have not consented to the new *post bellum* rules then at most the *jus post bellum* remains (for the moment) the law as it ought to be rather than the law as it is.

Others have been more explicit regarding what is required by a ‘cross-disciplinary’ approach to the *jus post bellum*. For example, Brian Orend calls for a new post-intervention law dealing with what interveners can (and ought) to do after military victory.<sup>29</sup> In his view, the content of the law ought to be derived from an explicitly moral source – Kantian political philosophy. In Orend’s view, Kant’s *jus post bellum* is instructive for the contemporary development of the law of armed conflict.

This approach falls into the non-positivist approach to law. It does not fully emphasize that the creation and modification of international treaties on the law of armed conflict is fundamentally a multilateral effort by States.<sup>30</sup> Treaty law is based on State consensus and it is created according to the ‘collective will’ of States (rather than the individual will of each of them).<sup>31</sup> The circumvention of this multilateral approach to law-making carries certain risks. A unilateral interpretation of post-conflict law could simply be imposed on weaker States.<sup>32</sup> As Martii Koskeniemi argues, some actors refer to the ‘special character’ of certain norms and this ‘enables them to transgress the preferences of single individuals, clans or nations’.<sup>33</sup> Because reason (in contrast to State will or State consensus) is presented as universal, these

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<sup>29</sup> Brian Orend, ‘*Jus Post Bellum* - A Just War Theory Perspective’, in Carsten Stahn and Jann K. Kleffner (eds.), *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008), 31.

<sup>30</sup> See Gregory Fox, ‘Navigating the Unilateral/Multilateral Divide’, in Carsten Stahn, Jennifer Easterday and Jens Iverson (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014), 230.

<sup>31</sup> See Bruno Simma and Andreas L. Paulus, ‘The Responsibility of Individuals for Human Rights Abuses in Internal Conflict: A Positivist View’, 302, 304 citing Heinrich Triepel, *Völkerrecht und Landesrecht* (Leipzig, Hirschfeld, 1899).

<sup>32</sup> Robert Cryer, ‘Law and the *Jus Post Bellum*: Counselling Caution’, in Larry May and Andrew T. Forcehimes, *Morality, Jus Post Bellum and International Law*, (New York, Cambridge University Press: 2012) 223; Roxana Vatanparast, ‘Waging Peace – Ambiguities, Contradictions, and Problems of a *Jus Post Bellum* Legal Framework’, in Carsten Stahn, Jennifer Easterday and Jens Iverson, (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014) 142.

<sup>33</sup> Martti Koskeniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870 – 1960* (Cambridge: Cambridge University Press: 2001), 489.

commands are presented as enjoying universal validity. In Koskenniemi's words, the approach can be characterized as follows:

I can rest confident that I know what principles apply not only to me and my group but to any person or any group. If I engage in contacts with them, I need not face them as equals. I need not be open to their preferences because I already know that mine are universally valid ....<sup>34</sup>

This approach to the identification of the law has a historical resonance in the 'civilization' of the indigenous peoples of North and South America.<sup>35</sup> In seeking to legitimize the application of the '*jus gentium*' to the colonization of the indigenous population of America, scholars such as Francisco de Vitoria argued that the indigenous population in question was 'capable of reason'. The consequences of this approach were far-reaching and permitted the exploration and exploitation of the new territories. As Anghie explains,

Vitoria's apparently innocuous enunciation of a right to 'travel' and 'sojourn' extends finally to the creation of a comprehensive, indeed inescapable system of norms which are inevitably violated by the Indians. [...] Vitoria asserts that 'to keep certain people out of the city or province as being enemies, or to expel them when already there, are acts of war.'<sup>36</sup>

It was not necessary for early and classical writers to demonstrate that the civilizations they were destroying had not consented to the system of norms imposed on them. The early and classical writers simply did not distinguish between moral and legal norms. As explained more fully in chapter 3, Orend's approach to post-conflict law runs the risk of following a similar pattern. Orend advocates legal reform in post-conflict peacebuilding according to

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<sup>34</sup> Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870 – 1960* (Cambridge: Cambridge University Press: 2001), 489.

<sup>35</sup> Anthony Anghie, *Imperialism, Sovereignty and International Law*, (New York, CUP: 2004).

<sup>36</sup> Anthony Anghie, *Imperialism, Sovereignty and International Law*, (New York, CUP: 2004), 21.

certain norms that are derived from a Kantian approach to justice. The ‘reasonable’ nature of these norms suffices for their universal validity. The preference of different States is not considered in any detail. This approach ignores the legitimate normative pluralism that exists in the international legal order. As Brad Roth argues,

In order to serve its essential function, a legal order must have, in the eyes of a system’s efficacious actors, a legitimacy that withstands disagreement among those actors about the substantive justness of outcomes.<sup>37</sup>

This is particularly important in international law given the vast disparity in power between States. In the alternative, the morality (or otherwise) reflected in the policies of powerful States can be presented as universal to the detriment of weaker States. Orend’s *jus post bellum* is the most assertive example of this approach.

In relation to transitional criminal justice, one difficult question is whether post-conflict law requires that child soldier perpetrators of international crimes be prosecuted. Orend does not deal explicitly with this particular issue. A positivist approach to this question would look to the rules of law as they have been declared, or written down, or assented to by States. After treaty law, a positivist would look to international customary law. If the answer remains elusive, then positivists would consider the ‘general principles’ of law as accepted by nations.<sup>38</sup> Importantly, for positivists, these are legal principles as declared by States in their mutual relations (and as a matter of their domestic law). In relation to criminal law, an example would be the principle of *res judicata* which prohibits ‘double jeopardy’.<sup>39</sup> But a non-positivist, such as Dworkin, would not discard other political

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<sup>37</sup> Brad Roth, *Sovereign Equality and Moral Disagreement*, (New York, OUP: 2011), 21.

<sup>38</sup> For an example of this approach see, Antonio Cassese, Guido Acquaviva, Mary Fan, and Alex Whiting, *International Criminal Law – Cases & Commentary* (New York, OUP: 2011) 3.

<sup>39</sup> Antonio Cassese, Guido Acquaviva, Mary Fan, and Alex Whiting, *International Criminal Law – Cases & Commentary* (New York, OUP: 2011) 3.

and moral norms from the legal equation. Instead, he would identify the principles which explain and justify the posited rules. In this sense, ‘gaps’ in the law are resolved by reference to legal principles that can be referred to in order to decide any question of law.<sup>40</sup>

It may be that the result would be the same in each case. These characterizations of law and legal reasoning do not necessarily produce different answers to difficult questions. But they may and, furthermore, they reflect very different pictures of ‘the discipline’ of international law. A positivist approach prioritizes the principles of sovereign equality of States in the international legal order. It accepts that States disagree about the political and moral principles that legitimize their internal political orders. In this way, law-making is linked to the consent of States. State cannot be legally bound unless they consent to be legally bound. This approach seeks to protect all States from unwanted interference in their internal affairs. The Dworkinian alternative does not prioritize the consent of States. This would only be a part of the legal equation. The law would also be supported by those political and moral principles that best explain and justify the rules to which States have consented. This places morality at the heart of the question of legal interpretation in international law. This is controversial. International law is a decentralized legal order where a single authoritative interpreter cannot be found. For this reason, States have agreed already on an interpretive framework in the Vienna Convention on the Law of Treaties.<sup>41</sup> To propose a Dworkinian approach to international law is to raise a number of questions about the fundamental principles of the international legal order. These include the central place of the Vienna Convention in the interpretation of treaties and the fact that international law derives from the consent of States. The rejection of the established tradition of international

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<sup>40</sup> Ronald Dworkin, ‘No Right Answer?’, 53 *New York University Law Review* (1978) 1.

<sup>41</sup> Vienna Convention on the Law of Treaties, (adopted 23 May 1969, entered into force 27 January 1980), UNTS 1155.

law may have serious implications for the future development of international law and relations between States.

### **2.1.2 The international legal order**

Stahn's reference to the 'cross-disciplinary' nature of the *jus post bellum* raises an important point about the relationship between morals and law in international legal order. The contemporary (mainstream) approach to international legal argument is founded on three interrelated pillars: voluntarism, neutrality and positivism.<sup>42</sup>

Firstly, the international legal order is founded on the principle of voluntarism. International law is considered to be a 'system of objective principles and neutral rules that *emanate from States' will*, either directly through treaty or indirectly through custom [my emphasis]'.<sup>43</sup> Voluntarism is encapsulated in the *Lotus* judgment of the Permanent Court of International Justice.<sup>44</sup> The 'nature and existing conditions' of international law are stated to be as follows:

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the

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<sup>42</sup> There is some discussion about whether there is an easily identifiable mainstream approach. I argue that there is, at least, an approach that most international lawyers would recognise as 'mainstream' even if there are now a variety of theoretical approaches. See generally, Prosper Weil, 'Towards Relative Normativity in International Law?' 77 *AJIL* (1983) 413; Steven R. Ratner and Anne-Marie Slaughter, 'Appraising the Methods of International Law: A Prospectus for Readers', 93 *AJIL* (1999) 291 and in the same volume Bruno Simma and Andreas L. Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflict: A Positivist View', 302, 304; On the separation of law and morals in analytical jurisprudence see H. L. A. Hart, 'Positivism and the Separation of Law and Morals', in H. L. A. Hart, *Essays in Jurisprudence and Philosophy*, (New York, OUP: 1988), 49.

<sup>43</sup> Andrea Bianchi, *International Law Theories – An Inquiry into Different Ways of Thinking* (New York, OUP: 2016), 21; see Article 38 (1) (c) of the Statute of the International Court of Justice, UN Charter, chapter XIV, (signed 26 June 1945, adopted 24 October 1945) UNTS 1 XVI, available at: <http://www.refworld.org/docid/3ae6b3930.html>, last accessed 20 June 2017).

<sup>44</sup> *Case of the S.S. "Lotus" (France vs. Turkey)* PCIJ 1927 (series A) No. 10.



relations between these co-existing independent communities or with a view to the achievement of common aims.<sup>45</sup>

This picture of international law brings with it certain consequences. Chief among these is that law appears limited. The possibilities of gaps in the regulation of State interaction are very high. For this reason, perhaps, international rules have emerged that do not owe their existence to State-consent.

The usual example is the principle of *pacta sunt servanda* which obliges States to keep to their promises. This does not necessarily affect the mainstream view of international law. It may be possible to understand this rule not *strictly* as a legal rule but rather as an international norm of international politics. After all, as Hedley Bull explained, any society must protect certain values in order to even exist as a society.<sup>46</sup> Insofar as the society of States constitutes a society, the principle of *pacta sunt servanda* functions as a rule that is, to a certain extent, implicit in their association.<sup>47</sup> Without a ‘general presumption that agreements entered into will be carried out’ it would not be possible to imagine human cooperation in any field.<sup>48</sup>

Furthermore, there are other kinds of rules which govern State behaviour which emerge ‘beyond the State’, i.e. through private governance networks.<sup>49</sup> A private governance network is a network of sub-State-officials (legislators, courts, and administrative agencies) that interact transnationally with other sub-State officials, each representing the ‘national

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<sup>45</sup> *Case of the S.S. “Lotus”* (France vs. Turkey) PCIJ 1927 (series A) No. 10, 18.

<sup>46</sup> Hedley Bull, *The Anarchical Society – A Study of Order in World Politics* (Palgrave Macmillan, Basingstoke: 2012) 5.

<sup>47</sup> Though, as ‘elementary’ as this rule is, some promises are sometimes broken in order to secure other important values, see Hedley Bull, *The Anarchical Society – A Study of Order in World Politics* (Palgrave Macmillan, Basingstoke: 2012) 18.

<sup>48</sup> Hedley Bull, *The Anarchical Society – A Study of Order in World Politics* (Palgrave Macmillan, Basingstoke: 2012) 5.

<sup>49</sup> Anne-Marie Slaughter, ‘Governing the Global Economy through Government Networks’, in Michael Byers (ed.) *The Role of Law in International Politics* (New York, OUP: 2000), 177; Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization*, (Oxford, OUP: 2012). See also Paul Schiff Berman, ‘Global Legal Pluralism’ 80 *Southern California Law Review* (2007) 1155.

interest'.<sup>50</sup> For Slaughter, these rules are evidence that international law is not only about States and their consent. Andreas Fischer-Lescano and Gunther Teubner, have argued that these private networks are engaged in the formation of 'global law'. For them, international law is a part of a more complex picture of global legal regulation. The point is that Slaughter, Fischer-Lescano and Teubner all say that international law-making is about more than just States consenting to rules.<sup>51</sup>

Voluntarists may retort that *pacta sunt servanda* is a norm of customary international law (i.e. ultimately subject to State consent). In terms of governance networks, a traditionalist might simply deny that, in this example, 'global administrative law' is really international law. Instead they would consider it a collection of 'best practices' only. The mainstream view of international law depends on keeping a rigid faith with an easily identifiable methodological presupposition. Unfortunately, as will be seen in relation to transitional criminal justice, sometimes this strict methodology fails to provide any easy answers. Novel situations arise where 'the rules run out' or conflict and a more sophisticated approach to the identification of law is required.

Secondly, the traditional approach to international law is based on the strict separation of law from morals or policy. The traditional approach favours (supposed) ideological neutrality as a necessary requirement of a system of law in an international society of sovereign equal States. According to Prosper Weil ideological neutrality is 'necessary to guarantee the coexistence of heterogeneous entities in a pluralistic society'.<sup>52</sup> This approach is founded on the recognition that States disagree on a number of fundamental political, moral and religious questions. Therefore, as Başak Çali has put it, if 'morality is called upon

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<sup>50</sup> Anne-Marie Slaughter, 'Governing the Global Economy through Government Networks', in Michael Byers (ed.) *The Role of Law in International Politics* (New York, OUP: 2000), 177, 178.

<sup>51</sup> Andreas Fischer-Lescano and Gunther Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', 26 *Michigan Journal of International Law* (2004) 999; see also Alan Boyle and Christine Chinkin, *The Making of International Law* (New York, OUP: 2007).

<sup>52</sup> Prosper Weil, 'Towards Relative Normativity in International Law?' 77 *AJIL* (1983) 413, 420.

to determine the content of international law there is an important danger: the views of the mighty may win over the views of the weak.<sup>53</sup> For the traditional approach, therefore, the law is a system of objective and neutral rules. It may be doubted how any rule, or norm, or system could be neutral among a diverse number of States. The rise of human rights norms since the end of the Second World War has been driven by a commitment to political liberalism. Further, the economic organization of the international system reflects a particular set of ideological interests which suit powerful States.<sup>54</sup> Most obviously, in terms of peace and security, the international legal order privileges the interests of the five States on the UN Security Council that enjoy veto-wielding power.<sup>55</sup> The very fact of drawing a boundary between ‘the legal’ and ‘the moral’ can be challenged as a political and ideological act.<sup>56</sup>

Finally, as explained briefly above, the mainstream approach to international law is founded on positivism. The view is that for an international rule to become international law, ‘it must be shown that it is the product of one, or more, of three law-creating processes: treaties, international customary law or the general principles of law recognised by civilised nations’.<sup>57</sup> It rules out other potential law-creating processes such as ‘natural law [or] moral postulates’.<sup>58</sup> International treaties are documents that States sign and ratify, thereby incorporating the rules of the treaty into domestic law. International customary law is ‘evidence of general practice accepted as law’.<sup>59</sup> As the International Court of Justice (ICJ) explained in the *Legality of Nuclear Weapons* case, customary rules were to be found

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<sup>53</sup> Başak Çali, ‘On Interpretivism and International Law’, 20 *EJIL* (2009) 805.

<sup>54</sup> Joseph Stiglitz, *Globalization and its Discontents*, (London, Penguin: 2002).

<sup>55</sup> China, France, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Russia.

<sup>56</sup> Andrea Bianchi, *International Law Theories – An Inquiry into Different Ways of Thinking* (New York, OUP: 2016), 24.

<sup>57</sup> Georg Schwarzenberger, *International Law* (3rd. Edition, 1957), Vol. 1, 26.

<sup>58</sup> Georg Schwarzenberger, *International Law* (3rd. Edition, 1957), Vol. 1, 26.

<sup>59</sup> See Article 38 (1) (c) of the Statute of the International Court of Justice, UN Charter, chapter XIV, (signed 26 June 1945, adopted 24 October 1945) UNTS I XVI, available at: <http://www.refworld.org/docid/3ae6b3930.html>, last accessed 20 June 2017).

‘primarily in the actual practice and *opinio juris* of States’.<sup>60</sup> In this scheme, the *opinio juris* represents the ‘acceptance’ of the rules, the psychological commitment to a particular practice as law. Finally, international law also incorporates the general principles of law. These are the principles accepted by civilised nations in *foro domestico*, i.e. ‘certain principles of procedure, the principle of good faith, and the principle of *res judicata*,...’<sup>61</sup> While there may be questions about the incorporation and interpretation of these rules in domestic legal systems, these rules form the basis of a (partially) unified legal system which eschews reliance on morality for the identification of the relevant legal norms.<sup>62</sup>

Positivism, as alluded to above, is not unproblematic. New situations arise which the original rule-makers may not have foreseen. In this situation, positivists in domestic systems argue that judges enjoy a strong discretion to decide the ‘new law’. This view, obviously, results in retrospective legislation (judges make the law and this is applied retrospectively to the facts of the case). Those subject to the new rules appear to suffer for the benefit of the system as a whole. However, positivists can also argue that the system is not as inflexible as it appears. Legal rules (whether agreed to by States or laid down by domestic legislatures) are, to a certain extent, ‘open-textured’.<sup>63</sup> The rules, once agreed, must be flexible enough to be interpreted in future situations. This means that the ‘individual preferences and political choices of the lawyer’ are inevitably part of the interpretation and application of legal rules.<sup>64</sup> Context is important in the interpretation of legal rules so that to avoid charges of retrospective legislation lawyers can argue by analogy so that the new situation falls under an old rule. Traditional approaches reflect a number of shared understandings. These

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<sup>60</sup> *Legality of the Threat or Use of Nuclear Weapons Case*, (Advisory Opinion), I.C.J. Rep. (1996), 226.

<sup>61</sup> Lord Phillimore, Advisory Committee of Jurists, *Procès verbal of the Proceedings of the Committee* (June 16 - July 24, 1920, L.N. Publication, 1920).

<sup>62</sup> Martti Koskeniemi, ‘The Politics of International Law – 20 years later’ 20 (2009) *EJIL* 7; ‘Fragmentation of International Law? Postmodern Anxieties’ (2002) 15 *Leiden Journal of International Law* 553.

<sup>63</sup> H. L. A. Hart, *The Concept of Law* (New York, OUP: 1997) 135.

<sup>64</sup> Bruno Simma and Andreas L. Paulus, ‘The Responsibility of Individuals for Human Rights Abuses in Internal Conflict: A Positivist View’, 302, 306.

presuppositions and preferences (i.e. in interpretive strategy) can be characterised in different ways. An acceptance that rules are ‘open-textured’ allows for a certain flexibility of approach. It also brings positivism closer to an interpretive approach to law and legal reasoning.<sup>65</sup>

Interpreting the rules of international law can cause problems. Sometimes rules conflict or factual situations overlap with different sets of rules. In transitional criminal justice, the requirements of accountability and amnesty are in conflict. On the one hand, States are under a duty to punish international crimes committed in non-international armed conflicts.<sup>66</sup> On the other hand, any duty to punish sits uneasily with the overall aim of transitions, i.e. an end to the fighting. In Colombia, all sides have committed atrocities. Thus, Colombia’s duty to prosecute those responsible for international crimes sits uneasily with the overall aim of a transition which is to secure peace in Colombia after decades of armed conflict. In relation to child soldier perpetrators, the situation is complicated by the view that child soldiers are usually viewed as victims of the conflict. Those who view child soldier perpetrators as ‘victims-first’ support the extension of a full amnesty. Nevertheless, this view is not necessarily shared by the survivors of child soldier violence. Thus, the reintegration of child soldier perpetrators may be affected. This is especially the case if local communities into which the child soldier perpetrators must reintegrate share a perception that they are criminals who have failed to atone for the atrocities they committed. As a matter of international law, it is not clear whether a duty to prosecute extends to child soldier perpetrators. This is a situation where the rules do not provide an easy answer. It is not clear whether post-conflict criminal justice ought to be measured by local or international

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<sup>65</sup> Ronald Dworkin, *Law’s Empire*, (Oxford, Hart Publishing: 2006). Although, only in the descriptive aspects of Dworkin’s theory – its normative branch (the principle of integrity) would not necessarily be implicated in the admittance that lawyers rely on individual preferences to interpret supposedly neutral rules.

<sup>66</sup> Diane Orentlicher, ‘Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime’, 100 *The Yale Law Journal* (1991) 2537; *Prosecutor v. Dusko Tadić*, Judgment, IT-94-1-T, (2 October 1995).

standards. In Colombia, juvenile justice provisions provide for the special prosecution of violent children. But alternatively, post-conflict justice could be measured by international standards on child protection.

The fragmentation of the law suggests that the law must be interpreted. Thus, lawyers may look for interpretive aids. Vaughan Lowe has argued that a number of norms are emerging in different areas of international law which help in resolving conflicts between legal rules.<sup>67</sup> So-called ‘interstitial norms’ are not legally binding on courts, or States, in the same way as the primary norms of the system (derived from treaty law, or customary international law). These interstitial norms develop in the same way as the law of Equity developed in UK law. The requirements of legal reasoning create these norms which allow for reconciliation between different rules and principles. So, in the example noted above, the resolution of the conflicts between amnesty and accountability in post-conflict law may be explained by reference to this kind of interstitial norm – not legally binding, but they ‘direct the manner in which competing or conflicting norms that do have their own normativity should interact in practice’.<sup>68</sup>

The identification of these interstitial norms would be a useful exercise for international lawyers. This is one way to understand Stahn’s call for a ‘cross-disciplinary’ approach to the *jus post bellum*. It refers to the need for an interpretive approach to the rules of post-conflict law to switch in focus from the specific rules to the principles or norms which support them and give them a particular character in application.<sup>69</sup> An interpretive approach to the *jus post bellum* has been suggested by Gallen.<sup>70</sup> This is explained in more detail in

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<sup>67</sup> Vaughan Lowe, ‘The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?’ in Michael Byers (ed.) *The Role of Law in International Politics* (New York, OUP: 2000) 207, 212.

<sup>68</sup> Vaughan Lowe, ‘The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?’ in Michael Byers (ed.) *The Role of Law in International Politics* (New York, OUP: 2000) 207, 216.

<sup>69</sup> Ronald Dworkin, *Law’s Empire*, (Oxford, Hart Publishing: 2006)

<sup>70</sup> James Gallen, ‘*Jus Post Bellum*: An Interpretive Framework’, in Carsten Stahn, Jennifer Easterday and Jens Iverson, (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014) 58.

section 2.4. Whether this approach to the *jus post bellum* helps practitioners to identify the rules of transitional criminal justice is evaluated in chapters 4, 5 and 6. Suffice it to say for now, that Gallen's approach is based explicitly on Dworkin's legal philosophy. This has certain implications. Dworkin, an avowed 'non-positivist' argued that law is always an interpretive concept. In other words, identifying the law is always a case of undertaking a 'moral reading of legal texts'.<sup>71</sup> A Dworkinian account of the *jus post bellum* necessarily implies that international law is also a case of producing a moral account of legal texts. Therefore, the *jus post bellum* as an interpretive framework, is an explicit attempt to eliminate the epistemological divide between the moral and the legal. Whether this helps practitioners to identify post-conflict law in relation to transitional criminal justice is the central question of this research (see chapters 4, 5 and 6). The rest of this chapter sets out in more detail the development of the *jus post bellum* as a moral and legal concept. It takes a chronological approach to the development of the subject.

## **2.2 The *jus post bellum* as 'post-war justice' or 'justice after war'**<sup>72</sup>

The first wave of *jus post bellum* scholarship defined the concept as 'post-war justice' or 'justice after war' – the third (largely forgotten) branch of just war theory. Proponents of the *jus post bellum* argued that contemporary just war theory distinguished between the *jus ad bellum* (the justice in resorting to armed force) and the *jus in bello* (just conduct during armed conflict) but that the *jus post bellum* had been ignored.<sup>73</sup>

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<sup>71</sup> Liam Murphy, 'Law Beyond the State: Some Philosophical Questions' 28 *EJIL* (2017) 203, 205.

<sup>72</sup> These terms are used interchangeably in the just war theory literature.

<sup>73</sup> For a historical review of the central figures in just war theory and their contributions see James Turner Johnson, *Ideology, Reason and the Limitation of War – Religious and Secular Concepts 1200 – 1740* (New Jersey, Princeton University Press: 1975); see also Michael Walzer, *Just and Unjust Wars* (New York, Basic Books: 2006). See Serena K. Sharma, 'Reconsidering the *jus ad bellum/jus in bello* distinction' in Carsten Stahn and Jann K. Kleffner (eds.), *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008) 9, for an argument that the distinction is too easily assumed.

It is true that many contemporary approaches to just war theory lacked an explicit *post bellum* category. For example, Michael Walzer's *Just and Unjust Wars* which lacks any explicit reference to the *jus post bellum*. *Post bellum* matters do arise in relation to unconditional surrender and justice in peace settlements.<sup>74</sup> Also, the last two chapters are dedicated to 'The Question of Responsibility' and they deal respectively with the crime of aggression and war crimes.<sup>75</sup> However, Walzer did not refer to these issues as part of any *jus post bellum*. Other comprehensive reviews of the history and development of just war thought also exclude any reference to the *jus post bellum* and also divide the theory into *ad bellum* and *in bello* categories.<sup>76</sup>

Michael J. Schuck was the first contemporary just war theorists to argue that just war theory included post-war justice.<sup>77</sup> Schuck argued,

If one assumes for the moment [...] that the rubrics of the just war theory are morally tenable...then post war behaviour must also come under moral scrutiny. If [we] are called upon to probe the moral propriety of entering and conducting war by using the seven *jus ad bellum* principles (which concern justification for using force) and the two *jus in bello* principles (which apply to conduct in war), should they not also be called upon to monitor the moral propriety of conducting a war through some set of *jus post bellum* principles?<sup>78</sup>

Schuck presents a *jus post bellum* which is historically grounded. The tone of his argument is religious and its theoretical content is drawn from St. Augustine. He proposed three *jus post bellum* principles: repentance, honourable surrender and restoration. There is little detailed information in terms of what the fulfilment of these *jus post bellum* principles would entail.

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<sup>74</sup> Michael Walzer, *Just and Unjust Wars*, (New York, Basic Books: 2006), 109.

<sup>75</sup> Michael Walzer, *Just and Unjust Wars*, (New York, Basic Books: 2006), 286.

<sup>76</sup> James Turner Johnson, *Ideology, Reason and the Limitation of War: Religious and Secular Concepts 1200 – 1740* (New Jersey, Princeton University Press: 1975). According to Johnson, the division is owing to the dual fountains of just war thought in theology and secular chivalric custom.

<sup>77</sup> Michael J. Schuck, 'When the Shooting Stops: Missing Elements in Just War Theory', *The Christian Century* (26 October 1994) 982.

<sup>78</sup> Michael J. Schuck, 'When the Shooting Stops: Missing Elements in Just War Theory', *The Christian Century* (26 October 1994) 982.



It could be argued that repentance, honourable surrender and restoration are all relevant to war crimes trials involving children. Yet, there is no discussion about the content of these principles and how they ought to be operationalised in modern international law.<sup>79</sup> Further, Schuck does not justify why an Augustinian approach to *jus post bellum* is warranted over and above any other possible approach. He is not concerned in demonstrating how the principles could be used to resolve post-conflict legal issues. Therefore, from the perspective of contemporary international law, there is little value in discussing Schuck's contribution in any detail.

Orend identified the same lacuna in modern just war theory. He argued that the *jus post bellum* ought to be recognised as it was present in the Kant's just war theory. For Orend, the lack of any explicit reference to the *jus post bellum* in most contemporary just war thought was a mistake and an oversight.<sup>80</sup> Orend first concern was 'internal'; he was concerned with the *jus post bellum* in relation to his own discipline. He considered that a just war theory that lacked any *jus post bellum* was open to challenge from its traditional opponents (realists and pacifists).<sup>81</sup> He argued that even if a State had initiated a just war, and fought justly, it was still not possible to say that a State had fought a just war. Echoing Schuck's earlier sentiments, Orend argued,

...it stands to reason that just as we can imagine a war justly begun being fought unjustly, so too we can imagine a war justly begun, and justly fought, but ending with a set of unjust settlement terms [...] just war theorists must consider the justice not only of the resort to war in the first

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<sup>79</sup> To be fair to Schuck, he does not argue in favour of a new legal category.

<sup>80</sup> Brian Orend, 'Jus Post Bellum' 31 *Journal of Social Philosophy* (2000) 117, 118.

<sup>81</sup> The actual debates that occur between realists, pacifists and just war theorists are not directly relevant to this research so they will not be pursued in any length. For a flavour of this debate see Michael Walzer, 'The Triumph of Just War Theory (and the Dangers of Success)' in Michael Walzer, *Arguing About War*, (New Haven, Yale University Press: 2004), 3.

place, and not only of the conduct within war, once it has begun, but also of the termination phase of the war, in terms of the cessation of hostilities and the move back from war to peace.<sup>82</sup>

Later Orend argued that the conclusions of just war theory scholarship on the *jus post bellum* ought to be instructive for the development of international law of armed conflict.<sup>83</sup> In this regard, of immediate interest is that there is a certain temporal ambiguity in Orend's call for a *jus post bellum*. The issue of identifying the 'post' in the *jus post bellum* continues to be important for the legal side of the scholarship.<sup>84</sup> At one and the same time, Orend asserts that the *jus post bellum* covers 'the termination phase of the war' and 'the move back from war to peace'.<sup>85</sup> As will be argued in more detail in chapter 3, contemporary armed conflicts seldom follow such a linear pattern. Many situations fall into a cyclical 'not-war, not-peace' category that involve a number of State and non-State actors. Orend's account (and Schuck's) are premised on the notion that it is possible to say when a post-conflict phase has begun. These definitional difficulties (and other issues) are passed over in much of Orend's *jus post bellum* theory. Chapter 3 evaluates in more detail the plausibility and desirability of Orend's *jus post bellum* theory in relation to transitional criminal justice.

### **2.2.1 The *jus post bellum* as 'post-intervention' justice**

Many of the early proposals for the *jus post bellum* must be read in the context of the 2003 invasion of Iraq.<sup>86</sup> The 2003 Iraq War caused many of these contributions to share a number

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<sup>82</sup> Brian Orend, 'Jus Post Bellum' 31 *Journal of Social Philosophy* (2000) 117, 118.

<sup>83</sup> Brian Orend, 'Jus Post Bellum – A Just War Theory Perspective', in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008) 31.

<sup>84</sup> Martin Wählisch, 'Conflict Termination from a Human Rights Perspective: State Transitions, Power-Sharing, and the Definition of the "Post"', Carsten Stahn, Jennifer Easterday and Jens Iverson, (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014) 315.

<sup>85</sup> Brian Orend, 'Jus Post Bellum' 31 *Journal of Social Philosophy* (2000) 117, 118.

<sup>86</sup> The 2003 Iraq War caused many just war theorists to join the debate see Davida Kellogg, 'Jus Post Bellum: The Importance of War Crimes Trials', 32 *Parameters* (2002); Gary J. Bass, 'Jus Post Bellum', 32 *Philosophy and Public Affairs* (2004); Michael Walzer, *Arguing*

of features. Firstly, the focus was on the end of international armed conflict and non-international armed conflict was not discussed at any length. This thesis extends the scope of the *jus post bellum* towards the non-international armed conflict in Colombia. If a concept is purported to deal with post-conflict law, it ought to deal with the most common type of post-conflict situations – those that arise after non-international armed conflicts. But owing to the 2003 Iraq War most *jus post bellum* theorists focused on foreign interventions.

For example, Michael Walzer reviewed his evaluation of just war theory and included the *jus post bellum* defined as ‘justice-in-endings’.<sup>87</sup> His most extensive analysis of the *jus post bellum* is conducted in relation to the rights and duties of the States involved in post-intervention reconstruction.<sup>88</sup> The context of ‘foreign intervention’ led Walzer to emphasize the principle of ‘local ownership’, i.e. the *jus post bellum* involves doing ‘everything possible’ to ensure that post-intervention reconstruction is conducted by and for the local population.<sup>89</sup>

Local ownership is a principle that aims to defend defeated States from neo-colonialism. However, Walzer does not make clear what ‘local ownership’ might mean at the end of non-international armed conflicts, such as in post-conflict Colombia. In Colombia, there has been no foreign intervention and the ‘locals’ have been in a non-international armed conflict for over five decades.<sup>90</sup> In this type of post-conflict society, international or ‘third party’ supervision may be very desirable as a way of guaranteeing the implementation of the peace agreement. The International Criminal Court, by the fact of initiating a ‘preliminary

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*About War* (New Haven, Yale University Press: 2004); Rear Admiral Louis V. Iasello, ‘*Jus Post Bellum*’, 3/4 *Naval War College Review* (Summer/Autumn 2004).

<sup>87</sup> Michael Walzer, *Arguing About War*, (New Haven, Yale University Press: 2004), 22.

<sup>88</sup> Michael Walzer, *Arguing About War*, (New Haven, Yale University Press: 2004), 92.

<sup>89</sup> Michael Walzer, *Arguing About War*, (New Haven, Yale University Press: 2004), 161. For some of the practical dilemmas involved see Jane Stromseth, David Wippman and Rosa Brooks, *Can Might Make Rights – Building the Rule of Law After Military Interventions* (New York, CUP: 2006) 379.

<sup>90</sup> There has been significant ‘international supervision’ in the sense that Colombia has been under investigation by the International Criminal Court since 2004, see René Urueña, ‘Prosecutorial Politics: The ICC’s Influence in Colombian Peace Processes, 2003-2017’, 111 *AJIL* (2017) 104.

investigation' into the Colombian conflict, has performed this supervisory role.<sup>91</sup> Bell has argued that the 'delegation of powers of interpretation and enforcement to third parties' is also a way of promoting compliance with the terms of the peace agreement.<sup>92</sup> This appears to be backed up by State practice. Since the end of the Cold War, 52% of peace agreements explicitly involve a third party as a signatory of the peace agreement.<sup>93</sup> This may be third States or even individual experts perceived as neutral by the negotiating parties. In Colombia, Dag Nylander (a Norwegian official) played a key role in brokering the peace.<sup>94</sup> It may be that local ownership in this type of context remains a similar principle to that espoused by Walzer. Nevertheless, Walzer's commentary on post-war justice really must be understood as inspired and directed to the question of post-intervention Iraq and the need to defend against the charge of neo-colonialism in the reconstruction of the Iraqi State.

Gary Bass has also discussed the *jus post bellum* in relation to foreign interventions. As with Walzer, much of Bass's theory is simply inapplicable to the Colombian situation owing to the lack of a State vs. State armed conflict. For example, in terms of transitional criminal justice, Bass argues that the *jus post bellum* requires 'the arresting and trying of war criminals'.<sup>95</sup> This view implies that war criminals have fought with the party that 'lost' the armed conflict. Bass argues from the position of a 'just' party that has 'won' the armed conflict. This simply makes no sense in post-conflict Colombia where the post-conflict context is the result of a 'no-winner' situation that leads to a negotiated peace. It is to the detriment of early *jus post bellum* scholarship that contributors ignored the most common form of ending conflicts. In this context, 'who' should be tried, 'by whom' and 'for what' are all difficult questions. In relation to child soldier perpetrators of international crimes, the

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<sup>91</sup> René Urueña, 'Prosecutorial Politics: The ICC's Influence in Colombian Peace Processes, 2003-2017', 111 *AJIL* (2017) 104.

<sup>92</sup> Christine Bell, *On the Law of Peace – Peace Agreements and the Lex Pacificatoria* (New York, OUP: 2008), 175

<sup>93</sup> Christine Bell, *On the Law of Peace – Peace Agreements and the Lex Pacificatoria* (New York, OUP: 2008), 175

<sup>94</sup> See <http://www.bbc.co.uk/news/world-latin-america-37206714> (last accessed 26 May 2017).

<sup>95</sup> Gary Bass, 'Jus Post Bellum', 32 *Philosophy and Public Affairs* (2004) 412.

parties in Colombia were unable to agree on what ought to happen to those child soldiers between 14 and 18 years of age.<sup>96</sup> In Colombia, this recurrent dilemma of transitional criminal justice will need to be dealt with by a chief prosecutor (to be appointed). Importantly, the dilemma must be resolved according to a specific purpose: the establishment of a more stable and secure peace. Thus, a simple injunction that ‘war criminals ought to be tried’ is divorced from the complexities of transitional criminal justice in non-international armed conflicts. On a policy level, there may be many reasons to try war criminals, in some situations, even though they are children. It might have a deterrent effect which would make child recruitment less attractive to adult commanders of non-State armed groups. At present, the fact that child soldiers tend not to be prosecuted could be seen as encouraging their utility in combat roles. Further, their young age at the time of the commission of the crimes might be reflected at the sentencing stage which could focus on restorative justice rather than incarceration. Neither international human rights law nor international humanitarian law prohibits post-conflict societies from prosecuting child soldiers (see chapter 3).<sup>97</sup> Furthermore, for some child soldiers, participation in transitional criminal justice mechanisms is necessary for the purposes of reintegrating themselves and preventing their social exclusion by the affected community.<sup>98</sup> Ethnographic research has demonstrated that child soldier returnees who are, or are thought to have been, implicated in these types of crimes are a serious ‘at-risk constituency’.<sup>99</sup> They are at risk because their participation in serious human

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<sup>96</sup> Joint Communiqué #70, Havana, Cuba, 15 May 2016, (Agreement on Minors) available at: <http://www.altocomisionadoparalapaz.gov.co/mesadeconversaciones/PDF/comunicado-conjunto-70-version-ingles-1-1463432344.pdf> (last accessed 21 June 2017).

<sup>97</sup> Noelle Quéniwet, ‘Does and Should International Law Prohibit the Prosecution of Children for War Crimes’, 28 *EJIL* (2017) 433.

<sup>98</sup> Mark Drumbl, *Reimagining Child Soldiers in International Law and Policy*, (Oxford, OUP: 2012); Fanny Leveau, ‘Liability of Child Soldiers under International Criminal Law’, 4 *Osgoode Hall Review of Law and Policy* (2013) 36.

<sup>99</sup> Mark Drumbl, ‘Child Soldiers, Transitional Justice, and the Architecture of *Post Bellum* Settlements’, in Larry May and Andrew T. Forcehimes, (eds.) *Morality, Jus Post Bellum and International Law*, (CUP, New York: 2012), 139, 155; also ‘The Effects of the Lubanga Case on Understanding and Preventing Child Soldiering’, in Terry D. Gill et al (ed.) 15 *Yearbook of International Humanitarian Law* (2012) 87.

rights violations makes their reintegration into local communities more difficult.<sup>100</sup> They may face open or ‘simmering’ antagonism from recovering post-conflict communities.<sup>101</sup> As a consequence, they are more likely to either remilitarize or turn to organized criminal activity and, therefore, become a ‘spoiler-risk’ in terms of the peace process as a whole.<sup>102</sup> Mark Drumbl notes that current policy discourages the discussion of children as the subjects of criminal accountability.<sup>103</sup> According to Drumbl, the effect of the ‘international legal imagination’ is to reflect an image of the child soldier as a ‘faultless passive victim’.<sup>104</sup> This image informs current law and policy during transitions, and though it may be well-intended, it ‘flattens’ and ‘omits details’ which are crucial to the reintegration of this group.<sup>105</sup> Most obviously, reintegration depends on acknowledgement of fault. But as Drumbl notes,

[child soldiers] are taken to lack any volition. [...] Accordingly, former child soldiers cannot plausibly play active roles in transitional justice mechanisms—such as truth commissions and reintegrative ceremonies—that examine their agency, authorship, or role in violence.<sup>106</sup>

The usual exclusion of child soldiers from transitional justice mechanisms is a policy error. Of course, the faultless passive victim might be accurate in some instances. However, the pervasive reiteration of this image by NGOs and UN agencies is reductive. Drumbl has written extensively on the range of literature which lies ‘fallow’ and ought to inform the

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<sup>100</sup> Angela Veale and Aki Stavrou, ‘Former Lord’s Resistance Army Child Soldier Abductees: Explorations of Identity in Reintegration and Reconciliation’, *Peace and Conflict: Journal of Peace Psychology* (2007), 273, 288.

<sup>101</sup> Mark Drumbl, ‘Child Soldiers, Transitional Justice, and the Architecture of *Post Bellum* Settlements’, in Larry May and Andrew T. Forcehimes, (eds.) *Morality, Jus Post Bellum and International Law*, (CUP, New York: 2012), 139, 162.

<sup>102</sup> Mark Drumbl, ‘Child Soldiers, Transitional Justice, and the Architecture of *Post Bellum* Settlements’, in Larry May and Andrew T. Forcehimes, (eds.) *Morality, Jus Post Bellum and International Law*, (CUP, New York: 2012), 139, 162.

<sup>103</sup> Mark Drumbl, ‘Child Soldiers, Transitional Justice, and the Architecture of *Post Bellum* Settlements’, in Larry May and Andrew T. Forcehimes, (eds.) *Morality, Jus Post Bellum and International Law* (CUP, New York: 2012), 139, 141.

<sup>104</sup> Mark Drumbl, ‘Child Soldiers, Transitional Justice, and the Architecture of *Post Bellum* Settlements’, in Larry May and Andrew T. Forcehimes, (eds.) *Morality, Jus Post Bellum and International Law* (CUP, New York: 2012), 139, 141.

<sup>105</sup> Mark Drumbl, ‘Child Soldiers, Transitional Justice, and the Architecture of *Post Bellum* Settlements’, in Larry May and Andrew T. Forcehimes, (eds.) *Morality, Jus Post Bellum and International Law* (CUP, New York: 2012), 139, 141.

<sup>106</sup> Mark Drumbl, *Reimagining Child Soldiers in International Law and Policy* (New York, OUP: 2012), 95.

reality of child soldiering.<sup>107</sup> The stories of how child soldiers become involved in conflict vary. Post-conflict Colombia has an opportunity to take a more nuanced approach to the transitional criminal accountability of serious offenders who are under 18. The very fact of being under 18 ought not to remove the possibility of participation in transitional criminal justice mechanisms. The peace agreement between the FARC-EP and the government reflects a shared understanding that many crimes were committed by child soldiers active on all side of the conflict.<sup>108</sup> In order to secure the principle of non-impunity, transitional criminal justice mechanisms will have to extend to, at least some, child soldiers.

The issue of child soldiers (and this group of child soldiers in particular) is absent from most of the *jus post bellum* literature. For Walzer, Bass and other early contributors to the *jus post bellum* debate, the concept was related to ‘humanitarian intervention’ or the ‘responsibility to protect’. In other words, Walzer, Bass and others considered post-war justice issues in relation to the *jus ad bellum* considerations of whether to intervene in ‘rogue States’ such as Afghanistan and Iraq. The close conceptual link between the *ad bellum* and *post bellum* categories will be further explored in chapter 3. For now, the point is that in the early discussions on post-war justice, the criminal accountability of child soldiers at the end of non-international armed conflicts was largely overlooked.

The most comprehensive attempt at crafting a ‘moral’ *jus post bellum* theory is offered by Larry May.<sup>109</sup> May’s theory is also that which is most easily applicable to non-international armed conflicts. He discusses the *jus post bellum* as a compendium of six normative principles which must all be met in order to ensure a just peace.<sup>110</sup> These are: rebuilding, retribution, reparation, reconciliation and proportionality. The principles

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<sup>107</sup> Mark Drumbl, *Reimagining Child Soldiers in International Law and Policy* (New York, OUP: 2012), 11.

<sup>108</sup> Joint Communiqué #70, Havana, Cuba, 15 May 2016, (Agreement on Minors) available at: <http://www.altocomisionadoparalapaz.gov.co/mesadeconversaciones/PDF/comunicado-conjunto-70-version-ingles-1-1463432344.pdf> (last accessed 21 June 2017).

<sup>109</sup> Larry May, *After War Ends* (New York, CUP: 2012)

<sup>110</sup> Larry May, *After War Ends* (New York, CUP: 2012) 22.

represent the ideals that post-conflict societies ought to aim at. Importantly, May argues that it is not necessary fully to satisfy all the principles ‘in order to have a just and lasting peace’.<sup>111</sup> This is owing to the fact that May’s *jus post bellum* analysis is subjected to an overarching controlling principle of *meionexia* – defined as ‘taking less than one is due’.<sup>112</sup> This principle ought to guide the victors in war ‘in order to better achieve the humanitarian goals in the transition from war to peace’.<sup>113</sup> However, it is also relevant to parties attempting to implement a peace agreement at the end of a non-international armed conflict. In relation to transitional criminal justice, for example, the concept of *meionexia* is especially important insofar as the requirements of ‘peace’ and ‘justice’ for the victims of the war are considerably in tension.<sup>114</sup> Post-conflict accountability at the end of non-international armed conflicts may require victims and perpetrators to accept less than what they are owed. In Colombia, the parties have agreed to set up a Special Tribunal for Justice.<sup>115</sup> As a part of transitional criminal justice, the agreement sets out accountability measures which balance the interests of peacemakers and victims of the conflict.<sup>116</sup> The transitional justice measures foresee a system of amnesties or reduced sentences in exchange for truth telling and the admission of guilt.<sup>117</sup> This approach seems to fit quite well with May’s idea that justice after war is

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<sup>111</sup> Larry May, *After War Ends* (New York, CUP: 2012) 14.

<sup>112</sup> Larry May, *After War Ends* (New York, CUP: 2012) 7.

<sup>113</sup> Larry May, *After War Ends* (New York, CUP: 2012) 9.

<sup>114</sup> For an argument that peace ought to trump justice concerns see Anonymous, ‘Human Rights in Peace Negotiations’ 18 *Human Rights Quarterly* (1996) 249.

<sup>115</sup> See Part 5.2 of the ‘Final Agreement for the End of Conflict and the Construction of a Stable and Long Lasting Peace’, (hereafter the Peace Agreement) signed on 24 November 2016 and ratified by Congress 1 December 2016. The full text of the peace agreement is available at: <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf>. I will use my own translations from Spanish to English throughout this thesis.

<sup>116</sup> Part 5.2 of the ‘Final Agreement for the End of Conflict and the Construction of a Stable and Long Lasting Peace’, (hereafter the Peace Agreement) signed on 24 November 2016 and ratified by Congress 1 December 2016. The full text of the peace agreement is available at: <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf>.

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<sup>117</sup> Part 5.2 of the ‘Final Agreement for the End of Conflict and the Construction of a Stable and Long Lasting Peace’, (hereafter the Peace Agreement) signed on 24 November 2016 and ratified by Congress 1 December 2016. The full text of the peace agreement is available at: <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf>.

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‘limited’. What is not clear is where the balance ought to be struck. May offers the principle of proportionality as an overarching regulative principle. As a matter of law, proportionality is already an accepted principle of international law. Thus, the principle of *meionexia* in post-conflict Colombia could represent an idea that reconciliation and peace are best served by an acceptance, by all sides, that no-one will get everything that they want.

Orend, Walzer, Bass and May are only a selection of the many writers that have discussed the *jus post bellum* as a matter of post-war justice. Overall, a review of the literature suggests that just war theorists now recognise that the *jus post bellum* ought to be considered as a third branch of (Western) just war theory.<sup>118</sup> However, this thesis is concerned with the *jus post bellum* as a matter of international law. As such, the specific prescriptive aspects of these contributions on post-war justice are not directly relevant to this research. These theories are only relevant to this research insofar as the *jus post bellum* is considered a new category in international law. Orend is the only writer who argues that his theory ought to be developed into international law. Therefore, this research will focus in more detail on Orend’s work on the *jus post bellum*.

Firstly, a focus on Orend’s work allows for a very brief evaluation of the historical pedigree of the *jus post bellum* concept (chapter 3). Orend claims that the *jus post bellum* can be derived from Immanuel Kant’s moral philosophy – especially *The Doctrine of Right* and *Perpetual Peace*. Its historical pedigree is relevant insofar as Orend claims that law and morals (just war theory) ought to mirror one another. In this sense, Orend argues that the ‘rediscovery’ of the *jus post bellum* in just war theory ought to be relevant for the progressive development ‘real-world realization of morality through law’.<sup>119</sup> He argues that ‘there should

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<sup>118</sup> Though for a non-Western contribution see Farhatul Mustamirrah Mahamad Aziz and Mohd Rizal Yaaqub, ‘*Jus Post Bellum: The Missing Link of Just War Theory: A Theoretical Examination of What is Justice After the War?*’, 12 *Malaysian Journal of Society and Space* (2016) 1.

<sup>119</sup> Brian Orend, ‘*Jus Post Bellum – A Just War Theory Perspective*’, in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008) 32.

be another Geneva Convention [...] focusing exclusively on *jus post bellum*...' and that '[t]here needs to be both moral and legal completion and comprehensiveness in connection with the ethics of war and peace'.<sup>120</sup> Thus, the role of morality in the development of the international legal order is a central feature of Orend's theory. A focus on Orend's work, therefore, allows for the evaluation of a simple way that the *jus post bellum* could 'help to identify post-conflict law', i.e. as a new Additional Protocol to the Geneva Conventions for the post-conflict phase.

This would be highly controversial insofar as the current political climate does not appear conducive to the negotiation and adoption of large-scale multinational agreements in the law of armed conflict. In terms of on-going conflicts, the discussions would necessarily be overshadowed by the ongoing (failed) discussions on how to end the international armed conflict in Syria. Further, the case has not been made that the current legal framework is broken to the extent that a whole new area of law is necessary to deal with post-conflict issues. In relation to transitional criminal justice, solutions to difficult questions have been found on a case-by-case basis and always in relation to the specific post-conflict situations that have arisen. Existing categories of law, such as international human rights law, international criminal law and international humanitarian law, have been used by peace negotiators to fashion *sui generis* approaches to transitional justice which best serve the prospects of peace.<sup>121</sup> The flexibility of the current approach may be lost by the agreement of a new Additional Protocol that set fixed rules on what was permissible in post-conflict justice.<sup>122</sup> For example, in relation to transitional criminal justice, it is helpful for the law to

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<sup>120</sup> Brian Orend, 'Jus Post Bellum – A Just War Theory Perspective', in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008) 36.

<sup>121</sup> See generally Christine Bell, *Peace Agreements and Human Rights* (New York, OUP: 2000); *On the Law of Peace – Peace Agreements and the Lex Pacificatoria* (New York, OUP: 2008).

<sup>122</sup> Christine Bell, 'Of Jus Post Bellum and Lex Pacificatoria – What's in a Name?', in Carsten Stahn, Jennifer Easterday and Jens Iverson, (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014), 181,

acknowledge a grey area where ‘accountability and amnesty are useful and permissible’.<sup>123</sup> From a conflict resolution perspective, flexibility, rather than prescriptive rules is more helpful. Moreover, given the variety in State practice, it may be impossible in practice for States to agree on these rules. This is especially the case in relation to the criminal accountability of child soldiers. In this sense, the general exclusion of child soldiers from post-conflict accountability mechanisms reflects the disagreements between and within States on the appropriate minimum age of criminal responsibility for children.<sup>124</sup>

In Colombia, the government and the FARC-EP were unable to decide what ought to happen in relation to the punishment of child soldiers aged between 14 and 18 who were implicated in war crimes. Natalia Springer has estimated a total of up to 18,000 active child soldiers in Colombia.<sup>125</sup> There are over eight million registered ‘victims’ of the conflict.<sup>126</sup> 1,000 child soldiers have been recruited by non-State armed groups since the beginning of the peace talks in 2012.<sup>127</sup> Taking these numbers together, it is highly likely that many child soldiers have committed war crimes. But there is considerable ambiguity in relation to the post-conflict accountability of child soldier returnees that are implicated in international

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<sup>123</sup> Christine Bell, ‘Of *Jus Post Bellum* and *Lex Pacificatoria* – What’s in a Name?’, in Carsten Stahn, Jennifer Easterday and Jens Iverson, (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014), 181, 201.

<sup>124</sup> See Matthew Happold, ‘The Age of Criminal Responsibility for International Crimes under International Law’ in Karin Arts and Vesselin Popovski (eds.) *International Criminal Accountability and the Rights of Children* (TMC Asser Press: The Hague, The Netherlands: 2005), 69; Brittany Ursini, ‘Prosecuting Child Soldiers: The Call for a Minimum Age of Criminal Responsibility’, 89 *St. John’s Law Review* (2015), 1023.

<sup>125</sup> Natalia Springer, *Como lobo entre corderos. Del uso y reclutamiento de niños, niñas y adolescentes en el marco del conflicto armado y la criminalidad en Colombia* (Bogotá: Springer Consulting Services, 2012), 34.

<sup>126</sup> See United States Institute for Peace, ‘Q&A with Virginia Bouvier: Colombia, Guerrillas Reach Accord on Rights for Victims of War’, available at: <http://www.usip.org/publications/2015/12/17/qa-colombia-guerrillas-reach-accord-rights-victims-of-war>

<sup>127</sup> UNICEF, ‘Childhood in the Time of War: Will the children of Colombia know peace at last?’ (March 2016), available [http://reliefweb.int/sites/reliefweb.int/files/resources/UNICEF\\_Colombia\\_Child\\_Alert\\_March\\_2016\\_FINAL.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/UNICEF_Colombia_Child_Alert_March_2016_FINAL.pdf) accessed 18 January 2017, (‘UNICEF Childhood in Time of War: Colombia’)

crimes. This is clear from an evaluation of Joint Communiqué #70 (Agreement on Minors).<sup>128</sup>

Firstly, there are some points about which the parties reached a clear and unambiguous agreement. For example, the negotiating parties in Colombia have agreed that children under 14 ‘can in no case be held criminally responsible’.<sup>129</sup> This demonstrates a desire to find equivalence between the approach of transitional criminal justice and the ordinary criminal justice system because the minimum age of criminal responsibility in Colombia is 14. But the parties have also agreed a special bracket of criminal responsibility between 14 and 18. This indicates that disagreement about who is a ‘child’ for the purposes of criminal responsibility arises in this range.

The agreement States that ‘[m]inors aged 14 to 18 who leave the camps of the FARC-EP...will be granted the benefit of pardon for rebellion and related offences *when there is no impediment in Colombian law*’.<sup>130</sup> In the first place, this is in line with international humanitarian law. Article 6(5) of Additional Protocol I urges that ‘the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict’.<sup>131</sup> However, there is no indication in the agreement about what would count as ‘related offences’ for the purposes of amnesty. The ‘Final Peace Agreement’ includes a chapter on ‘Victims’ which makes no special consideration for child soldiers (hence the ‘Agreement on Minors’ which is separate document). In relation to non-child

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<sup>128</sup> Joint Communiqué #70, Havana, Cuba, 15 May 2016, (Agreement on Minors) available at: <http://www.altocomisionadoparalapaz.gov.co/mesadeconversaciones/PDF/comunicado-conjunto-70-version-ingles-1-1463432344.pdf> (last accessed 21 June 2017).

<sup>129</sup> Joint Communiqué #70, Havana, Cuba, 15 May 2016, (Agreement on Minors) available at: <http://www.altocomisionadoparalapaz.gov.co/mesadeconversaciones/PDF/comunicado-conjunto-70-version-ingles-1-1463432344.pdf> (last accessed 21 June 2017).

<sup>130</sup> Joint Communiqué #70, Havana, Cuba, 15 May 2016, (Agreement on Minors) available at: <http://www.altocomisionadoparalapaz.gov.co/mesadeconversaciones/PDF/comunicado-conjunto-70-version-ingles-1-1463432344.pdf> (last accessed 21 June 2017).

<sup>131</sup> Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts, (adopted 8 June 1977, entered into force 7 December 1978), 1125 UNTS 3, Article 6(5).

soldier perpetrators, some ‘related offences’ for the purposes of general amnesty have been mentioned. These include forced displacement, conspiracy to rebel, sedition, rioting, kidnapping, and extra-judicial killing. Further, there is no indication in Joint Communiqué #70 of what counts as an ‘impediment in Colombian law’ for the purposes of the ‘pardon for rebellion’. This may be, perhaps, a *rebus sic stantibus* provision. In the event that circumstances change, the State reserves the right to prosecute 14 to 18 year olds. But the situation is even more uncertain in relation to minors ‘accused or convicted’ of crimes ‘not subject to amnesty or pardon’.<sup>132</sup> The most relevant crimes are serious war crimes and crimes against humanity. The Joint Communiqué simply States that these ‘will be studied at a later stage’.<sup>133</sup>

The above sketch of the ‘Agreement on Minors’ indicates that the parties in Colombia accept that child soldier accountability is permitted and may be required by law. The ultimate decision will be taken by a chief prosecutor. The variety of possible cases that might arise suggests that a case-by-case approach to child soldier accountability could be most appropriate. However, as a matter of international human rights law, the Committee on the Rights of the Child has urged State parties to the Convention on the Rights of the Child not to determine questions of criminal responsibility by reference to subjective factors such as ‘the attainment of puberty, the age of discernment of the personality of the child’.<sup>134</sup> How the Committee’s General Comments affect the interpretation of the peace agreement remains to be seen. But it is doubtful whether a new Additional Protocol that sets out the rules on this issue would be agreed at the level of detail needed to resolve the dilemmas. Furthermore,

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<sup>132</sup> Joint Communiqué #70, Havana, Cuba, 15 May 2016, (Agreement on Minors) available at: <http://www.altocomisionadoparalapaz.gov.co/mesadeconversaciones/PDF/comunicado-conjunto-70-version-ingles-1-1463432344.pdf> (last accessed 21 June 2017).

<sup>133</sup> Joint Communiqué #70, Havana, Cuba, 15 May 2016, (Agreement on Minors) available at: <http://www.altocomisionadoparalapaz.gov.co/mesadeconversaciones/PDF/comunicado-conjunto-70-version-ingles-1-1463432344.pdf> (last accessed 21 June 2017).

<sup>134</sup> UNCRC, ‘Report on the tenth session’ (Geneva, 30 October 1995), UN Doc. CRC/C/46 (1995), at paragraph 203.

chapter 3 expands on how the existing categories provide some guidance as to what ought to be done.

Nevertheless, Orend's proposal for a new Protocol is an assertive and simple way that post-war justice could influence post-conflict law. Further, most, if not all, contributors to the field, whether from just war theory or international law, cite Orend as the 'initiator' of the *jus post bellum* debate. As such, to the extent that international lawyers have joined the debate on the *jus post bellum* this is owing to Orend's call for a new treaty on post-conflict matters. Therefore, chapter 3 is devoted to evaluating Orend's proposal in detail in relation to the question of transitional criminal justice.

### **2.3 The *jus post bellum* as a legal concept**

Orend's proposal is not the only way that a 'legal' *jus post bellum* has been discussed. Many international lawyers have demonstrated interest in the *jus post bellum*.<sup>135</sup> After all, there are certain similarities between the moral and legal discourse on armed conflict. Most apparent is that international lawyers also refer to the '*jus ad bellum*' and the '*jus in bello*'.<sup>136</sup> However, lawyers and just war theorists may mean different things when referring to these terms.<sup>137</sup> For mainstream international lawyers, these terms function as shorthand for the

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<sup>135</sup> Most of the contributions in the most recent edited collection on the subject are from international lawyers, see Carsten Stahn, Jennifer Easterday and Jens Iverson (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014).

<sup>136</sup> Although it is rare to see the terms used before 1930, see Robert Kolb, 'Origin of the Twin Terms *Jus Ad Bellum*/*Jus in Bello*' 37 *International Review of the Red Cross* (1997) 553; see also Sean Murphy, 'Protean *Jus ad Bellum*', 27 *Berkley Journal of International Law* (2009) 22; Inger Österdahl, 'Dangerous Liaison: The Disappearing Dichotomy between *Jus ad Bellum* and *in Bello*' in 78 *Nordic Journal of International Law* (2010) 553.

<sup>137</sup> Some contributions to the law of armed conflict do not see a strict separation between law and morality, for example, Fernando Tesón, 'Humanitarian Intervention: Loose Ends', 10 *Journal of Military Ethics* (2011), 192; Ronald Dworkin, 'A New Philosophy for International Law', 41 *Philosophy and Public Affairs* (2013) 1.

specific rules and principles of international law.<sup>138</sup> For ‘non-positivists’ they include the moral principles that govern the use of force and the conduct of war.

On a traditional reading, the *jus ad bellum* hinges on the prohibition on the use of inter-State force found in Article 2(4) of the UN Charter.<sup>139</sup> Exceptions to this rule are also considered part of the *jus ad bellum*. There are only two exceptions in the UN Charter: the chapter VII collective measures decided by the UN Security Council (Articles 39 – 51) and in self-defence according to Article 51.<sup>140</sup> The *jus ad bellum* as a matter of just war theory is related to a discussion of ‘just cause’, ‘right intention’ and ‘proportionality’. These moral principles are not thought to be relevant for the purposes of identifying the law on the use of force. However, as discussed, rules that must be interpreted demand a certain flexibility of approach. An interpretive approach to law blurs the line between legal and moral approaches.

Similarly, for international lawyers the *jus in bello* denotes the rules of conduct that apply to armed conflict. The modern rules have developed in a piecemeal fashion since the middle of the 19th Century.<sup>141</sup> There are different rules which apply to different kinds of armed conflict.<sup>142</sup> The first question in identifying the rules is to ask what type of armed conflict is being fought. Lawyers must refer to a range of different treaties and also consider any customary international law that applies to the factual scenario. The main reference

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<sup>138</sup> I use the term ‘traditional’ international lawyers to refer to those lawyers that adhere to the positivist conception of international law as described above and with the caveat that there are many ways of thinking about the nature of ‘international law’, see Andrea Bianchi, *International Law Theories – An Inquiry into Different Ways of Thinking* (New York, OUP: 2016).

<sup>139</sup> UN Charter, (signed 24 October 1945, entered into force 24 October 1945) 1 UNTS XVI.

<sup>140</sup> UN Charter, (signed 24 October 1945, entered into force 24 October 1945) 1 UNTS XVI. See generally, Yoram Dinstein, *War, Aggression and Self-Defence*, 5th Ed. (Cambridge, CUP: 2011), 185.

<sup>141</sup> Precursors to the law of armed conflict can be found as far back as ancient India and China. See for a brief history, Gary D. Solis, *The Law of Armed Conflict*, (New York, CUP: 2011) 4. However, the modern system can be traced back to humanitarian concerns that emerged in the context of the U.S. Civil War.

<sup>142</sup> See generally, Dietrich Schindler, ‘The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols’, *Recueil des Cours*, Volume 163 (1979), 147; See also International Committee of the Red Cross, ‘How is the Term “Armed Conflict” Defined in International Humanitarian Law’, Opinion Paper (2008) available at: <https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf> (last accessed 5 August 2015).

points in treaty law are the four Geneva Conventions of 1949 and their Additional Protocols.<sup>143</sup> However, treaties on prohibited weapons such as those prohibiting chemical weapons are also included in the *jus in bello*.<sup>144</sup> As in just war theory, the post-conflict phase has traditionally lacked a ‘stand-alone’ legal category. This means that it has been possible for lawyers to mirror just war theory arguments in favour of ‘completing’ the law of armed force by recognising a tripartite conception.<sup>145</sup> Three general approaches can be discerned from how the *jus post bellum* has been used:

- i) a term that *describes* all the existing law that applies
- ii) a term for a new law that *ought* to come into being
- iii) a term for ‘emerging law’ that *has changed* the existing law

The remainder of this section evaluates these three conceptions.

### **2.3.1. Describing the post-conflict legal framework**

The first is the least controversial. Some have used the *jus post bellum* as a new descriptive term for all the law that applies during the post-conflict phase. For example, Inger Österdahl and Esther van Zandel have argued that the *jus post bellum* is an area of law that mixes a number of different legal categories,

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<sup>143</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC I) 75 UNTS 31; Geneva Convention for the Amelioration of the Conditions of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GC II) 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War (GC III) 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC IV) 75 UNTS 287 (all four Conventions adopted 12 August 1949, entered into force 21 October 1950). Lawyers contributing to the *jus post bellum* debate have focused on the law of occupation found in Articles 27-34 and 47-78 of the fourth Geneva Convention.

<sup>144</sup> Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (Chemical Weapons Convention) 1974 UNTS 45 (adopted 13 January 1993, entered into force 29 April 1997).

<sup>145</sup> Carsten Stahn ‘*Jus ad bellum*’, ‘*jus in bello*’... ‘*jus post bellum*’? – Rethinking the Conception of the Law of Armed Force’, 17 *EJIL* (2006) 921.



...international humanitarian law, international human rights law, international criminal law, national criminal law, national administrative law, national constitutional law, and national military law. Also one can think of incorporating international and national laws relating to the financial and economic sectors as economic reconstruction is a very important part of the post – conflict phase.<sup>146</sup>

This approach is echoed by Vincent Chetail who argues that ‘far from being based upon a coherent and uniform set of standards’ the law that regulates the move from conflict to peace is ‘located at the intersection of various branches of law, as much international as domestic’.<sup>147</sup> In the context of transitional criminal justice in Colombia, therefore, the *jus post bellum* might include: international humanitarian law, international criminal law, international human rights law, the Constitution of Colombia, the Colombian Penal Code, the peace agreement and the ‘special legislative measures for peace’ as confirmed by the Constitutional Court.<sup>148</sup> The peace agreement states that for the purposes of the Special Tribunal for Peace the most relevant bodies of law are international human rights law, international humanitarian law and international criminal law.<sup>149</sup>

Of course, a simple descriptive account of the law must take into account that these bodies of law are subject to international and regional interpretations. Thus, in relation to humanitarian law, the case-law of the International Criminal Tribunal for the Former Yugoslavia has provided interpretations of the law that depart from earlier established rules.

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<sup>146</sup> Inger Österdahl and Esther van Zandel, ‘What Will *Jus Post Bellum* Mean? Of New Wine and Old Bottles’ 14 *Journal of Conflict and Security Law* (2009) 175.

<sup>147</sup> Vincent Chetail, *Post – Conflict Peacebuilding – A Lexicon* (New York, OUP: 2008), 17.

<sup>148</sup> See Articles 1 and 2, Legislative Act No. 1 of 2016, which created the Special Legislative Procedures for Peace are Presidential Decrees and laws passed through Congress along fast – track legislative procedures, available at: <http://es.presidencia.gov.co/normativa/normativa/ACTO%20LEGISLATIVO%2001%20DEL%207%20DE%20JULIO%20DE%202016.pdf> Although these new procedures are now in doubt, see <http://www.eltiempo.com/politica/proceso-de-paz/rodrigo-uprimny-habla-de-la-decision-de-la-corte-de-modificar-el-fast-track-90240> (in Spanish).

<sup>149</sup> Peace Agreement, Part 5.2., Point 19, p. 147. Available at: <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf>

The best example is the interpretation of the law on the boundaries between an internal and international armed conflict in *Nicaragua* and *Tadić*.<sup>150</sup> Nevertheless, this way of using the term is useful. In highlighting the mixture of legal categories, and different interpretations, which define the ‘post-conflict phase’, the *jus post bellum* serves as a reminder that a ‘one-size-fits-all’ approach to post-conflict matters is difficult to sustain. For example, in relation to the criminal accountability of child soldiers, the applicable law depends on the minimum age of criminal responsibility in the State concerned. As States simply do not agree on what the universal minimum age of criminal responsibility ought to be, there could be no uniform *jus post bellum* that applies as a matter of international law.<sup>151</sup> Each post-conflict situation will need to deal with the criminal accountability of child soldiers and adolescents in view of the domestic legal system. For now the point is that using the *jus post bellum* as a new umbrella term for the law as it stands changes very little and is relatively uncontroversial. At most, naming a fragmented legal matrix the ‘*jus post bellum*’ can be seen as an attempt to impose ‘lexical’ coherence on the law of armed conflict.<sup>152</sup> But even so, the law itself is unchanged and the provisions of the existing legal categories remain the same.

### **2.3.2. The *jus post bellum* as a reform proposal**

The *jus post bellum* has been discussed as a reform proposal in favour of a new post-intervention law. This is best exemplified by Orend’s call for a new Geneva Convention on

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<sup>150</sup> *Case Concerning Military and Paramilitary Activities In and Against Nicaragua* (Nicaragua v United States of America) (Merits) 27 June 1986, ICJ Reports 1986, No. 70 (available at: <http://www.refworld.org/cases/ICJ,4023a44d2.html>) (last accessed 23 June 2017); *Prosecutor v. Dusko Tadić* (Appeal Judgment), IT-94-I-A, International Criminal Tribunal for the former Yugoslavia (ICTY) 15 July 1999, available at: <http://www.refworld.org/docid/40277f504.html> (last accessed 23 June 2017).

<sup>151</sup> Brittany Ursini, ‘Prosecuting Child Soldiers: The Call for an International Minimum Age of Criminal Responsibility’, 89 *St. John’s Law Review* (2015) 1023.

<sup>152</sup> See Christine Bell, ‘Of *Jus Post Bellum* and *Lex Pacificatoria* – What’s in a Name?’, in Carsten Stahn, Jennifer Easterday and Jens Iverson, (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014), 181.

post-intervention reconstruction.<sup>153</sup> As noted above, Orend has argued that international law ought to follow just war theory in developing a *post bellum* category. In his view, a new Geneva Convention ought to focus on ‘what the winners of war may and may not do to countries and regimes they have defeated.’<sup>154</sup> Whether this is necessary, desirable and possible is the focus of chapter 3. Orend has presented the most assertive version of the *jus post bellum* as ‘post-intervention law’ but others have also argued for the development of a new legal paradigm.<sup>155</sup> As with developments in just war theory, these reform arguments emerged in response to the legal issues that arose in the context of the invasion and reconstruction of Iraq (see section 2.2.1). The occupying powers in Iraq carried out extensive legislative, economic and political reforms to the structure of the Iraqi State.<sup>156</sup> Yet, a so-called ‘transformative occupation’ is faced with significant legal challenges. Primarily, occupation law contains concrete provisions preventing occupiers from undertaking the types of reforms which were seen as necessary (by the victorious powers) in post-intervention Iraq. The relevant norms are primarily Article 43 of Convention IV Respecting the Laws and Customs of War 1907 (the Hague Regulations) and Article 64 Geneva Convention IV (GCIV) 1949.<sup>157</sup> For example, Article 43 States,

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<sup>153</sup> Brian Orend ‘*Jus Post Bellum – A Just War Theory Perspective*’, in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008) 31.

<sup>154</sup> Brian Orend ‘*Jus Post Bellum – A Just War Theory Perspective*’, in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008) 31, 36.

<sup>155</sup> See Kristen Boon, ‘Legislative Reform in Post-Conflict Zones’, (2005) 50 *McGill Law Journal*, 285; Jean L. Cohen, ‘The Role of International Law in Post – Conflict Constitution – Making: Toward a *Jus Post Bellum* for ‘Interim Occupations’, 51 *New York Law School Review* (2006/2007), 498.

<sup>156</sup> See Michael J. Kelly, ‘Iraq and the Law of Occupation: New Tests for an Old Law’ 6 *Yearbook of International Humanitarian Law* (December 2003) 127. There has been a vast amount of literature on the legal issues that surrounded the regime change in Iraq, see David Scheffer, ‘Beyond Occupation Law’ 97 *AJIL* (2003) 842; Alexander Orakhelashvili, ‘The Post – War Settlement in Iraq: The UN Security Council Resolution 1483 (2003) and General International Law’ 8 *Journal of Conflict and Security Law* 307; Martin Zwanenburg, ‘Existentialism in Iraq: Security Council Resolution 1483 and the Law of Occupation’ 86 *International Review of the Red Cross* (2004) 856; Adam Roberts, ‘Transformative Military Occupations: Applying the Laws of War and Human Rights’, 100 *American Journal of International Law* (2006).

<sup>157</sup> Convention IV respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, (Hague Regulations) (adopted 18 October 1907, entry into force 26 January 1910); Geneva Convention Relative to the Protection of Civil Persons in Time of War, (adopted 12 August 1949, entry into force 21 October 1950) 75 UNTS 287.

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.<sup>158</sup>

Article 64 GCIV is slightly more permissive. It allows the Occupying Power to change the laws in force in cases where they constitute a threat to [the Occupier's] security.<sup>159</sup> Further, the Occupying Power may also subject the population of the occupied territory to,

provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration...<sup>160</sup>

There is debate about how these provisions interact with the normative pull of human rights law.<sup>161</sup> However, the important point for taxonomical purposes is that contributors to the *jus post bellum* debate interpreted the changes made to post-intervention Iraq as non-consensual legal reform which took place in relative freedom from any accountability mechanisms.<sup>162</sup> For example, Kristen Boon argued that the intervening forces could 'operate with nearly untrammelled discretion, above the checks and balances' normally required by the rule of

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<sup>158</sup> Convention IV respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, (Hague Convention) (adopted 18 October 1907, entry into force 26 January 1910); Geneva Convention Relative to the Protection of Civil Persons in Time of War, (GC IV) (adopted 12 August 1949, entry into force 21 October 1950) 75 UNTS 287.

<sup>159</sup> Article 64 Geneva Convention Relative to the Protection of Civil Persons in Time of War, (adopted 12 August 1949, entry into force 21 October 1950) 75 UNTS 287.

<sup>160</sup> Geneva Convention Relative to the Protection of Civil Persons in Time of War, (adopted 12 August 1949, entry into force 21 October 1950) 75 UNTS 287, art. 64.

<sup>161</sup> See Adam Roberts, 'Transformative Military Occupations: Applying the Laws of War and Human Rights', 100 *American Journal of International Law* (2006).

<sup>162</sup> Kristen Boon, 'Legislative Reform in Post-Conflict Zones', (2005) 50 *McGill Law Journal*, 285.

law.<sup>163</sup> As a response, Boon called for a *jus post bellum* which would require that ‘international authorities and occupants who assume governing and legislative duties exercise their powers according to certain principles of justice’.<sup>164</sup> In her view, ‘trusteeship, accountability and proportionality’ could be used to ‘articulate substantive standards in the legal frameworks applicable to occupation’.<sup>165</sup> How this would actually operate as a matter of law is unclear and vague. It could be that Boon was simply calling for a new interpretive stance rather than new rules and norms. More will be said about this approach in Part B of this thesis.

As with the just war theorists, these comments are relatively detached from the realities of post-conflict Colombia. Boon’s work calls for a new paradigm of post-intervention law that creates normative parameters for the possible activities of intervening States and international organizations. A similar approach was adopted by Jean L. Cohen who argued that it was imperative to ‘come up with international law principles adequate to the normative and structural conditions of the current epoch’.<sup>166</sup> Thus, the idea that the law of occupation was unfit for purpose was, again, the motivating factor behind the definition of *jus post bellum* as a proposal for legal reform. Cohen’s view was that a new *jus post bellum* was needed to restructure the law of occupation. For Cohen, this new *post bellum* law should incorporate the principle of self-determination. The occupier ‘is trustee for the sovereignty of the indigenous population, [...] it must ensure that the latter has the opportunity, at the earliest possible moment and with the greatest possible scope and autonomy, to determine its own political institutions’.<sup>167</sup> This mirrors arguments put forward by Walzer and Bass about

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<sup>163</sup> Kristen Boon, ‘Legislative Reform in Post-Conflict Zones’, (2005) 50 *McGill Law Journal*, 285.

<sup>164</sup> Kristen Boon, ‘Legislative Reform in Post-Conflict Zones’, (2005) 50 *McGill Law Journal*, 285, 290.

<sup>165</sup> Kristen Boon, ‘Legislative Reform in Post-Conflict Zones’, (2005) 50 *McGill Law Journal*, 285, 326.

<sup>166</sup> Jean L. Cohen, ‘The Role of International Law in Post – Conflict Constitution – Making: Toward a *Jus Post Bellum* for ‘Interim Occupations’, 51 *New York Law School Review* (2006/2007), 498, 502.

<sup>167</sup> Jean L. Cohen, ‘The Role of International Law in Post – Conflict Constitution – Making: Toward a *Jus Post Bellum* for ‘Interim Occupations’, 51 *New York Law School Review* (2006/2007), 498, 527.

the necessity of local ownership in reconstruction processes. As such, the ‘post-intervention’ literature is based on the borrowing of just war theory arguments for the purposes of the development of the law of occupation.<sup>168</sup>

Furthermore, Cohen argued that the principle of State-sovereignty demanded a narrow interpretation of human rights norms by international actors because ‘an occupant cannot be expected to institute all the human rights protections that exist in international covenants’.<sup>169</sup> In terms of resources, this may be true and arguments made by Charles Garraway in relation to an occupiers detention powers support Cohen’s point. Garraway has argued that faced with poor detention facilities in Afghanistan, an occupier may be faced with a conundrum.

If they hand over detainees to unsatisfactory Afghan facilities, they are open to criticism and indeed, may, subject to applicability, be in breach of their own human rights obligations. On the other hand, if they seek to hold the detainees themselves, there are further issues as to authority and different human rights obligations may arise.<sup>170</sup>

Thus, for Cohen, the *jus post bellum* regime had to chart a middle course between rigid adherence to the strictures of occupation law and ‘overly-enabling reforms in the name of human rights or ‘democratic regime-change’.<sup>171</sup>

These arguments in favour of a new law for post-intervention reconstruction are misconceived. Although made in good faith, the creation of a new legal regime applicable to the post-intervention phase would likely encourage military interventions to the detriment of

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<sup>168</sup> In terms of a new Additional Protocol on post-intervention matters, chapter 3 will identify certain pitfalls in this approach. In terms of an interpretive approach, Part B will evaluate the plausibility of this version of the *jus post bellum*.

<sup>169</sup> Jean L. Cohen, ‘The Role of International Law in Post – Conflict Constitution – Making: Toward a *Jus Post Bellum* for ‘Interim Occupations’, 51 *New York Law School Review* (2006/2007), 498, 529.

<sup>170</sup> Charles Garraway, ‘The *Jus Post Bellum*: A Practitioner’s Perspective’, in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008) 153, 158.

<sup>171</sup> Jean L. Cohen, ‘The Role of International Law in Post – Conflict Constitution – Making: Toward a *Jus Post Bellum* for ‘Interim Occupations’, 51 *New York Law School Review* (2006/2007), 498, 501.

weaker States.<sup>172</sup> A set of unilateral legal obligations to reconstruct States may add strength, in practical terms, to a legal *right* to undertake humanitarian intervention. This is especially the case when these obligations are linked to the central tasks of reconstruction (establishing the rule of law, order and security, preparing free and fair elections, building democratic institutions, implementing economic liberalization and implementing human rights and liberties). These *jus post bellum* obligations are easily capable of being interpreted as powers. In fact, a new Additional Protocol would arise *de jure*. A questionable intervention into the affairs of weaker States (on ‘humanitarian’ grounds) would be made more legitimate if international law provided concrete norms for post-intervention reconstruction along liberal democratic lines. Boon recognizes as much when she highlights the *jus post bellum* end goals, ‘to establish security, create the political and economic basis for independence, and promote a democratic process’. In this way, from the outset, the legalization of the *jus post bellum* raises (rather than diminishes) concerns of neo-colonialism and imperialism. In arguing that the *jus post bellum* could be used to maximize the accountability of foreign interveners and re-establish the rule of law, these same interveners accrue special powers that grant them the rights to rebuild States and territories in their image. This argument will be fleshed out in chapter 3 in relation to Orend’s call for a new Additional Protocol.

### **2.3.3. The *jus post bellum* as a new law that has already emerged**

The *jus post bellum* has also been used to denote a new legal practice that has already altered the existing law. Carsten Stahn has argued that the practice of States and international organizations in the field of peace-making has provided evidence of the ‘crystallization of

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<sup>172</sup> Roxana Vatanparast, ‘Waging Peace – Ambiguities, Contradictions, and Problems of a *Jus Post Bellum* Legal Framework’, in Carsten Stahn, Jennifer Easterday and Jens Iverson, (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014) 142.

certain rules and institutional frameworks for the organization of peace'.<sup>173</sup> Stahn focuses on peace agreement practice to argue that peace-making has become internationalized.<sup>174</sup> For Stahn,

Modern peace agreements regularly contain a large regulatory component, including numerous provisions on the organization of public authority and individual rights, such as provisions on transitional government, claims mechanisms, human rights clauses, provisions on demobilization, disarmament and reintegration, as well as provisions on individual accountability.<sup>175</sup>

Stahn's point is that these regulatory provisions, when considered alongside 'structures and institutional frameworks' to ensure compliance, result in a new legal practice, a new *jus post bellum*.<sup>176</sup> Stahn argues that a new legal paradigm has arisen insofar as international practice has realised that the outcome of peace agreement negotiations cannot be 'left entirely to the skills of negotiators'.<sup>177</sup> Thus, he points to the interconnected nature of contemporary international society and argues that it creates a trend towards viewing peace-making as an activity of concern to the 'international community' as a whole.<sup>178</sup>

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<sup>173</sup> Carsten Stahn, 'Jus Post Bellum: Mapping the Discipline(s)' in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008), 93, 100.

<sup>174</sup> Carsten Stahn, 'Jus Post Bellum: Mapping the Discipline(s)' in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008), 93, 100.

<sup>175</sup> Carsten Stahn, 'Jus Post Bellum: Mapping the Discipline(s)' in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008), 93, 100.

<sup>176</sup> Carsten Stahn, 'Jus Post Bellum: Mapping the Discipline(s)' in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008), 93, 100.

<sup>177</sup> Carsten Stahn, 'The Future of the Jus Post Bellum', in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008), 231, 236.

<sup>178</sup> See for example, Stephen C. Neff, 'Conflict Termination and Peace – Making in the Law of Nations: A Historical Perspective' in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008), 77.



It is true that after the Cold War there has been a demonstrable trend towards the multilateralization of peace-making efforts.<sup>179</sup> It may be that international practice of States and international organizations has ‘crystallized’ around a body of new post-conflict *norms*.<sup>180</sup> However, whether these are probative of a new legal paradigm which has altered the existing legal framework is more controversial. The difficulty arises in ascribing *legal* status to a body of normative parameters which are of uncertain scope and applicability. Not every rule that creates order in the international system of States is a *legal* rule.<sup>181</sup> It is better to see this approach to the *jus post bellum* as an interpretive approach which focuses on principles rather than law. Gallen has argued that the *jus* in the *jus post bellum* ought to be thought of as an interpretive framework of post-conflict principles.<sup>182</sup> But Gallen adds that the interpretive framework ought to be understood as a Dworkinian framework. This involves seeing international law as an interpretive system subject to the overarching principle of integrity. The full implications of this view, in relation to child soldier accountability, will be discussed in detail in chapters 4 - 6. The important point to make for this chapter is that these principles are no less ‘*legal*’ for their failure to correspond to the formal international law-making processes of treaty and customary law. This is owing to the fact that law itself, for Dworkin, includes and is justified by those moral principles which best explain and justify the legal order as a whole. Gallen’s *jus post bellum* theory attempts to respond to the fragmented nature of law and practice in post-intervention reconstruction by relying on post-conflict principles. But using moral principles to resolve the indeterminacy of legal rules is open to the criticisms advanced by Koskeniemi, Çali and Cryer. The views of the powerful may be

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<sup>179</sup> Gregory Fox, ‘Navigating the Unilateral/Multilateral Divide’, in Carsten Stahn, Jennifer Easterday and Jens Iverson (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014), 230.

<sup>180</sup> The question is whether these are legal norms in the ‘proper’ sense. For an argument in favour of maintaining a clear boundary between legal and non-legal norms see Prosper Weil, ‘Towards Relative Normativity in International Law?’, 77 *AJIL* 413.

<sup>181</sup> Hedley Bull, *The Anarchical Society – A Study of Order in World Politics* (Palgrave Macmillan, Basingstoke: 2012) 5.

<sup>182</sup> James Gallen, ‘*Jus Post Bellum: An Interpretive Framework*’, in Carsten Stahn, Jennifer Easterday and Jens Iverson (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014), 58. Part B of this thesis examines whether this conceptualisation is useful for post – conflict practitioners working in transitional criminal justice.

imposed on those of the weak. Whether and how Gallen's theory helps to identify the rules of transitional criminal justice is the central task of Part B of this thesis.

Eric De Brabandere has argued that Gallen's theory is a rather 'minimalist' conception of the *jus post bellum* (especially when compared with the some of the more assertive earlier suggestions).<sup>183</sup> But this is owing to the fact that Brabandere does not consider the implications of, what he calls the 'rather jurisprudential' element of Gallen's version of the *jus post bellum*.<sup>184</sup> It is common for mainstream international lawyers simply to refuse to engage with any theoretical enquiry into the nature of the international legal order. Reimagining the *jus post bellum* as an interpretive framework implies that the mainstream view of international law is only a part of the broader legal picture. Emphasizing the role of post-conflict principles in regulating the behaviour of States and international organizations implies a broader view of 'international law' than is usually permitted by the mainstream epistemic communities that seek to influence State behaviour.<sup>185</sup> Gallen's argument that the practice of States and international organizations during transitions is governed and justified by the principles of the *jus post bellum* implies a departure from the mainstream approach to international law.

In discussing post-intervention peacebuilding Gallen focuses on the principles of accountability, proportionality and stewardship. In relation to transitional criminal justice, Gallen might argue that the principles of reconciliation, rehabilitation, non-repetition, accountability and proportionality have shaped the practice of States in transition. According to this view, reference to these principles ought to be made when States and international

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<sup>183</sup> Eric De Brabandere, 'The Concept of *Jus Post Bellum* in International Law', in Carsten Stahn, Jennifer Easterday and Jens Iverson (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014) 123.

<sup>184</sup> Eric De Brabandere, 'The Concept of *Jus Post Bellum* in International Law', in Carsten Stahn, Jennifer Easterday and Jens Iverson (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014) 123, 137.

<sup>185</sup> Andrea Bianchi, *International Law Theories – An Inquiry into Different Ways of Thinking* (New York, OUP: 2016) 12: an epistemic community refers to, 'the 'knowledge' we have of a given field, to the way in which we come to apprehend it theoretically, to use it practically, and to explain its operation'. See also Fish's notion of an 'interpretive community', in Stanley Fish, *Is There a Text in this Class? – The Authority of Interpretive Communities* (Cambridge, Massachusetts, Harvard University Press: 1980).

organizations aim to justify any incoherence in their approach to post-intervention peacebuilding. However, many problems surround the re-interpretation of international law as an interpretive legal order that aims at integrity. Very little research has been done on how the concept of integrity functions in the international legal order.

#### **2.3.4 Interpretive principles and the *lex pacificatoria***

Gallen's *jus post bellum* as 'interpretive principles' echoes Bell's work on a new *lex pacificatoria* that covers the peace agreement practice.<sup>186</sup> However, Bell is explicit that these new norms are *not* law in the traditional sense of the word. She argues that as international law affects the possibilities of peace-making, so conflict resolution techniques have affected the nature of the legal norms. In her words,

The term *lex pacificatoria* acknowledges that international law may usefully be shaped by conflict resolution innovations, even as it attempts to shape settlement terms, [...] In remaining open to viewing both those parties to the conflict and international legal actors as peace-makers capable of the generation of pluralist and competing legal standards, the term *lex pacificatoria* also points to the contingent nature of new ad – hoc legal developments...<sup>187</sup>

Thus, for Bell, the emerging 'post-conflict law' is a result of the way peace-makers are using the relevant legal categories. For example, in relation to transitional criminal justice, Bell argues that the new *lex* has emerged from 'the overall import and direction of human rights, humanitarian and international criminal law when read as a unified body', rather than from

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<sup>186</sup> Christine Bell, *Peace Agreements and Human Rights* (New York, OUP: 2000); *On the Law of Peace – Peace Agreements and the Lex Pacificatoria* (New York, OUP: 2008).

<sup>187</sup> Christine Bell, 'Of *Jus Post Bellum* and *Lex Pacificatoria* – What's in a Name?', in in Carsten Stahn, Jennifer Easterday and Jens Iverson (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014), 181, 205.

‘any one convention or provision’.<sup>188</sup> Stahn makes a similar point when he argues that a ‘piecemeal’ approach to the *jus post bellum* is misguided. Instead he identifies the challenge of post-conflict law as relating to the definition of the ‘interplay between different legal orders and bodies of law’.<sup>189</sup> But on this reading, the fragmented nature of post-conflict law means that ‘the law’ on many topics is identified as a result of interpretation. However, the way that the law is interpreted, according to Bell, depends on a negotiated response to why the conflict emerged, who won, and why it ought to be over. Thus, the interpreters bring their own experiences of conflict to the interpretation of post-conflict law. The normativity in the system comes less from traditional approaches to law and more from the way that subsequent post-conflict situations investigate previous transitions. The way law has been interpreted in post-conflict situations presents normative parameters for what is possible as a matter of law in subsequent transitions. For Stahn, all of this means that ‘the conceptual development of *jus post bellum* requires more inter-disciplinary discourse’ and that law ‘may draw valuable insights from the content of the classical *jus post bellum* under just war doctrine.’<sup>190</sup> But States are unlikely to support a new *jus post bellum* category that relies on particular interpretations of just war theory.

Bell’s approach to the *lex pacificatoria* is very different to the way that Orend and Gallen use the term *just post bellum*. This is owing to the strictly inductive methodology that is involved in her study. Orend and Gallen mix inductive and deductive approaches. Orend argues for a more ‘robust’ set of top-down rules that are applicable after a victorious power

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<sup>188</sup> Christine Bell, *On the Law of Peace – Peace Agreements and the Lex Pacificatoria* (New York, OUP: 2008), 244; see also Diane Orentlicher, “‘Settling Accounts’ Revisited: Reconciling Global Norms with Local Agency”, 10 *International Journal of Transitional Justice*, (2007) 10.

<sup>189</sup> Carsten Stahn, ‘*Jus Post Bellum*: Mapping the Discipline(s) in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008), 93, 105.

<sup>190</sup> Carsten Stahn, ‘*Jus Post Bellum*: Mapping the Discipline(s) in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008), 93, 112.

defeats an unjust enemy.<sup>191</sup> These are to be deduced from a Kantian approach to international justice. The innovation introduced by Gallen is that the *jus* in the *jus post bellum* must adhere to the Dworkinian principle of integrity. This will be explained in more detail in chapter 4. Chapter 5 then demonstrates what the *jus post bellum* as integrity in relation to post-conflict Colombia might look like. Integrity is an overarching moral principle.<sup>192</sup> It requires that legal interpretations represent the entire legal order as a coherent and unified legal system. This aspect of Gallen's theory is plainly at odds with Bell's characterization of the emerging law which emphasizes that peacemakers are creating the new law from the 'bottom-up'. As Bell has argued, the *lex pacificatoria* 'does not signal a fully-fledged regime as a possible, or desirable, end point [...] it signals that the indeterminacy of post-conflict law may indeed be a 'good thing'.<sup>193</sup> For Bell, instead of regulating negotiation outcomes, it may be better to 'provide broad normative parameters' which 'support the idea that negotiated outcomes should be both capable of implementation and accord with some sense of justice, while leaving room for the contestation over what concepts such as "accountability", "justice" and even "peace" require'.<sup>194</sup> In relation to transitional criminal justice, Bell's formulation makes sense. In the context of non-international armed conflicts such as Colombia, peace depends on the parties negotiating a solution which is acceptable to victims and former perpetrators alike. This extends to the decisions made by the chief prosecutor in relation to the criminal liability of child soldiers. In this respect, a commitment may be seen potentially as closing off certain avenues and possibilities of innovation and interpretation in post-conflict law. The Dworkinian method, as will be seen in chapter 5, emerges from a study of common-law

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<sup>191</sup> Christine Bell, 'Of *Jus Post Bellum* and *Lex Pacificatoria* – What's in a Name?', in in Carsten Stahn, Jennifer Easterday and Jens Iverson (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014), 181, 205.

<sup>192</sup> Ronald Dworkin, *Law's Empire*, (Oxford, Hart Publishing: 2006), 178.

<sup>193</sup> Christine Bell, 'Of *Jus Post Bellum* and *Lex Pacificatoria* – What's in a Name?', in in Carsten Stahn, Jennifer Easterday and Jens Iverson (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014), 181, 205.

<sup>194</sup> Christine Bell, 'Of *Jus Post Bellum* and *Lex Pacificatoria* – What's in a Name?', in in Carsten Stahn, Jennifer Easterday and Jens Iverson (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014), 181, 205.

adjudication and the principle of *stare decisis*. Thus, the *jus post bellum* as integrity urges coherence in interpretations which the *lex pacificatoria* does not. Arguably, when the aims are an end to fighting and a more sustainable and peaceful future, the coherence in the law ought to make way for the political imperatives of discrete transitional societies.

### **3. Conclusion**

Good reasons exist for maintaining a strict positivist methodology in the identification of international law. It is a deep concern to many international lawyers, not to mention States, that mixing morality into the law increases the risk of allowing the powerful to influence the law to their own ends. The international legal order defends against this possibility by promoting the sovereign equality of its members as the foundational principle of international law. One way of understanding this principle is that it represents the ‘persistent, though bounded, disagreement [about] what constitutes a legitimate and just internal public order.’<sup>195</sup> Therefore, recognising that the foundation of international law rests on sovereign equality helps to ‘militate against powerful States’ penchant for invoking universal principles to rationalise unilateral (and typically self-serving) impositions upon weak States (and subjugated peoples).’<sup>196</sup>

This does not preclude an approach to the identification of normative parameters or principles which have emerged through State practice. Not all rules are legal rules. However, whether certain rules or norms ought to be ‘hardened’ into law in relation to transitional criminal justice might be doubted. The dilemmas exist because of the social

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<sup>195</sup> Brad Roth, ‘Sovereign Equality and ‘Bounded Pluralism’ in the International Legal Order’, *Proceedings of the Annual Meeting (American Society of International Law)*, Vol. 99, March 30 - April 2, 2005, 392.

<sup>196</sup> Brad Roth, ‘Sovereign Equality and ‘Bounded Pluralism’ in the International Legal Order’, *Proceedings of the Annual Meeting (American Society of International Law)*, Vol. 99, March 30 - April 2, 2005, 392.

context of transitions. In these situations, forward-looking analyses that focus on the establishment of a stable and secure peace are to be favoured.

The principle of sovereign equality guards against the transposition of a (moral) version of the *jus post bellum* into international law. No amount of academic enthusiasm will create a new legal category for post-conflict peacebuilding. The methodology of international law is fixed. If there is to be a new *jus post bellum*, it will be States that decide to legislate to those ends. Whether a new post-conflict law on transitional criminal justice ought to be codified is the subject matter of chapter 3. Whether a more minimal conceptualization of ‘the *jus post bellum* as principles’ is useful is the subject matter of Part B.

## **CHAPTER 3: THE *JUS POST BELLUM* AS A NEW ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS<sup>1</sup>**

### **3.1 Introduction**

The previous chapter demonstrated how the *jus post bellum* has been used in different ways by different epistemic communities and, sometimes, within the same epistemic community. It identified two ways that the *jus post bellum* has been used as a normative concept in international law:

- i) as a proposal for a new Additional Protocol to the Geneva Conventions as proposed by Brian Orend or,<sup>2</sup>
- ii) as a Dworkinian interpretive framework for the post-conflict legal landscape as proposed by James Gallen.<sup>3</sup>

The overall aim of this thesis is to evaluate whether and how each of these proposals are practically useful. This chapter evaluates the first of these: whether the *jus post bellum* ought to be a new Additional Protocol to the Geneva Conventions.<sup>4</sup> The current law of armed

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<sup>1</sup> Although Brian Orend calls for a ‘new Geneva Convention’, a new post-conflict law technically would be drawn up as a new Protocol to the existing Geneva Conventions. There are currently three Additional Protocols to the Geneva Conventions: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts 1977 (AP I) 1125 UNTS 3 and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts 1977 (AP II), 1125 UNTS 609 (both Protocols adopted 8 June 1977, entered into force 7 December 1978) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (AP III) (adopted 8 December 2005, not yet entered into force) (available at: <http://www.refworld.org/docid/43de21774.html>).

<sup>2</sup> Brian Orend, ‘*Jus Post Bellum* – A Just War Theory Perspective’, in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008) 31.

<sup>3</sup> James Gallen, ‘*Jus Post Bellum*: An Interpretive Framework’, in Carsten Stahn, Jennifer Easterday and Jens Iverson, (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014) 58.

<sup>4</sup> Brian Orend, ‘*Jus Post Bellum* – A Just War Theory Perspective’, in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008) 31. Although self-avowedly discussing ‘post-war



conflict provides no single coherent set of rules for transitional criminal justice. A new post-conflict set of rules, therefore, might appear as a desirable and necessary development. All States have an interest in the successful termination of armed conflicts. Therefore, the identification of legal rules on reconstruction ought to be, *prima facie*, desirable. However, the burden of proof for reform of the current legal framework is on Brian Orend and other proponents of the *jus post bellum*. This chapter evaluates whether the case for a new *jus post bellum* has been made convincingly enough.

The nature of peacebuilding means that the proposals could be evaluated in relation to many areas of post-conflict peacebuilding. The discussion in this chapter focuses on transitional criminal justice and the criminal accountability of child soldier perpetrators of international crimes.<sup>5</sup> This is an area of law that is unclear. The law is founded on a mixed and fragmented legal framework that draws on domestic criminal law as well as international human rights law, international humanitarian law and international criminal law. According to Orend, a new *jus post bellum* Protocol ought to be agreed in order to resolve some of this uncertainty.<sup>6</sup> This chapter, therefore, asks whether a new Additional Protocol is needed; whether agreement on the rules of transitional criminal justice would be possible and whether such a development would be desirable. Furthermore, a detailed discussion on the law on child soldiers is lacking in almost all the *jus post bellum* literature.<sup>7</sup> But the reintegration of child soldiers into post-conflict civilian communities is crucial. Those children who are

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justice', Orend argues for the reform of the law of armed conflict. This chapter evaluates Orend's proposal from a legal perspective. Whether Orend's arguments are plausible or not from the perspective of just war theory is not considered.

<sup>5</sup> International core crimes are defined as serious war crimes, crimes against humanity, genocide and aggression, see Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmhurst, *An Introduction to International Criminal Law and Procedure* (Cambridge, CUP: 2011), 4.

<sup>6</sup> See Carsten Stahn, 'Jus ad bellum', 'jus in bello' ... 'jus post bellum'? – Rethinking the Conception of the Law of Armed Force', 17 *EJIL* (2006) 921; James Gallen, 'Jus Post Bellum: An Interpretive Framework', in Carsten Stahn, Jennifer Easterday and Jens Iverson, (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014) 58.

<sup>7</sup> Though see, Mark Drumbl, 'Child Soldiers, Transitional Justice, and the Architecture of *Post Bellum* Settlements', in Larry May and Andrew T. Forcehimes, (eds.) *Morality, Jus Post Bellum and International Law*, (CUP, New York: 2012), 139.

implicated in international crimes represent a risk in terms of the peace process.<sup>8</sup> Yet, in Colombia, whether and how child soldiers ought to participate in transitional criminal justice measures is unclear. The transitional criminal justice measures were the most contentious aspect of the peace negotiations.<sup>9</sup> The measures as they relate to child soldier perpetrators are very ambiguous. Transitional criminal justice, therefore, represents a crucial area of post-conflict law which is a good ‘testing ground’ for Orend’s idea of a new post-conflict Additional Protocol to the Geneva Conventions. If the *jus post bellum* as proposed by Orend ought to be supported in relation to this difficult issue, then other areas of post-conflict law could also come under consideration for legal reform. On the other hand, if Orend’s proposal ought to be rejected, then similar arguments in relation to other areas of post-conflict law might be considered as reasons against legal reform in those areas.

It is not possible to answer the question of the thesis without taking a position on Orend’s theory. The question asks whether the *jus post bellum* concept is useful for practitioners in solving a particular problem in post-conflict law. Orend’s proposal represents the most direct way that the *jus post bellum* concept could be useful – i.e. by representing a new ‘third branch’ of the law of armed conflict, i.e. a *jus post bellum* as a matter of positive international law, that would take precedent over the other areas of international law by virtue of being the *lex specialis* on point.

To be clear, as Colombia tries to decide how to deal with the criminal accountability of its child soldier perpetrators, there is no post-conflict legal framework in international law that provides a direct answer. Instead, international law provides a number of different rules and post-conflict actors in Colombia must use these parameters and arrive at a plausible

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<sup>8</sup> ‘Spoilers’ are defined as those individuals or groups that through their activities make it difficult for transitional societies to emerge from armed conflict. In this context, child soldiers implicated in international crimes may be at a risk of turning to organised crime and this is a destabilising factor in post-conflict phase.

<sup>9</sup> In Colombia, the negotiating parties took three times as long to agree on transitional justice than on any other issue in the peace agreement negotiations.

interpretation of the law. Orend suggests that a Kantian version of the *jus post bellum* does provide answers to the dilemma. Thus, if Orend is right, the answer to the thesis question would be a simple ‘yes’ – the *jus post bellum* would be useful in helping practitioners solve particular dilemmas in post-conflict law. However, if Orend is wrong and a new additional protocol is undesirable, unnecessary or, perhaps, impossible, then one of the most assertive and important *jus post bellum* theories would be unhelpful and the answer to the thesis question would be no. The point of the thesis, overall, is to study the two main *jus post bellum* theories and decide if they are helpful in practice. If not, then the *jus post bellum* concept probably ought not to attract much more attention from scholars.

Section 3.2 sets out the dilemma of transitional criminal justice in general and in relation to child soldiers implicated in international crimes. Section 3.3 sets out Orend’s proposed answer to this problem. Section 3.4 critically evaluates two issues that arise in relation to Orend’s theory. First, whether Orend’s reliance on a ‘Kantian’ *jus post bellum* is appropriate in terms of contemporary international law. Second, it deals with the difficulty in identifying the ‘post’ in deciding when a new Additional Protocol ought to apply. Section 3.5 evaluates whether Orend’s proposal is possible. Considerable difficulties would accompany negotiations on new rules for transitional criminal justice matters. Section 3.6 argues that a new Additional Protocol is not strictly necessary because as a matter of international law, human rights law and humanitarian law provide (at least some) normative parameters to deal with child soldier accountability. It is important to recognise that the current approach affords post-conflict societies with a certain flexibility to tailor transitional criminal justice to the requirements of the transition. This is important as not all post-conflict societies are the same. Furthermore, child soldiers are not a uniform set of individuals and the legal response ought to be tailored to the problems of different post-conflict societies. In section 3.7, this chapter concludes by asserting that in relation to transitional criminal justice

and child soldiers, Orend's *jus post bellum* proposal ought not to be supported. Thus, a different conceptualization of the *jus post bellum* is necessary if it is to be relevant to the field of post-conflict law. Part B of this thesis introduces and evaluates a more sophisticated version of the *jus post bellum* that focuses on its possible usefulness as an interpretive framework.

### **3.2 The dilemmas of transitional criminal justice**

Legal reform is premised on the existence of a problem that requires a new legal solution. This section begins by setting out the 'problem' that Orend's *jus post bellum* proposal sets out to solve: the dilemma of transitional criminal justice in general and in relation to child soldiers in particular.

#### **3.2.1 General dilemma: peace vs. justice**

The context of transitions gives rise to a tension between 'international criminal lawyers' goal of ending impunity [justice] and conflict mediators' goal of resolving conflicts as quickly as possible [peace]'.<sup>10</sup> In the context of non-international armed conflict, the very point of a transition is the end of the armed conflict and a concerted effort to move towards a more peaceful society. Thus, peace negotiators must design peace agreements that are mutually acceptable to the parties to the conflict. This offers a good opportunity for an end to

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<sup>10</sup> Theodor Meron, *The Making of International Criminal Justice: The View from the Bench: Selected Speeches* (New York, OUP: 2011), 157. The notions of 'justice' and 'peace' are, of course, highly contentious. I use 'justice' here to mean criminal justice, i.e. criminal accountability after a trial. I use 'peace' to mean the end of hostilities (i.e. a ceasefire, or a 'negative' peace). On the distinction between 'negative' and 'positive' peace see John Galtung, *War and Defence: Essays in Peace Research* (Copenhagen, Christian Eljers: 1975), 76. On the Kantian idea of a 'perpetual peace' see, the difference between a 'suspension of hostilities' and an 'end to all hostilities', in Hans Reiss (ed.) *Kant – Political Writings* translated by H. B. Nisbet, (Cambridge, CUP: 2001), 94.

hostilities and increases the possibilities of a move back towards a ‘positive’ and sustainable peace.<sup>11</sup>

In Colombia, the FARC-EP demanded a role in the political establishment in exchange for bringing to an end the armed struggle.<sup>12</sup> Although for many this has been controversial, a refusal to accept the transformation of the FARC-EP from guerrilla army to a political party would be tantamount to refusing to end the armed conflict. The peace agreement States that the ‘construction and consolidation’ of peace depends on a ‘democratic expansion’ that allows ‘new forces to emerge’ in the political landscape.<sup>13</sup> Thus, the peace agreement guarantees five FARC-EP seats in the Congress and five in the Senate.<sup>14</sup> Furthermore, the FARC-EP party will contest the general elections in 2018.<sup>15</sup>

At the same time, the five decades long internal armed conflict has generated many victims and survivors of atrocities. New generations follow the old and ‘the past, unaccounted for, does not lie quiet’.<sup>16</sup> In Colombia, there are now almost 8.5 million registered victims.<sup>17</sup> This represents almost one in five of the total population.<sup>18</sup> Everybody in Colombia knows somebody affected by the armed conflict. Accounting for serious crimes

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<sup>11</sup> On ‘positive peace’ see John Galtung, *War and Defence: Essays in Peace Research* (Copenhagen, Christian Eljers: 1975), 76.

<sup>12</sup> See Part 2 the ‘Final Agreement for the End of Conflict and the Construction of a Stable and Long Lasting Peace’, (hereafter the Peace Agreement) signed on 24 November 2016 and ratified by Congress 1 December 2016. The full text of the peace agreement is available at: <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf>. (I will use my translations from Spanish to English throughout).

<sup>13</sup> Part 2 the ‘Final Agreement for the End of Conflict and the Construction of a Stable and Long Lasting Peace’, (hereafter the Peace Agreement) signed on 24 November 2016 and ratified by Congress 1 December 2016. The full text of the peace agreement is available at: <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf>. (I will use my translations from Spanish to English throughout).

<sup>14</sup> Part 3, Point 3.2.1.2 of the ‘Final Agreement for the End of Conflict and the Construction of a Stable and Long Lasting Peace’, (hereafter the Peace Agreement) signed on 24 November 2016 and ratified by Congress 1 December 2016. The full text of the peace agreement is available at: <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf>. (I will use my translations from Spanish to English throughout).

<sup>15</sup> See <http://www.semana.com/nacion/articulo/acuerdo-de-paz-senado-aprueba-reforma-de-reincorporacion-politica-de-las-farc/523329> (last accessed 3 July 2017).

<sup>16</sup> Naomi Roht-Arriaza and Javier Mariezcurrena (Eds.) *Transitional Justice in the 21st Century – Beyond Truth v. Justice*, (Cambridge, CUP: 2006), 1.

<sup>17</sup> See ‘Official Register of Victims’, Government of Colombia Victims Unit, (in Spanish, available at: <https://rni.unidadvictimas.gov.co/RUV>, last accessed 1 July 2017).

<sup>18</sup> The total population of Colombia is 48.3 million.

committed during the conflict, therefore, presents itself as an imperative if the post-conflict settlement is designed to enjoy any democratic legitimacy. Indeed, in campaigning for a ‘no’ vote during the peace agreement referendum, former President Alvaro Uribe managed to mobilize a significant sector of the Colombian population against the peace agreement.<sup>19</sup> His campaign argued that the transitional criminal justice measures in the peace agreement were tantamount to impunity for the crimes committed by the FARC-EP and would be ‘the harbinger of future conflicts’.<sup>20</sup> This cannot be dismissed as purely political machinations. Human Rights Watch also argued that the transitional criminal justice measures in the peace agreement did not go far enough in respecting the rights of victims.<sup>21</sup>

Furthermore, post-conflict accountability for FARC-EP crimes can be understood in terms of domestic law. In non-international armed conflicts, rebel groups do not enjoy the ‘privilege of belligerency’.<sup>22</sup> In relation to Colombia, this means that, as a matter of international humanitarian law, the FARC-EP have never enjoyed ‘the right to participate directly in hostilities’.<sup>23</sup> Thus, throughout the armed conflict they have been subjected to the territorial and personal jurisdiction of Colombian criminal law. The Colombian Penal Code criminalizes sedition, rebellion and other acts that threaten the existence and security of the

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<sup>19</sup> See ‘Uribe: The Havana Agreement has Open and Hidden Impunity’ (in Spanish) <http://www.noticiasrcn.com/nacional-dialogos-paz/uribe-el-acuerdo-habana-tiene-impunidad-abierta-y-disfrazada> (last accessed 5 October 2016). I will rely on my own translations from Spanish to English throughout this article.

<sup>20</sup> See ABC International, ‘Uribe: Total Impunity will be the Mother of Future Violence’ (in Spanish) [http://www.abc.es/internacional/abc-alvaro-uribe-impunidad-total-sera-madre-nuevas-violencias-201610020243\\_noticia.html](http://www.abc.es/internacional/abc-alvaro-uribe-impunidad-total-sera-madre-nuevas-violencias-201610020243_noticia.html); see also ‘Ex-president Uribe Wages One-Man Twitter War against Colombia Peace Deal’ <https://www.washingtonpost.com/news/worldviews/wp/2015/09/25/ex-president-uribe-wages-one-man-twitter-war-against-colombia-peace-deal/> (both last accessed 5 October 2016).

<sup>21</sup> See ‘Human Rights Watch Analysis of Colombia - FARC-EP Agreement’ available at: <https://www.hrw.org/news/2015/12/21/human-rights-watch-analysis-colombia-farc-agreement> (last accessed 5 October 2016).

<sup>22</sup> See Frédéric Mégret, ‘Should Rebels be Amnestied?’, in Carsten Stahn, Jennifer Easterday and Jens Iverson (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014) 519, 521.

<sup>23</sup> The position is different in international armed conflicts, see Article 43.2 of AP I, “members of the armed forces of a party to a conflict [...] are combatants, that is to say, they have the right to participate directly in hostilities.”

State including ‘military hostility’.<sup>24</sup> Thus, FARC-EP combatants can be thought of as criminals that ought to be prosecuted rather than enemy combatants.<sup>25</sup>

Nevertheless, the end of the armed conflict is unlikely to arrive if the terms of the peace are perceived as worse (by FARC-EP combatants) than continued hostilities. In Colombia, the FARC-EP has challenged the government for a number of decades.<sup>26</sup> This situation of persistent armed conflict has come to represent the normal state of affairs for its members and for Colombian society. The transition to a new and uncertain political settlement is unlikely to be achieved if rebels are required to lay down their weapons in exchange for certain imprisonment. In these circumstances, peace negotiators are under pressure to agree to some post-conflict amnesties in exchange for the end of the conflict.<sup>27</sup>

The law on amnesties, however, is relatively unclear.<sup>28</sup> On the one hand, Bell and Roht-Arriaza have argued that blanket amnesties are no longer an option for States.<sup>29</sup> Although blanket amnesty laws have been challenged, it is not the case that they are altogether prohibited by international law.<sup>30</sup> Spain’s 1977 Amnesty Law provides for a blanket amnesty that continues to shield individual perpetrators from responsibility for atrocities committed

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<sup>24</sup> See Articles 111-132, *Colombian Penal Code, 2nd Book, Special Part*, ‘Delitos contra la Existencia y Seguridad del Estado’, and ‘Delitos contra el Régimen Constitucional’, available in Spanish at: <http://alcaldiademonteria.tripod.com/codigos/penal/sgndpnal.htm>

<sup>25</sup> Frédéric Mégret, ‘Should Rebels be Amnestied?’, in Carsten Stahn, Jennifer Easterday and Jens Iverson (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014) 519, 521.

<sup>26</sup> There is some debate about the ‘start’ of the armed conflict, for a brief summary see <https://www.elheraldo.co/politica/las-teorias-del-origen-del-conflicto-armado-en-colombia-184562> (in Spanish, last accessed 1 July 2017).

<sup>27</sup> In some ways this can be understood as the recognition of an ‘*ex-post* privilege of belligerency’, Frédéric Mégret, ‘Should Rebels be Amnestied?’, in Carsten Stahn, Jennifer Easterday and Jens Iverson (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014) 519, 521.

<sup>28</sup> See Diane Orentlicher, ‘Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime’, 100 *The Yale Law Journal* (1991) 2537; Yasmin Naqvi, ‘Amnesty for war crimes: Defining the limits of international recognition’, 85 *IRRC* (2003) 583; Lisa J. Laplante, ‘Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes’, 49 *Virginia Journal of International Law* (2009) 915;

<sup>29</sup> Naomi Roht-Arriaza, ‘Transitional Justice and Peace Agreements’, Geneva, International Council for Human Rights Policy, (2006), available online at: [http://www.ichrp.org/files/papers/63/128\\_-\\_Transitional\\_Justice\\_and\\_Peace\\_Agreements\\_Roht-Arriaza\\_Naomi\\_2005.pdf](http://www.ichrp.org/files/papers/63/128_-_Transitional_Justice_and_Peace_Agreements_Roht-Arriaza_Naomi_2005.pdf) (last accessed 1 July 2017); Christine Bell, *On the Law of Peace – Peace Agreements and the Lex Pacificatoria* (New York, OUP: 2008), 240.

<sup>30</sup> For example, in relation to a challenge to the Spanish amnesty law see [http://www.eldiario.es/norte/euskadi/Marzo-Martin-Villa-reconocer-trabajadores-jueza\\_Servini\\_0\\_659684310.html](http://www.eldiario.es/norte/euskadi/Marzo-Martin-Villa-reconocer-trabajadores-jueza_Servini_0_659684310.html) (last accessed 30 June 2017).

during Franco's regime.<sup>31</sup> Furthermore, the Mozambique Amnesty Law 15/92 of 14 October 1992 also failed to contain any accountability mechanisms for dealing with the atrocities committed by both sides during the conflict.<sup>32</sup> In relation to the armed conflict in Liberia, the Liberian President Charles Taylor, who was indicted by the Special Court for Sierra Leone, pressed for an amnesty in exchange for leaving the Presidency. Furthermore, the International Court of Justice recently has confirmed the absolute immunity of any incumbent head of State.<sup>33</sup> Finally, the peace process in El Salvador included a National Reconciliation Law that provided an amnesty law that made it virtually impossible to bring perpetrators of international crimes and human rights violations to justice.<sup>34</sup> The question, therefore, turns to the nature and conditions of the specific amnesties and the extent to which they are recognized by international law.

This is not a question that *jus post bellum* scholars have dealt with directly. In Colombia, the parties have negotiated a form of 'limited' justice.<sup>35</sup> The transitional justice mechanisms are part of the 'Integral System for Truth, Justice, Reparation and Non-Repetition'.<sup>36</sup> The agreement contemplates the creation of a number of separate but 'integrated' mechanisms. These include: a Truth, Reconciliation and Non-Repetition

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<sup>31</sup> See the 'consolidated version', *Amnesty Law 46/1977, 15 October 1977, BOE-A-1977-24937*, available at: <https://www.boe.es/buscar/pdf/1977/BOE-A-1977-24937-consolidado.pdf> (in Spanish, I use my own translations). The amnesty law continues to function as a 'shield' against the investigation and prosecution of those responsible owing to the fact that the main political parties continue to uphold its validity and vote against any proposed amendments, see <http://www.publico.es/politica/ley-amnistia-seguira-escudo-franquista.html> (last accessed 30 June 2017).

<sup>32</sup> Victor Igraja, 'Amnesty Law, Political Struggles for Legitimacy and Violence in Mozambique', 9 *International Journal of Transitional Justice* (2015) 239.

<sup>33</sup> *Case Concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of Congo v. Belgium) Judgment of 14 February 2002, ICR Reports 1 (2002).

<sup>34</sup> See Daniel Cerqueira and Leonor Arteaga, 'Challenging the Amnesty Law in El Salvador: Domestic and International Alternatives to Bring an End to Impunity', *Due Process of Law Foundation* (June 2016), available at: [http://www.dplf.org/sites/default/files/amnesty\\_law-final-24june.pdf](http://www.dplf.org/sites/default/files/amnesty_law-final-24june.pdf) (last accessed 1 July 2017).

<sup>35</sup> Ruti Teitel, *Transitional Justice* (New York, OUP: 2000).

<sup>36</sup> Part 5, 'Final Agreement for the End of Conflict and the Construction of a Stable and Long Lasting Peace', (hereafter the Peace Agreement) signed on 24 November 2016 and ratified by Congress 1 December 2016. The full text of the peace agreement is available at: <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf>. (I will use my translations from Spanish to English throughout).



Commission; a Special Search Unit for Conflict-Related Disappeared Persons; the Special Jurisdiction for Peace and a range of specific measures on reparations.<sup>37</sup> The parties have agreed that there are some crimes which are not capable of amnesties. Point 25, Part 5 states that '[t]here are crimes which are not capable of attracting amnesties or pardons'.<sup>38</sup> These are stated as 'crimes against humanity' and 'other crimes as defined in the Rome Statute'.<sup>39</sup> Points 40 and 41, Part 5 elaborate on the crimes which are incapable of attracting amnesties:

...crimes against humanity, genocide, serious war crimes (all systematic breaches of international humanitarian law), taking of hostages or other serious deprivations of liberty, torture, extrajudicial executions, forced disappearances, violent rape and other forms of sexual violence, the 'taking' of children, forced displacement, recruitment of children, as confirmed in the Rome Statute.<sup>40</sup>

However, those persons accused of committing these crimes can still avoid a jail sentence. The peace agreement states that sanctions will aim at 'satisfying the rights of victims and consolidating the peace'.<sup>41</sup> This means that perpetrators may come forward to accept responsibility and give a full factual account of the events that occurred and their

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<sup>37</sup> Part 5, 'Final Agreement for the End of Conflict and the Construction of a Stable and Long Lasting Peace', (hereafter the Peace Agreement) signed on 24 November 2016 and ratified by Congress 1 December 2016. The full text of the peace agreement is available at: <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf>.

(I will use my translations from Spanish to English throughout).

<sup>38</sup> Point 25, Part 5, 'Final Agreement for the End of Conflict and the Construction of a Stable and Long Lasting Peace', (hereafter the Peace Agreement) signed on 24 November 2016 and ratified by Congress 1 December 2016. The full text of the peace agreement is available at: <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf>.

(I will use my translations from Spanish to English throughout).

<sup>39</sup> Point 25, Part 5 'Final Agreement for the End of Conflict and the Construction of a Stable and Long Lasting Peace', (hereafter the Peace Agreement) signed on 24 November 2016 and ratified by Congress 1 December 2016. The full text of the peace agreement is available at: <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf>.

(I will use my translations from Spanish to English throughout).

<sup>40</sup> Point 40, Part 5 'Final Agreement for the End of Conflict and the Construction of a Stable and Long Lasting Peace', (hereafter the Peace Agreement) signed on 24 November 2016 and ratified by Congress 1 December 2016. The full text of the peace agreement is available at: <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf>.

(I will use my translations from Spanish to English throughout).

<sup>41</sup> Point 60, Part 5 'Final Agreement for the End of Conflict and the Construction of a Stable and Long Lasting Peace', (hereafter the Peace Agreement) signed on 24 November 2016 and ratified by Congress 1 December 2016. The full text of the peace agreement is available at: <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf>.

(I will use my translations from Spanish to English throughout).

involvement in the same. This can result (in some cases) in a semi-deprivation of liberty and service to the community of up to eight years for serious crimes.<sup>42</sup> What remains unclear is whether this system of transitional criminal justice will apply to child soldier perpetrators.

### **3.2.2 Transitional criminal justice and child soldier perpetrators**

The general dilemma between peace and justice provides the background to the specific issue of child soldiers. But the relationship between transitional criminal justice and child soldiers is complicated by a number of factors. Child soldiers are not a uniform group of individuals. This should not be surprising. There are an estimated 250,000 children worldwide involved in armed conflict.<sup>43</sup> Many child soldiers may be ‘forcibly recruited’ into armed groups.<sup>44</sup> But the individual situations, stories and circumstances of child soldiering vary.<sup>45</sup> In Colombia, an estimated 18,000 children have taken part in the armed conflict.<sup>46</sup> Some estimates in Colombia assert that up to 60% of those that joined the FARC-EP joined ‘of their own volition’.<sup>47</sup> Thus, the difference in individual circumstances makes it difficult to ascertain what ought to be the proper relationship between transitional criminal justice and under-18s. Further, in Colombia, the involvement of children in armed conflict must be understood in the context of Colombia’s juvenile delinquency problem. Recent estimates from 2013 assert

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<sup>42</sup> Point 60, Part 5 ‘Final Agreement for the End of Conflict and the Construction of a Stable and Long Lasting Peace’, (hereafter the Peace Agreement) signed on 24 November 2016 and ratified by Congress 1 December 2016. The full text of the peace agreement is available at: <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf>. (I will use my translations from Spanish to English throughout).

<sup>43</sup> Ilse Derluyn, Wouter Vandenhoe, Stephan Parmentier and Cindy Mels, ‘Victim and/or perpetrators? Towards and interdisciplinary dialogue on child soldiers’ 15 *BMC International Health and Human Rights* (2015) 1

<sup>44</sup> Peter W. Singer, *Children at War*, (New York, Pantheon Books: 2005) 60.

<sup>45</sup> Mark Drumbl, *Reimagining Child Soldiers in International Law and Policy*, (Oxford, OUP: 2012); Mark Drumbl, ‘Child Soldiers, Transitional Justice, and the Architecture of *Post Bellum* Settlements’, in Larry May and Andrew T. Forcehimes, (eds.) ‘Morality, *Jus Post Bellum* and International Law’, (CUP, New York: 2012), 139.

<sup>46</sup> Natalia Springer, *Como lobo entre corderos. Del uso y reclutamiento de niños, niñas y adolescentes en el marco del conflicto armado y la criminalidad en Colombia* (Bogotá: Springer Consulting Services, 2012), 34.

<sup>47</sup> Peter W. Singer, *Children at War*, (New York, Pantheon Books: 2005) 61; see also Ilse Derluyn, Wouter Vandenhoe, Stephan Parmentier and Cindy Mels, ‘Victim and/or perpetrators? Towards and interdisciplinary dialogue on child soldiers’ 15 *BMC International Health and Human Rights* (2015)

that there are over 34,000 cases of juvenile delinquency in Colombia. This is owing to socio-economic factors such as income inequality, institutionalized poverty, and lack of opportunities including education. However, the existence of non-State armed groups, associated with the right and the left of the political spectrum, are also to blame for the involvement of children in the commission of serious crimes. In Colombia, the age of minimum criminal responsibility is 14. Those under 14 can never be subjected to the criminal sanction. As a matter of ordinary justice, those between 14 and 18 years of age are subject to the *Sistema de Responsabilidad Penal para Adolescentes* (the ‘System for Adolescent Criminal Responsibility’, hereafter ‘SACR’) which treats all cases of juvenile criminal responsibility.<sup>48</sup> This is a hybrid system of justice which involves the creation of specialized teams of individuals that work with the relevant norms and institutions to decide what to do with instances of juvenile justice.<sup>49</sup> The relationship between the SACR and the transitional criminal justice mechanisms set up by the peace agreement remains to be seen. The peace agreement states that only children under 14 are immune from prosecution.<sup>50</sup> A special bracket between 14 and 18 has been agreed and the parties also agreed that the issue of child soldier perpetrators in this age bracket ‘will be studied at a later stage’.<sup>51</sup> This reflects the approach of the ‘ordinary’ justice system as reflected in the SACR. Under this system, children and adolescents between 14 and 18 can be subjected to the criminal sanction but the

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<sup>48</sup> Henry Torres Vásquez and Jairo Rojas Ángel, ‘Tratamiento al La Delincuencia Juvenil en Colombia en el Sistema De Responsabilidad de Adolescentes’, 30 *Verba Iuris* (Dec 2013) 115.

<sup>49</sup> Henry Torres Vásquez and Jairo Rojas Ángel, ‘Tratamiento al La Delincuencia Juvenil en Colombia en el Sistema De Responsabilidad de Adolescentes’, 30 *Verba Iuris* (Dec 2013) 115, 118.

<sup>50</sup> The ‘Model Criminal Code’ sets the minimum age of criminal responsibility at 12. The Code suggests that the trials of any 12-17 years olds should take place in ‘Special Panels for Juveniles’, see Article 322, Vivienne O’connor and Colette Rausch, *Volume 1: Model Codes for Post-conflict Criminal Justice – Model Criminal Code* (United States Institute of Peace, 2008) (hereafter ‘Model Criminal Code’).

<sup>51</sup> Joint Communiqué #70, Havana, Cuba, 15 May 2016, (Agreement on Minors) available at: <http://www.altocomisionadoparalapaz.gov.co/mesadeconversaciones/PDF/comunicado-conjunto-70-version-ingles-1-1463432344.pdf> (last accessed 21 June 2017).

‘superior interests of the child’ must take priority at all times.<sup>52</sup> Exactly how this system of juvenile justice will apply, and ought to apply, to those child soldiers suspected of the commission of international crimes remains unclear. However, given the high levels of juvenile delinquency, and the evidence that some child soldier perpetrators are adolescents and have volunteered to join armed groups, it may be argued that participation in transitional criminal justice mechanisms ought to be retained.

On the other hand, in terms of criminal responsibility, it may be possible to challenge the extent to which an under-18 is capable of ‘volunteering’ for an armed group. A typical argument from the international legal community is provided by the Special Representative of the UN Secretary-General who argued that there was no difference between forced recruitment and volunteering in her *amicus curiae* brief in the *Lubanga* case at the International Criminal Court.<sup>53</sup> As a matter of international criminal law, an individual must demonstrate ‘intention’ and ‘knowledge’ in order to attract criminal responsibility.<sup>54</sup> Thus, the issue is one of maturity and whether children involved in armed conflict can ever be culpable to the relevant extent. As mentioned, there are different paths into child soldiering and different experiences of child soldiering. These realities may (or may not) have an impact on whether a child soldier is guilty of the commission of international crimes. However, it ought not to influence the question of whether they ought to be prosecuted for the commission of international crimes. There is no doubt that in Colombia many children will have committed international crimes. Personal accounts of the type of acts that children have committed are available and there ought to be few evidentiary hurdles to providing a

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<sup>52</sup> Corte Suprema de Justicia, Proceso No. 35681, 29 June 2011, MP Julio Enrique Socha Salamanca, available online at: [http://www.icbf.gov.co/cargues/avance/docs/csj\\_scp\\_35681\(29-06-11\)\\_2011.htm](http://www.icbf.gov.co/cargues/avance/docs/csj_scp_35681(29-06-11)_2011.htm) (last accessed 1 August 2017).

<sup>53</sup> *Situation in the Democratic Republic of the Congo in the case of the Prosecutor v Thomas Lubanga Dyilo*, written submission of the UN Special Representative of the Secretary-General on Children and Armed Conflict, submitted in application of Rule 103 of the Rules of Procedure and Evidence, Decision of the Pre-Trial Chamber, No. ICC-01/04-01/06-1229-AnxA, paras. 13-14.

<sup>54</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), 2187 UNTS 90, article 30, available at: [https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf) (last accessed 12 July 2017).

detailed factual account of the relevant atrocities.<sup>55</sup> Thus, at the very least, the transitional justice response ought to be tailored to the individual situations that arise, for example, by the installation of a system of post-conflict juvenile justice.<sup>56</sup>

On current evidence, the international response to child soldiering is to deal with all child soldiers as victims.<sup>57</sup> There is a strong trend against the involvement of child soldiers in transitional criminal justice mechanisms. For example, the International Criminal Tribunal for the Former Yugoslavia did not prosecute anyone under the age of 18.<sup>58</sup> In Sierra Leone, the Special Court for Sierra Leone had jurisdiction over persons over the age of fifteen but no prosecutions were forthcoming. It is possible that a similar approach will be taken in Colombia. However, this would not necessarily be the best response to the problem of juvenile justice in Colombia. According to Mark Drumbl, the tendency to present *all* children involved in armed conflict as victims of armed conflict is well-intentioned but mistaken.<sup>59</sup> It creates problems in terms of reintegration of child delinquents into post-conflict communities. Those children that are implicated in international crimes or atrocities are a difficult and ‘at-risk’ subgroup of child soldiers.<sup>60</sup> Children implicated in war crimes or crimes against humanity are likely to require more help and support in the reintegration process. They are also more at risk of being re-criminalized and of joining organized crime

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<sup>55</sup> Human Rights Watch, “*You’ll Learn Not to Cry*”: *Child Combatants in Colombia* (New York, September 2003) 95, available online: <https://www.hrw.org/reports/2003/colombia0903/colombia0903.pdf> (last accessed 3 July 2017).

<sup>56</sup> See Vivienne O’connor and Colette Rausch, *Volume 1: Model Codes for Post-conflict Criminal Justice – Model Criminal Code* (United States Institute of Peace, 2008) (hereafter ‘Model Criminal Code’).

<sup>57</sup> Mark Drumbl, *Reimagining Child Soldiers in International Law and Policy* (New York, OUP: 2012).

<sup>58</sup> Fanny Levaue, “Liability of Child Soldiers Under International Criminal Law”, 4 *Osgoode Hall Review of Law and Policy* (2014) 36, 41.

<sup>59</sup> Mark Drumbl, *Reimagining Child Soldiers in International Law and Policy* (New York, OUP: 2012).

<sup>60</sup> Mark Drumbl, ‘Child Soldiers, Transitional Justice, and the Architecture of *Post Bellum* Settlements’, in Larry May and Andrew T. Forcehimes, (eds.) *Morality, Jus Post Bellum and International Law* (CUP, New York: 2012), 139, 155; Angela Veale and Aki Stavrou, ‘Former Lord’s Resistance Army Child Soldier Abductees: Explorations of Identity in Reintegration and Reconciliation’ 13 *Peace and Conflict: Journal of Peace Psychology* (2007) 273. On the whole, there are high rates of community acceptance of child soldiers among post-conflict communities (admittedly physical acceptance is not necessarily indicative of reconciliation) see Drumbl, ‘Child Soldiers, Transitional Justice, and the Architecture of *Post Bellum* Settlements’, 154 citing the Republic of Liberia, Truth and Reconciliation Commission Report, Volume Three: Appendices, Title II: *Children, the Conflict and the TRC Children Agenda* 72 (2009) (Drumbl cites as available online but not possible to access as of 1 July 2017).

as a substitute for their experience as child soldiers. The reintegration process ought to reflect these individual realities. Those children that have been implicated in international crimes ought to be assessed for their potential criminal liability. The focus of the criminal process should reflect their vulnerability as children. A special juvenile system of justice, based on the experiences of the SACR, would be preferable and the punishments for child soldier perpetrators should be focused on restorative justice and rehabilitation. This tailored-approach to post-conflict justice is hampered by the overwhelming perception that children are primarily victims of the armed conflict and not active decision-makers. The tendency to treat all child soldiers as victims translates into post-conflict reintegration mechanisms which ‘belies considerable on the ground variability’.<sup>61</sup>

In terms of ‘peace’ vs. ‘justice’, it may be that a need to secure a stable and peaceful future for post-conflict societies militates against the prosecution of young perpetrators of armed violence. On the other hand, in some (serious) cases it is not clear why young perpetrators of international crimes ought not to be treated very differently from adults. In this context, the question for this chapter is whether Orend’s *jus post bellum* proposal helps to resolve these issues. The next section sets out Orend’s proposal.

### **3.3 The Orendian *jus post bellum***

Orend argues that his thinking is ‘located first and foremost within the confines of just war theory.’<sup>62</sup> However, he also argues that his views are intended to

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<sup>61</sup> Mark Drumbl, ‘Child Soldiers, Transitional Justice, and the Architecture of *Post Bellum* Settlements’, in Larry May and Andrew T. Forcehimes, (eds.) *Morality, Jus Post Bellum and International Law* (CUP, New York: 2012), 139, 142.

<sup>62</sup> Brian Orend, ‘*Jus Post Bellum: A Just War Theory Perspective*’, Brian Orend, ‘*Jus Post Bellum – A Just War Theory Perspective*’, in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008) 31, 32.

...impact upon international law indirectly...by offering up its deeply considered views on the ethics of war and peace...for possible inclusion in a ratified legal document.<sup>63</sup>

Thus, Orend's argument can be read as a policy proposal from the perspective of what the law ought to be. He presents a number of principles of a general *jus post bellum* and then a more specific set of principles for 'forcible post-war regime change'.<sup>64</sup> Only the first of these is relevant to post-conflict Colombia as 'forcible post-war regime change' is a set of principles for foreign 'interventions' akin to that which the US and its allies carried out in 2003 in Iraq. Thus, only the general principles applicable to all post-war settlements will be discussed.

Orend begins by asking what a 'just' participant in war may rightly aim at in terms of post-war settlement. He makes a number of starting assumptions. Firstly, that it is possible to separate 'just' and 'unjust' parties in a classic 'inter-state' armed conflict. This is questionable from the perspective of the international law of armed conflict which does not focus on the 'justice' of war but rather those rules that States have agreed shall apply equally to all parties in armed conflict.

Secondly, Orend assumes that the principles derived from inter-state armed conflicts are applicable to other types of armed conflict, such as civil wars and those with a significant 'foreign intervention' element. The reason for this is that the principles he derives from Kant's theory have a 'generality' and 'moral strength'. This is not highly problematic. The principles that Orend proposes are very abstract (proportionality, compensation, rehabilitation) and the difficulty is likely to be what they mean, or ought to mean, in specific

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<sup>63</sup> Brian Orend, 'Jus Post Bellum: A Just War Theory Perspective', Brian Orend, 'Jus Post Bellum – A Just War Theory Perspective', in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008) 31, 32.

<sup>64</sup> Brian Orend, 'Jus Post Bellum: A Just War Theory Perspective', Brian Orend, 'Jus Post Bellum – A Just War Theory Perspective', in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008) 31, 38.

contexts where the local conditions and reasons for the conflict impose themselves on the putatively universal norms.

Third, Orend provides these principles as guidance for those actors who want to end their conflicts in a ‘fair, justified way’.<sup>65</sup> In this respect, he notes that those actors who do not want to follow his principles are unjustified and in violation of the *jus post bellum*. He points to the specific example of those actors who argue that ‘might is right’ and rejects that principle as impossible under a Kantian philosophy. This only begs the question of why a Kantian philosophy ought to be declarative of the issue. That discussion is left until later in the chapter but, more specifically, Orend means that aggressors, those who violate the *jus ad bellum* in legal or moral terms, can never comply with the *jus post bellum* because their settlement terms will necessarily be unjust. From a legal perspective, this is not clear as the law of armed conflict maintains a strict separation between the *ad bellum* and *in bello* (and, therefore, *post bellum*) categories.<sup>66</sup> For example, the 2003 invasion of Iraq by the United States and its allies was an illegal use of force (i.e. in violation of the UN Charter rules on the use of force between member States). Yet, the post-war reconstruction of Iraq was legal pursuant to UN Security Council Resolution 1483 and the law of occupation. This, in turn, said nothing about the legality of the initial invasion.

Keeping these often problematic assumptions in mind, Orend returns to the initial question and answers it in the following way:

...what are the ends or goals of a just war? The general answer is a more secure possession of our rights, both individual and collective. The aim of a just and lawful war...is the resistance of

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<sup>65</sup> Brian Orend, ‘*Jus Post Bellum: A Just War Theory Perspective*’, Brian Orend, ‘*Jus Post Bellum – A Just War Theory Perspective*’, in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008) 31, 38.

<sup>66</sup> See Christopher Greenwood, ‘The Relationship Between *Ius ad Bellum* and *Ius in Bello*’, 9 *Revue of International Studies* (1983) 221.



aggression and the vindication of the fundamental rights of societies, ultimately on behalf of the human rights of their individual citizens.<sup>67</sup>

### **3.3.1 Rights Vindication**

Orend's interpretation of the Kantian approach sees armed conflict as primarily a violation of the individual and collective rights of societies. Their vindication is the obvious and unnegotiable aim of a 'just' post-war settlement. Yet, it is not clear what vindication means. In the context of Colombia, it may be easy to agree that the victims of child soldier crimes ought to be vindicated. However, what this means exactly is less clear. For example, Orend does not demonstrate whether a 'transitional justice' system which exchanges truth and confession for 'alternative punishments' (essentially more lenient punishments) suffices to vindicate the rights of victims. Orend argues that 'vindicating rights', rather than 'vindictive revenge' is what is necessary. However, lacking in more detail, Orend's *jus post bellum* is likely to remain too abstract to be useful in practice.

### **3.3.2 Proportionality and publicity**

Orend argues that the peace settlement should be 'measured and reasonable' and 'publicly proclaimed'.<sup>68</sup> Of course, proportionality is already a fundamental part of legal reasoning.<sup>69</sup> Thus, there is no problem in accepting that a legal *jus post bellum* regime ought to reflect the

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<sup>67</sup> Brian Orend, 'Jus Post Bellum: A Just War Theory Perspective', Brian Orend, 'Jus Post Bellum – A Just War Theory Perspective', in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008) 31, 38 – 39.

<sup>68</sup> Brian Orend, 'Jus Post Bellum: A Just War Theory Perspective', Brian Orend, 'Jus Post Bellum – A Just War Theory Perspective', in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008) 31, 39.

<sup>69</sup> Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' 47 *Columbia Journal of Transnational Law* (2008) 73, 'proportionality-based rights adjudication now constitutes one of the defining features of global constitutionalism...', at 74.

principle of proportionality. It is also not a problem to argue that any peace agreement ought to be publicly proclaimed, and, in fact, State practice is based around recording peace agreements at the United Nations.<sup>70</sup> Once more, the problem is likely to arise in terms of what these abstract principles mean in concrete cases. Furthermore, some armed conflicts do not end with a peace agreement. Thus, whether it should be measured, reasonable and publicly proclaimed is simply inapplicable in certain contexts, for example, the 2003 Iraq War.

### **3.3.3 Discrimination**

Orend argues that the *jus post bellum* requires discrimination between ‘the leaders, the soldiers, and the civilians in the defeated country’.<sup>71</sup> He says civilians are entitled to immunity from ‘punitive post-war measures’ such as ‘sweeping socio-economic sanctions’.<sup>72</sup> These comments are most probably directed at the post-intervention reconstruction of Iraq and the necessity to ensure that the Coalition Provisional Authority protected the welfare of ordinary Iraqis.<sup>73</sup> Yet, Orend says nothing about how discrimination affects transitional justice mechanisms. Orend does not provide any details on, for example, how female child soldiers ought to receive special treatment in transitional justice mechanisms. Thus, once more, it is easy to agree that discrimination is an important principle in *post bellum* mechanisms. For the record, international law has already moved towards recognising

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<sup>70</sup> See United Nations Peacemaker, Peace Agreements Database, <https://peacemaker.un.org/document-search> (last accessed 21 June 2018)

<sup>71</sup> Brian Orend, ‘*Jus Post Bellum: A Just War Theory Perspective*’, Brian Orend, ‘*Jus Post Bellum – A Just War Theory Perspective*’, in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008) 31, 41.

<sup>72</sup> Brian Orend, ‘*Jus Post Bellum: A Just War Theory Perspective*’, Brian Orend, ‘*Jus Post Bellum – A Just War Theory Perspective*’, in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008) 31, 41.

<sup>73</sup> This is already a legal obligation in occupation contexts pursuant to Articles 42 – 56 of Convention IV respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, (Hague Regulations) (adopted 18 October 1907, entry into force 26 January 1910); and Articles 27 – 34 and 47 – 78 of Geneva Convention Relative to the Protection of Civil Persons in Time of War, (adopted 12 August 1949, entry into force 21 October 1950) 75 UNTS 287.

gender-specific measures in *post bellum* mechanisms.<sup>74</sup> Thus, whether a new *post bellum* law is necessary to secure these principles is doubtful.

### **3.3.4 Punishment**

On punishment, Orend is not always clear. He argues that a Kantian *jus post bellum* would punish ‘the leaders of the regime’ in ‘public international trials for war crimes’.<sup>75</sup> He also says that ‘soldiers, from all sides to the conflict’ should be held accountable.<sup>76</sup> It appears, therefore, that Orend might be in favour of pursuing the criminal accountability of child soldier perpetrators for the commission of war crimes.<sup>77</sup>

However, post-conflict countries often do not have the resources (time, money, political will) to investigate, prosecute and punish all perpetrators of war crimes. Orend’s views on punishment lack nuance and a sense of the political realities in post-conflict societies. For example, given that he envisages a situation with an ‘overall just winner’ and an ‘overall unjust loser’, Orend does not comment nor contemplate on the number of alternatives to punishment (in the sense of criminal trials) developed in international law since the democratic transitions in Latin America in the 1980s.<sup>78</sup>

In general terms, the approach has reflected a policy of prioritization in prosecuting some individuals coupled with collective truth and reconciliation commissions that are

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<sup>74</sup> See UN Security Council Resolution 1325, 31 October 2000, S/RES/1325, available online at: <http://www.un-documents.net/sr1325.htm> (last accessed 21 June 2018). See also Office of the Special Adviser on Gender Issues and Advancement of Women (OSAGI), Department of Economic and Social Affairs, *UN Security Council Resolution 1325 (2000) on Women, Peace and Security – Understanding the Implications, Fulfilling the Obligations*, available online at: [http://www.un.org/womenwatch/osagi/cdrom/documents/Background\\_Paper\\_Africa.pdf](http://www.un.org/womenwatch/osagi/cdrom/documents/Background_Paper_Africa.pdf) (last accessed 21 June 2018).

<sup>75</sup> Brian Orend, ‘*Jus Post Bellum: A Just War Theory Perspective*’, Brian Orend, ‘*Jus Post Bellum – A Just War Theory Perspective*’, in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008) 31, 41. On the benefits of public trials after conflict see Mark Osiel, *Mass Atrocity, Collective Memory and the Law*, (Transaction Publishers, New Jersey: 2000).

<sup>76</sup> Ibid.

<sup>77</sup> Although, Orend is silent on what the minimum age of criminal responsibility should be.

<sup>78</sup> See Elin Skaar, Jemima García-Godos and Cath Collins (eds.) *Transitional Justice in Latin America – The uneven road from impunity towards accountability* (Routledge, Abingdon: 2017).

intended to contribute to reconciliation. Whether a Kantian *jus post bellum* could support ‘alternative sentences’ that exchange disarmament for truth and a more lenient punishment is not clear. But in the Colombian context, the sheer number of perpetrators means that prosecuting all putative war criminals is impossible. Thus, a deal has been struck where some truth and confessions are exchanged for a limited sanction of between 5 – 8 years. The peace agreement distinguishes between different types of individual culpability in terms of those who recognise the truth and confess to their crimes (limited sanction available) and those who do not (full criminal trial).<sup>79</sup> This introduces a considerable administrative component to the transitional justice system. It is unlikely that there will be many that fail to confess to their crimes and avail themselves of the benefits of the deal. Nevertheless, this approach is probably not in line with a Kantian *jus post bellum*. Then again, Orend’s commitment to Kantian retributivism is questionable insofar as (in relation to forcible post-war regime change) he supports prioritization in prosecutions depending on whether the individuals concerned may or may not be useful in the reconstruction effort owing to their ‘expertise’.<sup>80</sup> Overall, there is a trend towards accountability or a ‘crystallizing international norm’.<sup>81</sup> But Orend’s proposals on punishment are unsuited to the complex realities of the Colombian context.

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<sup>79</sup> See ‘Final Agreement for the End of Conflict and the Construction of a Stable and Long Lasting Peace’ signed on 24 November 2016 and ratified by Congress 1 December 2016. The full text of the peace agreement is available at: <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf> at p. 172; see also Joana Loyo Cabezudo, ‘La justicia transicional en Colombia: Un instrumento creado para erradicar la impunidad?’ 5 *Anuario Iberoamericano de Derecho Internacional Penal* (2017) 32 – 61.

<sup>80</sup> Brian Orend, ‘*Jus Post Bellum*: A Just War Theory Perspective’, Brian Orend, ‘*Jus Post Bellum* – A Just War Theory Perspective’, in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008) 31, 45. In fact, Orend advocates consequentialist approach to post-war justice in other places too, see his comments on adhering to the laws of war during the conflict: ‘This is morally vital for its own sake, as well as to help win the hearts and minds of the locals and to establish the legitimacy of the occupation’, at 45.

<sup>81</sup> *Prosecutor v. Kallon and Kamara*, Special Court for Sierra Leone, Appeals Chamber, 13 March 2004, para. 82.

### **3.3.5 Compensation**

Orend says very little about compensation. In his view, '[f]inancial restitution may be mandated, subject to proportionality and discrimination'.<sup>82</sup> But, again, he has in mind the kind of post-intervention reconstruction that took place after the invasion of Iraq where an overall winner decides on how to rebuild the defeated State. This is not the situation in Colombia and, therefore, the views are slightly off point. For example, Orend discusses the feasibility of a 'post-war poll tax' on the civilians of a defeated State. In Colombia, this is inapposite and some of the financial resources for the reconstruction of the State have actually come from external sources.<sup>83</sup>

In fact, reparations are already reflected in the rules and practice of post-conflict reconstruction. As is well known, Germany paid over \$60 billion to victims of the Holocaust.<sup>84</sup> International human rights law grants individuals a 'right to a remedy', which may include financial remuneration, pursuant to Article 2(3) of International Covenant on Civil and Political Rights (ICCPR).<sup>85</sup> Of course, financial compensation may not necessarily satisfy victims of international crimes committed by child soldiers. But reparations can also be important for symbolic reasons.<sup>86</sup> Thus, Orend's proposals are not really necessary in terms of rules of post-conflict law and the context of post-conflict Colombia.

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<sup>82</sup> Brian Orend, 'Jus Post Bellum: A Just War Theory Perspective', Brian Orend, 'Jus Post Bellum – A Just War Theory Perspective', in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008) 31, 41.

<sup>83</sup> See, for example, that the UN Post-Conflict Fund has benefitted over 700,000 Colombians, UNDP, Latin America and the Caribbean, Press Release, 30 June 2017, available at: <http://www.latinamerica.undp.org/content/rblac/en/home/presscenter/pressreleases/2017/06/30/m-s-de-700-000-colombianos-beneficiados-por-iniciativas-de-la-onu-auspiciadas-por-fondo-para-posconflicto.html> (last accessed 18 June 2018).

<sup>84</sup> Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmhurst, *An Introduction to International Criminal Law and Procedure* (Cambridge, CUP: 2011), 576.

<sup>85</sup> International Covenant on Civil and Political Rights, 16 December 1966, UNTS 999, (adopted 16 December 1966, entry into force 23 March 1976).

<sup>86</sup> Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmhurst, *An Introduction to International Criminal Law and Procedure* (Cambridge, CUP: 2011), 576.

### **3.4 Evaluating Orend**

Section 3.3 set out Orend's suggestions in relation to the law on post-war settlements. As has been seen, he is mostly concerned with situations where an overall 'just' winner is reconstructing an 'unjust' loser in classic inter-State armed conflict. This is not really apposite to the Colombian situation which can more accurately be described as a 'draw'. Further, Orend makes assumptions about the way the principles apply to the post-conflict actors which cannot really be supported in terms of law. Post-conflict actors in Colombia simply do not fall neatly into 'just' and 'unjust' categories and international law does not require that they are identified. Finally, many of the abstract principles that Orend proposes lack detail and are not very helpful in the specific context of Colombia. Others, if they were 'legalized', would not add anything new to the international law and policy that surrounds post-conflict peacebuilding.

This section evaluates Orend's proposal in more detail. It asks two questions. The first relates to Orend's claim for the historical pedigree of the *jus post bellum* in his reliance on Immanuel Kant's political philosophy. It argues that the reliance on Kant is neither significant nor relevant for the development of the contemporary legal order. Thus, Orend's proposals should be considered on their own merits. Secondly, it raises an important question in relation to applicability. A new Additional Protocol on transitional criminal justice suggests that there ought to be a defined 'post' *bellum* moment that triggers its applicability.<sup>87</sup> However, transitional criminal justice mechanisms can occur during conflict and can extend long beyond the end of hostilities. The former was the case in Colombia during the

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<sup>87</sup> See Martin Wählisch, 'Conflict Termination from a Human Rights Perspective: State Transitions, Power-sharing, and the Definition of the "Post"', in Carsten Stahn, Jennifer Easterday and Jens Iverson (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014), 315.

demobilization of the paramilitary AUC forces.<sup>88</sup> In these circumstances, it is doubtful whether a strict ‘post-conflict’ period can be identified which supports can be supported in practice. This suggests that a more dynamic conception of the *jus post bellum* is necessary. The benefits of a more dynamic conceptualization will be explored in Part B.

### **3.4.1 Is Kant relevant?**

For Orend, the *jus post bellum* is a Kantian concept which ought to be developed into the third branch of the international law of armed conflict. He argues that Kant was ‘the first figure to offer us truly deep, systematic and forward-looking reflections on justice after war’.<sup>89</sup> But Orend does not explain why Kant ought to be relevant to the development of contemporary international law. There are good reasons not to rely on a Kantian approach to international law. It is better that moral and legal concepts ought to be considered in relation to their historical and social context.<sup>90</sup> This is necessary because moral and legal concepts arise in response to the realities of social life.<sup>91</sup> Their existence is linked to a specific role that they perform in society. As society changes, so moral and legal concepts can be expected to change in meaning. Any contemporary relevance of Kant’s ideas needs to consider that his approach to political philosophy was conditioned by the era in which he lived and wrote. In Orend’s claim for the historical pedigree of the *jus post bellum* these social and historical

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<sup>88</sup> See Lisa J. Laplante and Kimberly Theidon, ‘Transitional Justice in Times of Conflict: Colombia’s Ley de Justicia y Paz’ 28 *Michigan Journal of International Law* (2007) 49.

<sup>89</sup> Brian Orend, ‘*Jus Post Bellum* – A Just War Theory Perspective’, in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008) 31, 34.

<sup>90</sup> Alasdair MacIntyre *A Short History of Ethics* (New York, Macmillan: 1966) 2.

<sup>91</sup> Alasdair MacIntyre *A Short History of Ethics* (New York, Macmillan: 1966) 2.

differences are not always taken seriously. Orend simply assumes that Kant's comments in *Perpetual Peace* and *The Doctrine of Right* are directly relevant to the modern era.<sup>92</sup>

In fact, several early or classical writers could be deemed to have identified a form of *jus post bellum*. Stahn has indicated the early aspects of the *jus post bellum* in St. Augustine, de Vitoria and Suárez.<sup>93</sup> Robert Cryer has argued that Alberto Gentili might also be thought of as the foundation of the *jus post bellum*.<sup>94</sup> Finally, May goes back to Aristotle and the concept of *meionexia* in his formulation of the origins of the *jus post bellum*.<sup>95</sup> These (and other) early writers' thoughts on post-war *justice* may be interesting. However, the relevance of these writers for the development of contemporary transitional criminal justice is doubtful. The field of transitional criminal justice did not come into existence until the 1980s and the transitions to liberal democratic governments in Latin America and Eastern Europe.<sup>96</sup> The social, political and legal context in which the current debate unfolds is radically different to that which was known to early and classical writers. Therefore, as Cryer has argued, 'methodological issues need to be thought through with respect to direct reliance on such writers in terms of our understanding of the law'.<sup>97</sup>

For example, Kant wrote in German. From a linguistic point of view, the German language has two words which are translated into English as 'law' – *Gesetz* and *Recht*. They

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<sup>92</sup> See especially, Brian Orend, 'Jus Post Bellum', 31 *Journal of Social Philosophy* (2000), 117; 'Jus Post Bellum – A Just War Theory Perspective', in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008) 31, 34.

<sup>93</sup> Carsten Stahn, 'Jus Post Bellum: Mapping the Discipline(s)' in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008), 93, 94.

<sup>94</sup> Robert Cryer, 'Law and the Jus Post Bellum: Counselling Caution', in Larry May and Andrew T. Forcehimes, *Morality, Jus Post Bellum and International Law*, (New York, Cambridge University Press: 2012) 223, 226.

<sup>95</sup> Larry May, *After War Ends* (New York, CUP: 2012).

<sup>96</sup> Ruti Teitel, *Transitional Justice* (New York, OUP: 2000), vii; Mark Freeman and Dražan Djukić, 'Jus Post Bellum and Transitional Justice', in Carsten Stahn and Jann K. Kleffner, (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008), 213.

<sup>97</sup> Robert Cryer, 'Law and the Jus Post Bellum: Counselling Caution', in Larry May and Andrew T. Forcehimes, *Morality, Jus Post Bellum and International Law*, (New York, Cambridge University Press: 2012) 223, 226.



are roughly equivalent to the Latin *lex* and *jus*.<sup>98</sup> The first word refers to positive law. The second, according to H.L.A. Hart, refers to the ‘morality of the law’. Hart argues,

The words ‘*droit*’, ‘*diritto*’ and ‘*Recht*’, used by continental jurists, have no simple English translation, and seem to English jurists to hover uncertainly between law and morals, but they do in fact mark off an area of morality (the morality of law) which has special characteristics. It is occupied by the concepts of justice, fairness, rights and obligation.<sup>99</sup>

Therefore, for traditional international lawyers, Kant’s work on *Recht* is about what the law ought to be and not about what the law is.<sup>100</sup> In particular, *Recht* justifies the enforcement of the law from a moral perspective. Kant argues that *Recht* and the [moral] authorization to use coercion [...] mean one and the same thing’.<sup>101</sup> But the contemporary international legal order is more concerned with the procedural validity of legal rules. Legal validity depends on the rules emerging from the agreements between States. The law is, therefore, different from what it ought to be because it derives simply from a social fact: the consent of States.

Further, it is important to note that Kant wrote for a purpose. Kant wrote *Perpetual Peace* in response to the events of his time, namely the signing of the Treaty of Basel (1795) which secured French non-interference in the partition of Poland by Austria, Prussia and Russia.<sup>102</sup> This is clear from the form of the text which follows that of a peace treaty.<sup>103</sup> Each principle in the essay is formulated as ‘no *x* shall *y*’ to indicate the necessary changes that would have to be made in the reality of international relations for progress towards ‘perpetual

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<sup>98</sup> Most European languages are structured in similar way: Spanish, *ley* and *derecho*, French *loi* and *droit*, Italian *legge* and *diritto*.

<sup>99</sup> H. L. A. Hart, ‘Are there any natural rights?’ 64 *Philosophical Review* (1955) 2; see also H. L. A. Hart, *Essays in Jurisprudence and Philosophy* (New York, OUP: 1988) 49.

<sup>100</sup> Of course, from a Kantian perspective these are one and the same thing.

<sup>101</sup> Hans Reiss, *Kant – Political Writings* (ed.), translated by H. B. Nisbet, (Cambridge, CUP: 2001), 135.

<sup>102</sup> See Elisabeth Ellis, *Kant’s Politics – Provisional Theory for an Uncertain World* (Yale University Press, New Haven: 2005), 74.

<sup>103</sup> Kant’s essay is divided into a ‘Preamble’ and ‘Preliminary’ and ‘Definitive’ articles for a perpetual peace between States.

peace'.<sup>104</sup> Some have argued that Kant adopted this approach in order to criticize the Prussian sovereign.<sup>105</sup> According to Ellis,

Kant is trying to do a number of different things at once: write a serious political treatise on international legal order, satirize the pretensions of absolutist governing cliques, and simultaneously attempt to convince those same partisans of the old regime to submit to the rule of reason.<sup>106</sup>

Orend's interpretation and reliance on a Kantian *jus post bellum* fails to take any of this into account. But Orend may have tried to justify the reliance on Kantian political theory. He could have argued that whatever the historical and social context of *Perpetual Peace*, Kant's political philosophy (including the *jus post bellum*) is relevant to the modern law because it is the product of applying the categorical imperative to the practice of peace-making. This would have required Orend to defend the modern relevance of the categorical imperative for international law. He may have stated that unlike so-called 'hypothetical imperatives', the categorical imperative was considered by Kant to be the only objective moral principle. Orend could have argued that the categorical imperative is a 'natural' or 'universal' principle derived from reason that explains and justifies all law.<sup>107</sup> As such, Orend could have argued that Kant's comments in *Perpetual Peace* could be 'universalized', separated from their immediate context, and taken as prescriptions for the modern international legal order.

This would be very controversial for the reasons explained in chapter 2. Traditionally, international lawyers eschew moral justification for the law and focus on the

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<sup>104</sup> Elisabeth Ellis, *Kant's Politics – Provisional Theory for an Uncertain World* (Yale University Press, New Haven: 2005), 74.

<sup>105</sup> For this reason, in the 'Preamble' Kant attempts to shield himself by claiming that *Perpetual Peace* provides 'abstract ideas' that ought not to trouble the 'worldly – wise Statesman', see Hans Reiss, *Kant – Political Writings* (ed.), translated by H. B. Nisbet, (Cambridge, CUP: 2001), 93.

<sup>106</sup> Elisabeth Ellis, *Kant's Politics – Provisional Theory for an Uncertain World* (Yale University Press, New Haven: 2005), 71.

<sup>107</sup> See Hans Reiss, *Kant – Political Writings* (ed.), translated by H. B. Nisbet, (Cambridge, CUP: 2001) 18.

consent of States to a set of objective and easily identifiable rules. Law and morality are treated as different and separate. Orend's argument would have challenged the traditional view of the nature of international law.<sup>108</sup> States would be unlikely to agree on a new Protocol on transitional criminal justice simply because Kant's political philosophy can be interpreted as requiring it. But Orend's reliance on Kant for the development of international law does not include an argument in favour of adopting a Kantian concept of international law. Neither does Orend appreciate that there is a great deal of debate about the correct interpretation of a Kantian position on international law.<sup>109</sup> There is no need to resolve this debate here but merely to highlight the problems involved in easily assuming that Orend's interpretation of a Kantian *jus post bellum* should be instructive for the development of international law.

Given that a number of other writers could be claimed as 'the source' of modern rules on post-conflict law, the better view is to separate the claims to historical pedigree of the *jus post bellum* from the concrete proposals advanced by Orend. This is especially important given that Orend himself is less than faithful to the Kantian approach when dealing with transitional criminal justice. Orend declares himself in favour of an approach that looks for pragmatic consequentialism. According to Orend, 'middle-ranking civil servants' ought not to be prosecuted for war crimes owing to 'their local knowledge and bureaucratic expertise.'<sup>110</sup> This approach has some merits. It attempts to balance backwards-looking requirements of justice and forward-looking arguments that aim towards peace. In terms of State practice, international criminal justice is set up to prosecute those most responsible for

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<sup>108</sup> There are many modern challenges to the 'traditional' approach, see for a very personal account, Andrea Bianchi, *International Law Theories* (New York, OUP: 2016).

<sup>109</sup> See Fernando Tesón, *A Philosophy of International Law* (Boulder, Westview Press, Colorado: 1998); Patrick Capps, *The Kantian 'Project in Modern International Legal Theory'* 5 *EJIL* (2001), 1003; Patrick Capps and Julian Rivers, 'Kant's Concept of International Law', 16 *Legal Theory* (2010) 229, 231.

<sup>110</sup> Brian Orend, 'Jus Post Bellum – A Just War Theory Perspective', in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008) 31, 45.

international crimes. However, this approach does not appear to adhere to a Kantian approach to criminal justice.<sup>111</sup> The Kantian approach to punishment tends towards a retributivist approach and is opposed to all forms of consequentialism.<sup>112</sup> Retributivism means that all those suspected of war crimes should be prosecuted. Consequentialism accepts that some may be spared if that would lead to better consequences. As a retributivist, Kant's approach would disregard whether or not an individual's skills are useful for the post-conflict reconstruction phase. Thus, if Kant's political philosophy is asserted as the origins for the development of contemporary international law, it must be followed through and, as Cryer has argued, not discarded 'when it becomes inconvenient'.<sup>113</sup> For the purposes of this thesis, the Kantian origins of the *jus post bellum* ought to be disregarded. Orend's *jus post bellum* proposal ought to be evaluated and discussed on its own merits.

### **3.4.2 Applicability problems: When is the 'post-'?**

Orend makes no specific mention of child soldiers implicated in international crimes. He has argued simply that a *jus post bellum* would involve the prosecution and punishment of the leaders of the 'defeated country'.<sup>114</sup> This reflects Orend's interest in post-intervention reconstruction, regime change and the 2003 Iraq War. Orend says that he has provided an 'overall blueprint which can be amended, as details demand, in particular as well as unconventional cases'.<sup>115</sup> However, even though the content of Orend's *jus post bellum* is

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<sup>111</sup> Robert Cryer, 'Law and the *Jus Post Bellum*: Counselling Caution', in Larry May and Andrew T. Forcehimes, *Morality, Jus Post Bellum and International Law*, (New York, CUP: 2012), 223.

<sup>112</sup> See Anthony Duff and David Garland (eds.) *A Reader on Punishment* (Oxford, OUP: 1994), 2.

<sup>113</sup> Robert Cryer, 'Law and the *Jus Post Bellum*: Counselling Caution', in Larry May and Andrew T. Forcehimes, *Morality, Jus Post Bellum and International Law*, (New York, CUP: 2012), 223.

<sup>114</sup> Brian Orend, 'Jus Post Bellum – A Just War Theory Perspective', in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008) 31, 40. However, as mentioned above, this need not include those who may be useful for their 'bureaucratic expertise'.

<sup>115</sup> Brian Orend, 'Jus Post Bellum – A Just War Theory Perspective', in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008) 31, 38.

unclear (in relation to child soldiers) the operational aspects of a new Protocol can be evaluated. In this regard, the applicability of an Additional Protocol to the Geneva Conventions which deals with ‘post-conflict law’ presumes the prior existence of an armed conflict that has ended. Yet, this is far from a straightforward issue and it has important implications.

#### **3.4.2.1 The end of non-international armed conflict<sup>116</sup>**

If Orend’s *jus post bellum* proposal is to be taken seriously as a reform of the current law of armed conflict it has to follow the rules of the system it seeks to join.<sup>117</sup> However, Orend’s proposal fails to discuss in any detail the temporal applicability of the new law. He only suggests that the rules of the *jus post bellum* would be triggered when ‘a new day has dawned’.<sup>118</sup> In his words,

The precise diagnosis of ‘post’ is truly, difficult – but by no means should this difficulty be thought to be a good reason to give up entirely on the task of providing belligerents with guidance during the termination phase. To use a crude analogy to the sunrise: who can say, around dawn, exactly where night ends and day begins? But eventually it is irrelevant and we all come to realize a new day has dawned, a new phase has been entered, and new and fresh activities and principles are needed.<sup>119</sup>

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<sup>116</sup> See Rogier Bartiels, ‘From *Jus in Bello* to *Jus Post Bellum*: When do Non-International Armed Conflicts End?’ in Carsten Stahn, Jennifer Easterday and Jens Iverson, (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014), 297.

<sup>117</sup> Gregory Fox, ‘Navigating the Unilateral/Multilateral Divide’, in Carsten Stahn, Jennifer Easterday and Jens Iverson (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014), 229, 230.

<sup>118</sup> Brian Orend, ‘*Jus Post Bellum* – A Just War Theory Perspective’, in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008) 31, 34.

<sup>119</sup> Brian Orend, ‘*Jus Post Bellum* – A Just War Theory Perspective’, in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008) 31, 34.

This may be an acceptable approach in terms of just war theory but it is unsuited to the applicability of a new body of post-conflict law. Orend presents the *jus post bellum* as an area of law for the post-conflict period. This implies that it ought to have a set of specific rules on transitional criminal justice that override the *jus in bello* (applying during the conflict) and other legal categories (such as domestic law). In this case, then there must be a moment in time when an Additional Protocol on post-conflict law would apply. The *lex specialis* principle in international law asserts that the most specific law to the situation in question takes priority.<sup>120</sup> Therefore, it must be possible to identify when a particular paradigm applies or ceases to apply. The *jus in bello* applies during the armed conflict. The *jus post bellum*, which would contain different rules, applies at the end of armed conflict.

This is important in relation to the criminal accountability of child soldiers. The most relevant rules are found in Common Article 3 to the Geneva Conventions, Additional Protocol II (when applicable) and customary international humanitarian law.<sup>121</sup> The issue may be important in relation to children who are caught (or surrender) while the conflict is ongoing. During armed conflict, these children may be subjected to administrative detention and prosecution under national criminal law.<sup>122</sup> As has been mentioned above, the Colombian Penal code applies to members of the rebel armed forces such as the FARC-EP. Association with these groups would open children to potential criminal responsibility in terms of the law on sedition and rebellion.<sup>123</sup> A *jus post bellum* would tend to focus on the aims of transition and provide for specific rules on children that emphasize their reintegration and rehabilitation. In the Colombian context, a transitional criminal justice mechanism provides

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<sup>120</sup> On the *lex specialis* principle see Report of the Study Group of the International Law Commission, 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law', 58th Session, A/CN.4/L.682, (13 April 2006), 38.

<sup>121</sup> See Office of the Special-Representative of the Secretary-General for Children and Armed Conflict, Working Paper No. 3, *Children and Justice During and in the Aftermath of Armed Conflict*, (September 2011).

<sup>122</sup> Office of the Special-Representative of the Secretary-General for Children and Armed Conflict, Working Paper No. 3, *Children and Justice During and in the Aftermath of Armed Conflict*, (September 2011), 27.

<sup>123</sup> Articles 111-132, *Colombian Penal Code, 2nd Book, Special Part*, 'Delitos contra la Existencia y Seguridad del Estado', and 'Delitos contra el Régimen Constitucional', available in Spanish at: <http://alcaldiademonteria.tripod.com/codigos/penal/sgndpnal.htm>

for ‘alternative sentences’ which focus on restorative justice. Restorative justice measures favour a collective approach to punishment.<sup>124</sup> As discussed above, the context of transitions prefers this form of ‘limited justice’ to guide the measures dealing with the criminal accountability for international crimes. Therefore, the difference between an ongoing armed conflict and the end of an armed conflict can have important implications for criminal responsibility of children.

In relation to non-international armed conflicts, such as Colombia, there is very little guidance in international law in terms of how to decide that the armed conflict has ended. Treaty law lacks any specific direction. Common Article 3 to the Geneva Conventions makes no reference to when an ‘armed conflict not of an international character’ ends. Article 2(2) of Additional Protocol II refers to the ‘end of the armed conflict’ but it does not define when this is.<sup>125</sup> The Commentary to Additional Protocol II states that the rules are no longer applicable ‘at the end of hostilities’.<sup>126</sup> The 1995 *Tadić* Appeal Chamber decision on jurisdiction also provides some guidance.<sup>127</sup> The Appeals Chamber Stated that ‘[i]nternational humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities [...] in the case of internal conflicts, [until] a peaceful settlement is achieved’.<sup>128</sup> This is not very clear. It may mean the end of active fighting (i.e. the agreement of a ceasefire) or it may mean the general close of hostilities (i.e. the reaching of a peace settlement). Furthermore, neither ceasefires nor peace agreements are reliable indicators that an armed conflict is truly over. For example, in Sierra Leone, two agreements

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<sup>124</sup> See generally Erik Luna, ‘In Support of Restorative Justice’, in Paul H. Robinson, Stephen Garvey, and Kimberly Kessler Ferzan (eds.) *Criminal Law Conversations* (New York, OUP: 2009), 585.

<sup>125</sup> Article 2(2), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts 1977 (AP II), 1125 UNTS 609 (adopted 8 June 1977, entered into force 7 December 1978).

<sup>126</sup> Commentary to Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts 1977 (AP II), (Commentary to AP II of 1978), 1359, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=9CD233913B6BC768C12563CD00439FD4> (last accessed 5 July 2017).

<sup>127</sup> *Prosecutor v. Dusko Tadić*, Judgment, IT-94-1-T, (2 October 1995).

<sup>128</sup> *Prosecutor v. Dusko Tadić*, Judgment, IT-94-1-T, (2 October 1995), 70.

were signed but the conflict continued until the Revolutionary United Front was defeated.<sup>129</sup> Similarly, in Colombia, the armed conflict has followed a ‘stop-start’ pattern and there have been several attempts at peace.<sup>130</sup> This has made it difficult to think of the conflict in terms of a linear event with a ‘beginning, middle and an end’ in the way that Orend has argued.<sup>131</sup> An alternative approach, therefore, must be found to decide when a *post bellum* phase has been reached.

One possible approach is to focus on the criteria which signal the existence of a non-international armed conflict. The relevant criteria are those which distinguish a state of non-international armed conflict from lesser types of armed violence such as internal disturbances. The current legal framework emphasizes two criteria: intensity of fighting, and the organization of armed groups. Roger Bartiels has argued that it may be possible to apply these concepts ‘in reverse’.<sup>132</sup> It could be argued that the absence of the criteria necessary to identify the existence of an armed conflict logically entails the end of an armed conflict. At this stage, the post-conflict Additional Protocol on transitional criminal justice could be said to apply.

Although this seems logical, it is not necessarily an answer to the problem. The categorization of internal violence is a grey area in the law of armed conflict.<sup>133</sup> The ICTY has considered the definition of non-international armed conflict at some length.<sup>134</sup> The *Tadić*

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<sup>129</sup> See Africa Confidential, ‘Chronology of Sierra Leone: How Diamonds Fuelled the Conflict’ (1998), available at: [https://www.africa-confidential.com/special-report/id/4/Chronology\\_of\\_Sierra\\_Leone](https://www.africa-confidential.com/special-report/id/4/Chronology_of_Sierra_Leone) (last accessed 5 July 2017).

<sup>130</sup> See ‘Colombia: Conflict Timeline’ <https://www.insightonconflict.org/conflicts/colombia/conflict-profile/conflict-timeline/>

<sup>131</sup> Brian Orend, ‘*Jus Post Bellum* – A Just War Theory Perspective’, in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008) 31, 36.

<sup>132</sup> Rogier Bartiels, ‘From *Jus in Bello* to *Jus Post Bellum*: When do Non-International Armed Conflicts End?’ in Carsten Stahn, Jennifer Easterday and Jens Iverson, (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014), 297, 303.

<sup>133</sup> How is the Term “Armed Conflict” Defined in International Humanitarian Law?, International Committee of the Red Cross (ICRC) Opinion Paper, March 2008; Martin Wählisch, ‘Conflict Termination from a Human Rights Perspective: State Transitions, Power-Sharing, and the Definition of the “Post”’, Carsten Stahn, Jennifer Easterday and Jens Iverson, (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014) 315, 317.

<sup>134</sup> See *Prosecutor v. Dusko Tadić*, Judgment, IT-94-I-T, (2 October 1995); *Prosecutor v. Fatmir Limaj*, Judgment, IT-03-66-T, (30 November 2005), para. 84; Eve La Haye, *War Crimes in Internal Armed Conflicts* (Cambridge, CUP: 2008) 10.



decision became the reference point for all subsequent decisions of the ICTY. It stated that an armed conflict existed ‘whenever there is a resort to *protracted* armed violence between governmental authorities and *organised* armed groups or between such groups, within a State’.<sup>135</sup> A thorough review of the ICTY jurisprudence and the surrounding literature is provided in the *Boškoski* judgment.<sup>136</sup> In terms of the protracted nature of the armed violence, the subsequent jurisprudence has stated that this refers to the ‘intensity’ of violence rather than its ‘duration’.<sup>137</sup> In *Boškoski* the ICTY Trial Chamber identified many of the relevant factors that must be taken into account. These included the seriousness of attacks, the use of armed forces, the type of actions, the effect on the civilian population, and whether the conflict has attracted the attention of the UN Security Council.<sup>138</sup>

However, the issue of duration has not been completely removed from the analysis. There is still a temporal requirement insofar as the violence must be protracted. In support of this position, the Trial Chamber relied on Article 8 (2) (d) Rome Statute of the International Criminal Court which States that Common Article 3 does not apply to ‘isolated and sporadic acts of violence or other acts of a similar nature.’<sup>139</sup> Nevertheless, short conflicts can be armed conflicts. On this, there is regional jurisprudence which is of direct relevance to the Colombian situation. The Inter-American Commission on Human Rights has found a confrontation of 30 hours constituted an armed conflict owing to,

...the concerted nature of the hostile acts undertaken by the attackers, the direct involvement of governmental armed forces, and the nature and level of the violence attending the events in

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<sup>135</sup> *Prosecutor v. Dusko Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-T, (2 October 1995), 70.

<sup>136</sup> *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, (Trial Judgment) ICTY-04-82-A (10 July 2008) 175.

<sup>137</sup> Rogier Bartels, ‘From *Jus in Bello* to *Jus Post Bellum*: When do Non-International Armed Conflicts End?’ in Carsten Stahn, Jennifer Easterday and Jens Iverson, (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014), 297, 305; see also *Juan Carlos Abella v. Argentina*, Inter-American Commission on Human Rights, Case 11.137, Report No. 55/97, OEA/Ser.L/II.95 Doc. 7 rev. at 271 (1997) para. 156.

<sup>138</sup> *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, (Trial Judgment) ICTY-04-82-A (10 July 2008) 177.

<sup>139</sup> *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, (Trial Judgment) ICTY-04-82-A (10 July 2008) 186.

question [...] the attackers involved carefully planned, coordinated and executed an armed attack, i.e. a military operation, against a quintessential military objective – a military base.<sup>140</sup>

Thus, the temporal length of the conflict is not necessarily a reliable indicator. Furthermore, in terms of the organised nature of the armed groups, the Trial Chambers have considered whether the armed groups have a headquarters and the ability to procure and distribute weapons.<sup>141</sup> In Colombia, the FARC-EP and other rebel groups have always adhered to an organised command structure. Further, the FARC-EP is set to enter the political arena as a political party in the 2018 elections but this is would obviously be after the armed conflict is over.

The point is that these are only indicators of the existence of the conflict. Although they can be successfully applied in the analysis of situations of violence they are not necessarily determinative.<sup>142</sup> It is still difficult to state with certainty when a conflict is over and a transitional phase has begun. Some factors may be given less weight in certain contexts. For example, there are many conflicts in Africa where the type of weaponry is far below that found in the former Yugoslavia. Further, as mentioned, there is a question is whether it is possible to apply these factors ‘in reverse’ to suggest that the non-international armed conflict has ended and that the *jus post bellum* applies. There is no jurisprudence to support this approach. Further, some factors simply cannot be applied in reverse.<sup>143</sup> For example, the fact that the violence has not attracted the attention of the UN Security Council cannot be indicative of the end of an armed conflict, especially when it concerns one of the permanent members.

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<sup>140</sup> See also *Juan Carlos Abella v. Argentina*, Inter-American Commission on Human Rights, Case 11.137, Report No. 55/97, OEA/Ser.L/V/II.95 Doc. 7 rev. at 271 (1997) para. 156.

<sup>141</sup> Eve La Haye, *War Crimes in Internal Armed Conflicts* (Cambridge, CUP: 2008) 10.

<sup>142</sup> Katie A. Johnson, ‘Transformations of Conflict Status in Libya’ 17 (2012) *Journal of Conflict and Security Law* 89.

<sup>143</sup> Rogier Bartiels, ‘From *Jus in Bello* to *Jus Post Bellum*: When do Non-International Armed Conflicts End?’ in Carsten Stahn, Jennifer Easterday and Jens Iverson, (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014), 297, 309.

There is a great difficulty in identifying the ‘end’ of a non-international armed conflict. In Colombia, the conflict between the FARC-EP and the government has ended insofar as the peace agreement has been signed and is now in its implementation phase. The ceasefire has (for the most part) held and both parties are committed to the transition towards a stable peace. Thus, the applicability of a Protocol on transitional justice would not necessarily be problematic. A new *post bellum* Protocol, therefore, might be designed to apply after a peace agreement and during its implementation phase. However, it would be difficult for States to agree on this question. Sometimes, transitional justice measures are initiated during armed conflicts.<sup>144</sup> Not all conflicts end in peace agreements. And as mentioned, peace agreements fail and States return to violence, sometimes for many years as a time. Therefore, States are unlikely to agree on a set of rules with such uncertain applicability requirements. There is already a great deal of debate about when the *jus ad bellum* and *jus in bello* apply, for example, in relation to post-conflict detention and peacekeeping.<sup>145</sup> As such, adding another difficult applicability problem to the law of armed conflict would be unwise.

### **3.5 Is a new Additional Protocol possible?**

Putting aside the difficult issues of applicability, there are a further two issues that are relevant to the question of whether it would be possible for States to agree on a new Protocol that dealt with the criminal accountability of children. The first relates to the variety of different views on the minimum age of criminal responsibility. The second relates to the separation of negotiations on a new post-conflict Protocol for transitional criminal justice matters from other post-conflict issues such as ‘transformative occupation’.

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<sup>144</sup> Lisa J. Laplante and Kimberley Theidon, ‘Transitional Justice in Times of Conflict: Colombia’s Ley de Justicia y Paz’ 28 *Michigan Journal of International Law* (2007) 49.

<sup>145</sup> Charles Garraway, ‘The *Jus Post Bellum*: A Practitioner’s Perspective’, in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008) 153.

### **3.5.1 The Minimum Age of Criminal Responsibility**

A post-conflict, transitional criminal justice Protocol would need to be clear as to the minimum age of criminal responsibility. There is a great variety among States in the minimum age of criminal responsibility.<sup>146</sup> In Congo, one 14 year old child soldier has been executed and four others received death sentences.<sup>147</sup> In the UK, the minimum age of criminal responsibility is ten.<sup>148</sup> At the 27th International Conference of the Red Cross and the Red Crescent, several States declared that the minimum age for children to be recruited ought to be raised to 18.<sup>149</sup> Although international human rights law encourages States to set a minimum age below which children cannot be held criminally responsible, it does not specify an appropriate age.

One approach would be to set 18 as the minimum age of criminal responsibility. There is already a strong movement against the enlistment by States of any children under 18.<sup>150</sup> The logic of this approach is that if a child is ‘too young to fight’ at 18, then they are too young to be criminal responsible for their actions in the commission of crimes. However, under international humanitarian law, the age below which conscription of enlisting children into armed forces is a war crime is 15.<sup>151</sup> Therefore, according to the same logic, 16 to 18 year

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<sup>146</sup> Matthew Happold, ‘The Age of Criminal Responsibility for International Crimes under International Law’ in Karin Arts and Vesselin Popovski (eds.) *International Criminal Accountability and the Rights of Children* (TMC Asser Press: The Hague, The Netherlands: 2005), 69; Brittany Ursini, ‘Prosecuting Child Soldiers: The Call for a Minimum Age of Criminal Responsibility’, 89 *St. John’s Law Review* (2015), 1023.

<sup>147</sup> See *Congo: Don’t Execute Child Soldiers*, Human Rights Watch, (2 May 2001) available at: <http://www.hrw.org/news/2001/05/02/congo-dont-execute-child-soldiers>; Brittany Ursini, ‘Prosecuting Child Soldiers: The Call for a Minimum Age of Criminal Responsibility’, 89 *St. John’s Law Review* (2015), 1023.

<sup>148</sup> Section 34 of the Crime and Disorder Act 1998 abolished the previous regime of *doli incapax* and sets 10 as the minimum age of criminal responsibility (although children under 10 may be subject to ‘Child Safety Orders’ under Section 11 of the Act) available online at: <https://www.legislation.gov.uk/ukpga/1998/37/contents>.

<sup>149</sup> See ICRC Study of Customary International Law, Commentary on Rule 136, available at: [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter39\\_rule136#Fn\\_98\\_14](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter39_rule136#Fn_98_14) (last accessed 12 July 2017).

<sup>150</sup> See Child Soldiers International <https://www.child-soldiers.org/child-recruitment>

<sup>151</sup> Rome Statute, Article 8 (2)(b) (xxvi) and (e)(vii), available at: [https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf) (last accessed 12 July 2017).

olds are not too young to fight and ought to be criminally responsible for the commission of international crimes.

States have not agreed on a minimum age of criminal responsibility because the decision of when a child becomes an adult is considered to be a question for domestic States. It is a question that involves cultural and religious views. As such, it is incredibly unlikely that States would be able to agree on an age. Indeed, the current framework which leaves the decisions to States may be coupled with the lack of prosecutions of child soldiers in order to suggest that a customary international norm may be developing that actually prohibits prosecutions of under 18s. This is unlikely given that the Optional Protocol to the UNCRC uses language which appears less than mandatory in stating that signatory States ‘take all *feasible* measures [my emphasis]’ not to deploy under 18s in armed conflict.<sup>152</sup> Further article 3 of the Optional Protocol accepts that the voluntary recruitment of under-18s is permitted.<sup>153</sup>

### **3.5.2 Other issue areas**

It would be difficult to open discussions on a new Protocol for transitional criminal justice without considering other post-conflict issues that arise. The fact of post-conflict transitions raises many questions about the interaction between human rights law and humanitarian law in relation to a number of issues.<sup>154</sup> This section discusses one issue relatively briefly. After

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<sup>152</sup> UN General Assembly, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, (adopted 25 May 2000, entered into force 12 February 2002), Article 1.

<sup>153</sup> UN General Assembly, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, (adopted 25 May 2000, entered into force 12 February 2002), Article 3.

<sup>154</sup> These include, *inter alia*, transformative occupation, detention and the use of force see generally Charles Garraway ‘The *Jus Post Bellum*: A Practitioner’s Perspective’, in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict*, (adopted 25 May 2000, entered into force 12 February 2002), Article 1.

<sup>154</sup> UN General Assembly, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, (adopted 25 May 2000, entered into force 12 February 2002), Article 3.

<sup>154</sup> These include, *inter alia*, transformative occupation, detention and the use of force see generally Charles Garraway ‘The *Jus Post Bellum*: A Practitioner’s Perspective’, in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008) 153.

the 2003 Iraq War, there has been considerable debate about whether international law permits the practice of ‘transformative occupations’.<sup>155</sup>

### **3.5.2.1. Transformative Occupations**

The legal dilemma faced by practitioners can be framed as a matter of legal principle versus political reality. The law of armed conflict contains a set of norms in the *jus in bello* which reflect the rights and duties of occupiers in post-intervention settings known as the law of occupation. In principle, these rights and duties were designed to be restrictive. The law was designed to regulate ‘a temporary set of affairs pending a peace agreement’.<sup>156</sup> The result is that the rights and obligations contained in the law reflect a ‘conservationist principle’ which supports the maintenance of the *status quo ante bellum*.

While some provisions are easy for the Occupying Power to comply with, others prescribe more onerous positive duties.<sup>157</sup> Article 50 of the Fourth Geneva Convention requires that the Occupying Power, ‘facilitate the proper working of all institutions devoted to the care and education of children.’<sup>158</sup> This provision requires the Occupying Power to ‘*take all necessary steps* to facilitate the identification of children and the registration of their parentage’ and to ‘*make arrangements* for the maintenance and education, if possible by persons of their own nationality, language and religion, of children who are orphaned or

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<sup>155</sup> Adam Roberts, ‘Transformative Military Occupation: Applying the Laws of War and Human Rights’, 100 *AJIL* (2006) 580; Alexander Orakhelashvili, ‘The Interaction Between Human Rights Law and Humanitarian Law: Fragmentation, Conflict, Parallelism or Convergence?’ 19 *EJIL* 1 (2008) 161; Marko Milanovic, ‘A Norm Conflict Perspective on the Relationship Between International Humanitarian Law and Human Rights Law’ 14 *Journal of Conflict and Security Law* (2010) 3; Noam Lubell, ‘Human Rights Obligations in Military Occupation’ 94 *IRRC* (Spring 2012) 885.

<sup>156</sup> Adam Roberts, ‘Transformative Military Occupation: Applying the Laws of War and Human Rights’, 100 *AJIL* (2006) 580, 582.

<sup>157</sup> For example, Article 48 of the Fourth Geneva Convention (GC IV) simply requires the Occupying Power to desist from infringing the rights of non-nationals (of an occupied State) to leave the territory in question.

<sup>158</sup> Geneva Convention Relative to the Protection of Civil Persons in Time of War, (GC IV) (adopted 12 August 1949, entry into force 21 October 1950) 75 UNTS 287, art. 50.

separated from their parents as a result of the war...[emphasis added]<sup>159</sup> At the same time, the law of occupation gives few rights to Occupying Powers, e.g. the law requires that the Occupying Power respect the laws in force in the defeated State.<sup>160</sup> In this way, the law is supposed to protect the sovereignty of the defeated State.

However, in practice, situations have arisen where the conservationist principle has been put under considerable pressure. For example, the reconstruction of Germany after the Second World War included the significant reform of its legal, political and economic institutions. This reflected the political and practical impossibility of reverting to Nazism (the *status quo ante bellum*) after the end of the war. In these types of extreme case it is, at the very least, short-sighted that the law requires a return to the conditions that gave rise to the initial conflict in the first place.<sup>161</sup>

Transformative occupations, therefore, raise the potential for conflict between principle and practice. While in principle the law tends to prohibit changes to the internal political structures of defeated States, the case for doing so can seem unavoidable in certain situations. The war in Iraq provided the most recent illustration of this dilemma.<sup>162</sup> According to Garraway, there was no way that the coalition forces would hand power back to Saddam after invading to remove his government. But the lack of a UN chapter VII mandate,

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<sup>159</sup> Geneva Convention Relative to the Protection of Civil Persons in Time of War, (GC IV) (adopted 12 August 1949, entry into force 21 October 1950) 75 UNTS 287, art. 50.

<sup>160</sup> Convention IV respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, (Hague Regulations) (adopted 18 October 1907, entry into force 26 January 1910) art. 43.

<sup>161</sup> Transformation may also be legitimized in moral terms in terms of aiming at 'reasonable security against future attack', Michael Walzer, *Just and Unjust Wars*, (New York, Basic Books: 1977), 118.

<sup>162</sup> There has been a vast amount of literature on the law of occupation, post-Iraq. See generally, David Scheffer, 'Beyond Occupation Law', 97 *American Journal of International Law* (2003) 4, 842; Michael J. Kelly, 'Iraq and the Law of Occupation: New Tests for an Old Law', 6 *Yearbook of International Humanitarian Law* (2003), 127; Alexander Orakhelashvili, 'The Post-War Settlement in Iraq: The UN Security Council Resolution 1483 (2003) and General International Law' 8 *Journal of Conflict and Security Law* (2003) 2, 307; Martin Zwanenburg, 'Existentialism in Iraq: Security Council Resolution 1483 and the Law of Occupation', 86 *International Review of the Red Cross* (2004) 856, 745; Gregory Fox, 'Transformative Occupation and the Unilateralist Impulse' 94 *International Review of the Red Cross* (2012) 885, 2012.

authorizing the use of force, meant that the post-intervention reconstruction of Iraq fell to be regulated by the restrictive law of occupation.

As occupiers, there was a question about what changes to Iraqi institutions could be achieved within the very conservative legal regime. There were other reasons for aiming to avoid the law of occupation. The reliance on the law of occupation for the reconstruction of Iraq exposed the US and the UK to an increased risk of liability.<sup>163</sup> David Scheffer has highlighted several instances where the US and the UK failed to discharge their duties under the law of occupation.<sup>164</sup> The risk of liability is also heightened when ‘non-occupying States’ are involved in the reconstruction efforts.<sup>165</sup> There were, therefore, suggestions that the law of occupation was not compatible with some of the reconstruction activities required of States.

However, a new body of law that permits transformative goals for victorious States is unnecessary. Human rights norms and the potential ‘fall-back’ option of the UN Security Council provide sufficient flexibility. The leading International Court of Justice decisions in the *Nuclear Weapons* case and the *Wall* as well as the vast majority of academic opinion suggest that human rights norms apply during armed conflict and occupation.<sup>166</sup> The relevant legal analysis must take place at the level of the specific norms. For example, in Iraq, occupiers might change the laws in force by arguing that their international obligations, or even customary international law on human rights, prevented them from maintaining Iraqi

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<sup>163</sup> David Scheffer, ‘Beyond Occupation Law’, 97 *American Journal of International Law* (2003) 4, 842. See for example the human rights litigation in the UK under the Human Rights Act 1998, see *R (Al-Jedda) v. Secretary of State for Defence* [2007] UKHL 58, [2008] 1 AC 332 (*Al-Jedda*); *R (Al-Saadoon and Mufdhi) v. Secretary of State for Defence* [2009] EWCA Civ 7 (*Al-Saadoon CA*); *R (Al-Saadoon and Mufdhi) v. Secretary of State for Defence* [2008] EWHC 3098 (*Al-Saadoon HC*).

<sup>164</sup> David Scheffer, ‘Beyond Occupation Law’, 97 *American Journal of International Law* (2003) 4, 842, 855.

<sup>165</sup> The possibility that States could be involved in the reconstruction efforts and not be Occupying Powers is made possible according to UNSC Resolution 1483 which expressly limits occupiers status to the US and the UK.

<sup>166</sup> The U.S. has been the most noticeable detractor from the view that the international human rights regime applies in situations of armed conflict and occupation.



penal legislation in force.<sup>167</sup> Further, the legitimacy of the transformative project affects the content of the law that applies to the practice. This is, of course, hugely controversial. The question is whether the law of occupation ought to be interpreted more loosely in relation to liberal democratic transformations. The short answer is probably ‘no, but in practice it probably is’. The tone of the UN Charter, and the legal order post-1945, supports and promotes the spread of liberal democratic States. Although the principle of State sovereignty remains the fundamental principle in international relations, the effect of human rights norms on the interpretation of sovereignty cannot be underestimated.<sup>168</sup> The notion that the concept of State sovereignty includes a measure of responsibility to protect the State’s population came out of the ICISS report and has found relatively universal agreement.<sup>169</sup> In reality, there is unlikely to be international condemnation of transformative process towards increased human rights protections.<sup>170</sup>

Advocating a less stringent interpretation of specific provisions of the law of occupation is not the same as circumventing its provisions altogether. Arguably, a new Additional Protocol, as proposed by Orend, would permit a relatively untrammelled transformation of States towards a more liberal democratic regime. A victorious Occupying Power under Orend’s system would legitimately be able to change the political institutions of defeated States, by declaring the beginning of the ‘post-intervention phase’. This state of affairs would lead to the effective removal of important legal barriers to the questionable use of unilateral inter-State armed force. This should be resisted while at the same time acknowledging the reality of specific situations.

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<sup>167</sup> See Coalition Provisional Authority (CPA) Order No. 7, available at: [http://www.iraqcoalition.org/regulations/20030610\\_CPAORD\\_7\\_Penal\\_Code.pdf](http://www.iraqcoalition.org/regulations/20030610_CPAORD_7_Penal_Code.pdf) (last accessed 5 August 2015).

<sup>168</sup> Jean L. Cohen, ‘Rethinking Human Rights, Democracy and Sovereignty in the Age of Globalization’ 36 *Political Theory* (2008), 578.

<sup>169</sup> Carsten Stahn ‘Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?’ 101 *American Journal of International Law* (2007) 99.

<sup>170</sup> Although there will be international condemnation if the use of force is unauthorized as in Iraq.

Iraq was a classic ‘not-war, not-peace’ society of the kind which causes uncertainty in the applicability of the law. The occupation was at an end, in formal terms, yet it was ongoing. The international conflict between the U.S. and Iraq was at an end, yet a new non-international armed conflict had just begun. In these circumstances, the rules of the law of occupation are not fixed in stone but relatively open to interpretation. In particular, the effect of a long term occupation and the loosening of the relevant restrictive norms might be achieved through an open interpretation of the relevant ‘escape clauses’. A number of ‘escape clauses’ are built into the most prohibitive regulations in question, specifically Article 43 of the Hague Regulations and Article 64 of Geneva Convention IV. For example, the rules of the Hague Regulations 1907 are clear that the Occupying Power must not change the laws in force, *unless absolutely prevented* (the necessity requirement).<sup>171</sup> Further, Article 43 of the Regulations assumes that the existing framework is the product of a ‘legitimate powers’.<sup>172</sup> In Iraq, the necessity requirement and the legitimacy of the previous regime were both open to interpretation and debate. As a matter of legal doctrine, it is not clear whether the illegitimacy of the defeated regime means that the laws in force can be changed or how, but the notion that the laws in force would be satisfactory and should be protected ought to be doubted.

Further, the more recent Article 64 GC IV is slightly more permissive than Article 43 and allows the Occupying Power to change the laws in force in cases where they constitute a threat to [the Occupier’s] security.<sup>173</sup> This would permit significant security sector reform in

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<sup>171</sup> Convention IV respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, (Hague Regulations) (adopted 18 October 1907, entry into force 26 January 1910) art. 43.

<sup>172</sup> Convention IV respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, (Hague Regulations) (adopted 18 October 1907, entry into force 26 January 1910) art. 43.

<sup>173</sup> Geneva Convention Relative to the Protection of Civil Persons in Time of War, (GC IV) (adopted 12 August 1949, entry into force 21 October 1950) 75 UNTS 287, art. 64.

Iraq and, perhaps even, the deployment of a multinational security force. Further, the Occupying Power may also

subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.<sup>174</sup>

The provision provides the Occupying Power with a considerable amount of leeway. Further, it could plausibly be argued that the ‘maintenance of orderly government of the territory’ required the formation of a Governing Council of Iraq to represent the sovereignty of the Iraqi people. Arguably, CPA Orders on ‘de-ba’athification’, the establishment of an Iraqi Civil Defence Corps and the establishment of an Iraqi Ministry for Human Rights could all be brought within the scope of Article 64.<sup>175</sup>

The contextual interpretation of the law of occupation, which involves the effect of human rights law, can lead to the repealing and creation of new laws. This happens so that an intervener obliges with international human rights commitments. The fact that this practice is likely to be controversial politically means that the intervener will need to revert to the UN Security Council in order to obtain a mandate for the necessary regime change. This is as it should be. The UN Security Council is the only body with the legitimacy to circumvent the law of occupation and dis-apply the relevant norms of occupation law. As Eric de Brabandere has argued, it should not be surprising that the law of occupation is unsuited to regime change. This is the whole point of the law. As he says, ‘the very reason the laws of

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<sup>174</sup> Geneva Convention Relative to the Protection of Civil Persons in Time of War, (GC IV) (adopted 12 August 1949, entry into force 21 October 1950) 75 UNTS 287, art. 64.

<sup>175</sup> That the law of occupation is flexible enough to permit the reform of some Iraqi laws and institutions does not mean that all reforms would be acceptable. In the case of Iraq, the laws on foreign investment were perhaps the most salient example of an unnecessary reform which would fall foul of even a very loose reading of the law of occupation.

occupation are inadequate to deal with comprehensive post-conflict reconstruction missions [...] is precisely the reason for their existence, namely to limit the occupier's powers in a territory for which the occupier has no title.'<sup>176</sup> In this way, the law of occupation is supposed to present an obstacle to unwanted interference in the internal affairs of States. It stands as a barrier to the use of illegal armed force for the purposes of regime change.

Orend's argument, in favour of a new *jus post bellum* enables victorious powers to engineer post-intervention political 'rehabilitation'. They would be able to do so without incurring the risk of legal liability and, therefore, to many States these proposals would appear as an aggressive liberal imperialism. Negotiations on specific issues, such as transitional criminal justice, would be difficult to separate from broader issues raised during post-conflict situations. Further, as demonstrated in relation to the issue of post-intervention governance, the current system is not 'beyond repair'. Contextual approaches to the interpretation of the law provide some flexibility in regulating post-conflict situations. Furthermore, a sensible fallback option is the UN Security Council. Many previous reconstruction missions in the 1990s had taken place under the auspices of the UN (Bosnia 1995- ongoing, Kosovo 1999-ongoing, East Timor 1999-2002). As such, the Occupying Powers made a proposal to the UN Security Council which after several drafts became the UNSC Resolution 1483 (2003). Pursuant to Articles 25 and 103 UN Charter, the obligations imposed on States by the UN Security Council override any other obligations that they might have in international law.<sup>177</sup>

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<sup>176</sup> Eric de Brabandere, 'The Responsibility for Post-Conflict Reforms: A Critical Assessment of *Jus Post Bellum* as a Legal Concept', 53 *Vanderbilt Journal of International Law* (2010), 119. In this way, it functions as a barrier to inter-State aggression.

<sup>177</sup> For an argument that there are limits to what the UNSC can do to modify general international law, see Alexander Orakhelashvili, 'The Post War Settlement in Iraq: The UN Security Council 1483 (2003) and General International Law', 8 *Journal of Conflict and Security Law* (2003) 2, 307. For views on the relationship between UNSC 1483 (2003) and occupation law see David Scheffer, 'Beyond Occupation Law', 97 *American Journal of International Law* (2003) 4, 842; Michael J. Kelly, 'Iraq and the Law of Occupation: New Tests for an Old Law', 6 *Yearbook of International Humanitarian Law* (2003), 127; Martin Zwanenburg, 'Existentialism in Iraq: Security Council Resolution 1483 and the Law of Occupation', 86 *International Review of the Red Cross* (2004) 856, 745.

Thus, transformative occupations are possible by way of a *post bellum* appeal to the UN Security Council. In Iraq, as in other situations such as Kosovo, this might be seen as a dubious *ex post* legalization of the initial intervention (which in each case violated the *jus ad bellum*). However, this is a consequence of the separability thesis in international law. The rules of international law on the use of force do not affect the rules on the conduct of hostilities. Neither of these bodies of law affects the possibility and the legality of a post-intervention reconstruction mandate.

Unfortunately, although a transformative mandate might be agreed at the UN Security Council, political accommodation might cause considerable imprecision in the resulting law. For example, UN Security Council Resolution 1483 on Iraq can be read in support of two irreconcilable legal interpretations. On one view, the resolution States that the US and the UK were Occupying Powers and subject to the law of occupation, thereby opening them up to liability under the law as argued by Scheffer. However, it also authorised the Coalition Provisional Authority, ‘to promote the welfare of the Iraqi people through the effective administration of the territory....’.<sup>178</sup> The Authority was authorised to do so as long as it acted consistently with the UN Charter and ‘other relevant international law’.<sup>179</sup> This necessarily includes occupation law. UN Security Council Resolution 1483, therefore, created a complicated legal structure which effectively dis-applies certain aspects of the law of occupation (i.e. those prohibitions on legal, political and economic reform necessary to promote the welfare of the Iraqi people) while insisting that the law of occupation forms the legal basis for the (transformative) occupation.

Subsequently, Scheffer and others have questioned whether the resolution is clear enough to mandate the necessary reforms. Scheffer is right. Any liability incurred by the

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<sup>178</sup> UN Security Council Resolution 1483, 22 May 2003, ‘Preamble’, available online at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N03/368/53/PDF/N0336853.pdf?OpenElement> (last accessed 15 August 2017)

<sup>179</sup> UN Security Council Resolution 1483, 22 May 2003, ‘Preamble’, available online at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N03/368/53/PDF/N0336853.pdf?OpenElement> (last accessed 15 August 2017)

violation of the law of occupation by any of the States involved in the post-intervention reconstruction must lie with the occupying powers.<sup>180</sup> However, in other cases, it might be possible for the UN Security Council to drop the reference to the law of occupation altogether. This is not a perfect legal solution given that it involves political considerations in the identification of the relevant legal norms. In the case of Iraq, the illegal nature of the initial intervention made it impossible for the UN Security Council to drop the law of occupation completely. But when compared with Orend's *jus post bellum* (which would circumvent the need for a UN Security Council mandate altogether) it seems a sensible approach to the question of transformative occupation.

### **3.6 Is a new Additional Protocol necessary?**

The Orendian suggestion of a new *jus post bellum* Protocol implies that the current system is broken. As mentioned above, Orend is mostly thinking in terms of post-intervention reconstruction. His view is that when States intervene and defeat enemy States, there is uncertainty about the rules of reconstruction. Particularly, in relation to the lack of a *post bellum* set of rules in the law of armed conflict, Orend says that a new Additional Protocol is necessary. However, if States have refrained from setting up a *post bellum* branch to the law of armed conflict and detailed rules on reconstruction then this is owing to the fact that this is, at least in part, considered unnecessary.

In the first place, post-intervention reconstruction may be subject to the detailed guidance as laid down by the UN Security Council. In relation to transitional criminal justice, for example, the UN Security Council has set out detailed rules on the potential

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<sup>180</sup> Including States identified as non-occupying States bound by the law of occupation in UN Security Council Resolution 1483, such as the Netherlands.

prosecution of child soldiers. The Special Court for Sierra Leone had jurisdiction over child soldiers over the age of 15.<sup>181</sup> Given its position at the top of the international legal order, States have an obligation to follow its pronouncements.<sup>182</sup> In Sierra Leone, the ultimate decision whether to prosecute or not was left to the Chief Prosecutor David Crane who chose not to prosecute child soldiers.<sup>183</sup> According to Crane, the point of the international criminal justice system was to pursue those most responsible for the atrocities committed and, in his view, child soldiers and adolescents were not those most responsible. But other interpretations of international criminal justice are possible. Chapter 5 sets these out in the context of post-conflict Colombia. For present purposes, the point is that a lack of an Additional Protocol did not affect the ability of the UN Security Council to regulate the issue. Furthermore, when the UN Security Council is not involved, negotiating parties are able to use international law to design post-conflict transitional justice mechanisms as part of a peace agreement. Certain normative parameters can be found from a number of sources. Peace negotiators use domestic law and international treaty law for the purposes of designing transitional criminal justice mechanisms that are appropriate to the local context. This is possible by adopting an interpretive approach to what the law requires when all the relevant provisions are taken as a whole. Chapter 5 sets one way that this might work in practice. For the purposes of completeness, post-conflict Colombia would need to take account of all the relevant legal provisions. Some of the most important international legal provisions are found below.

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<sup>181</sup> Article 7, Statute of the Special Court for Sierra Leone, established pursuant to UN Security Council Resolution 1315 (2000), 16 January 2000, establishing a Special Court for Sierra Leone.

<sup>182</sup> Article 103, UN Charter, (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.

<sup>183</sup> See Press Release, Special Court for Sierra Leone, Public Affairs Office, (2 November 2002), <http://www.rscsl.org/Documents/Press/OTP/prosecutor-110202.pdf> (last accessed 7 August 2017).

### **3.6.1 Domestic Law**

The Constitution of Colombia is the superior normative structure of Colombia.<sup>184</sup> Article 44 guarantees that a number of rights accrue to children and adolescents in Colombia. These include the ‘right to life, physical integrity, health and social security’.<sup>185</sup> The State is obliged to ‘assist and protect the child in order to guarantee their development and the full exercise of their rights’.<sup>186</sup> It further States that the ‘rights of the child prevail over the rights of others’.<sup>187</sup> The Prosecutor also needs to consider the Colombian Penal Code. The most relevant body of law in this regard is Law 1098 of 8 November 2006, especially Section II on the ‘System of Criminal Adolescent Responsibility’ (SACR).<sup>188</sup> Article 139 asserts that SACR applies to juveniles between the ages of 14 and 18. The principles of the SACR are found in Article 141. It states that the SACR is based on the principles and definitions found in the ‘the Constitution, international human rights treaties’ and in ‘the present law (Law 1098).’<sup>189</sup> This system accepts that those between 14 and 18 are capable of being investigated, indicted and prosecuted. The only blanket amnesty applies to minors under 14 at the time of the commission of the crimes. Thus, from the perspective of domestic law, there is a barrier to

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<sup>184</sup> Constitution of Colombia of 1991, (available online at: <http://www.corteconstitucional.gov.co/Inicio/Constitucion%20politica%20de%20Colombia%20-%202015.pdf> (last accessed 7 August 2017).

<sup>185</sup> Article 44, Constitution of Colombia of 1991, (available online at: <http://www.corteconstitucional.gov.co/Inicio/Constitucion%20politica%20de%20Colombia%20-%202015.pdf> (last accessed 7 August 2017).

<sup>186</sup> Article 44, Constitution of Colombia of 1991, (available online at: <http://www.corteconstitucional.gov.co/Inicio/Constitucion%20politica%20de%20Colombia%20-%202015.pdf> (last accessed 7 August 2017).

<sup>187</sup> Article 44, Constitution of Colombia of 1991, (available online at: <http://www.corteconstitucional.gov.co/Inicio/Constitucion%20politica%20de%20Colombia%20-%202015.pdf> (last accessed 7 August 2017).

<sup>188</sup> Law 1098 of 8 November 2006, ‘Code on Childhood and Adolescence’ (Bogotá, 2010) available online at: [http://www.sipi.siteal.iipe.unesco.org/sites/default/files/sipi\\_normativa/codigo\\_de\\_infancia\\_y\\_adolescencia.pdf](http://www.sipi.siteal.iipe.unesco.org/sites/default/files/sipi_normativa/codigo_de_infancia_y_adolescencia.pdf) (last accessed 7 August 2017).

<sup>189</sup> Article 141, Law 1098 of 8 November 2006, ‘Code on Childhood and Adolescence’ (Bogotá, 2010) available online at: [http://www.sipi.siteal.iipe.unesco.org/sites/default/files/sipi\\_normativa/codigo\\_de\\_infancia\\_y\\_adolescencia.pdf](http://www.sipi.siteal.iipe.unesco.org/sites/default/files/sipi_normativa/codigo_de_infancia_y_adolescencia.pdf) (last accessed 7 August 2017).



prosecuting under 14s which has been recognised in the peace agreement between the FARC-EP and the Colombian government. Furthermore, there is a special system of juvenile justice in place which may be relevant in terms of child soldiers. From the perspective of the SACR, a deprivation of liberty for serious crimes is not discarded for those between the ages of 14 and 18. This is reflected in the peace agreement which states that those cases will be dealt with at a later date.<sup>190</sup> The point is that the domestic structure does not discard the possibility of prosecuting some child soldiers if they are suspected of committing very serious crimes.

### **3.6.2 International Law: Human Rights**

From the perspective of human rights law, the most relevant international treaty is the Convention on the Rights of the Child (CRC).<sup>191</sup> In article 1, the CRC asserts that ‘every human being below the age of 18 years’ is a child.<sup>192</sup> Thus, for the purposes of post-conflict Colombia, the transitional justice mechanisms must respect that a number of provisions from international law are relevant to all those combatants under 18. The key provision in the Convention is Article 3 which states that ‘in all actions concerning children...the best interests of the child shall be a primary consideration.’<sup>193</sup> These provisions could be interpreted as discouraging the prosecution of child soldiers. However, the CRC does not prohibit prosecution. Instead, it can be read as setting out safeguards that provide for special system of juvenile justice. Article 38 (2) even asserts that States parties ‘shall take all

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<sup>190</sup> See Joint Communiqué #70, Havana, Cuba, 15 May 2016, (Agreement on Minors) available at: <http://www.altocomisionadoparalapaz.gov.co/mesadeconversaciones/PDF/comunicado-conjunto-70-version-ingles-1-1463432344.pdf> (last accessed 21 June 2017).

<sup>191</sup> Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990), 1577 UNTS 27531, (CRC).

<sup>192</sup> Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990), 1577 UNTS 27531, (CRC) Article 1.

<sup>193</sup> Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990), 1577 UNTS 27531, (CRC) Article 3.

feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.’<sup>194</sup> This provision is directed at recruitment to the armed forces. In terms of those aged between 15 and 18, the CRC says that ‘priority’ should be given to those children who are oldest.<sup>195</sup> It is important to point out, however, that Colombia inserted a reservation to this provision. For Colombia, the relevant age is 18 as recruitment to the armed forces is prohibited below that age. Of course, this does not apply to those child soldiers associated with non-State armed groups. In this regard, the important point is that child soldiers may need a special and separate post-conflict justice system that is founded on principles that respond to their particular vulnerabilities. The CRC does not prohibit the prosecution of children.

However, the CRC does require a minimum age of criminal responsibility. Article 40(3) (a) of the Convention provides that State parties shall seek to establish a minimum age below which children shall be presumed to be incapable of criminal responsibility. However, the actual age is left to the discretion of States. The UN Committee on the Rights of the Child (hereafter the Committee) stated in its General Comment No. 10 that ‘a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable’.<sup>196</sup> However, as this is non-binding, many States continue to fix the minimum age of criminal responsibility below this age.<sup>197</sup> The Committee has also stated that criminal responsibility ought not to be determined by reference to subjective factors such as ‘the attainment of puberty, the age of discernment of the personality of the child’.<sup>198</sup>

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<sup>194</sup> UN Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990), 1577 UNTS 27531, (CRC), Article 38 (2).

<sup>195</sup> UN Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990), 1577 UNTS 27531, (CRC), Article 38 (3).

<sup>196</sup> UN Committee on the Rights of the Child (UNCRC), ‘General Comment No. 10 on Children’s Rights and Juvenile Justice’ (25 April 2007), CRC/C/GC/10, at 5.

<sup>197</sup> For example, in the UK it is 10. See UK government website: <https://www.gov.uk/age-of-criminal-responsibility> (last accessed 15 August 2017)

<sup>198</sup> UNCRC, ‘Report on the tenth session’ (Geneva, 30 October 1995), UN Doc. CRC/C/46 (1995), at paragraph 203.

Even though a specific Protocol on this issue is not available, rules exist that allow States to design appropriate transitional justice mechanisms for juveniles. Any system of post-conflict juvenile justice would be subject to a number of safeguards. The CRC contains a number of relevant rules. The main principle among these is article 3 which sets the ‘best interests’ of the child as the premier consideration.<sup>199</sup> However, other relevant rights are the right to non-discrimination (art. 2); the right to life, survival and development (art. 6); the right to be heard (art. 12) and to dignity (art. 40) which includes ‘promoting the child’s reintegration and the child assuming a constructive role in society’.<sup>200</sup>

States also rely on other non-legal norms. These norms are found in so-called ‘soft law’ instruments.<sup>201</sup> As explained above, the traditional way of thinking about international law finds legal validity in the consent of States (see 2.1.2). For some lawyers, this is a relatively ‘dated’ way of thinking about how States make law.<sup>202</sup> For example, Hillgenberg argues that sometimes States prefer to be bound by looser normative parameters. This may respond to ‘a general need for mutual confidence building’ or ‘the need to stimulate developments still in progress’.<sup>203</sup> It is, of course, true, and it may be possible to define this ‘soft-law’ in different ways.<sup>204</sup> For Boyle and Chinkin, ‘soft law’ simply refers to ‘a variety of non-legally binding instruments used in contemporary international relations’.<sup>205</sup> These norms respond to the kinds of rules that international relations theorists have discussed in

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<sup>199</sup> UN Committee on the Rights of the Child (UNCRC), ‘General Comment No. 10 on Children’s Rights and Juvenile Justice’ (25 April 2007), CRC/C/GC/10, at 5.

<sup>200</sup> UN Committee on the Rights of the Child (UNCRC), ‘General Comment No. 10 on Children’s Rights and Juvenile Justice’ (25 April 2007), CRC/C/GC/10, at 5.

<sup>201</sup> Hartmut Hillgenberg, ‘A Fresh Look at Soft Law’, 10 *EJIL* (1999) 499; Alan Boyle and Christine Chinkin, *The Making of International Law* (New York, OUP: 2007) 210, 211.

<sup>202</sup> Alan Boyle and Christine Chinkin, *The Making of International Law* (New York, OUP: 2007) 210, 211.

<sup>203</sup> Hartmut Hillgenberg, ‘A Fresh Look at Soft Law’, 10 *EJIL* (1999) 499.

<sup>204</sup> See generally R. R. Baxter, ‘International Law in “Her Infinite Variety”’ 29 *International and Comparative Law Quarterly* (1980) 549; Prosper Weil, ‘Towards Relative Normativity in International Law?’ 77 *AJIL* (1983) 413; H. Hillgenberg, ‘A Fresh Look at Soft Law’, 10 *EJIL* (1999) 499; Alan Boyle and Christine Chinkin, *The Making of International Law* (New York, OUP: 2007) 210.

<sup>205</sup> Alan Boyle and Christine Chinkin, *The Making of International Law* (New York, OUP: 2007) 210, 212.

relation to the order of international society.<sup>206</sup> For others, soft law is a challenge to the horizontal ‘inter-State’ nature of the international legal order.<sup>207</sup> Agreement on a definition is not necessary here. The point is that whatever their formal shortcomings, ‘soft law’ norms do not lack all authority and help States to regulate their behaviour.

The fact that States have agreed to soft-law measures in the area of child rights is significant. It suggests the recognition of the need for protection of children but also a desire for certain flexibility in the implementation of the regulatory requirements. In instrumental terms, the turn to soft law instruments ‘enables States to agree to more detailed and precise provisions because their legal commitment, and the consequences of any non-compliance, are more limited.’<sup>208</sup> The most important instrument in this area is known as the ‘Beijing Rules’.<sup>209</sup> This non-binding set of rules sets out standard minimum rules for the prosecution of children. Rule 1.2 urges States to develop conditions which ensure that the child has a ‘meaningful life in the community’.<sup>210</sup> Rule 1.4 States that ‘juvenile justice shall be conceived as an integral part of the national development process.’<sup>211</sup> The tone of the rules suggests an inclusive and holistic approach to dealing with children and justice. In terms of a minimum age of criminal responsibility, the ‘Beijing Rules’ state that the ‘beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity’.<sup>212</sup>

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<sup>206</sup> Hedley Bull, *The Anarchical Society – A Study of Order in World Politics* (Palgrave Macmillan, Basingstoke: 2012); Friedrich Kratochwil, *The Status of Law in World Society* (New York, CUP: 2014).

<sup>207</sup> Prosper Weil, ‘Towards Relative Normativity in International Law?’ 77 *AJIL* (1983) 413.

<sup>208</sup> Alan Boyle and Christine Chinkin, *The Making of International Law* (New York, OUP: 2007) 210, 214.

<sup>209</sup> UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), General Assembly Resolution 40/33 of 29 November 1985, available at: <http://www2.ohchr.org/english/law/pdf/beijingrules.pdf>

<sup>210</sup> Rule 1.2, UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), General Assembly Resolution 40/33 of 29 November 1985, available at: <http://www2.ohchr.org/english/law/pdf/beijingrules.pdf>

<sup>211</sup> Rule 1.4, UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), General Assembly Resolution 40/33 of 29 November 1985, available at: <http://www2.ohchr.org/english/law/pdf/beijingrules.pdf>

<sup>212</sup> Rule 4, UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), General Assembly Resolution 40/33 of 29 November 1985, available at: <http://www2.ohchr.org/english/law/pdf/beijingrules.pdf>

This may be helpful for interpretive purposes. It is a recognition that States differ legitimately on the minimum age owing to history and culture. But the commentary on the rule suggests that the minimum age ought not to be too different from that age at which other social and economic rights are acquired (such as marriage and/or the acquisition of civil majority status).<sup>213</sup> Rule 5 of the Beijing Rules is more relevant to the issue of transitional criminal justice. It States that the aim of juvenile justice ought to be ‘the well-being’ of the juvenile and urges a principle of proportionality.<sup>214</sup> This, however, is a reiteration of the CRC rules on the question which set out the best interests of the child as the primary consideration. Rule 6 makes provisions for the special needs of juveniles in terms of the amount of discretion allowed ‘at all stages of the proceedings’.<sup>215</sup> Rule 7 sets out procedural safeguards such as, the presumption of innocence, the right to remain silent and the right to presence of a parent or guardian during proceedings.<sup>216</sup> Rule 11 states that ‘consideration’ shall be given to dealing with juvenile offenders without resorting to formal trials. This rule seeks to avoid the stigmatization that comes with criminalization. However, it is directed towards offences of a non-serious nature. Trials for serious international crimes are not specifically implicated and not prohibited. Taken together with the rest of human rights law on children, the Beijing Rules can be interpreted as a specialized system of juvenile justice. They do not prohibit prosecutions of children and/or adolescents suspected of committing international crimes. However, neither is this required. Therefore, these instruments suggest

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<sup>213</sup> Commentary, Rule 4, UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), General Assembly Resolution 40/33 of 29 November 1985, available at: <http://www2.ohchr.org/english/law/pdf/beijingrules.pdf>

<sup>214</sup> Rule 5, UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), General Assembly Resolution 40/33 of 29 November 1985, available at: <http://www2.ohchr.org/english/law/pdf/beijingrules.pdf>

<sup>215</sup> Rule 6, UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), General Assembly Resolution 40/33 of 29 November 1985, available at: <http://www2.ohchr.org/english/law/pdf/beijingrules.pdf>

<sup>216</sup> Rule 7, UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), General Assembly Resolution 40/33 of 29 November 1985, available at: <http://www2.ohchr.org/english/law/pdf/beijingrules.pdf>

that States have agreed on an international set of rules which leave the decisions on the criminal responsibility of children to the States themselves.<sup>217</sup>

### **3.6.3 International Humanitarian Law and International Criminal Law**

The conflict in Colombia qualifies as an internal armed conflict. In terms of a duty to punish crimes committed during armed conflict, the relevant provisions are found in Common Article 3 of the Geneva Conventions and Protocol II to the Geneva Conventions 1977.<sup>218</sup> Neither the text of Common Article 3, nor any provision of Additional Protocol II prescribes a duty to prosecute violations of ‘grave breaches’ of the Geneva Conventions.<sup>219</sup> This would extend to an absence of a duty to prosecute grave breaches committed by children. However, Additional Protocol II States that under-18s cannot be punished by death penalty.<sup>220</sup> This suggests that under international humanitarian law they can be prosecuted. Otherwise, there would be no need to set out a prohibition on the death penalty.

Further, a duty to punish becomes clear when international humanitarian law is read in conjunction with international criminal law.<sup>221</sup> Recent developments in international criminal justice suggest that prosecution for the commission of crimes under international

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<sup>217</sup> See Joint Communiqué #70, Havana, Cuba, 15 May 2016, (Agreement on Minors) available at: <http://www.altocomisionadoparalapaz.gov.co/mesadeconversaciones/PDF/comunicado-conjunto-70-version-ingles-1-1463432344.pdf> (last accessed 21 June 2017).

<sup>218</sup> Article 3 common to Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC I) 75 UNTS 31; Geneva Convention for the Amelioration of the Conditions of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GC II) 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War (GC III) 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC IV) 75 UNTS 287 (all four Conventions adopted 12 August 1949, entered into force 21 October 1950); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), ((adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609, article 4(3)(c).

<sup>219</sup> Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts, (adopted 8 June 1977, entered into force 7 December 1978), 1125 UNTS 3

<sup>220</sup> Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts, (adopted 8 June 1977, entered into force 7 December 1978), 1125 UNTS 3, article 6 (4).

<sup>221</sup> For an example of this approach see, Rogier Bartels and Katharine Fortin, ‘Law, Justice and a Potential Security Gap: The ‘Organization Requirement in International Humanitarian Law and International Criminal Law’, 21 *Journal of Conflict and Security Law* (2016) 29.

humanitarian law is permitted or even required. For example, article 8 of the Rome Statute of the International Criminal Court provides jurisdiction for the court for war crimes.<sup>222</sup> Article 8 states that war crimes include ‘[i]n the case of a conflict not of an international character, serious violation of [Common Article 3]’.<sup>223</sup> Furthermore, the *Tadić* decision, as well as the statutes establishing the Ad-Hoc International Criminal Tribunal in Rwanda and the International Criminal Court offer support for the view that international criminal responsibility for certain crimes is required in non-international armed conflicts.<sup>224</sup> As such, as a matter of humanitarian law, it is clear that Colombia has a duty to prosecute those who have committed war crimes. This would *prima facie* extend to children. However, humanitarian law is relatively unclear on the minimum age of criminal responsibility. This is reflected in a number of its provisions concerning the recruitment of children into armed forces or armed groups.

Additional Protocols I and II prohibit the recruitment of under-15s.<sup>225</sup> Article 77(2) of Additional Protocol I States that ‘[t]he Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces.’<sup>226</sup> This provision might be interpreted as suggesting that if children under the age of

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<sup>222</sup> Article 8, Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), 2187 UNTS 90, article 30, available at: [https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf) (last accessed 12 July 2017).

<sup>223</sup> Article 8 (2) (e), Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), 2187 UNTS 90, article 30, available at: [https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf) (last accessed 12 July 2017).

<sup>224</sup> *Prosecutor v. Tadić*, ICTY-94-1-A, (26 January 2000); Statute of the International Tribunal for the Former Yugoslavia 1993, \_ (ICTFY Statute), Statute of the International Tribunal for Rwanda 1995 (Rwanda Statute) and Rome Statute of the International Criminal Court 1999 (Rome Statute).

<sup>225</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), (adopted 8 June 1977, entered into force 7 December 1978), 1125 UNTS 3, article 77(2) and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), ((adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609, article 77(2)

<sup>226</sup> Article 77(2) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), (adopted 8 June 1977, entered into force 7 December 1978), 1125 UNTS 3.

15 ought not to participate in armed conflict, then they equally ought not to be prosecuted for war crimes. However, this view might be doubted. The negotiators at the Diplomatic Conference did not accept a proposed amendment by the Brazilian representative to the effect that penal proceedings ‘shall not be taken against, and sentence not pronounced on, persons who were under sixteen years at the time the offence was committed’.<sup>227</sup>

Thus, it appears difficult to conclude that States have agreed on a customary norm on the non-punishment of child soldiers. It might be argued that the Diplomatic Conference took place decades ago and that views on this matter have developed. However, contemporary instruments are also incoherent in respect of the minimum age at which children can participate in armed conflict. According to article 8(2)(b)(xxxvi) of the Rome Statute, ‘conscripting or enlisting children under the age of fifteen years’ is a war crime in non-international (and international) armed conflicts.<sup>228</sup> This suggests that 16-18 year olds can participate and be held liable for their actions in armed conflict. However, the Optional Protocol on the Involvement of Children in Armed Conflict which States that non-State armed forces ‘should not, under any circumstances, recruit...persons under the age of 18 years’.<sup>229</sup> Further, the Statute of the Special Court for Sierra Leone provides that the Court has jurisdiction over persons of 15 years of age. Article 7(1) sets out provisions for a juvenile and restorative justice approach to the prosecution of the child soldier.<sup>230</sup> Another view might be that international humanitarian law and international criminal law do not explicitly prohibit the prosecution of child soldiers.

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<sup>227</sup> Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, (1974- 1977: Geneva, Switzerland, CDDH/III/325, 307, see Matthew Happold, ‘The Age of Criminal Responsibility for International Crimes under International Law’ in Karin Arts and Vesselin Popovski (eds.) *International Criminal Accountability and the Rights of Children* (TMC Asser Press: The Hague, The Netherlands: 2005), 6972.

<sup>228</sup> Rome Statute of the International Criminal Court, (adopted 17 July 1998, entry into force 1 Jul 2002) UNTS 2187, Article 8(2)(b)(xxxvi).

<sup>229</sup> UN General Assembly, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, (adopted 25 May 2000, entered into force 12 February 2002),

<sup>230</sup> UN Security Council, Statute of the Special Court for Sierra Leone, Security Council Resolution 1315 (2000), 16 January 2002, article 7(1).



### **3.6.4 Other post-conflict situations**

In designing post-conflict mechanisms, the negotiators would also look at other post-conflict situations. The most relevant for the purposes of post-conflict Colombia would be Sierra Leone. There are important parallels in terms of the use of child soldiers, their participation in a non-international armed conflict, and the establishment of a special ‘post-conflict criminal court’.

More than 48,000 of the soldiers involved in the armed conflict were children (defined as under-18s in international law).<sup>231</sup> Unlike other post-conflict situations, article 7 of the Statute of the Special Court for Sierra Leone (SCSL) did provide the court with jurisdiction over child soldiers over 15 years of age.<sup>232</sup> This is an important aspect of the history and practice of child soldier accountability in transitional criminal justice. However, the chief prosecutor decided that child soldiers in Sierra Leone were not ‘persons who bear the greatest responsibility’ for the international crimes committed during the armed conflict in that country.<sup>233</sup> He, therefore, refused to indict any child soldier perpetrators. This was despite the view from the UN that declared that those ‘most responsible’ did not exclude those between the ages of 15 and 18.<sup>234</sup> The UN Secretary-General, Kofi Annan Stated that although it was ‘inconceivable that children could be in a political or military leadership position [...] the gravity and seriousness of the crimes they have allegedly committed would

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<sup>231</sup> Mohamed Gibril Sesay and Mohamed Suma, Research Unit of the International Center for Transitional Justice, ‘Transitional Justice and DDR: The Case of Sierra Leone’, June 2009, available online at: <https://www.ictj.org/sites/default/files/ICTJ-DDR-Sierra-Leone-CaseStudy-2009-English.pdf> (last accessed 15 August 2017).

<sup>232</sup> Article 7, Statute of the Special Court for Sierra Leone, established pursuant to UN Security Council Resolution 1315 (2000), 16 January 2000, available online at: <http://www.refworld.org/docid/3dda29f94.html> (last accessed 15 August 2017).

<sup>233</sup> Press Release, Special Court for Sierra Leone, Public Affairs Office, (2 November 2002), available online at: <http://www.rscsl.org/Documents/Press/OTP/prosecutor-110202.pdf> (last accessed 7 August 2017).

<sup>234</sup> Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Security Council, S/2000/915, (4 October 2000)

allow for their inclusion within the jurisdiction of the Court.<sup>235</sup> Annan alluded to serious calls for child soldier accountability from within Sierra Leone. He stated that ‘the Government of Sierra Leone and representatives of Sierra Leone civil society clearly wish to see a process of judicial accountability’.<sup>236</sup> Also, according to these voices, ‘the people of Sierra Leone would not look kindly upon a court which failed to bring to justice children who committed crimes of that nature and spared them the judicial process of accountability’.<sup>237</sup> This shows that the law on child soldier accountability straddles international and local processes and principles. The Colombian peace agreement clearly states that child soldiers may be responsible for international crimes.<sup>238</sup> It leaves the decision as to whether to grant an amnesty to child soldiers to a special unit in the ‘Special Jurisdiction for Peace’.<sup>239</sup>

In terms of punishment, the peace agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone States that child soldier perpetrators would be spared incarceration.<sup>240</sup> Article XXX of the peace agreement States that the special needs of child soldiers would be dealt with by the ‘international community’, through the Office of the ‘UN Special Representative for Children in Armed Conflict,

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<sup>235</sup> Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Security Council, S/2000/915, (4 October 2000), 7.

<sup>236</sup> Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Security Council, S/2000/915, (4 October 2000), 7.

<sup>237</sup> Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Security Council, S/2000/915, (4 October 2000), 7.

<sup>238</sup> Joint Communiqué #70, Havana, Cuba, 15 May 2016, (Agreement on Minors) available at: <http://www.altocomisionadoparalapaz.gov.co/mesadeconversaciones/PDF/comunicado-conjunto-70-version-ingles-1-1463432344.pdf> (last accessed 21 June 2017); Amnesty Law, Article 27, Point 10, chapter 4, ‘Final Agreement for the End of Conflict and the Construction of a Stable and Long Lasting Peace’ signed on 24 November 2016 and ratified by Congress 1 December 2016. The full text of the peace agreement is available at: <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf>

<sup>239</sup> See Amnesty Law, Article 27, Point 10, chapter 4, ‘Final Agreement for the End of Conflict and the Construction of a Stable and Long Lasting Peace’ signed on 24 November 2016 and ratified by Congress 1 December 2016. The full text of the peace agreement is available at: <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf>

<sup>240</sup> Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, 7 July 1999, (Lome Accords) available online at: <http://www.sierra-leone.org/lomeaccord.html> (last accessed 15 August 2017).

UNICEF and other agencies'.<sup>241</sup> This reinforces a view that international standards needed to be taken into account and that child soldier accountability was not simply a matter for the local community. Importantly, in Sierra Leone, international NGOs were against prosecution.<sup>242</sup> In their view, it put the success of their rehabilitation programmes at risk. For this reason, and despite provisions that set out safeguards for juvenile justice, the Secretary-General's Report stated that 'ultimately, it will be for the Prosecutor' to decide whether action should be taken against any child soldier. In the end, there were no prosecutions of under-18s.

### **3.6.5 The Peace Agreement between FARC-EP and Colombian Government**

The above normative parameters have been used in Colombia to design a transitional criminal justice regime that complies with international legal norms in relation to child soldiers. The peace agreement states that the relevant law, for the purposes of transitional criminal justice is a mixture of domestic and international law.<sup>243</sup> Thus, the post-conflict law regime in any post-conflict State is a mixture of different legal categories. In explicitly affirming this fact, the peace agreement encourages an interpretive approach to the identification and implementation of the relevant legal rules. This means that it supports an interpretation of the law which looks at the whole picture and distils the relevant rules from a number of different sources. In this respect, Orend's suggestion for a new Protocol on child soldier accountability would simply be part of the picture of the relevant rules. As this

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<sup>241</sup> Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, 7 July 1999, (Lome Accords) available online at: <http://www.sierra-leone.org/lomeaccord.html> (last accessed 15 August 2017), article XXX.

<sup>242</sup> Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Security Council, S/2000/915, (4 October 2000), 7.

<sup>243</sup> See Part 5, Point 19 of the 'Final Agreement for the End of Conflict and the Construction of a Stable and Long Lasting Peace', (hereafter the Peace Agreement) signed on 24 November 2016 and ratified by Congress 1 December 2016. The full text of the peace agreement is available at: <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf>. (I will use my translations from Spanish to English throughout).

section has argued, the current framework is not broken and provides a flexible system for the interpretation in different scenarios. Importantly, this has slowly built up a practice which States can turn to for guidance.

In Colombia, the agreement states that for the purposes of the Special Jurisdiction for Peace, ‘the legal frames of reference are principally international human rights law and international humanitarian law’.<sup>244</sup> However, the same paragraph states that the transitional criminal justice mechanisms will adopt their resolutions or sentences and base themselves on ‘the Colombian Penal Code and/or international human rights law, international humanitarian law and international criminal law’.<sup>245</sup> Thus, post-conflict law must be interpreted in order to decide whether it requires, permits, or prohibits the prosecution of child soldier perpetrators in specific circumstances. The decisions to prosecute child soldiers or not will depend on the interpretation that is given to the several rules that are applicable.

A new Special Tribunal for Peace will be set up to hear individual cases. If an individual wants to access these (more lenient) sentences, they must come forward, plead guilty, provide a full account of the events that occurred, and undertake to make reparations to the victims of their actions. An individual, found guilty of serious crimes, may receive a sentence of up to eight years deprivation of liberty. This form of ‘limited justice’ aims at satisfying the requirements of peace (the rebels laying down their weapons) and the requirements of justice (satisfying the rights of victims to the truth and accountability). It has been possible to design these transitional criminal justice mechanisms without a new Additional Protocol on transitional justice. Instead, those involved in designing the

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<sup>244</sup> Part 5, Point 19 of the ‘Final Agreement for the End of Conflict and the Construction of a Stable and Long Lasting Peace’, (hereafter the Peace Agreement) signed on 24 November 2016 and ratified by Congress 1 December 2016. The full text of the peace agreement is available at: <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf>. (I will use my translations from Spanish to English throughout).

<sup>245</sup> Part 5, Point 19 of the ‘Final Agreement for the End of Conflict and the Construction of a Stable and Long Lasting Peace’, (hereafter the Peace Agreement) signed on 24 November 2016 and ratified by Congress 1 December 2016. The full text of the peace agreement is available at: <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf>. (I will use my translations from Spanish to English throughout).

mechanisms have drawn from other post-conflict experiences and domestic law on juvenile justice. All of the foregoing suggests that those negotiating or implementing transitional criminal justice mechanisms as they relate to children have some normative guidance from which to interpret the requirements of the law. However, the resulting peace agreement must be interpreted and implemented. In this regard, an interpretive approach is necessary to make the argument in favour or against indictment and prosecution in specific cases.

The facts will differ in accordance with every situation. In some cases, child soldiers may have been in a leadership position or committed a series of repeated serious crimes. In this case, the law might be interpreted to require child soldiers to enter the transitional criminal justice mechanism, explain themselves and provide reparations to the communities that they have damaged. Importantly, this might have instrumental benefits from the perspective of their reintegration and the possibilities of community reconciliation. However, the peace agreement does not oblige the chief prosecutor to do so. In deciding whether to bring prosecutions the Prosecutor has a wide range of legal sources to choose from in order to explain and justify the approach chosen. It may be that Colombia refrains from prosecuting children. In which case, the current framework will provide the legal basis for doing so. As mentioned, current practice militates against the prosecution of children.

In these circumstances, a new set of *jus post bellum* rules would reduce the flexibility of the current system in providing prescriptive rules for States to follow (notwithstanding the difficulties in agreeing those rules). In the difficult post-conflict period, States are unlikely to want to reduce their options. The Colombian peace agreement makes repeated references to the applicable law. It sets out the law which is most relevant. Thus, the current system is workable and encourages an interpretive approach to post-conflict law. A demonstration of how an interpretive approach provides some answers to a specific case of the criminal responsibility of children is provided in chapter 5. A new Protocol presents itself as a

rejection of this approach in favour of prescriptive rules on how States ought to deal with the question.

### **3.7 Concluding remarks on Orend's proposals**

This chapter has introduced and evaluated argued Orend's proposals for a new *jus post bellum*. The main thrust of the evaluation has been that although Orend may be right that the law of armed conflict does not provide specific rules on the criminal responsibility of children in post-conflict societies, there are *enough* rules for practitioners designing post-conflict mechanisms to work something out. Thus, a whole new area of law that prescribes new rules to follow is not necessary.

Furthermore, the sheer variety in child soldiering experiences militates against a 'one-size-fits-all approach'. As such, a new set of hard rules would be undesirable. This is further reinforced by the fact that States disagree about when children become adults. In these circumstances, a new set of rules would be very difficult for States to agree on. Finally, a new Protocol on transitional criminal justice would need to specify how it fits into the architecture of the law of armed conflict. Orend's proposal does not elaborate on how this would be done. However, the difficulties in specifying the beginning or end of any non-international armed conflict suggests that this area of the law ought to be left alone in favour of a different approach to identifying post-conflict rules. Sometimes, the appropriate way forward is for a United Nation Security Council to step in. In other situations, an interpretive approach which combines reliance on international human rights law, international humanitarian law and international criminal law may be possible. This thesis argues that Orend's proposal ought to be rejected in favour of a more dynamic conception of the *jus post bellum*.

A final remark on Orend's suggestion may be to re-imagine the same as a 'soft law' instrument for 'post-intervention reconstruction'.<sup>246</sup> The term 'soft law' is slightly misleading. Shelton states that it simply refers to 'non-binding political instruments such as declarations, resolutions, and programs of action...'<sup>247</sup> However, as Ellis argues; there are three ways of understanding 'soft law':

...binding legal norms that are vague and open-ended and therefore (arguably) neither justiciable nor enforceable; non-binding norms, such as political or moral obligations, adopted by states; and norms promulgated by non-state actors.<sup>248</sup>

For Orend's purposes, it is the second of the three conceptualizations that is most relevant. Rather than arguing for a new Additional Protocol that would radically change the law of armed conflict, it may be possible for Orend to 'scale back' his proposal and push for a new 'soft law' on the *jus post bellum* relevant to post-intervention reconstruction. A set of post-conflict norms may be gathered in a document and put to militarily powerful States that tend to intervene in the affairs of other weaker States. The idea may be to agree to a minimum level of human rights protection and accountability by having States agree to a number of principles which (although non-binding) carry with them a political or moral expectation of compliance. This seems like a sensible half-way point (between purely-moral and fully-legal norms). Yet, a number of issues arise.

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<sup>246</sup> On 'soft law' see generally, R. R. Baxter, 'International Law in "Her Infinite Variety"', 29 *International and Comparative Law Quarterly* (1980) 54; Prosper Weil, 'Towards Relative Normativity in International Law?' 77 *American Journal of International Law* (1983) 413; Jaye Ellis, 'Shades of Grey: Soft Law and the Validity of Public International Law', 25 *Leiden Journal of International Law* (2012) 313.

<sup>247</sup> Dinah Shelton, 'Soft Law' in GW Law Faculty Publications and Other Works, *Handbook of International Law* (Routledge Press, 2008), 1.

<sup>248</sup> Jaye Ellis, 'Shades of Grey: Soft Law and the Validity of Public International Law', 25 *Leiden Journal of International Law* (2012) 313, 315.

Firstly, and especially relevant to the question of this thesis, Orend is silent on child soldiers and their accountability. It may be possible to draw an inference from Orend's Kantian approach and draft a set of norms relevant to child soldier perpetrators. However, as demonstrated, Orend is slightly inconsistent with his Kantian approach, eschewing it for instrumentalism when it is convenient and useful.<sup>249</sup> Moreover, States disagree on fundamental issues to do with the conception of the 'child', i.e. when a child becomes an adult. Therefore, a soft law instrument, in relation to child soldier perpetrators, may be either very difficult to agree on, or, so vague as to lack any real normative bite (even in purely political terms). This does not mean, however, that it would be useless. It may bite in some situations and may promote a view of child soldier accountability that, over time, generates consensus, even over very difficult issues such as the minimum age of responsibility.

Another problem is that an agreement on children already exists in the form of the Beijing Rules.<sup>250</sup> As discussed, this soft-law instrument already deals with the minimum requirements for the prosecution of children. Of course, the Beijing Rules were not drafted and agreed with post-conflict situations in mind. However, as discussed in relation to other rules above, States may be able to use these as normative parameters and a general guide in seeking to design post-conflict mechanisms relevant to child soldier perpetrators. This is, effectively, what a 'soft' *jus post bellum* would aim to do in any event. Thus, the arguments made in relation to the 'hard' *jus post bellum* might be equally applicable to the 'soft' *jus post bellum*. Specifically, it appears unnecessary to agree on new (soft) norms when some relevant norms already exist. It also appears very difficult to imagine States agreeing on fundamental issues of applicability, in terms of when a child or adolescent is mature enough for their actions to attract criminal responsibility. Finally, post-conflict societies must deal with the issue of child soldier perpetrators in a way that suits the overall aims of the

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<sup>249</sup> See section 3.3.4.

<sup>250</sup> See section 3.6.2.



transition. This means that post-conflict child soldier accountability will be a different issue in different places.

While these are good arguments, nevertheless, a softer instrument could at least make explicit the agreed starting points for any subsequent interpretation of post-conflict law. It would be useful for post-conflict actors to have a specific document that contained the relevant norms or principles to be applied to the specific question. These may be very vague and abstract. However, this does not mean they would be useless. For example, in relation to the thorny issue of the minimum age of criminal responsibility, the *jus post bellum* may suggest that a more lenient approach be taken in relation to child soldiers without explicitly saying what age this requires. Even in States where the minimum age of criminal responsibility was very low, a principle that requires a more lenient approach in transitional contexts would ensure the raising of the minimum age of criminal responsibility. This might also be designed and promulgated to take precedence over previous instruments that do not deal with transitions, such as the Beijing Rules.

Of course, as soft law, States would be able to side-step the norms when they needed to. The existence of the instrument, however, may mean that States would have to explain why they were doing so, and this, in and of itself, would be useful in terms of the development of State practice in post-conflict contexts. However, a soft law *jus post bellum* on child soldier accountability would not necessarily draw from Orend's proposals. Orend has not developed a Kantian theory on child soldier accountability and this is a significant and difficult area for more research. Instead, the idea of a *jus post bellum* which helps post-conflict actors to interpret the law (rather than simply mandate the applicable rules) is the best way forward for the concept.

The following section introduces a conception of the *jus post bellum* which favours a shift from post-conflict legal rules to post-conflict legal principles. Subsequent sections

demonstrate how a *jus post bellum* centred on principles may help actors to decide what ought to be done in relation to child soldier perpetrators.

## **PART B**

### **CHAPTER 4: TOWARDS A DWORKINIAN VERSION OF THE *JUS POST BELLUM*?**

#### **4.1 Introduction**

The previous chapter evaluated whether the *jus post bellum* ought to be seen as a new Additional Protocol to the Geneva Conventions. It discussed the proposition in relation to whether a new Protocol on the issue of child soldiers and transitional criminal justice would be a necessary, possible and desirable development. It found that there were several obstacles to the proposal. A new *jus post bellum* Protocol would be unnecessary. The current legal structure provides States with some normative parameters. These can be used to interpret the law in a way that allows for a situation-specific design of transitional justice mechanisms. The flexibility of the current system is one of its strengths and so the creation of a new set of prescriptive rules would also be undesirable. Any gains derived from an increase in legal certainty would be offset by important losses that stem from the difficulties in prescribing particular substantive outcomes in difficult transitional negotiations. In essence, prescriptive rules of transitional criminal justice may make it more difficult to attain ceasefires and design peace agreements.

In any event, in the field of transitional criminal justice and the accountability of child soldiers, it would be very difficult for States to agree on the applicable rules. This is owing to the variety of opinions among States in terms of the minimum age of criminal responsibility. But even within States, there would be disagreements over the nature and aims of punishment in situations of transition. Further, it would also be difficult to open up negotiations on a new

area of the law of armed conflict and, at the same time, refrain from dealing with a number of other, very controversial, post-conflict issues.

Furthermore, many difficulties accompany the creation of a new Protocol on transitional criminal justice in terms of legal applicability. The uncertainties in fixing a ‘post’ moment in armed conflicts are unlikely to disappear in relation to other areas (i.e. the use of force and detention). In this regard, negotiations are unlikely to be simple. There is no indication that States have the will or interest in designing new legal rules in this area. In fact, in a number of different areas, States are moving towards forms of ‘soft law’ or ‘best practices’ in terms of regulation.<sup>1</sup> In relation to child soldier accountability, the ‘Beijing Rules’ are a good example. There is a ‘trend towards deformalization’ and this is best reflected in the conceptualization of post-conflict law as new *lex* rather than ‘law’ as properly understood.<sup>2</sup> Finally, contemporary international relations are preoccupied with a number of issues which will stretch the capacities of important actors in the negotiation of new rules in the field of armed conflict. The European Union is concerned with the Brexit negotiations. The USA, Russia and China are not aligned in relation to difficult issues such as Syria and North Korea. In this climate, the negotiation of a new post-conflict Protocol in the law of armed conflict seems very unlikely.

Given the overall situation, a new conceptualization of the *jus post bellum* is needed. Otherwise, the concept itself, and the academic attention devoted to it, ought to be called into question. This chapter introduces and analyses a more recent version of the *jus post bellum*. Gallen has argued that the *jus post bellum* is much more than ‘a strict temporal end-of-conflict period in international law’.<sup>3</sup> Instead, Gallen advocates a more ‘dynamic’

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<sup>1</sup> Friedrich Kratochwil, *The Status of Law in World Society* (New York, CUP: 2014), 101.

<sup>2</sup> Christine Bell, ‘Of *Jus Post Bellum* and *Lex Pacificatoria* – What’s in a Name?’, in Carsten Stahn, Jennifer Easterday and Jens Iverson, (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014), 181, 200.

<sup>3</sup> James Gallen, ‘The *Jus Post Bellum*: An Interpretive Framework’, in Carsten Stahn, Jennifer Easterday and Jens Iverson (eds.) *Jus Post Bellum - Mapping the Normative Foundations* (OUP, New York: 2014), 58.

conceptualization of the *jus post bellum* that seeks to avoid the problems in identifying the end of armed conflict.<sup>4</sup> For Gallen, a Dworkinian version of the *jus post bellum* provides the best possible avenue for the development of the concept as a matter of international law. This is owing to the fact that Gallen sees the central problem of post-conflict law as one of ‘complex interpretation and evaluation’.<sup>5</sup> In response, a Dworkinian *jus post bellum* framework introduces the concept of integrity into the arena of post-conflict law. Dworkin’s theory (interpretivism) presents a way of thinking, or a methodology, for asserting propositions of law. Anthea Roberts and others have shown (albeit only in relation to customary international law) that this can be a fruitful way of thinking about international law and legal practice. In this respect, it is possible to think about post-conflict law according to an interpretive lens. But the normative aspect of Dworkin’s theory (integrity) may be more problematic. Whether and how Gallen may be right in assuming that a Dworkinian version of the *jus post bellum* is useful is the central question of the next three chapters.

This chapter introduces and explains Gallen’s theory of *jus post bellum*. Gallen’s theory is directed specifically at post-intervention societies. Therefore, for the purposes of the current thesis it has to be developed. The central issue is what it means to insist on integrity in post-conflict law. Integrity developed as a theory to deal with the issue of *stare decisis* in common law countries. Among other things, Dworkin argued that interpretations of the law were required to be coherent with those earlier decisions which came previously. But in the *jus post bellum*, integrity appears to point in different directions.

On the one hand, post-conflict law is an ‘inward-looking’ question of national law. In this respect, integrity could mean that the interpretations of law proposed by post-conflict actors have to be coherent with other interpretations of law made by other actors in the same

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<sup>4</sup> James Gallen, ‘The *Jus Post Bellum*: An Interpretive Framework’, in Carsten Stahn, Jennifer Easterday and Jens Iverson (eds.) *Jus Post Bellum - Mapping the Normative Foundations* (OUP, New York: 2014), 58.

<sup>5</sup> James Gallen, ‘The *Jus Post Bellum*: An Interpretive Framework’, in Carsten Stahn, Jennifer Easterday and Jens Iverson (eds.) *Jus Post Bellum - Mapping the Normative Foundations* (OUP, New York: 2014), 58, 69.

post-conflict situation. This is Gallen's view. He argues that interpretations of post-conflict law in transitional criminal justice must be coherent in principle with the other interpretations of the law in relation to, for example, security sector reform, development or other peacebuilding activities. Gallen does not focus on whether interpretations of post-conflict law ought to be coherent with those of other post-conflict situations, i.e. whether transitional criminal justice in Colombia must be coherent with transitional criminal justice in Sierra Leone. His overall concern is organizational coherence in law and policy in single post-intervention societies.

On the other hand, thinking about integrity and post-conflict law raises an 'outward-looking' dimension. The *jus post bellum* as integrity may suggest that a set of international norms are developing into post-conflict law for all post-conflict societies. Many *jus post bellum* theorists have identified a set of 'crystallizing' international norms. But it is not yet clear what an interpretation of post-conflict law must be coherent *with* for the purposes of 'an international *jus post bellum*'.

The international legal order is a decentralized order. There is no central decision-maker (such as a constitutional court) which can provide the authoritative interpretations of law with which States must find coherence. Thus, it may be thought that, as a matter of law, there can be no legal obligation for post-conflict actors in Colombia to seek coherence with the interpretations of law in other post-conflict situations. It may be argued that these are simply different legal systems. However, to the extent that each society is interpreting and applying international law (to post-conflict issues) there is a legal duty to seek coherence with previous interpretations of international law. To ignore previous interpretations of international law may be tantamount to rejecting its binding nature. At the very least, if a different interpretation is needed, the State involved must explain its divergence from other interpretations of the law in other post-conflict societies. A Dworkinian viewpoint suggests

that this divergence has to be explained and the result must be coherent in principle with other post-conflict situations. Thinking and acting in this way, post-conflict actors would be developing the contours and accepting the normative constraints of the *jus post bellum* as integrity. There may be doubts about this conceptual approach. Dworkin himself was uncertain about whether his theory was useful in understanding the nature of law in the post-conflict context.<sup>6</sup> Nevertheless, the pursuit of integrity across post-conflict societies may be useful. It can contribute to the identification and development of a set of post-conflict norms by reminding States of the international dimension of their post-conflict activities.

Whether this approach adds value to those involved in the practice of post-conflict law will depend on the analysis in relation to a specific issue. In this regard, the central questions in this thesis is whether and how a Dworkinian *jus post bellum* helps post-conflict actors to identify the law of transitional criminal justice in relation to the criminal accountability of child soldier perpetrators. Importantly, this chapter will not provide a direct response to Gallen's theory. Gallen is concerned with a slightly different question relating to the coordination of different peacebuilding actors within a post-intervention State. This chapter modifies Gallen's theory and prepares the ground for its application in chapter 5. Chapter 6 raises some important objections to this version of the *jus post bellum*. Chapter 7 situates the *jus post bellum* as integrity in international legal scholarship. Chapter 8 sets out future possible directions for the *jus post bellum* and it makes some concluding remarks.

Section 4.2 introduces and analyses Gallen's interpretation of the *jus post bellum* as integrity. Section 4.3 begins to reconstruct a new Dworkinian approach to the *jus post bellum*. Section 4.4 deals with an important 'threshold objection' to Dworkin's theory. Section 4.5 presents an example of post-conflict decision-making in Colombia as the opposite

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<sup>6</sup> See Ronald Dworkin, *Law's Empire* (Portland, Oregon, Hart Publishing: 2006) 202, fn. 24.

of integrity. Section 4.7 makes some concluding comments and prepares the ground for the application of the *jus post bellum* in relation to a case-study in chapter 5.

## **4.2 Gallen's theory of the *jus post bellum***

Gallen's is concerned with the moral legitimacy of post-intervention law and policy.<sup>7</sup> He accepts that the *jus post bellum* cannot be considered a new development in terms of positive international law and develops a 'dynamic' conceptualization that focuses on the *jus post bellum* as an overarching framework of principles. The main benefit to this view is that 'post-conflict' law and policy often occurs during armed conflict (as in Colombia).<sup>8</sup> Thus, its interpretation and application cannot be linked to a specific 'end point' in armed conflict. Modern conflict may be too 'stop-start' for that to be possible. As a set of principles that apply during and after conflict (and according to Gallen maybe even before) the *jus post bellum* may better fit the realities of modern transitions.<sup>9</sup>

However, Gallen also has a particular kind of post-intervention transition in mind. He identifies a lack of coordination between different post-intervention actors as the main problem in terms of the moral legitimacy of transitions from conflict to peace. In his view,

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<sup>7</sup> James Gallen, 'The *Jus Post Bellum*: An Interpretive Framework', in Carsten Stahn, Jennifer Easterday and Jens Iverson (eds.) *Jus Post Bellum - Mapping the Normative Foundations* (OUP, New York: 2014), 58.

<sup>8</sup> For example, Law 975 of 2005, a transitional justice measure aiming to demobilize around 30,000 paramilitary soldiers, available online in Spanish: <https://www.fiscalia.gov.co/colombia/wp-content/uploads/2013/04/Ley-975-del-25-de-julio-de-2005-concordada-con-decretos-y-sentencias-de-constitucionalidad.pdf> (last accessed 18 July 2018); see also Lisa J. Laplante and Kimberly Theidon, 'Transitional Justice in Times of Conflict: Colombia's Ley de Justicia y Paz' 28 *Michigan Journal of International Law* (2007) 49; Kai Ambos, "The Colombian Peace Process (Law 975 of 2005) and the ICC's Principle of Complementarity", in Carsten Stahn and Mohamed M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice*, Vol. II, (Cambridge, CUP: 2011).

<sup>9</sup> Linking the *jus post bellum* to 'pre-conflict' may be risky in terms of linking the *jus post bellum* (a desired post-conflict state of affairs) and the *jus ad bellum* (reasons for going to war in the first place). The danger lies in powerful states using the *jus post bellum* to weaken the prohibition of armed force under the *jus ad bellum*, see Robert Cryer, 'Law and the *Jus Post Bellum*: Counselling Caution', in May and Forchimes, *Morality, Jus Post Bellum and International Law*, (New York, Cambridge University Press: 2012) 223.



an overarching interpretive framework, a *jus post bellum*, could ‘emphasize their mutually supporting relationship and interdependent goals’.<sup>10</sup> In Gallen’s words,

...the distinctive value of *jus post bellum* should be in recognizing that the various norms, regulations, and practices relevant to transitions are inter-dependent and mutually re-enforcing and as a result can be evaluated and interpreted in a unified fashion.<sup>11</sup>

Gallen is, thus, proposing a new language of overarching principles that different post-conflict actors should refer to when interpreting post-conflict law and policy. In this way, the fragmentation of the field can be unified under a single core set of principles.

The approach Gallen adopts is Dworkinian. He identifies the complexity of post-intervention law and policy as the central problem and provides Dworkin’s theory of law as a possible solution. Gallen analyses the problem and presents three main factors that lead to the complexity of post-conflict law. In simple terms: there are a number of legal actors, a number of different applicable legal regimes and each transitional society is different.

Despite this general approach, Gallen mainly discusses post-intervention societies and the lack of coherence between the legal utterances of different actors. This results in indeterminacy and fragmentation in post-conflict law and policy and a potentially incoherent approach to law during transitions. Dworkin’s theory of integrity urges coherence in interpretation. For this reason, Gallen thinks that constructing a coherent *jus post bellum* that applies within post-conflict societies may benefit from a Dworkinian lens. The following sections (4.2.1 – 4.2.3) discuss and evaluate Gallen’s analysis and provide an explanation of how these issues of fragmentation arise in the Colombian context. This prepares the ground

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<sup>10</sup> James Gallen, ‘The *Jus Post Bellum*: An Interpretive Framework’, in Carsten Stahn, Jennifer Easterday and Jens Iverson (eds.) *Jus Post Bellum - Mapping the Normative Foundations* (OUP, New York: 2014), 59.

<sup>11</sup> James Gallen, ‘The *Jus Post Bellum*: An Interpretive Framework’, in Carsten Stahn, Jennifer Easterday and Jens Iverson (eds.) *Jus Post Bellum - Mapping the Normative Foundations* (OUP, New York: 2014), 59.

for Gallen's ideas in relation to integrity in sections 4.2.5 – 4.2.7. Finally, section 4.3 onwards reconstruct Gallen's theory into a more comprehensive and global approach to the *jus post bellum*.

#### **4.2.1. International Law and Policy**

There are a wide range of areas of international law and policy that are relevant to transitions. Gallen argues that some areas such as transitional justice, peace agreements, peacebuilding and State building are directed at the 'narrow factual circumstances of transition'.<sup>12</sup> At the same time other areas are 'universal in application' insofar as they apply to 'consolidated democracies' as well as countries in transition, i.e. refugee and migration law, constitutionalism, and the development of a country's economy'.<sup>13</sup> The applicable legal framework in this situation is, therefore, a mixture of legal categories reflecting different 'value preferences' emerging from policy goals in different fields. To take just three examples, security sector reform aims at 'the enhancement of effective and accountable security for the State and its peoples...'<sup>14</sup> Transitional justice focuses on the legacy of mass abuse and atrocity either in transitions from conflict to peace or authoritarian rule to democratic rule.<sup>15</sup> Finally, the creation of new human rights institutions will aim at the enhancement of the human rights.<sup>16</sup>

To these three examples could be added many more such as, economic policies for the revitalization of the labour market, humanitarian aid restructuring and other development

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<sup>12</sup> James Gallen, 'Jus Post Bellum: An Interpretive Framework', in Carsten Stahn, Jennifer Easterday and Jens Iverson, (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014) 58, 60.

<sup>13</sup> James Gallen, 'Jus Post Bellum: An Interpretive Framework', in Carsten Stahn, Jennifer Easterday and Jens Iverson, (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014) 58, 60.

<sup>14</sup> U.N. Department of Peacekeeping Operations, Security Sector Reform Unit, The U.N. SSR Perspective, (2012) available at ([http://www.un.org/en/peacekeeping/publications/ssr/ssr\\_perspective\\_2012.pdf](http://www.un.org/en/peacekeeping/publications/ssr/ssr_perspective_2012.pdf)), 2.

<sup>15</sup> Mark Freeman and Dražan Djukić, 'Jus Post Bellum and Transitional Justice', in Carsten and Jann K. Kleffner, (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008) 213, 214.

<sup>16</sup> Christine Bell, *Peace Agreements and Human Rights*, (New York, OUP: 2000), 193.

goals.<sup>17</sup> Gallen's point is that goals such as 'security', 'justice', 'human rights', 'economic growth', 'development' or 'democracy' represent 'competing spheres of authority' that raise the need to make strategic choices between them.<sup>18</sup>

In Colombia, a cursory look over the 'General Agreement to End the Conflict and Build a Stable and Lasting Peace' (hereafter 'General Agreement'), speaks to the possibility of legal fragmentation.<sup>19</sup> In the first place, fragmentation appears as a result of the signing of separate substantive agreements. These range over land reform, the integration of former rebels into the political process, the resolution of illegal drug cultivation and the special justice tribunal for victims. These agreements reflect specific value goals such as land reform and restitution, the protection of private land holdings, and a better and more consolidated democracy. The special goal of transitional criminal justice encompasses the desire for justice for victims of the conflict and the reconciliation and reintegration of former combatants in furtherance of a sustainable peace. Fragmentation in value goals creates the possibilities of legal conflicts arising insofar as the peace agreements provide a road-map to peace. For instance, 'peace' depends on the reintegration of former FARC-EP rebels into society and democratic politics, but 'justice' depends on the accountability of perpetrators of human rights violations and war crimes in view of the demands of an estimated 8 million registered victims of the conflict.<sup>20</sup> Gallen, generally, claims that the *jus post bellum* as

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<sup>17</sup> Martin Wählisch, 'Conflict Termination from a Human Rights Perspective - State Transitions, Power-Sharing and the Definition of the 'Post'', Carsten Stahn, Jennifer Easterday, and Jens Iverson, *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014) 315, 332.

<sup>18</sup> James Gallen 'Jus Post Bellum: An Interpretive Framework', in Carsten Stahn, Jennifer Easterday and Jens Iverson, (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014) 58, 61.

<sup>19</sup> The 'General Agreement to End the Conflict and Build a Stable and Lasting Peace' was signed on 26th August 2012 and it served as the reference document for the subsequent negotiations on each of its substantive points. All of the documents are available (some in English) at the official website for the peace talks which can be found at <https://www.mesadeconversaciones.com.co/documentos-y-comunicados> (last accessed 7 January 2016). I will use my own translations from Spanish to English.

<sup>20</sup> The figure of 7.6 million reflects the number of registered victims since the talks began. An unprecedented number have participated in the talks, see the expert comment from Virginia Bouvier from the United States Institute for Peace <http://www.usip.org/publications/2015/12/17/qa-colombia-guerrillas-reach-accord-rights-victims-of-war> and her personal blog ( <https://vbouvier.wordpress.com> ) for a comprehensive and up-to-date snapshot of the talks to date.

integrity helps to resolve these types of conflicts by appealing to the shared goals of the relevant political actors in transitions.

#### **4.2.2 Legal Foundations for the Engagement of International Actors**

Gallen identifies the ‘legal foundations for the engagement of international actors’ as another level of complexity in identifying the *jus post bellum*.<sup>21</sup> Gallen points out that the legal foundations for international participation ‘make a legal or moral difference to their engagements’.<sup>22</sup> The first dimension of complexity (rule-fragmentation) interacts with the second dimension of complexity on international actors. However, it is clear that Gallen is only considering post-intervention issues. He argues,

substantive international rules, norms and principles must therefore cover a variety of factual and legal circumstances, from full occupation by a belligerent State, through to a variety of Security Council authorizations, through to the legitimate consent of an affected population to the presence of donor States and INGOs on their territory.<sup>23</sup>

For instance, international human rights norms may be displaced by other (superior) rules, such as, resolutions of the UN Security Council. In Colombia, international participation in the transition appears to have been limited to certain States participating in the peace process (i.e. Venezuela, Cuba, and Norway). However, Point 6 of the ‘General Agreement’ makes explicit provision for international cooperation in the implementation phase of the

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21 James Gallen ‘*Jus Post Bellum*: An Interpretive Framework’, in Carsten Stahn, Jennifer Easterday and Jens Iverson, (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014) 58, 61.

22 James Gallen ‘*Jus Post Bellum*: An Interpretive Framework’, in Carsten Stahn, Jennifer Easterday and Jens Iverson, (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014) 58.

23 James Gallen ‘*Jus Post Bellum*: An Interpretive Framework’, in Carsten Stahn, Jennifer Easterday and Jens Iverson, (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014) 58, 63.

agreement.<sup>24</sup> In a joint communiqué, the parties to the Colombian peace talks have announced that they have invited a UN/CELAC (the Community of Latin American and Caribbean States) special unarmed political mission to monitor the ceasefire and the demobilization of the FARC-EP.<sup>25</sup> Although the details are not yet clear, international cooperation is based on the consent of the Colombian State (and the FARC-EP as part of the peace process). However, the presence of these political observers will be authorized by UN Security Council Resolution 2261 (2016) and this provides important immunities in relation to the rights and obligations of these actors in Colombia.

Nonetheless, there will be an absence of a more extensive military or political presence in Colombia. Therefore, it might be thought that this area of ‘complexity’ will be less problematic in Colombia than in other *post bellum* situations.<sup>26</sup> However, a broad conception of ‘international actors’ which goes beyond the paradigm of peace and security would include international financial institutions such as the World Bank, the International Monetary Fund (IMF) and other regional economic actors which may be involved such as the European Union. The legal foundations upon which these actors are involved in the Colombian transition must be considered as part of the legal complexity of identifying the *jus post bellum*. In this way, the *jus post bellum* ought to transcend the traditional separation

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<sup>24</sup> Point 6, The ‘General Agreement to End the Conflict and Build a Stable and Lasting Peace’ was signed on 26th August 2012 and it has served as the reference document for the subsequent negotiations on each of its substantive points. All of the documents are available (some in English) at the official website for the peace talks which can be found at <https://www.mesadeconversaciones.com.co/documentos-y-comunicados> (last accessed 7 January 2016). I will use my own translations from Spanish to English.

<sup>25</sup> In addition, there has been international supervision of the transitional justice process by the International Criminal Court, see the latest ICC Report on Preliminary Examination Activities (2015) at 32, (available at <https://www.icc-cpi.int/iccdocs/otp/OTP-PE-rep-2015-Eng.pdf>) (last accessed 22 January 2016).

<sup>26</sup> The best example is Iraq where the U.S. and the U.K. were subject to the law of occupation but other States were not according to U.N. Security Council Resolution 1483 see Martin Zwanenburg, ‘Existentialism in Iraq: Security Council 1483 and the law of occupation’, 86 IRRC (December 2004), No. 856, 753.

between matters of international law relating to peace and security and matters of international economic law.<sup>27</sup>

The most relevant actor in this respect may be the International Criminal Court (ICC). The ICC has been investigating Colombia since 2004. However, the ICC has no jurisdiction over children suspected of the commission of international crimes (defined as under 18s). Therefore, the more likely international pressures will come from advocates against the prosecution of child soldiers. A similar situation to that which emerged in Sierra Leone could be envisaged. In that post-conflict State, the SCSL had the jurisdiction over child soldiers. However, individuals, such as UNICEF's Joanna Van Gerpen, argued that the prosecution of child soldiers would amount to re-victimizing them and that, therefore, they ought not to be prosecuted.<sup>28</sup> This may have affected the decision to instill a two-tiered approach whereby the Court could prosecute child soldiers but the decision was left to the prosecutor.

#### **4.2.3 The Context of the Transitional Society**

The final dimension of complexity in interpreting the *jus post bellum* is the transitional society itself. This is not just because the domestic law of the State in transition will be part of any *jus post bellum* legal framework. Transitions must deal with a paradox. On the one hand, there is an overarching aim to transform behaviour and attitudes of the conflict society towards internationally recognized norms. On the other hand, several international law and policy fields are fixed on the idea of local ownership.<sup>29</sup> The dilemma is that although

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<sup>27</sup> See Joanna Kyriakakis, 'Justice after War: Economic Actors, Economic Crimes, and the Moral Imperative for Accountability after War', in Larry May and Andrew Forcehimes (eds.), *Morality, Jus Post Bellum and International Law*, (New York, Cambridge University Press: 2012) 113.

<sup>28</sup> See BBC News, 'UN Reviews 'war crimes' children trials' <http://news.bbc.co.uk/1/hi/world/africa/958709.stm> (last accessed 15 August 2017).

<sup>29</sup> See Annika S. Hansen, 'From Intervention to Local Ownership: Rebuilding a Just and Sustainable Rule of Law after Conflict', in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008).

‘[p]olicies in each field express the desirability of local ownership’ they do not have a ‘common framework for its understanding in different disciplines’.<sup>30</sup> Further, Hansen points to significant dilemmas exist in identifying local owners and balancing this desire with a realistic assessment of local capabilities.<sup>31</sup> There is a tension in ‘establishing the rule of law’ and ‘increasing the participation and control of local owners.’<sup>32</sup> There is also a tension between ‘aims and means’.<sup>33</sup> International actors are concerned with implementing a reform agenda which adheres to internationally recognized norms, such as democracy, and the rule of law. However, the means by which they interact with the local transitional society demonstrates that often ‘international accountability is non-existent’.<sup>34</sup> These two dilemmas are reproduced in each field, whether that is political reform, economics, security, etc.

Faced with these dilemmas, Gallen argues that the role of the *jus post bellum* is to offer an ‘adequate conception of the relationship between international and national actors’.<sup>35</sup> However, it is possible to go further. The question of local ownership is not merely a national-international paradigm but it might also have to apply across national-regional and regional-local dimensions. In transitional societies, such as Colombia, the issue of ‘locality’ must be seen as bound up with the issues of minority group rights. In Colombia, the peace

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<sup>30</sup> James Gallen ‘*Jus Post Bellum: An Interpretive Framework*’, in Carsten Stahn, Jennifer Easterday and Jens Iverson, (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014) 58, 65.

<sup>31</sup> Annika S. Hansen, ‘From Intervention to Local Ownership: Rebuilding a Just and Sustainable Rule of Law after Conflict’, in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008), 146.

<sup>32</sup> Annika S. Hansen, ‘From Intervention to Local Ownership: Rebuilding a Just and Sustainable Rule of Law after Conflict’, in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008) 151.

<sup>33</sup> Annika S. Hansen, ‘From Intervention to Local Ownership: Rebuilding a Just and Sustainable Rule of Law after Conflict’, in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008) 151

<sup>34</sup> Annika S. Hansen, ‘From Intervention to Local Ownership: Rebuilding a Just and Sustainable Rule of Law after Conflict’, in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008); see also Kristen Boon, ‘Legislative Reform in Post-Conflict Zones: Jus Post Bellum and the Contemporary Occupant’s Law-Making Powers’, 50 *McGill Law Journal*, (2005) 285.

<sup>35</sup> ‘*Jus Post Bellum: An Interpretive Framework*’, in Carsten Stahn, Jennifer Easterday and Jens Iverson, (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014) 58, 65.

agreements so far have made extensive reference to under-represented racial and ethnic groups, (i.e. *raizales*, *palenqueros*, *afrocolombianos* and other diverse indigenous groups). Therefore, the issue of local ownership in the *jus post bellum* should be adapted to fit the internal dynamics of the local context, i.e. the relationship between ethnic and racial groupings within the Colombian State and its regions.

#### **4.2.4 Summary**

This review of the fragmentation of law in *post bellum* practice has prepared the ground for an explanation of how integrity may be useful in the law of transitions. For Gallen, all the different areas of law and policy which apply in transitions proceed towards a coherent goal - the re-establishment of the rule of law and the rebuilding of civic trust. Thus, Gallen constructs a theory of integrity in the *jus post bellum* on an analysis of post-conflict law that points to an empirical reality: interdependence of separate activities. Gallen argues that if only actors could see how their activities were interdependent, they could use a unified frame of reference for the interpretation and application of law and policy after interventions (a new *jus post bellum*). The point is that each field of practice in transitions ‘purports to contribute to the restoration of civic trust and the rule of law as contributions to the reconstitution of a sovereign political community.’<sup>36</sup> He argues that if we acknowledge ‘organizing principles’ which are ‘deeper than the substantive law and policies’ shows a commitment to the practice of integrity in post-conflict law.<sup>37</sup> Integrity, in this sense, provides post-conflict actors with a mind-set and a language which can help them to trust in the post-conflict political community.

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<sup>36</sup> James Gallen ‘*Jus Post Bellum: An Interpretive Framework*’, in Carsten Stahn, Jennifer Easterday and Jens Iverson, (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014) 71.

<sup>37</sup> James Gallen ‘*Jus Post Bellum: An Interpretive Framework*’, in Carsten Stahn, Jennifer Easterday and Jens Iverson, (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014) 71.



#### **4.2.5 Interdependence in Transitions**

Integrity in post-conflict law, for Gallen, arises because all transitions share two conditions.

He describes as:

...intense demands and expectations for the achievements of public goods in political community [and] minimal bureaucratic capacity and legitimacy to achieve such goods, due to a breakdown of civic trust and the rule of law, relative to the prior commission of gross violations of human rights.<sup>38</sup>

The ‘fact’ that all transitions share these conditions (for Gallen) means that the responses to these conditions (from a number of different actors) are capable of being explained and interpreted under a unified framework – the *jus post bellum* as integrity.

However, this formulation of the ‘shared conditions’ of all transitional societies makes it clear that Gallen is only really considering post-intervention law and policy. In Colombia, there may be an intense demand for the achievement of public goods but these do not necessarily arise as a result of the armed conflict. Rather, Colombia, as a developing nation, is still struggling to find equality of opportunity for its citizens and exhibits a largely unequal division of wealth. The problems are economic, political and social but they are not necessarily *the result* of the armed conflict in the way Gallen suggests. In fact, many societies, whether post-conflict or not, continue to exhibit these kinds of demands.

Further, there may be, at times, a crippling bureaucracy in Colombia. A snapshot is provided from the perspective of criminal justice in section 4.5. However, this is not necessarily owing to the effects of armed conflict. Instead, again, the issues predate the armed conflict and must be linked to the development of Colombia in its entirety.

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<sup>38</sup> James Gallen ‘*Jus Post Bellum: An Interpretive Framework*’, in Carsten Stahn, Jennifer Easterday and Jens Iverson, (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014) 65.

Thus, one problem with Gallen's theory, (for the purposes of the thesis question) is that it does not really aim at the Colombian situation. Its analytical focus is simply elsewhere (i.e. Iraq, Kosovo, and Timor-Leste, perhaps). The conditions he presents are not self-evident 'facts' of all post-conflict societies. Gallen, indeed, admits that he has reverse-engineered the conditions 'by analogy to the circumstances of politics and justice that describe conditions in consolidated democracies'.<sup>39</sup> Here again, however, this approach probably simplifies the issue as various democracies continue to struggle with a number of domestic demands for public goods. Consolidated democracies do not necessarily eschew bureaucracy; and the capacity to deliver evenly public goods is not necessarily always linked to economic development. It may be better to simply agree that all transitional societies must pass through 'a new constitutional moment' where the renegotiation of the distribution of public goods takes centre stage. This focus on a constitutional moment is also more easily linked to a Dworkinian approach, given Dworkin's traditional focus on constitutional law and interpretation. As will be discussed later, the principle of integrity, for it to be able to work in post-conflict societies, requires that a community of principle exists in the relevant post-conflict state. The notion that a peace agreement is a new constitutional moment, at the very least, provides evidence that a new moment of agreement has arrived in a divided state. Once a certain amount of agreement has been achieved in a divided society, in theory, the community of principle required for the notion of integrity may take hold. This will be explained in more detail in due course.

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<sup>39</sup> James Gallen, 'The *Jus Post Bellum*: An Interpretive Framework', in Carsten Stahn, Jennifer Easterday and Jens Iverson (eds.) *Jus Post Bellum - Mapping the Normative Foundations* (OUP, New York: 2014), 65.

#### **4.2.6 Civic Trust and the Rule of Law**

Gallen's analysis focuses on the structural consequences of gross human rights violations: the breakdown of civic trust and the destruction of the rule of law. Once more, however, this is only partly relevant to the Colombian situation. Colombia has never ceased to exist (as a functioning democracy) despite many years of armed conflict. Instead, it has managed to stay unified despite an ongoing rebellion, which may be seen as evidence of a very strong national identity (if not a shared political and economic ideology). Thus, the notion that civic trust has broken down and the rule of law has ceased to function is, once more, linked more closely to situations which are post-intervention, as in Iraq, Kosovo, and Timor-Leste.

Nevertheless, to persist for a moment with Gallen's argument, he thinks that the fact that there has been a breakdown in civic trust and the rule of law provides post-conflict actors with a purpose to their activities, namely the re-establishment of these social institutions. Here Gallen examines the aims of a number of disparate post-conflict activities and demonstrates that they are all aiming at re-establishing civic trust and the rule of law. He discusses briefly transitional justice, peacebuilding, security-sector reform and development and explains how they can all be described as aiming at rebuilding civic trust and the rule of law. Even though these areas may all mean different things by these terms, Gallen argues that 'the nature of both these concepts, as social norms, makes it clear that contributions from the areas identified are inter-dependent and thus should be interpreted through a shared framework'.<sup>40</sup> This is probably not clear enough to do the work that Gallen wants these concepts to do. If the areas do mean different things in the way they are used by different post-conflict actors, then the whole notion of a shared framework breaks down. Never mind

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<sup>40</sup> James Gallen, 'The *Jus Post Bellum*: An Interpretive Framework', in Carsten Stahn, Jennifer Easterday and Jens Iverson (eds.) *Jus Post Bellum - Mapping the Normative Foundations* (OUP, New York: 2014), 67.

the fact that different societies are unlikely to share an understanding of what is ‘civic’ or even the ‘rule of law’. Further, it is not clear why the activities all contribute to a different ‘shared’ aim, a general guarantee of non-repetition, for example. Gallen does not really take much time to develop these ideas. He simply draws a general line between the activities and the putatively shared aim in order to reach the necessity, and requirement, of a shared interpretive framework. However, there is a sense that that which must be proved, a unified interpretive framework aiming at integrity, has been presupposed.

Thus, the notion of a shared framework for the interpretation of post-intervention law and policy probably needs to be reconstructed on firmer ground. Again, one way of doing this, is thinking about the notion of a transition as a constitutional moment. The different areas are then linked less by specific conditions that can be proved to exist in each society but by the more general fact of that the end of conflict, the acceptance of peace, is a constitutional moment of renegotiation. The link between peace agreement (and peace treaty) and constitutionalization is an interesting one. In international law, the Charter of the UN has often been discussed as a constitutional document that arose at the end of the Second World War.<sup>41</sup> It can be read as the result of a renegotiation of the constitution of the international community. Although this view is not unproblematic, it has the benefits of simplicity. Inevitably, at the end of conflict, a number of actors must accept a new start, under new rules, as the result of peace. Therefore, the *jus post bellum* as integrity, as a theoretical concept, can attach to this empirical fact of transition and develop from there.

Focusing on all transitions as constitutional moments is a better foundation for the *jus post bellum* as integrity. This approach better accommodates the Dworkinian approach to post-conflict law and society which Gallen advocates. This section ends by discussing the

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<sup>41</sup> Bardo Fassbender, ‘The UN Charter as Constitution of the International Community’ 36 *Columbia Journal of Transnational Law* (1998) 531.

three principles that, for Gallen, form the backbone of the *jus post bellum* as an interpretive framework that aims to integrity.

#### **4.2.7 Gallen's Principles**

Drawing on the earlier work of Kristen Boon and Jean L. Cohen, Gallen focuses on accountability, proportionality and stewardship as the relevant interpretive principles for post-conflict law.<sup>42</sup> Gallen surveys a number of post-intervention societies and argues that these principles support and explain why the law and policy in these situations is morally (and therefore legally) legitimate. These principles need not be discussed in detail. Suffice it to say that recourse to these principles is reflected in much international practice.<sup>43</sup> However, as a preliminary point, it seems clear that many other principles could be added to Gallen's list.

Firstly, from a philosophical perspective, Larry May has argued that the normative foundation for the *jus post bellum* ought to be the Aristotelian principle of *meionexia* (justice as taking less than what you are owed).<sup>44</sup> It captures the idea that in order for a stable future, all sides to the conflict ought to compromise to some extent. In relation to transitional criminal justice, the principle may be interpreted in different ways. On the one hand, those who require justice may see a 16 year old FARC-EP rebel soldier to be sufficiently mature to understand the nature of their actions. In this respect, the decision to prosecute international crimes such as murder, or rape, seems to follow from a simple requirement of justice.

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<sup>42</sup> Kristen Boon, 'Legislative Reform in Post-Conflict Zones: *Jus Post Bellum* and the Contemporary Occupant's Law-Making Powers', 50 *McGill Law Journal*, 285; Jean L. Cohen, 'The Role of International Law in Post-Conflict Constitution-Making: Towards a *Jus Post Bellum* for 'Interim Occupations' 51 *New York Law School Law Review* 2006-07), 497.

<sup>43</sup> See James Gallen, 'The *Jus Post Bellum*: An Interpretive Framework', in Carsten Stahn, Jennifer Easterday and Jens Iverson (eds.) *Jus Post Bellum - Mapping the Normative Foundations* (OUP, New York: 2014), 71 – 79.

<sup>44</sup> Larry May, *After War Ends - A Philosophical Perspective*, (CUP, New York: 2012); see also 'Jus Post Bellum, Grotius and Meionexia', in Carsten Stahn, Jennifer Easterday and Jens Iverson, (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014) 15.

However, the principle of *meionexia* could temper this normative requirement in the light of other important aims of post-conflict society. Thus, the need for reconciliation or reintegration of former combatants could be reinforced by the limited applicability of justice. *Meionexia*, therefore, can inform the interpretation of other, more specific, *jus post bellum* principles.

Secondly, on a Dworkinian approach, the relevant principles emerge from a study of the relevant practice. Therefore other principles could include reconciliation, retribution, reparation, rebuilding, restitution and proportionality. In addition, it may be argued that the most important principle in respect of post-conflict practice is founded on the principle of non-repetition.<sup>45</sup> It is not clear why any and all of these principles could not also form part of the Dworkinian *jus post bellum*. Post-conflict is founded on a number of principles beyond those that Gallen mentions.

In choosing accountability, proportionality and stewardship, therefore, Gallen's *jus post bellum* framework is designed to evaluate and justify the behaviour of international actors in governing States in post-intervention transitions. In this regard, his framework is designed to help these international actors in identifying post-intervention law as it applies to their activities. Gallen argues that his theory requires practitioners to interpret legal norms according to the overarching purpose of post-intervention transitions: the rebuilding of the rule of law and fostering civic trust.<sup>46</sup> He argues that these aims can be pursued through the application of the principle of integrity. For Gallen, only by pursuing integrity can the political and moral obligations of post-conflict law be legitimate to individuals in post-conflict societies. In his own words,

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<sup>45</sup> After all, the 1984 Report on the Argentinian disappeared was entitled 'Never Again', see *Nunca Más - Informe de la Comisión Nacional sobre la Desaparición de las Personas*, available for download at: <http://www.enmanosenadie.com.ar/tag/nunca-mas/> (last accessed 8 June 2016).

<sup>46</sup> James Gallen, 'Jus Post Bellum: An Interpretive Framework', in Carsten Stahn, Jennifer Easterday and Jens Iverson, (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014) 58.

The task of the *jus post bellum* as integrity is to therefore offer a description of the existing international law, policy, and theory as applied to given transitions and seek to justify this practice by reference to its value goals in a unified or coherent fashion.<sup>47</sup>

Thus, integrity is provided by Gallen as ‘guidance to those who have the special responsibility to interpret legal norms on behalf of the polity in question’.<sup>48</sup> Integrity, in the sense of coherence in law and legal policy, may provide individuals in transitional societies with a reason to believe in the post-conflict reconstruction.

A failure to implement the peace agreement in a way that respects the principle of integrity could damage the legitimacy of the post-conflict movement. Of course, after conflict, there may be disagreement about some of the aims or goals of the transition. In Colombia, for example, the end of the armed conflict with the FARC-EP is one of many goals of the conflict. Other goals include the redistribution of wealth, and the eradication of cocaine crops. Thus, it may not be easy to agree on how law ought to be interpreted. Nevertheless, integrity, on Gallen’s account, urges officials to justify legal decisions according to principles which can justify the post-conflict legal system as a whole.

### **4.3 Reconstructing the *jus post bellum* as integrity: The basics of Dworkin’s Theory**

Ronald Dworkin’s theory asserts that the indeterminacy of law can be resolved by appealing to legal principles that aim at integrity. This section introduces the aspect of Dworkin’s legal theory known as law as integrity. It emerged in opposition to two well-established theories of law known as ‘conventionalism’ and ‘pragmatism’.<sup>49</sup> Dworkin argues that law as integrity

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<sup>47</sup> James Gallen, ‘*Jus Post Bellum: An Interpretive Framework*’, in Carsten Stahn, Jennifer Easterday and Jens Iverson, (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014) 58, 70.

<sup>48</sup> James Gallen, ‘*Jus Post Bellum: An Interpretive Framework*’, in Carsten Stahn, Jennifer Easterday and Jens Iverson, (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014) 58, 70.

<sup>49</sup> In Dworkin’s work, the immediate target of his critique is the view held by Hart and his argument in, H.L.A. Hart, *The Concept of Law*, (2nd Edition, 1994).

provides a better explanatory theory of how judges actually decide hard cases. He also proposes law as integrity as a better normative theory of how judges ought to decide hard cases. His overall point is that the more ‘integrity’ is produced in an interpretation of law, the better this is from the perspective of justifying the coercive practice of a legal order as a whole.<sup>50</sup>

The central differences between these approaches are made evident in ‘hard cases’ where the law is unclear or uncertain. Dworkin distinguishes between ‘empirical’ and ‘theoretical’ disagreements but only the latter is relevant here.<sup>51</sup> These are disagreements about the grounds of law, about the kinds of propositions that can be made to make a proposition of law valid. In the context of post-conflict law, they are disagreements about the correct approach to the fragmentation of legal categories. As explained in chapter 3 (in relation to transitional criminal justice) a number of different legal categories regulate a specific issue. Theoretical disagreements become evident in relation to specific cases. This is owing to the fact that there are different possible interpretations of what the law *is* in relation to the issue at hand. Dworkin’s point is that the interpretation of what the law *is* in relation to any issue must be coherent with what the law *should be* according to the principle of integrity.

This chapter argues that the situation of child soldier accountability in post-conflict Colombia is a ‘hard case’ in the Dworkinian sense. This is owing to the lack of determinate rules on whether a child soldier perpetrator of international crimes must be prosecuted in the forthcoming Special Tribunal for Peace. As mentioned, in relation to situations involving minors ‘accused or convicted’ of crimes ‘not subject to amnesty or pardon’ (international

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<sup>50</sup> Thus, Dworkin thinks that the best justification for a legal decision must be coherent with the best explanations for the legal and political order of a State as a whole, see for the ‘unity of value’ thesis, Ronald Dworkin *Justice for Hedgehogs*, (Cambridge: The Belknap Press of Harvard University Press, 2011), ‘Value is one big thing. The truth about living well and being good and what is wonderful is not only coherent but mutually supporting: what we think about any one of these must stand up, eventually, to any argument we find compelling about the rest.’, 1.

<sup>51</sup> Ronald Dworkin, *Law’s Empire*, (Portland, Oregon, Hart Publishing: 2006), 3.



crimes) there is evidence of that the parties disagreed in the negotiation of the peace agreement. The only specific mention of the situation in the peace process is Joint Communiqué #70 which was then incorporated into the 2016 Amnesty Law. This simply states that the situations of child soldiers (aged 14-18) suspected of committing crimes which cannot be amnestied ‘will be studied at a later stage’.<sup>52</sup> The point of a Dworkinian *jus post bellum* is that this kind of question can be answered in a particular way that requires a focus on integrity. This section clarifies the theoretical aspects of law as integrity and its proposed solution to the interpretation of law in ‘hard cases’. It does this by distinguishing law as integrity from to other approaches to the nature of law and legal reasoning discussed by Dworkin: conventionalism and pragmatism.

#### **4.3.1 Conventionalism**<sup>53</sup>

Conventionalism, in Dworkin’s view, ‘restricts the law of a community to the explicit extension of its legal conventions like legislation and precedent’.<sup>54</sup> The conventionalist view is usually attributed to H.L.A. Hart and other ‘legal positivists’.<sup>55</sup> They converge on a central proposition. This is, that deciding whether any law is valid, and whether it forms part of any legal system, depends on its sources and not its merits.<sup>56</sup> This means that whether a law is a good law or a bad law is not relevant to its *validity* as law. John Gardner explains the positivist view succinctly,

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<sup>52</sup> Point 2, Joint Communiqué #70, May 15 2016, available at: <http://www.altocomisionadoparalapaz.gov.co/Prensa/Paginas/2016/mayo/Acuerdo-sobre-salida-de-menores-de-15-anos-de-campamentos-de-las-FARC-EP.aspx> (last accessed 2 June 2016).

<sup>53</sup> Ronald Dworkin, *Law’s Empire*, (Portland, Oregon, Hart Publishing: 2006), 114.

<sup>54</sup> Ronald Dworkin, *Law’s Empire*, (Portland, Oregon, Hart Publishing: 2006), 124.

<sup>55</sup> Ronald Dworkin, *Law’s Empire*, (Portland, Oregon, Hart Publishing: 2006), 52.

<sup>56</sup> John Gardner, ‘Legal Positivism - 5 1/2 Myths’, 46 *American Journal of Jurisprudence* 1 (2001) 199.

...a norm is valid as a norm of that system in virtue of the fact that at some relevant time and place some relevant agent or agents announced it, practiced it, invoked it, enforced it, endorsed it, or otherwise engaged with it.<sup>57</sup>

This view posits that law is a simple, backwards-looking, fact-checking procedure. The law is derived from acts of ‘officials’.<sup>58</sup> It does not matter that the law in question is a bad law that officials should not have engaged with. Neither do excellent norms become law by virtue of their desirability.<sup>59</sup> Law is law by virtue of its being posited, or practiced, or recognized by an official or institution of the State.

This view of law promotes legal certainty. It does this by providing an objective methodology by which to identify what the law requires and permits: the search for an empirical source. Conventionalism has been very influential in modern international law. It is recognized in Article 38 (1) (c) of the Statute of the International Court of Justice.<sup>60</sup> The Statute recognizes three primary sources of international legal obligation. These are international treaties, customary law and general principles of law recognized by civilized nations (see section 2.1.2). All of these sources are rules announced, practiced, invoked, enforced or endorsed by the relevant agents, in this case, States. Chapter 2 set out some of the benefits of this system in the context of normative pluralism among States. In a situation where States legitimately disagree on what would be a ‘good’ law, the conventionalist approach assures that only those rules to which States have agreed are ‘the law’.

Dworkin is not convinced that conventionalism provides a good descriptive or normative theory of law. The problem for Dworkin arises when there are novel situations for which an easily identifiable rule is unavailable. In the context of this thesis, the rule on

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<sup>57</sup> John Gardner, ‘Legal Positivism - 5 1/2 Myths’, 46 *American Journal of Jurisprudence* 1 (2001) 199, 200.

<sup>58</sup> I use ‘officials’ to cover a great range of actors in the legal system such as legislators, judges, lawyers, etc.

<sup>59</sup> John Gardner, ‘Legal Positivism - 5 1/2 Myths’, 46 *American Journal of Jurisprudence* 1 (2001) 199, 200.

<sup>60</sup> Article 38 (1) (c) of the Statute of the International Court of Justice, UN Charter, chapter XIV, (signed 26 June 1945, adopted 24 October 1945) UNTS 1 XVI, available at: <http://www.refworld.org/docid/3ae6b3930.html>, last accessed 20 June 2017).

whether child soldiers ought to be prosecuted for international crimes is an example. The issue is not that there is no law at all dealing with the issue. The problem is that there are several legal categories that may be relevant. Thus, there may be a disagreement between interpreters about the proper interpretation of post-conflict law on the issue.

The Hartian/conventionalist response to ‘hard cases’ is that judges must use their discretion to decide the dispute. This ‘discretion’ is understood by conventionalists as a ‘strong’ discretion. As Dworkin says, this suggests that they must ‘find some wholly forward-looking ground of decision’.<sup>61</sup> In relation to the criminal accountability of child soldiers in Colombia, conventionalism provides no concrete answer. No specific rule can be found on the issue. This is owing to the fact that the end of armed conflict provides a new situation for which there is neither specific precedent nor legislation. There are no social sources of law that can be pointed to as dispositive of the issue in a specific case. Therefore, according to the conventionalist view, whether a child should be prosecuted for serious crimes has to be decided according to some forward-looking grounds. However, this is problematic for Dworkin because it undermines the constraining feature of conventionalism which is that it urges judges to focus on empirical legal ‘sources’, such as legislation, official practice and precedent, in identifying the law. In a hard case, such as that of child soldier accountability, conventionalism appears to lose its distinctive nature. It advocates unconstrained judicial discretion. Dworkin argued that conventionalism, therefore, failed to explain what judges actually do in these kinds of hard cases. In his view, judges looked to principles to justify their interpretations.<sup>62</sup> The principles emerged from previous legal practice. Thus, in a ‘hard case’, there were no ‘gaps’ in the law. The law simply became a question of identifying the right principles that could explain and justify a line of previous similar decisions. These principles could then help to formulate the law for the new and

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<sup>61</sup> Ronald Dworkin, *Law's Empire*, (Portland, Oregon, Hart Publishing: 2006), 95.

<sup>62</sup> Ronald Dworkin, *Law's Empire*, (Portland, Oregon, Hart Publishing: 2006), 15.

specific case at issue. Fundamentally, Dworkin thought that if judges did not rely on conventionalism in hard cases then there must be something more to law and legal practice. In Dworkin's language, the result is that the theory of conventionalism does not 'fit' the reality of legal practice. It fails as an explanatory theory and, therefore, ought to be rejected as a normative theory: judges ought to go beyond conventionalism in identifying the law in hard cases.

In the context of Colombia, the question is whether a lack of specific post-conflict legal rules on child soldier perpetrators is only a matter of prosecutorial discretion. A Dworkinian approach would reject the idea that it was. It would also reject the view that the question was indeterminate. For Dworkin, even if the 'positive' law is unclear, the legal principles that justify the positive law can be identified. These principles must then be used to interpret the law in a way that makes the decision coherent with the previous decisions in the same area. Chapter 5 presents an example and evaluation of how this might be applied in a specific case in transitional criminal justice. Chapter 6 will then look at two specific problems with the Dworkinian version of the *jus post bellum*.

### **4.3.2 Pragmatism**

Dworkin also distinguishes law as integrity from 'pragmatism'. Pragmatism is at the other extreme from conventionalism. It rejects the idea that judges are constrained by *any* previous rules in deciding hard cases. Instead, pragmatists think that 'judges do and should make whatever decisions seem to them best for the community's future'.<sup>63</sup> Matters of consistency with the past are simply not as important as reaching the best decision for the community in any given case. For Dworkin, a pragmatist 'denies that past political decisions in themselves

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<sup>63</sup> Ronald Dworkin, *Law's Empire*, (Portland, Oregon, Hart Publishing: 2006), 95.

provide any justification for either using or withholding the State's coercive power'.<sup>64</sup> Thus, in Colombia, a judge or prosecutor may simply reject the idea that he is constrained by law in deciding whether a child soldier perpetrator ought to be prosecuted for international crimes.<sup>65</sup> He would instead think about what the best outcome would be in terms of the post-conflict community.

Perhaps, with an eye on the peace process and the fragility of the transition, a prosecutor could decide not to prosecute any child soldiers. It is the substance of the interpretation that matters not whether it can be reconciled with past practice. But, crucially, pragmatism is silent about which interpretations of the law are 'best' for the community. As an account of law, it leaves the decision to judges who decide unconstrained and according to their best judgment. Thus, one judge may think that the best decision is that which is economically-speaking 'most-efficient'. So, a judge in Colombia might think that prosecuting child soldiers would be inefficient in a variety of ways. The construction of a parallel juvenile justice system might be thought to place a burden on already stretched resources. Alternatively, a judge could think that child soldiers are an important resource in and of themselves in terms of rebuilding the post-conflict State. But another approach that favours retribution on moral grounds might lean towards prosecution in order to vindicate the 'moral order'.<sup>66</sup> On a pragmatic account of law and legal reasoning, neither approach would necessarily consider legal or institutional history as crucial to the identification of what the law is. A pragmatist would simply decide according to subjective political preferences.

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<sup>64</sup> Ronald Dworkin, *Law's Empire*, (Portland, Oregon, Hart Publishing: 2006), 151.

<sup>65</sup> Although *Law's Empire* focuses on 'judges in black robes', Dworkin himself argues that a fuller picture of law as integrity would require a study of all legal actors, including 'district attorneys', see *Law's Empire*, (Portland, Oregon, Hart Publishing: 2006), 14.

<sup>66</sup> This may be closer to a Kantian conception of post-conflict justice.

### **4.3.3 Interpretivism**

Dworkin thought that conventionalism and pragmatism were interpretations of law and that they were deficient. He argued that they missed a crucial aspect of adjudication which is that judges (and other actors in a legal system) find themselves engaged a process of ‘constructive interpretation’.<sup>67</sup> Judges are engaged in an argumentative practice which required an ‘interpretive attitude’ on their part.<sup>68</sup> This he defined as ‘imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong’.<sup>69</sup> Dworkin thought that judges constructed interpretations by *combining* elements of conventionalism and pragmatism. On the one hand, they were constrained by the law. Interpretations of the law had to be a part of the historical and institutional legal practice. As Dworkin stated, the ‘history or shape of a practice or object constrains the available interpretations of it.’<sup>70</sup> On the other hand, difficult cases arose where an interpretation had to be more than a mere pointing at past legal rules. There was a creative aspect to the law embodied in the theory of pragmatism which conventionalism missed. Thus, an aspect of the legal decision-making was rooted in backwards-looking empiricism. Another was forward-looking justification. For Dworkin, this provided a better explanatory theory of law. He called this descriptive aspect of his theory ‘interpretivism’.

In analytical terms, Dworkin distinguishes three stages in the process of interpretivism. The first stage is the ‘pre-interpretive’. This stage requires the very practice which calls to be interpreted to be identified by the participants. Interpreters identify the ‘raw data’ (rules, principles, conventions, practices) which fall to be interpreted. In the common law system that Dworkin was studying, this was a relatively simple task that required a judge

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<sup>67</sup> Ronald Dworkin, *Law's Empire*, (Portland, Oregon, Hart Publishing: 2006), 52.

<sup>68</sup> Ronald Dworkin, *Law's Empire*, (Portland, Oregon, Hart Publishing: 2006), 46.

<sup>69</sup> Ronald Dworkin, *Law's Empire*, (Portland, Oregon, Hart Publishing: 2006), 52.

<sup>70</sup> Ronald Dworkin, *Law's Empire*, (Portland, Oregon, Hart Publishing: 2006), 52.

to identify the rules and decisions relevant to the case. Dworkin accepts that this is not a mechanical task. There is an element of interpretation involved in deciding which rules are relevant or which practice is sufficient.<sup>71</sup> However, Dworkin argues that there must be a threshold below which the interpreter is no longer interpreting a previous practice but rather commencing anew.

At the second ‘interpretive’ stage, Dworkin introduces the idea of ‘fit’. Dworkin argues that at this stage several interpretations of the law may be possible. However, interpreters select (and ought to select) that interpretation which best fits the previous practice. The idea of integrity emerges here because those interpretations which best fit the previous practice are considered *prima facie* more desirable. At the post-interpretive stage, Dworkin introduces the idea of ‘justification’ or ‘substance’. The post-interpretive stage requires interpreters to consider what the legal practice is really about and how the decision adopted sets forth the meaning of the law for future behaviour. In this respect, any interpretation of the law must be justified according to some standards external to the law. In Dworkin’s legal theory, the relevant principles were the political/moral principles of the relevant community.

Chapter 6 will deal in detail with two problems with applying this framework to post-conflict law. Suffice it to say here that the *jus post bellum* as integrity may look for interpretive coherence in two directions, a) downwards or internally, towards the community in transition, and/or b) outwards and externally, towards a notion of ‘international community’.

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<sup>71</sup> For an analysis of this interpretive approach in relation to international customary law see Anthea Roberts, ‘Traditional and Modern Approaches to Customary International Law’, 95 *American Journal of International Law* (2001) 757.

A prosecutor or judge may look ‘inwards’ and think about the law in Colombia and the principles that best justify these rules.<sup>72</sup> A judge or prosecutor would fall below the required threshold if they did not consider the sources of law in Colombia, including those rules of international law which are applicable. They might also identify cases in juvenile justice from Colombia as part of the history of the practice. On Dworkin’s account, a prosecutor deciding whether to indict a particular child soldier for war crimes may also ignore certain rules and practices. For example, a prosecutor could consider whether the Catholic Church has a view but they may also consider this as irrelevant to the issue. In the interpretive stage, the prosecutor may need to think about the principles that emerge from the practice of law in Colombia and, especially, those that best explain and justify the peace agreement. In terms of Dworkin’s theory, this is relatively unproblematic. A conception of the *jus post bellum* as integrity would require that the interpretations of law are explained and justified by the principles which best explain the post-conflict Colombian legal order.

In parallel, the *jus post bellum* as integrity also suggests that there is an international dimension to post-conflict law with which a prosecutor’s interpretations must be coherent. This is as a result of international law being directly applicable in post-conflict Colombia. The notion of ‘a *jus post bellum*’ suggests that the principles that emerge from the application of international law in other transitions in other post-conflict societies may be relevant to the Colombian situation. Thus, the prosecutor may decide that the correct interpretation of post-conflict law in Colombia may incorporate the principles of an ‘international community’. On a Dworkinian reading, the relevant actors cannot ignore the interpretations of international law made in other situations. Therefore, insofar as they are interpreting international law in Colombia, they may need to identify previous post-conflict practice from other post-conflict States and must seek interpretive coherence with the way that international law is applied in

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<sup>72</sup> This may include the practice of local communities in Colombia (such as the *raizales* or *afrocolombianos*). These local communities may adhere to values which differ radically from notions of liberal international community.



these cases. In relation to the specific issue at hand, child soldier accountability, the experience of other post-conflict States could provide the prosecutor with a number of principles to be used in the interpretation of the law. Depending on how the prosecutor understands ‘international practice’ they may also look to those international organizations (NGOs, IGOs) that deal with child soldier issues, i.e. the Secretary-General’s Annual Report on Children and Armed Conflict (A/72/361).<sup>73</sup> Therefore, the *jus post bellum* as integrity affects the interpretation of post-conflict law insofar as it requires interpretive coherence in relation to international law.

As MacIntyre has argued, moral, social and political concepts are contingent on the particular characteristics of societies and their perception of history.<sup>74</sup> In this respect, the prosecutor or judge appears to have a choice in terms of which principles are most relevant, or best explain and justify the legal order in post-conflict Colombia. Once these are identified, Dworkin argues that there is a correct balancing of the analytical concepts of ‘fit’ and ‘substance’. Analytically, ‘fit’ is a question of how well an interpretation is coherent with what has come before, i.e. previous legal practice. As Dworkin argued, the facts of legal history limit the role of any judge’s personal convictions of justice in decisions-making.<sup>75</sup> Thus, the dimension of ‘fit’ supports the view that there is an element of conventionalism (as described by Dworkin) in identifying the law. For post-conflict law, this includes international law. If an interpretation does not ‘fit’ previous legal practice an interpreter may be challenged as not engaging in the previous practice in any meaningful way. This made it *prima facie* a ‘bad’ interpretation. Secondly, the ‘substance’ is a question of how desirable an interpretation is in view of the principles of the particular political community. This dimension supports the view that there is an element of ‘pragmatism’ in the identification of

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<sup>73</sup> UNGA, Seventy-first session, ‘Children and armed conflict’ (24 August 2017) A/72/361.

<sup>74</sup> Alasdair MacIntyre, *A Short History of Ethics* (New York, Macmillan: 1966), 1.

<sup>75</sup> Ronald Dworkin, *Law’s Empire*, (Portland, Oregon, Hart Publishing: 2006) 45.

the law. Judges find different principles that support their interpretation of the law in the particular case. These are drawn from a certain political morality that is reflected in the ‘community personified’.<sup>76</sup> If a decision is supported by the principles of the community (in the sense that it shows that community in its best light) then this is a ‘good’ interpretation. If an interpretation cannot be justified by the community’s principles then the converse would be true. These two dimensions have to be balanced against one another according to the principle of integrity. This provides a basis for Dworkin’s normative position. The ‘best’ interpretations are those which best have the most ‘integrity’.

#### **4.3.4 ‘Integrity’**

The foregoing explains and analyses how and why Dworkin thought that law and legal reasoning is an interpretive practice. In normative terms, interpretations of the law had to balance the elements of ‘fit’ and ‘justification’ as best as possible. But importantly, the relationship between the dimensions of ‘fit’ and ‘substance’ is itself subject to interpretation. As Dworkin says, ‘the different aspects or dimensions of a judge’s working approach...are in the last analysis all responsive to his political judgment. His convictions about fit, as these appear either in his working threshold requirement or analytically later in competition with substance, are political not mechanical’.<sup>77</sup> This means that the lack of ‘fit’ of any particular interpretation might be overcome by the desirability of its ‘substance’. In this sense, ‘fit’ is not an external element in the decision-maker’s approach. The dimension of ‘fit’ is also subject to matters of ‘substance’ and conviction. Thus, as will be explained later, Fish’s argument that Dworkin presents a ‘straw-man’ version of conventionalism is not quite true.

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<sup>76</sup> Ronald Dworkin, *Law’s Empire*, (Portland, Oregon, Hart Publishing: 2006) 167.

<sup>77</sup> Ronald Dworkin, *Law’s Empire*, (Portland, Oregon, Hart Publishing: 2006), 257; Charles Silver, ‘Elmer’s Case: A Legal Positivist Replies to Dworkin’, 6 *Law and Philosophy* (1987), 381; Brian Leiter, ‘Explaining Theoretical Disagreement’, 76 *The University of Chicago Law Review* (2009), 1215.

Dworkin fully accepts that interpretation is ‘all there is’. The difference is that Dworkin alleges that there is a normative, self-contained and self-standing principle of integrity, that can be used ‘outside of the system’ to coach judges on how they ought to proceed.<sup>78</sup> He argues,

Law as integrity denies that statements of law are either the backward-looking factual reports of conventionalism or the forward-looking instrumental programs of pragmatism. It insists that legal claims are interpretive judgments and therefore combine backward- and forward-looking elements; they interpret contemporary legal practice seen as an unfolding political narrative.<sup>79</sup>

This means that, in practice, law as integrity requires an interpreter to identify the law ‘on the assumption that [it] was created by a single author’.<sup>80</sup> This author is the ‘community personified – expressing a coherent conception of justice and fairness’.<sup>81</sup>

By way of analogy, Dworkin imagines a group of novelists writing a ‘chain novel’. Each novelist in the chain ‘interprets the chapter he has been given in order to write a new chapter’.<sup>82</sup> Dworkin argued that ‘[e]ach has the job of writing his chapter so as to make the novel being constructed the best it can be, and the complexity of this task models the complexity of deciding a hard case under law as integrity’.<sup>83</sup>

For novelists, ‘best’ could be defined in terms of aesthetics, plot, credibility and themes. Thus, the very matter of ‘best’ is itself a matter of interpretation. However, on Dworkin’s account the best interpretation is that which gives the novel the most integrity. That means novelists ought to interpret the work of previous writers in the chain-novel in a

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<sup>78</sup> Dworkin thought integrity was present in legislative as well as adjudicative processes, see Ronald Dworkin, *Law’s Empire*, (Portland, Oregon, Hart Publishing: 2006), 176.

<sup>79</sup> Ronald Dworkin, *Law’s Empire*, (Portland, Oregon, Hart Publishing: 2006), 225.

<sup>80</sup> Ronald Dworkin, *Law’s Empire*, (Portland, Oregon, Hart Publishing: 2006), 255.

<sup>81</sup> Ronald Dworkin, *Law’s Empire*, (Portland, Oregon, Hart Publishing: 2006), 255.

<sup>82</sup> Ronald Dworkin, *Law’s Empire*, (Portland, Oregon, Hart Publishing: 2006), 229. For a critique see Stanley Fish, ‘Working on the Chain Gang: Interpretations in the Law and in Literary Criticism’ 9 *Critical Enquiry – The Politics of Interpretation* (1982), 201; Fish, ‘Still Wrong After All These Years’, 6 *Law and Philosophy – Dworkin’s Law’s Empire* (1987) 401.

<sup>83</sup> Ronald Dworkin, *Law’s Empire*, (Portland, Oregon, Hart Publishing: 2006), 229

way that showed the entire novel itself in its best light. Thus, a previous writer might have decided that the novel was a sci-fi novel that centred on a male protagonist with super-hearing. Dworkin thought that integrity required that in these circumstances, the subsequent writers are constrained in what they can now say about the protagonist. In order to show the novel in its best light, certain aspects of the character would need to be reflected in the new interpretation.

The analogy in terms of law relates to how judges can decide novel hard cases that come before them. In the context of transitional criminal justice, integrity requires that a prosecutor or a judge chooses an interpretation of the law that provides the correct balance between ‘fit’ with past practice and ‘justification’ according to the moral and political principles of the relevant community. This is law as integrity. It requires that difficult cases are decided according to a scheme of principles. This provides individuals in a State with the best reasons to accept the coercive power of law and legal practice because it treats them with equal concern and respect. This is the case even, and especially, in instances of disagreement about what the law actually is.

Integrity is about interpretive consistency on matters of principle. Dworkin argues that law as integrity ‘requires a judge to test his interpretation of any part of the great network of political structures and decisions of his community by asking whether it could form part of a coherent political theory justifying the network as a whole’.<sup>84</sup> For Dworkin, integrity ought to be the aim of a legal system because it is the best way of justifying the coercive force of law over individual freedom. It is also the best way to demonstrate that law is concerned with the equal treatment of individuals. This is a question of what John Tasoulis calls

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<sup>84</sup> Ronald Dworkin, *Law's Empire*, (Portland, Oregon, Hart Publishing: 2006), 245.

‘substantive moral soundness’.<sup>85</sup> Law is ultimately subject to the desirability of the principles of political morality that it protects.

In the context of transitional criminal justice, an easy transposition of the chain novel analogy is difficult. The difficulty arises owing to the domestic/international dimensions of post-conflict law. On the one hand, different transitional justice societies apply different (domestic) legal systems. However, the same international legal norms may apply (it depends on the obligations that the State has accepted). If so, then there is also a legal requirement that legal actors in post-conflict Colombia choose interpretations of international law which are coherent with those applied in international practice, for example, in post-conflict Sierra Leone. This issue is dealt with in more detail later. Suffice it to say that a post-conflict actor is a part of more than one legal system. They may be required to look to other post-conflict situations for interpretive support. To return to the literary analogy, a writer in a chain novel is not required to make their interpretation of the novel coherent with a completely different novel. However, they are insofar as the different novels are part of a shared ‘universe’ or ongoing story. It is arguable that post-conflict law, as a matter of international practice, is such an ongoing story. In this respect, post-conflict actors in Colombia must continue the story of post-conflict law as it relates to child soldier accountability. What this actually means in practice will depend on the individual interpreters. However, they must find principled reasons for any decisions they make about the right interpretation of international law.

To return to Gallen’s argument, post-conflict actors must be ‘internally’ coherent, i.e. with other post-conflict activities. Therefore, a post-conflict actor working in transitional justice ought to try to interpret post-conflict law in a way that is coherent with those working in rule of law reform or security sector reform *in the same post-conflict State*. The *jus post*

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<sup>85</sup> John Tasoulas, ‘In Defence of Relative Normativity: Communitarian Values and the *Nicaragua Case*’, 16 *Oxford Journal of Legal Studies* (1996), 112.

*bellum* as integrity could simply mean this. However, insofar as it draws from international legal norms, it also means that those working in transitional justice should try to make their interpretations of the law coherent with other transitional justice situations. The very concept of the *jus post bellum* as integrity, therefore, may help post-conflict actors to be aware of the various dimensions of post-conflict law. This may help their interpretation of post-conflict law in their own transition. The problems in this regard will be fully thought through in chapter 5 which applies this approach to a specific issue of child soldier accountability. Objections to the *jus post bellum* as integrity are considered in chapter 6.

#### **4.3.5 Summary**

The foregoing has provided an account of law as integrity in the abstract although some attempt has been made to demonstrate how the ideas are relevant to the law of transitional criminal justice in Colombia. In order to construct a Dworkinian *jus post bellum*, four points are clear. Firstly, interpretivism is a methodology of interpretation. It urges interpreters of the law to ask questions of themselves and, therefore, it can be seen as describing and proposing an ‘attitude’. It is relevant to discover the law in hard cases and, therefore, it ought to be considered as *prima facie* relevant wherever theoretical disagreements arise in any legal system. Secondly, law as integrity is presented as a better explanation and justification of law and legal reasoning than conventionalism and pragmatism. In fact, it mixes both approaches and accepts that neither conventionalism nor pragmatism tells the whole story of legal interpretation. Thirdly, law as integrity is presented as a theory of how judges do and ought to decide hard cases. It appears that judges must be at the centre point in any notion of the *jus post bellum* as integrity. However, Dworkin accepts that other actors, such as prosecutors, are implicated in his analytical framework. Fourthly, interpretivism urges that

the principles of the community ought to explain and justify the applicable law. This raises a few problems insofar as post-conflict societies, such as Colombia, which may lack a notion of ‘community’ which is comparable to Dworkin’s concern with Anglo-American legal systems. However, all transitions all pass through a ‘constitutional moment’ which turns divided societies into (perhaps temporarily) unified communities. The idea of a ‘constitutional moment’ helps to bring transitions together under the same conceptual framework and provides support for the Dworkinian requirements in relation to a community of principle. Finally, the domestic/international dimensions of post-conflict law mean that post-conflict actors must be aware of the legal norms they are interpreting. Insofar as domestic actors in Colombia are interpreting and applying Colombian law, then there will be no need to look for coherence across different transitional societies. However, as soon as the relevant actors are looking at international legal norms that apply to the issue, then they cannot, on a Dworkinian reading, ignore international practice and the way international norms have been applied in other post-conflict societies. Indeed, they need to make sure their interpretations of the relevant rules are consistent in principle with those interpretations made of the rules in other post-conflict situations. To the contrary, international law would lack integrity and its moral or political legitimacy would suffer.

#### **4.4 Threshold objection: Theoretical disagreements in post-conflict Law**

There is an important threshold objection to Dworkin’s theory which must be dealt with at the outset. Dworkin’s theory of law as integrity is designed to respond to what Dworkin called ‘theoretical disagreements on the grounds of law’.<sup>86</sup> For Dworkin, legal positivism had not adequately responded to the existence or possibility of these theoretical

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<sup>86</sup> Ronald Dworkin, *Law’s Empire*, (Portland, Oregon, Hart Publishing: 2006), 11.

disagreements. Thus, his theory of interpretivism was offered as a better explanation of law and legal reasoning.

Brian Leiter has raised doubts about Dworkin's strategy.<sup>87</sup> *Law's Empire* constructs interpretivism around the concept of theoretical disagreements. But this ignores the brute fact that the majority of law and legal reasoning in any legal system demonstrates theoretical *agreement* on the grounds of law. If Leiter is right, then there is little point in continuing with a Dworkinian *jus post bellum* because 'law as integrity' would simply fail to capture the reality of law and legal reasoning. It would be rejected as deficient as an explanatory theory in the same way that Dworkin rejects conventionalism and pragmatism.

Leiter has argued, 'the main reason the legal system of a modern society does not collapse under the weight of disputes is precisely that *most* cases that are presented to lawyers never go any further than the lawyer's office'.<sup>88</sup> The implication is that the law which regulates most disputes is well-known and agreed upon. Furthermore, '*most* cases that lawyers take do not result in formal litigation' and '*most* cases that proceed to litigation settle by the end of discovery'.<sup>89</sup> Of those that proceed to trial and verdict, most cases do not get appealed and 'most cases that get appealed do not get appealed to the highest court, i.e., to the court where theoretical disagreements are quite likely rampant'.<sup>90</sup> Leiter's criticism takes aim at Dworkin's insistence that interpretivism provides a valid theory of the nature of law and legal obligation. For Leiter, a theory that purports to explain the nature of law ought to reflect as much of legal practice as possible. He argues that this is legal positivism. Dworkin's theory appears to avoid the vast majority of law and legal practice.

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<sup>87</sup> Brian Leiter, 'Explaining Theoretical Disagreement', 76 *The University of Chicago Law Review* (2009), 1215.

<sup>88</sup> Brian Leiter, 'Explaining Theoretical Disagreement', 76 *The University of Chicago Law Review* (2009), 1215.

<sup>89</sup> Brian Leiter, 'Explaining Theoretical Disagreement', 76 *The University of Chicago Law Review* (2009), 1215.

<sup>90</sup> Brian Leiter, 'Explaining Theoretical Disagreement', 76 *The University of Chicago Law Review* (2009), 1215.



It is true, that Dworkin ignores the vast majority of law and legal practice and focuses on salient issues that arise in appeal courts. But it is a simple fact that even though the majority of international law might demonstrate *agreement* on the grounds of law, transitions do demonstrate theoretical *disagreements* on the grounds of law. Post-conflict law can be considered to produce disagreements because it is uniquely contingent on the particularities of each transition. This includes the nature of the (sometimes ongoing) conflict and the political compromises reflected in the resulting peace agreement. Thus, integrity might be useful in elucidating the process of interpretation and providing a normative theory on how the parties ought to interpret the law.

As explained in relation to the issue of child soldier accountability, there may be many different ways of interpreting the law on the issue. The international rules that must be interpreted are easy enough to locate in empirical terms. The most relevant for transitional criminal justice are international human rights law, international humanitarian law and international criminal law. But the particular synthesis that results from the sum of the legal provisions in any particular transition is open to myriad interpretations. For example, in transitional criminal justice, there is an uncertain middle ground between blanket amnesty and full criminal accountability wherein States might achieve relatively acceptable transitional justice. On the one hand, the post-Cold War normative environment reflects a trend towards justice for victims and survivors. On the other hand, there is a need to secure the fragile constitutional settlement reflected in the peace deal itself. In these circumstances, peace negotiations during transitions can throw up theoretical disagreements on matters of post-conflict law when negotiating parties disagree on the *political* goals of the transitional justice measures and indeed the transition itself.<sup>91</sup> It is necessary to accept that post-conflict law may not be fully explained by a reliance on strict legal positivism. Among other

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<sup>91</sup> Leiter makes his point by explaining the legal system as a pyramid where only the very top is an environment of 'theoretical disagreement'.

things, the turn towards soft law and best practices in a variety of areas suggests that States themselves are more interested in effective regulation rather than formalism.

To summarise, the external challenge to a *jus post bellum* founded on Dworkin's theory may be tempered by a simple adjustment. In *Law's Empire*, Dworkin presented law as integrity as a (better) alternative to legal positivism. However, in post-conflict law, law as integrity is not necessarily an overall challenge to international legal positivism. In transitional situations legal positivism is important at the first pre-interpretive stage. The actual 'raw data' to be interpreted by negotiating parties must be international legal rules founded on State consent. Thus, legal positivism limits the actual practice involved in transitions that falls to be interpreted. Subsequently, the interpretive stage allows a measure of value to enter the system as negotiators wrestle with the dimensions of 'fit' and 'substance'. The *jus post bellum* as an interpretive framework is then a normative theory of post-conflict law. It is a theory which urges parties to think about how the principle of integrity affects the interpretation of the applicable law.

#### **4.5 The opposite of integrity in post-conflict law**

This chapter ends with an example of how Colombia has failed to follow the principles of integrity in the interpretation of post-conflict law. In a number of recent cases in Colombia, trials have been suspended pending the creation of the new Special Jurisdiction for Peace.<sup>92</sup> Defence lawyers have argued that the ordinary justice system is not competent to hear the cases against a number of military officers implicated in the 'false positives' scandal.<sup>93</sup> The

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<sup>92</sup> See recent news report in *Semana*, available online at: <http://www.semana.com/nacion/articulo/falsos-positivos-de-madres-de-soacha-juzgados-por-la-jep/524586> (last accessed 15 August 2017); and also in *Colombia Reports* <https://colombiareports.com/false-positives/>

<sup>93</sup> Seb Eskauriatza, 'Colombia struggles to deliver justice in army 'cash-for-kills' scandal', *The Conversation*, (18 September 2017) available online at: <https://theconversation.com/colombia-struggles-to-deliver-justice-in-army-cash-for-kills-scandal-82350>

scandal came to light in 2008 when 22 men from Soacha disappeared and were found dead hundreds of miles away in North Santander province. The scandal involved the introduction of a ‘cash-for-kills’ policy.<sup>94</sup> It awarded extra pay and rewards for combat kills but it resulted in poor or mentally ill civilians being murdered and passed-off as FARC-EP guerrillas. In suspending the trials, judges have argued that there would be no point in continuing given that the cases would end-up in the Special Jurisdiction for Peace.<sup>95</sup> Thus, they have failed to provide a principled case for the decision. They have created a legal limbo for victims. In fact, the judges suspending the trials simply cannot know whether the cases will go to the Special Jurisdiction for Peace. It is the Special Jurisdiction itself (once it comes into existence) which will decide which cases it takes on.<sup>96</sup> Further, the peace agreement stipulates that until the Special Jurisdiction for Peace is up and running, ongoing cases should continue as normal.<sup>97</sup>

Thus, law as integrity provides a language with which to criticize the implementation of the post-conflict agreement. One dimension of law as integrity in post-conflict situations involves judges making a principled case for their decisions which shows the legal system in its best light according to the principles upon which the Colombian State is founded. The judges may have argued that the principle of reconciliation requires that all cases related to the armed conflict be transferred to the Special Jurisdiction for Peace. This would not

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<sup>94</sup> The policy was implemented by Defence Minister Camilo Ospina (during ex-President Alvaro Uribe’s presidency), see Directive #29/2005, available online at: [https://dl.dropboxusercontent.com/u/50500020/Newsroom/Armed%20conflict/False%20positives/directiva\\_ministerial\\_29\\_2005.pdf](https://dl.dropboxusercontent.com/u/50500020/Newsroom/Armed%20conflict/False%20positives/directiva_ministerial_29_2005.pdf)

<sup>95</sup> The dispensation of justice has been slow. In one case, in Soacha, a mother has waited over nine years for the legal system to bring charges against military officers, see article in *Semana*, ‘La JEP deja en limbo a una madre de Soacha’, available online at: <http://www.semana.com/nacion/articulo/falsos-positivos-de-madres-de-soacha-juzgados-por-la-jep/524586> (last accessed 14 August 2017).

<sup>96</sup> Point 48, Part 5, ‘Final Agreement for the End of Conflict and the Construction of a Stable and Long Lasting Peace’, (hereafter the Peace Agreement) signed on 24 November 2016 and ratified by Congress 1 December 2016. The full text of the peace agreement is available at: <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf>. (I will use my translations from Spanish to English throughout).

<sup>97</sup> Point 48, Part 5, ‘Final Agreement for the End of Conflict and the Construction of a Stable and Long Lasting Peace’, (hereafter the Peace Agreement) signed on 24 November 2016 and ratified by Congress 1 December 2016. The full text of the peace agreement is available at: <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf>. (I will use my translations from Spanish to English throughout).

necessarily save them from criticism. It would misread the peace agreement and, in short, the false positives scandal is only tangentially linked to the armed conflict. Those committing the killings were incentivised by money and rewards and these were not specifically linked to the armed conflict. Nevertheless, the *jus post bellum* as integrity suggests that a principled argument ought to have been made.

The reason for this is based on Dworkin's view on the civic benefits of a legal system that follows integrity. In his view, a system that makes arbitrary decisions on important matters of principle would be rejected by most people. This is the case even if it was 'fair' in democratic terms. He demonstrates the point by referring to 'checkerboard' statutes.<sup>98</sup> For example, in the context of Colombian justice, imagine an approach is taken which decided the issue of child soldier accountability according to the views of the different regions of the Colombian State. Thus, post-conflict justice could say that those States that voted against the peace agreement could prosecute demobilized FARC-EP child soldiers, but those that voted in favour of the agreement could not. In Dworkin's view, when 'important matters of principle are at stake' (such as child soldier accountability) the population would reject an approach that decided the issue in this way. This is because in his view, 'the collective decision must [...] aim to settle on some coherent principle...'<sup>99</sup> In relation to whether a child soldier ought to be prosecuted in Colombia, therefore, integrity requires that previous legal practice is studied and interpreted (pre-interpretive and interpretive stages). Subsequently, justifications for the decision must be made according to the principles of Colombian society. Owing to the fact that Colombia is a post-conflict State, these principles should be those embodied and reflected in the peace agreement. In this regard, the peace

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<sup>98</sup> These are statutes which are unjustifiable in a society that promotes integrity, see Ronald Dworkin, *Law's Empire*, (Oxford, Hart Publishing: 2006), 178.

<sup>99</sup> Ronald Dworkin, *Law's Empire*, (Oxford, Hart Publishing: 2006), 179.

agreement ought to be seen as the new constitutional agreement that can be used to set the future direction of the post-conflict State.

#### **4.6 Conclusion**

This chapter has introduced and explained Gallen's theory of the *jus post bellum* which is based on a version of a Dworkinian legal theory. It has argued that indeterminacy is a characteristic of post-conflict law. Dworkin's interpretivism was born out of a need to avoid either conventionalism or pragmatism as explanations of judicial decision-making in hard cases. In his view, judges were constrained by past practice, legislation and precedent. However, when the conventions were absent or unclear, Dworkin did not think that judges simply made rules up. This would be problematic in terms of the rule of law.

Pro-active judicial legislation flirts with violating the legal principle of *nulla poena sine lege*. Neither did Dworkin believe that judges eschewed legal principles in favour of their own political views. The law was more than how judges felt on any particular issue on any particular day. Thus, Dworkin attempts to provide an account of law which places judges in hard cases under the constraining power of legal principles. The question that remains is whether a Dworkinian approach to law is ill-suited to the kinds of problems faced by post-conflict actors.

Dworkin's theory should be relevant to thinking about the correct approach to interpretation of post-conflict law. This chapter has argued that integrity means providing a principled justification which aims at coherence in post-conflict law. This may mean that interpretations must aim at purely 'internal' coherence with the law and practice of post-conflict Colombia. This is Gallen's point. But a more comprehensive view is that the 'external' coherence in principle that might be sought with other post-conflict societies is also important insofar as the interpretation of international law is at stake. An example has been

provided of a failure to produce integrity in the Colombian context. Furthermore, it is important to realize that law as integrity is not only relevant to judges. Although in Dworkin's theory the focus is on judges, the transitional criminal justice system in Colombia depends on a number of actors including the prosecutor. Thus, the question of whether a child ought to be criminally responsible will only come before judges if a child soldier is indicted. The final point relates to the principles of post-conflict justice which are relevant for post-conflict actors. These principles have been discussed at length in the literature. They emerge from an interpretation of previous practice with a view to presenting the community legal order as a coherent whole. The next chapter applies the theory to a specific crime committed by a child soldier who falls into the uncertain legal area. They are aged between 14 and 18 and the crimes they have committed are serious. The next chapter highlights how the *jus post bellum* as integrity can help a prosecutor to interpret post-conflict law.

## **CHAPTER 5: CASE STUDY: APPLYING THE *JUS POST BELLUM* AS INTEGRITY IN POST-CONFLICT COLOMBIA**

### **5.1 Introduction**

This chapter applies the *jus post bellum* as integrity to the identification of the law of transitional criminal justice in post-conflict Colombia. It presents a hypothetical ‘hard case’ in transitional criminal justice which could potentially come before a prosecutor in post-conflict Colombia. This chapter then analyses the *jus post bellum* as integrity in order to see how a Dworkinian approach to the interpretation of post-conflict law might look. Section 5.2 provides some context and background information on the Colombian armed conflict and events in the peace process to date. Section 5.3 sets out the hypothetical case. Section 5.4 applies the Dworkinian approach to the resolution of the legal question. In following the Dworkinian methodology, it identifies two issues that are problematic from the perspective of the *jus post bellum* as integrity: (i) an internal challenge to ‘law as integrity’ and (ii) an external challenge that doubts the normative value of integrity for international law. These challenges are elaborated in more detail in chapter 6. Section 5.5 makes some concluding remarks on how the chief prosecutor in Colombia ought to decide the question in accordance with law as integrity.

#### **5.1.1 Preliminary Remarks**

There are a few preliminary points that need to be discussed so that the aims of the chapter are made clear. First of all, this chapter is not intended to provide a direct response to Gallen’s theory. It is not concerned with whether the post-intervention activities of a number of different local and foreign actors can be explained and justified according to ‘the *jus post*

*bellum* as integrity’.<sup>1</sup> It only evaluates the usefulness of the *jus post bellum* as integrity in relation to a specific concrete issue: identifying the law of transitional criminal justice in relation to child soldiers in Colombia. In this regard, it is committed to a particular view of ‘usefulness’ which emphasizes the practical utility of the concept from a practitioner’s perspective.<sup>2</sup> The overall aim is to understand whether the *jus post bellum* as integrity helps those persons tasked with identifying the law in post-conflict societies. There are other ways to think about whether the *jus post bellum* concept is useful or not. These are dealt with in more detail in chapter 7.

Secondly, I have presented the issue of child soldier perpetrators as a ‘hard case’ in Dworkinian terms. The justification for this is found in chapter 4. A Dworkinian theory of the *jus post bellum* suggests that hard cases can be ‘solved’ by interpreting the law according to the principle of ‘integrity’.<sup>3</sup> In Dworkin’s theory, an all-powerful super-judge (Hercules) is tasked with demonstrating how integrity guides interpreters towards the ‘best’ legal answer.<sup>4</sup> But in post-conflict Colombia, the decision on child soldier accountability may not even come before a judge. It is a matter for the *Sala de Definición de Situaciones Jurídicas* (Chamber for the Identification of Juridical Situations, hereafter ‘Identification Chamber’) which forms part of the Special Jurisdiction for Peace.<sup>5</sup> The Identification Chamber is part of

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<sup>1</sup> This is Gallen’s Stated objective, see ‘*Jus Post Bellum: An Interpretive Framework*’, in Carsten Stahn, Jennifer Easterday and Jens Iverson, (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014) 58.

<sup>2</sup> See Charles Garraway, ‘The *Jus Post Bellum*: A Practitioner’s Perspective’, in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008) 153.

<sup>3</sup> Ronald Dworkin, ‘Law as Interpretation’, 9 *Critical Inquiry* 1 (1982) 179, 195. I use the term ‘solved’ here to suggest that the decision-maker does not have a strong discretion to decide but rather that the history of legal practice provides a limited set of answers to the question (see discussion of conventionalism in chapter 4).

<sup>4</sup> Ronald Dworkin, *Law’s Empire*, (Portland, Oregon, Hart Publishing: 2006) 240.

<sup>5</sup> Colombian Amnesty Law, chapter 4, ‘Final Agreement for the End of Conflict and the Construction of a Stable and Long Lasting Peace’ signed on 24 November 2016 and ratified by Congress 1 December 2016. The full text of the peace agreement is available at: <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf> (I use my translations from Spanish to English throughout).



the *Sala de Amnistía o Indultos* (Chamber for Amnesties and Pardons).<sup>6</sup> In Colombia, the composition of this chamber is not yet finalised. It is expected that a chief prosecutor will be appointed soon. However, no individual has yet been appointed.<sup>7</sup> A chief prosecutor may decide that no under-18s will be prosecuted in the Special Jurisdiction for Peace.<sup>8</sup> In this instance, the judges will simply not need to decide anything. The more important question to be decided, therefore, is whether or not a child soldier perpetrator ought to be prosecuted in the first place. This chapter, therefore, focuses on the role of the chief prosecutor and evaluates whether the *jus post bellum* as integrity is a useful guide to the interpretation of post-conflict law in Colombia. The *jus post bellum* as a Dworkinian concept, suggests that there *is* a right answer to the question that could come before the chief prosecutor.<sup>9</sup>

It may be objected that focusing on the chief prosecutor is a misapplication of Dworkin's theory. After all, Dworkin was concerned with 'judges in black robes'.<sup>10</sup> However, Dworkin also argued that a 'more complete' study of legal practice would include a number of legal officials including 'legislators, policemen, [and] district attorneys'.<sup>11</sup> If, as Dworkin argued, integrity is a principle in legislation and in adjudication, its relevance in the prosecutorial dimension ought not to be discarded.<sup>12</sup> There are, of course, important differences between the roles of a chief prosecutor and a judge. Problems and objections to

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<sup>6</sup> Colombian Amnesty Law, chapter 4, 'Final Agreement for the End of Conflict and the Construction of a Stable and Long Lasting Peace' signed on 24 November 2016 and ratified by Congress 1 December 2016. The full text of the peace agreement is available at: <http://www.altocomisionadopalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf> (I use my translations from Spanish to English throughout).

<sup>7</sup> There has been some debate about whether the 'ordinary' State Prosecution Service (*Procuraduría*) should be involved. It now appears that the State Prosecutor will be able to intervene in some cases upon the request of a magistrate of the JEP and according to the parameters established by the magistrate, see Governmental News Bulletin 101, 'Procuraduría podrá intervenir en la JEP para la protección de las víctimas', available in Spanish online at <https://www.procuraduria.gov.co/portal/Procuraduria-podra-intervenir-en-la-JEP-para-proteccion-de-las-victimas.news> (last accessed 8 August 2017).

<sup>8</sup> UN Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990), 1577 UNTS 27531, (CRC), Article 1.

<sup>9</sup> Ronald Dworkin, 'Law as Interpretation', 9 *Critical Inquiry* 1 (1982) 179.

<sup>10</sup> Ronald Dworkin, *Law's Empire*, (Portland, Oregon, Hart Publishing: 2006) 12.

<sup>11</sup> Ronald Dworkin, *Law's Empire*, (Portland, Oregon, Hart Publishing: 2006) 12.

<sup>12</sup> Ronald Dworkin, *Law's Empire*, (Portland, Oregon, Hart Publishing: 2006) 176.

the application of Dworkin's method to the prosecutor's task will be considered in chapter 6. The key issue for the purposes of this chapter is that the prosecutor in post-conflict Colombia will be tasked with interpreting the law.

Post-conflict law straddles domestic and international legal orders. It is a combination of different international legal categories, i.e. international human rights law and international humanitarian law. But these categories intersect with national law, i.e. the 1991 Constitution of Colombia and the Colombian Penal Code. Further, post-conflict law in one place may be shaped by conflict resolution strategies found in other post-conflict situations. These situations themselves sit uncertainly between international and domestic legal orders. This raises a challenge for the purposes of the application of Dworkin's theory in the present context. The principle of integrity emerges when a community commits to the resolution of disagreements according to a coherent framework of principles. In the present case, however, there are two 'legal communities' (domestic and international).<sup>13</sup> If the concept of integrity means different things in each legal order (domestic and international) then there may be a problem for the prosecutor in terms of applying the principle.

If the prosecutor in post-conflict Colombia considers herself primarily as a local official, then the relevant framework of principles that need to explain and justify her interpretation of post-conflict law are drawn from the Colombian legal order. She must find interpretations of the law which are coherent with the Colombian legal order. On the other hand, if she understands herself as a State representative applying international law, then integrity suggests that her interpretation may need to be explained and justified by the principles of the international legal order.

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<sup>13</sup> There are challenges to describing the international legal order as a community. However, this issue is left to one side for now. See Herman Mosler, 'The International Society as a Legal Community' 140 *Recueil des Cours* (1974) 1: 'The collection of subjects participating in the international legal order constitutes a *community*, and all subjects of international law are its members (emphasis in the original)', 12; see also Christian Tomuschat, 'Obligations Arising for States Without or Against Their Will' 241 *Recueil des Cours* (1993) 195; Bruno Simma, 'From Bilateralism to Community Interest in International Law 250 *Recueil des Cours* (1999) 217; Erika de Wet, 'International Constitutional Order' 55 *International and Comparative Law Quarterly* (2006) 51.

In this respect, a chief prosecutor in a post-conflict situation is required to fulfil a ‘split role’.<sup>14</sup> She is operating simultaneously in local and international legal order. This is the case for all State officials. As Antonio Cassese argued, this ‘split role’ means that State officials ‘operate in a Dr Jekyll and Mr. Hyde manner, exhibiting a split personality [sic]’.<sup>15</sup> Thus, the *jus post bellum* as integrity, in order to be truly Dworkinian, may need to explain the rules of post-conflict law by reference to principles which explain and justify both legal orders. This suggests that, for the purposes of post-conflict Colombia, national and international laws are considered as part of a hierarchical whole.<sup>16</sup> This raises a number of debates in international law including the question of normative hierarchy in the international legal order, and the nature of ‘global law’ in the age of globalization. However, on a Dworkinian reading this presents few problems. Law as integrity is generally hostile to ‘departments of law’.<sup>17</sup> In relation to the domestic legal order, the division of law into contract, tort, administrative law, criminal law etc. is against the general spirit of integrity. This is because law as integrity asks judges and other interpreters of law to make it coherent as a whole. Further, in *Justice for Hedgehogs*, Dworkin commits himself to a theory of value which is unified. For present purposes, this simply means that Dworkin thought that the answers to legal and moral questions had to be coherent with one another. Thus, he may not have found it difficult to argue that interpretations of national law and international law had to be coherent with each other. Nevertheless, the fact that the domestic and international legal orders are understood by States as separate legal orders cannot be ignored. This chapter does not deal with these issues. These and other challenges are left to chapter 6. It only sets

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<sup>14</sup> This ‘split role’ theory is attributable to George Scelle’s idea of the *dédoublément fonctionnel*, see Antonio Cassese, ‘Remarks on Scelle’s Theory of “Role Splitting”’ (*dédoublément fonctionnel*) 1 *EJIL* (1990) 210, 213.

<sup>15</sup> Antonio Cassese, ‘Remarks on Scelle’s Theory of “Role Splitting”’ (*dédoublément fonctionnel*) 1 *EJIL* (1990) 210, 213.

<sup>16</sup> See for example Hans Kelsen, *General Theory of Law and State* (Cambridge, Harvard University Press: 1945) at 121, ‘...the basic norms of the different national legal orders are themselves based on a general norm of the international legal order.’

<sup>17</sup> Ronald Dworkin, *Law’s Empire*, (Portland, Oregon, Hart Publishing: 2006) 253.

out what a Dworkinian approach to the child soldier accountability problem might look like in post-conflict Colombia.

## **5.2 Historical Context: Colombia and Violence**

The interpretation of law does not occur in a vacuum. Every interpretation of law takes place in a particular social and political context. Therefore, the analysis of integrity will be improved by the provision of a necessarily brief and history of conflict in Colombia.<sup>18</sup> These facts are set out as an attempt to acknowledge the interpretive background information that any post-conflict prosecutor will bring to the interpretation of the law.

Colombia has a long history of violence. The Spaniards found a modest indigenous population of around 3-4 million. By the time of Colombia's independence in 1810, this number was down to around 130,000.<sup>19</sup> After independence, Simón Bolívar, the first president of Gran Colombia, tried to unify a vast territory that was controlled by Spain (covering contemporary Ecuador, Panamá, Venezuela and Colombia). Bolívar was opposed by elites with particular and regional economic interests. His defeat, and the end of the vision of a unified Gran Colombia, set on course a pattern of conflict that is unparalleled in Latin America.

In the 19th century, Colombia was a country of 'permanent war'.<sup>20</sup> Following independence, there were 'eight general civil wars, 14 local civil wars, countless small uprisings, two international wars with Ecuador and three coups d'état'.<sup>21</sup> The bloodiest was

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<sup>18</sup> For a fuller account see Jenny Pearce, *Colombia – Inside the Labyrinth* (Nottingham, Russel Press: 1990); Charles Bergquist, Ricardo Peñaranda, and Gonzalo Sánchez, *Violence in Colombia, 1990-2000* (SR Books, Wilmington, Del: 2001); Ann Farnsworth-Alvear, Marco Palacios, and Ana María Gómez López (eds.) *The Colombia Reader – History, Culture, Politics* (Durham, Duke University Press: 2017)

<sup>19</sup> Jenny Pearce, *Colombia – Inside the Labyrinth* (Nottingham, Russel Press: 1990), 14.

<sup>20</sup> Jenny Pearce, *Colombia – Inside the Labyrinth* (Nottingham, Russel Press: 1990), 17.

<sup>21</sup> Jenny Pearce, *Colombia – Inside the Labyrinth* (Nottingham, Russel Press: 1990), 17.

the Thousand Days War that resulted in over 100,000 deaths and the loss of Panamá.<sup>22</sup> Perhaps for these reasons, it is difficult to agree on the ‘beginning’ of the current conflict situation. The last period of relative tranquillity was between the early 20th century and the 1929 global economic depression. In 1915, the memoirist, José María Quijano Wallis (1847 – 1922) wrote, ‘[m]ay...all Colombians...not lose sight of and not to forget...the awful memory of our wars, so that the peace we have enjoyed during the last thirteen years might be prolonged indefinitely’.<sup>23</sup> Unfortunately, peace did not last long. Internal uprisings and violence resumed in the period following the 1929 depression. This period of violence has continued until the present day. The recent peace negotiations and the resulting ceasefires are reasons for optimism. Recently, there is evidence that Colombians have become used to speaking about their country in post-conflict terms.<sup>24</sup> The recent meeting between previously bitter enemies (the left-wing FARC-EP guerrilla and the right-wing AUC paramilitary) is a further symbol that all relevant parties are committed to a post-conflict Colombia.<sup>25</sup> However, there are also news reports that signal the emergence of spoilers and attempts to upset the peace process.<sup>26</sup>

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<sup>22</sup> Jenny Pearce, *Colombia – Inside the Labyrinth* (Nottingham, Russel Press: 1990), 25.

<sup>23</sup> Ann Farnsworth-Alvear, Marco Palacios, and Ana María Gómez López (eds.) *The Colombia Reader – History, Culture, Politics* (Durham, Duke University Press: 2017) 342.

<sup>24</sup> See a number of news reports, Olga Patricia Rendón Marulanda, ‘Así Avanza el posconflicto en Colombia’, *El Colombiano*, (17 March 2017), available at: <http://www.elcolombiano.com/colombia/paz-y-derechos-humanos/entrevista-a-rafael-pardo-sobre-avances-en-el-posconflicto-CE6170958> (last accessed 30 July 2017); ‘Los pasos hacia la reconciliación del país’, 29 July 2017, <http://www.semana.com/nacion/articulo/procesos-de-paz-reconciliacion-ivan-marquez-freddy-rendon-y-otros/534201> (last accessed 29 July 2017).

<sup>25</sup> ‘Los pasos hacia la reconciliación del país’, 29 July 2017, <http://www.semana.com/nacion/articulo/procesos-de-paz-reconciliacion-ivan-marquez-freddy-rendon-y-otros/534201> (last accessed 29 July 2017).

<sup>26</sup> For example the recent bombing of a local business in central Bogotá see New York Times Report, June 17 2017, <https://www.nytimes.com/2017/06/17/world/americas/colombia-explosion-shopping-center-bogota.html?mcubz=0> (last accessed 17 August 2017).

The difficulty in finding a ‘starting point’ to the Colombian conflict is reflected in the difficulties in agreeing on why the conflict emerged.<sup>27</sup> Wallis wrote in 1915 that Colombia’s history of violence was owing to political-economic reasons. In his view,

The lack of development of our national wealth and consequent impoverishment of our people has led the military caudillos, most of the time, to seek their livelihood and personal aggrandizement in the hazards of civil war, or in the intrigue and accommodations of politics.<sup>28</sup>

In terms of ‘national wealth’, Colombia’s conflict has reflected divergent opinions on economic modes of development and, especially, the issue of land ownership. In the 1920s, even during a period of relative stability, Colombia was characterised by peasant revolts and the opposition between organised labour and the oligarchic ruling class. The issue then, as now, was ownership of important factors of production, such as land.

Given that land ownership and redistribution is a prominent part of the peace agreement, the story of the current situation might be thought to begin at the end of the 1920s.<sup>29</sup> In this period, the Liberal Party, who had lost the ‘Thousand Days War’, was politically defeated and the Conservative Party led the government. But the 1929 depression led to a change of fortunes for the Liberal Party and the emergence of Jorge Eliécer Gaitán as a popular ‘man of the people’ figure. For the Conservative Party, radical caudillos such as

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<sup>27</sup> See for different theories, <https://www.elheraldo.co/politica/las-teorias-del-origen-del-conflicto-armado-en-colombia-184562> (in Spanish, last accessed 31 July 2017)

<sup>28</sup> Ann Farnsworth-Alvear, Marco Palacios, and Ana María Gómez López (eds.) *The Colombia Reader – History, Culture, Politics* (Durham, Duke University Press: 2017) 339, citing Charles Bergquist, *Coffee and Conflict in Colombia, 1886 – 1910* (Durham, Duke University Press: 1978), 4.

<sup>29</sup> Part 1, ‘Integrated Rural Reform’ of the ‘Final Agreement for the End of Conflict and the Construction of a Stable and Long Lasting Peace’ signed on 24 November 2016 and ratified by Congress 1 December 2016. The full text of the peace agreement is available at: <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf>

Laureano Gómez Castro started to incite violence against the Liberals Party and its supporters.<sup>30</sup> This marks the slow beginning of a period of conflict known as ‘*la Violencia*’.<sup>31</sup>

In response to the State-led oppression of the Liberal Party movement, on 7 February, 1948, Gaitán led a ‘Silent Demonstration’ out onto the streets of Bogotá. Gaitán gave a ‘Prayer for Peace’ speech in front of the presidential palace, wherein he called for the President Mariano Ospina Pérez to ‘restore public tranquillity’ to the country. Gaitán said,

Prevent violence. We seek the defence of human life, which is the least a people can ask for. Instead of this blind and uncontained force, we should make the most of the people’s capability to work for the benefit of Colombia’s progress.<sup>32</sup>

The demonstrators stood and listened in total silence. A few months later, on 9 April 1948, Gaitán was assassinated. The reaction to his assassination, known as ‘*el Bogotazo*’, marks the beginning of *la Violencia*. It is impossible to say how many people died during this period between 1948 and 1965. Estimates range from 250,000 to 300,000.<sup>33</sup> In terms of the scale of violence, and the reasons for it, *la Violencia* marks the beginning of the current conflict.<sup>34</sup> In 1958, the violence ended with the Liberal and Conservative parties forming a *Frente Nacional* (‘National Front’) in the *Declaration of Sitges*.<sup>35</sup> The leaders of these parties agreed to alternate the presidency so that socialist parties or candidates were excluded. The

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<sup>30</sup> Ann Farnsworth-Alvear, Marco Palacios, and Ana María Gómez López (eds.) *The Colombia Reader – History, Culture, Politics* (Durham, Duke University Press: 2017) 343.

<sup>31</sup> The Violence, (1948-1965), estimated 200,000 dead in inter-factional political violence.

<sup>32</sup> Speech of Jorge Eliécer Gaitán, ‘Prayer for Peace’, 7 February 1948, in Ann Farnsworth-Alvear, Marco Palacios, and Ana María Gómez López (eds.) *The Colombia Reader – History, Culture, Politics* (Durham, Duke University Press: 2017) 345.

<sup>33</sup> Ann Farnsworth-Alvear, Marco Palacios, and Ana María Gómez López (eds.) *The Colombia Reader – History, Culture, Politics* (Durham, Duke University Press: 2017) 347.

<sup>34</sup> Lisa J. Laplante and Kimberly Theidon, ‘Transitional Justice in Times of Conflict: Colombia’s Ley de Justicia y Paz 28 *Michigan Journal of International Law* (2007) 49.

<sup>35</sup> Lisa J. Laplante and Kimberly Theidon, ‘Transitional Justice in Times of Conflict: Colombia’s Ley de Justicia y Paz 28 *Michigan Journal of International Law* (2007) 49.

pact was overwhelmingly approved by Colombians in a plebiscite.<sup>36</sup> The ‘Sitges pact’ led to the emergence of a number of guerrilla movements in the 1960s, including the *Ejército de Liberación Nacional* (ELN) and the FARC-EP. These groups began an insurgency against the State which then prompted a counterinsurgency movement. A number of legal and illegal paramilitary organisations were formed which fought the FARC-EP, sometimes with State support, but at other times supported and financed by powerful economic interests.<sup>37</sup> The conflict became complicated as different actors became involved. In the 1980s, cocaine production and distribution raised extra income (i.e. US dollars) for all sides of the conflict. Different groups became interested in the drug trade but also in legal business interests such as mining and palm oil.<sup>38</sup> These economic actors would employ paramilitary groups to defend their interests and to clear the land of civilians. After the 1980s, it became difficult to separate organized crime activities from ‘legitimate’ rebellion.<sup>39</sup> The predation of Colombia’s natural resources became as much a reason for the violence as any imagined political struggle.<sup>40</sup> In the 1990s, a US initiative, ‘Plan Colombia’ ensured that the government received millions of dollars in aid. This money was used by Colombia to fund the counterinsurgency which intensified.

In the 2000s, the creation of the International Criminal Court had a significant impact on the armed conflict.<sup>41</sup> It led to attempts in Colombia to provide justice for the millions of victims of the armed conflict. Colombia has been under ICC investigation since 2004.<sup>42</sup> In

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<sup>36</sup> Alvaro Gómez Hurtado and Ofelia Uribe de Acosta, ‘Two Views of the National Front’ in Ann Farnsworth-Alvear, Marco Palacios, and Ana María Gómez López (eds.) *The Colombia Reader – History, Culture, Politics* (Durham, Duke University Press: 2017) 360.

<sup>37</sup> Lisa J. Laplante and Kimberly Theidon, ‘Transitional Justice in Times of Conflict: Colombia’s Ley de Justicia y Paz 28 *Michigan Journal of International Law* (2007) 49.

<sup>38</sup> Nicole Summers, ‘Colombia’s Victims’ Law: Transitional Justice in a Time of Violent Conflict?’ 25 *Harvard Human Rights Law Journal* (2011) 219, 221.

<sup>39</sup> Paul Collier, ‘Rebellion as a Quasi-Criminal Activity’, 44 *The Journal of Conflict Resolution* (2000) 839.

<sup>40</sup> Paul Collier, ‘Rebellion as a Quasi-Criminal Activity’, 44 *The Journal of Conflict Resolution* (2000) 839, 852.

<sup>41</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), 2187 UNTS 90 (ICC).

<sup>42</sup> Report on Preliminary Examination Activities 2016, (14 November 2016), The Office of the Prosecutor, International Criminal Court, 52, available online at: [https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE\\_ENG.pdf](https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf) (last accessed 7 August 2017)



2007, Colombia attempted to initiate a transitional justice programme to demobilize the right wing paramilitary armies (the AUC).<sup>43</sup> Unfortunately, around the same time as the demobilization of the AUC (right-wing paramilitary groups), a ‘cash-for-kills’ policy was introduced by Defence Minister Camilo Ospina (during ex-President Alvaro Uribe’s presidency). This policy awarded extra pay (\$1,500) for Colombian Army personnel in exchange for evidence of ‘positive combat kills’.<sup>44</sup> The details of this policy and its disastrous results have been mentioned above (section 4.4). Civilians were lured by offers of employment and driven for hundreds of miles into FARC-EP controlled areas. They were executed and dressed in FARC-EP combat uniforms and presented as ‘combat kills’. According to one study, which focuses on the links between US Aid and the so-called ‘false positives’ scandal, there were over 5,763 extra-judicial executions between 2000 and 2010.<sup>45</sup> The number may be higher. Many senior commanders in Colombia’s military are implicated in this scheme. There have already been some prosecutions. Up to February 2016, the Colombian courts passed 817 convicting sentences against 961 members of the armed forces.<sup>46</sup>

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<sup>43</sup> Lisa J. Laplante and Kimberly Theidon, ‘Transitional Justice in Times of Conflict: Colombia’s Ley de Justicia y Paz 28 *Michigan Journal of International Law* (2007) 49.

<sup>44</sup> Republic of Colombia, Defence Ministry, Directive #29/2005, (17 November 2005), available online [https://dl.dropboxusercontent.com/u/50500020/Newsroom/Armed%20conflict/False%20positives/directiva\\_ministerial\\_29\\_2005.pdf](https://dl.dropboxusercontent.com/u/50500020/Newsroom/Armed%20conflict/False%20positives/directiva_ministerial_29_2005.pdf) (last accessed 16 August 2017).

<sup>45</sup> Fellowship of Reconciliation and Colombia-Europe-U.S. Human Rights Observatory, ‘The Rise and Fall of ‘False Positive’ Killings in Colombia: The Role of U.S. Military Assistance, 2000-2010’, May 2014, available online at: <http://archives.forusa.org/sites/default/files/uploads/false-positives-2014-colombia-report.pdf> (last accessed 6 August 2017).

<sup>46</sup> Report on Preliminary Examination Activities 2016, (14 November 2016), The Office of the Prosecutor, International Criminal Court, 52, available online at: [https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE\\_ENG.pdf](https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf) (last accessed 7 August 2017). The dispensation of justice has been slow. In one case, in Soacha, a mother has waited over nine years for the legal system to bring charges against military officers, see article in *Semana*, ‘La JEP deja en limbo a una madre de Soacha’, available online at: <http://www.semana.com/nacion/articulo/falsos-positivos-de-madres-de-soacha-juzgados-por-la-jep/524586> (last accessed 14 August 2017).

### **5.2.2 Context and its relevance for the interpretation of post-conflict law**

This section has set out the context of the Colombian armed conflict. The main reason is that a chief prosecutor could not decide the legal question in a political vacuum. All interpretations of post-conflict law are subject to the local legal and political context. Thus, any decision on child soldier accountability must take into account that Colombian children have been born and raised in a country which has been in a state of perpetual war.<sup>47</sup> Context is also important insofar as this chapter (and this thesis) can provide policy recommendations for those involved in the implementation of transitional criminal justice measures outlined in the peace agreement.

No child soldiers have been indicted for any crimes related to the ‘false positives’ scandal. The Colombian Army does not deploy under-18s, pursuant to Law 548 of 1999.<sup>48</sup> Nevertheless, the history of armed violence and the number of child soldiers involved (especially in the FARC-EP) suggest that there will be many cases of child soldier perpetrators. A recent study has identified that 47% of FARC-EP combatants were recruited as child soldiers.<sup>49</sup> The peace agreement states that international crimes committed by child soldiers between 14 and 18 years of age will be studied at a later date.<sup>50</sup> It also states that it is for the Special Jurisdiction for Peace to decide ‘whether those who were under 18 at the moment of the commission of international crimes incapable of amnesty will be exempted

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<sup>47</sup> Alasdair MacIntyre, *A Short History of Ethics* (New York, Macmillan: 1966).

<sup>48</sup> Article 2, Law 548 of 1999, available online at: <http://www.fiscalia.gov.co/jyp/wp-content/uploads/2012/05/Ley-548-de-23-de-Diciembre-de-1999.pdf> (last accessed 17 August 2017).

<sup>49</sup> See report in *Semana*, 29 October 2017, citing a study by Luis Andrés Fajardo, ‘Reclutamiento de niñas y niños como crimen internacional de las FARC en Colombia’, (Universidad Sergio Arboleda: 2014) <http://www.semana.com/nacion/articulo/el-47-de-los-integrantes-de-las-farc-fueron-reclutados-siendo-ninos/407422-3>

<sup>50</sup> Joint Communiqué #70, Havana, Cuba, 15 May 2016, (Agreement on Minors) available at: <http://www.altocomisionadoparalapaz.gov.co/mesadeconversaciones/PDF/comunicado-conjunto-70-version-ingles-1-1463432344.pdf> (last accessed 21 June 2017).

from criminal prosecution'.<sup>51</sup> The overall question for this thesis is whether the *jus post bellum* as integrity helps the chief prosecutor to identify the correct interpretation of the law in this specific situation. The next hypothetical set of facts is, therefore, presented as a plausible situation. It is supposed to illustrate a broader idea about how a Dworkinian approach may look. It is not supposed to provide a mechanistic account of what is *required* of prosecutors in post-conflict situations dealing with this issue. At some points, the argument will acknowledge weaknesses and objections. It is not supposed to be an approach that solves all potential problems in the interpretation of post-conflict law. Nevertheless, the argument is presented as a picture of a Dworkinian approach to interpretation in post-conflict law. This sets the stage for two central critiques of this approach in chapter 6.

### **5.3 Hypothetical case facts**

For ease of reference, this section sets out a set of facts involving a hypothetical child soldier (Juan) and a hypothetical chief prosecutor at the Chamber for Amnesties and Pardons (Ronalda).<sup>52</sup>

Ronalda is faced with the following set of facts:

On 1 January 2006, a 12 year old male called Juan volunteered to join the FARC-EP guerrilla. His father had been kidnapped and murdered by members of the Colombian Army. Juan was from a poor rural area, and he had few socio-economic opportunities. Many like

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<sup>51</sup> Amnesty Law, Article 27, Point 10, Chapter 4, 'Final Agreement for the End of Conflict and the Construction of a Stable and Long Lasting Peace' signed on 24 November 2016 and ratified by Congress 1 December 2016. The full text of the peace agreement is available at: <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf>

<sup>52</sup> There is no special reason for naming the ex-child soldier 'Juan' other than that it is a very common name. There is an obvious reason for naming the hypothetical chief prosecutor 'Ronalda'.

him had already joined the FARC-EP. When the guerrillas arrived at his village, he urged his mother to let him join the group. He planned to join the army and receive a salary that he could send back to his mother. When she resisted he escaped and joined the FARC-EP ranks. Juan began working as a porter, and then he worked as a spy. Finally, he was given a rifle and he became a child combatant in the FARC-EP. Naturally, he felt a sense of belonging in the guerrilla camps and he was impressed by older members present in the armed group. In 2009, Juan was part of a small company of FARC-EP fighters who were ordered to attack and take control of a small rural village controlled by the Colombian Army. Juan was 15. They were ordered to establish control over the cocaine manufacturing laboratory. The village was defended by a number of armed forces personnel. The FARC-EP outnumbered them and they were better armed. The State armed forces were defeated and taken hostage. Juan took part in the conflict. After establishing control, the FARC-EP rounded-up the surviving army personnel. A FARC-EP commander ordered Juan to execute one of the soldiers. Juan executed the detainees. As the months passed, Juan executed several other detainees. It became a matter of routine. As he rose through the ranks he ordered other younger children to execute detainees.

Juan was a child soldier from 2006 to 2012. He killed dozens of detainees between 2009 and 2012 (his age was 15 to 18). After the recent FARC-EP demobilization process, Juan (now 22) has turned in his weapon and he is committed to the peace process. Under common Article 3 to the Geneva Conventions, detainees must be treated humanely and cannot legally be killed.<sup>53</sup> Thus, there is enough evidence to suggest that Juan has committed a war crime

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<sup>53</sup> Article 3, Geneva Convention Relative to the Treatment of Prisoners of War, (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 1949, available at: <http://www.refworld.org/docid/3ae6b36c8.html> (last accessed 14 August 2017).

contrary to customary international humanitarian law and article 8 (2)(a) (i) of the Rome Statute (wilful killing of persons protected by the Geneva Conventions).<sup>54</sup>

#### **5.4. A Dworkinian Approach to Criminal Accountability in Colombia**

Ronalda must decide how to interpret the law of transitional criminal justice in Colombia as it relates to child soldier perpetrators. This section analyses the method of interpretation as implied by the *jus post bellum* as integrity. It identifies the rules from which an interpretation must be made. It sets out the principles that best explain and justify the law. It then applies these principles to Juan's case.

##### **5.4.1 RONALDA'S METHOD: REVIEW OF INTERPRETIVISM**

This section sets out a brief review of the interpretive method. Interpretivism sets out a three-stage process to the interpretation of law. RONALDA's first task is to compile the 'raw data' of the practice, i.e. that which is relevant for the law of transitional criminal justice.<sup>55</sup> This means that she must accumulate the history of the law and legal practice from which an interpretation must be made. In the analogy of the chain novel (see section 4.3.3) this part of the Dworkinian interpretive method is akin to the reading of the previous chapters of the 'chain novel'.<sup>56</sup> From a Dworkinian viewpoint, RONALDA must regard herself 'in deciding the new case before [her], as a partner in a complex chain enterprise'.<sup>57</sup> Before a new writer in the chain can add their chapter they must read the chapters that have been written. Thus, before

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<sup>54</sup> Article 8 (2)(a)(i) Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), 2187 UNTS 90.

<sup>55</sup> Ronald Dworkin, *Law's Empire*, (Portland, Oregon, Hart Publishing: 2006) 65.

<sup>56</sup> Ronald Dworkin, *Law's Empire*, (Portland, Oregon, Hart Publishing: 2006) 228.

<sup>57</sup> Ronald Dworkin, 'Law as Interpretation' 9 *Critical Inquiry* 1 (1982) 179, 193.

Ronalda in Colombia can interpret the law, she must read through the history of the practice. As will be seen, this ‘pre-interpretive step’ is difficult to separate from the interpretive stage. At the ‘interpretive stage’ Ronalda must interpret the law of transitional criminal justice. She must identify those principles which best explain and justify the law. Integrity requires that she ‘has a responsibility to advance the enterprise in hand rather than strike out in some new direction’.<sup>58</sup> In terms of the *jus post bellum* as integrity, Ronalda must look at the law of transitional criminal justice and decide ‘what the point or theme of the practice so far, taken as a whole, really is.’<sup>59</sup> Of course, in a situation where legal rules conflict, there may be more than one plausible interpretation of the ‘enterprise in hand’. This is especially the case when the rules of two legal systems are involved (the Colombian and international legal orders). Integrity may mean that Ronalda has to find an interpretation of the relevant law that demonstrates coherence with the Colombian legal order. This is Gallen’s suggestion. Integrity, however, could also mean that Ronalda should find coherence across national and international legal orders. Insofar as Ronalda is applying international law, this is also a legal obligation. A detailed discussion is left to chapter 6.

Finally, at the ‘post-interpretive’ stage, the Dworkinian interpretive method turns to ‘justification’. Ronalda must decide what the principles that emerge from the practice mean when considered in Juan’s case. She must integrate the different principles in order to provide a justification for the decision that she makes.

Dworkin notes that in reality, interpretation is not as ‘deliberate’ and ‘structured’ as this analytical scheme suggests.<sup>60</sup> He argues that it is more ‘a matter of “seeing” at once the dimensions of [the] practice, a purpose or aim in that practice, and the post-interpretive

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<sup>58</sup> Ronald Dworkin, ‘Law as Interpretation’ 9 *Critical Inquiry* 1 (1982) 179, 193.

<sup>59</sup> Ronald Dworkin, ‘Law as Interpretation’ 9 *Critical Inquiry* 1 (1982) 179, 194.

<sup>60</sup> Ronald Dworkin, *Law’s Empire*, (Portland, Oregon, Hart Publishing: 2006) 67.

consequences of that purpose'.<sup>61</sup> However, for the purposes of evaluating the usefulness of the *jus post bellum* as integrity, it is useful to follow Dworkin's analytical approach to interpretation in its three-stages. In this respect, each stage represents a set of questions that Ronalda must ask herself.<sup>62</sup> The next section applies this interpretive methodology to the law and practice of child soldier accountability in post-conflict law.

#### **5.4.2 The pre-interpretive stage**

Ronalda is tasked with deciding whether to prosecute Juan for the crimes he is suspected of having committed. She begins by identifying all of the relevant law on the question of child soldier accountability. Many of the relevant legal provisions have been set out in detail in section 3.6. Ronalda sets out the following table as the relevant rules from which an interpretation of the law must be made:

DOMESTIC LAW	INTERNATIONAL LAW
The Colombian Peace Agreement <sup>63</sup> -Part 5. 'Agreement on Victims' -Amnesty Law. -Joint Communiqué #70 <sup>64</sup>	The Colombian Peace Agreement -Part 5. 'Agreement on Victims' -Amnesty Law. 'Justice and Peace Law' (Law 975) <sup>65</sup> -Joint Communiqué #70

<sup>61</sup> Ronald Dworkin, *Law's Empire*, (Portland, Oregon, Hart Publishing: 2006) 67.

<sup>62</sup> Ronald Dworkin, *Law's Empire*, (Portland, Oregon, Hart Publishing: 2006) 239.

<sup>63</sup> Final Agreement for the End of Conflict and the Construction of a Stable and Long Lasting Peace', (hereafter the Peace Agreement) signed on 24 November 2016 and ratified by Congress 1 December 2016. The full text of the peace agreement is available at: <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf>.

<sup>64</sup> Joint Communiqué #70, Havana, Cuba, 15 May 2016, (Agreement on Minors) available at: <http://www.altocomisionadoparalapaz.gov.co/mesadeconversaciones/PDF/comunicado-conjunto-70-version-ingles-1-1463432344.pdf> (last accessed 21 June 2017)

<sup>65</sup> Ley 975 de 2005, (25 July 2005), Official Diary, available online at: [https://www.cejil.org/sites/default/files/ley\\_975\\_de\\_2005\\_0.pdf](https://www.cejil.org/sites/default/files/ley_975_de_2005_0.pdf) (last accessed 24 August 2017)

The Colombian Constitution <sup>66</sup>  -Article 22  -Article 44  -Article 95	International Human Rights Law  -UNCRC <sup>67</sup>  -American Convention on Human Rights and case law of inter-American Court of Human Rights <sup>68</sup>
The Colombian Penal Code <sup>69</sup>  -Law 1098 of 8 November 2006 (especially Section II ‘System of Adolescent Criminal Responsibility (SACR)).	International Humanitarian Law  -Article 3 Common to the Geneva Conventions 1949 <sup>70</sup>  -Additional Protocol II to the Geneva Conventions <sup>71</sup> (article 77)
	International Criminal Law <sup>72</sup>  -Jurisprudence of ICTY/ICTR
	Law and practice of the Special Court for Sierra Leone

<sup>66</sup> Constitution of Colombia of 1991, (available online at: <http://www.corteconstitucional.gov.co/Inicio/Constitucion%20politica%20de%20Colombia%20-%202015.pdf> (last accessed 7 August 2017), see English language version here: [https://www.constituteproject.org/constitution/Colombia\\_2005.pdf](https://www.constituteproject.org/constitution/Colombia_2005.pdf)

<sup>67</sup> UN Convention on the Rights of the Child (adopted 20 November 1989; entered into force 2 September 1990) 1577 UNTS 27531.

<sup>68</sup> American Convention on Human Rights, ‘Pact of San Jose’, Costa Rica, (adopted 22 November 1969, entered into force, 18 July 1978), available online at: <http://www.refworld.org/docid/3ae6b36510.html> Inter-American Court of Human Rights, *Case of Vargas-Areco v. Paraguay*, Merits, Reparations, Costs, and Judgment of 26 September 2006, Series C No. 155, paras 111-134.

<sup>69</sup> Law 1098 of 8 November 2006, ‘Code on Childhood and Adolescence’ (Bogotá, 2010) available online at: [http://www.sipi.siteal.iipe.unesco.org/sites/default/files/sipi\\_normativa/codigo\\_de\\_infancia\\_y\\_adolescencia.pdf](http://www.sipi.siteal.iipe.unesco.org/sites/default/files/sipi_normativa/codigo_de_infancia_y_adolescencia.pdf) (last accessed 7 August 2017).

<sup>70</sup> Article 3 common to Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC I) 75 UNTS 31; Geneva Convention for the Amelioration of the Conditions of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GC II) 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War (GC III) 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC IV) 75 UNTS 287 (all four Conventions adopted 12 August 1949, entered into force 21 October 1950).

<sup>71</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), ((adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609, article 4(3)(c).

<sup>72</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), 2187 UNTS 90, article 30, available at: [https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf) (last accessed 12 July 2017).



	-Article 7 <sup>73</sup>
	Customary International Humanitarian Law -Rule 136 <sup>74</sup>
	Law and practice of other post-conflict tribunals (East Timor, Bosnia) <sup>75</sup>
	Peace Agreement Practice <sup>76</sup>

This is all that is required at the pre-interpretive stage. Whether she refers to all of these sources of law or only some of them is a matter for the interpretive stage. The weight that she affords to the different principles is also a matter for the interpretive stage. This stage is simply a matter of ‘seeing’ the relevant rules.

Yet, there is a problem with characterizing this stage as ‘pre-interpretive’. This relates to whether this field of law is as easily identifiable as those with which Dworkin’s theory was concerned in *Law’s Empire*. For example, there may be legitimate disagreement about some of these sources as part of the ‘raw data’ of the practice. There may also be legitimate disagreement about whether transitional criminal justice *is* ‘a practice’ with ‘a history’ and whether it includes transitional processes in other post-conflict situations. To some, these situations may clearly fall outside of the Colombian legal system. As such, there would be no legal obligation to even consider these situations. The charge would be that they

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<sup>73</sup> Statute of the Special Court for Sierra Leone, established pursuant to UN Security Council Resolution 1315 (2000), 16 January 2000.

<sup>74</sup> See ICRC Study of Customary International Law, Commentary on Rule 136, available at: [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter39\\_rule136#Fn\\_98\\_14](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter39_rule136#Fn_98_14) (last accessed 12 July 2017).

<sup>75</sup> Bosnia and Herzegovina: Criminal Code, (entered into force 1 March 2003) art. 8, available online at: <http://www.refworld.org/docid/4d2dbb212.html> ; UN Transitional Administration in East Timor (UNTAET), Regulation 2001/25 on the Amendment of UNTAET Regulation no. 2000/11: On the Organization of Courts in East Timor and UNTAET Regulation no. 2000/30: On the Transitional Rules of Criminal Procedure, Doc. UNTAET/REG/2001/25, (14 September 2001), Section 45(1).

<sup>76</sup> Given the range of peace agreements that have been signed and deposited with the UN, this chapter only deals with a selection of relevant provisions, see UN Peacemaker, Peace Agreements Database Search, available online at: <http://peacemaker.un.org/document-search> (last accessed 24 August 2017)

are not part of the same ‘chain novel’. The most that this line of reasoning would admit is that a prosecutor may see these other situations as relevant and may look at these other situations as part of the history of transitional criminal justice.

This is, however, an interpretive issue. Thus, the ‘pre-interpretive’ stage in post-conflict law is not easily separable from the interpretive. These and other issues will be left to one side for now and discussed in more detail in chapter 6. Suffice it to say that this thesis argues that insofar as all transitional justice situations are bounded by international law, whether treaty or custom, then domestic actors are under a duty to interpret the rules in a way that is faithful to their provenance. In order to do this, domestic actors in Colombia, may be required to look at the way that other transitional criminal justice situations have interpreted the international rules on child soldiering.

### **5.4.3 The interpretive stage**

Ronalda has identified the relevant law and it is now possible for her to enter the ‘interpretive stage’. The interpretation of the rules requires Ronalda to identify those principles which best explain (‘fit’) and justify (‘substance’) the rules themselves. Dworkinian post-conflict law is, therefore, a mixture of the rules and the principles which best explain and justify the rules in light of the community’s political morality.<sup>77</sup> In this sense, the aim is to identify ‘a particular conception of community morality as decisive of legal issues’.<sup>78</sup> Further, it urges that the closer they achieve a principled coherence between law and the political morality of a particular community the better they are interpreting the law.<sup>79</sup>

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<sup>77</sup> For the classic Statement on the separation of law and morals see H.L.A. Hart, ‘Positivism and the Separation of Law and Morals’ in H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (New York, OUP: 1988) 49.

<sup>78</sup> Ronald Dworkin, ‘Hard Cases’ in *Taking Rights Seriously* (\_\_\_\_\_)81, 126.

<sup>79</sup> Ronald Dworkin, *Justice for Hedgehogs*, (Cambridge: The Belknap Press of Harvard University Press, 2011).

There are a few caveats that must be mentioned. This stage does not consider important issues of evidence. It also does not consider whether Juan has any legal defences available to him. For the sake of simplicity and clarity of exposition, this chapter assumes that the evidence demonstrates that there is a very good case for a conviction and that issues of possible defences are no part of Ronalda's interpretive task. The only task for Ronalda is to interpret post-conflict law in order to decide whether she should prosecute Juan for his crimes. Further, this chapter assumes that there are voices within Colombia that call for Juan's prosecution. The point is that this difficult decision cannot be avoided. This assumption appears justified in view of the experiences of other post-conflict societies in reintegrating ex-child combatants. For example, in post-conflict Sierra Leone, the reintegration of former child combatants was made difficult in that local communities did not always accept that those being reintegrated were blameless victims of the armed conflict.<sup>80</sup>

Following the Dworkinian example, Ronalda sets out a number of possible interpretations of the law.<sup>81</sup>

#### **5.4.3.1 Five interpretations**

1. Post-conflict law requires that all child soldier perpetrators over the minimum age of criminal responsibility at the time of the alleged crimes must be prosecuted.
2. Post-conflict law permits States to prosecute child soldier perpetrators over the minimum age of criminal responsibility.

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<sup>80</sup> Mohamed Gibril Sesay, and Mohamed Suma M., 'Transitional Justice and DDR: The Case of Sierra Leone', Research Unit of the International Centre for Transitional Justice (June 2009), available online at: <https://www.ictj.org/sites/default/files/ICTJ-DDR-Sierra-Leone-CaseStudy-2009-English.pdf> (last accessed 15 August 2017), at 15: 'the most significant determinant of whether a former fighter gained acceptance into his or her family and community was the level of abuse the former combatants' armed group inflicted upon civilians of that area.'

<sup>81</sup> Ronalda Dworkin, *Law's Empire*, (Portland, Oregon, Hart Publishing: 2006) 240.

3. Post-conflict law permits States to prosecute child soldier perpetrators over the minimum age of criminal responsibility but this is discouraged and reserved for those most responsible.
4. Post conflict law permits States to prosecute child soldier perpetrators over 15 but this is discouraged and reserved for those most responsible.
5. Post-conflict law prohibits all prosecutions of child soldier perpetrators.

After setting out the possible interpretations, Ronalda turns to interpret the previous practice to see which of these interpretations best fits the practice. In the interpretation of the previous law and practice, she discovers principles which best explain and justify that law and practice. Not all of these interpretations are consistent with the principles of the practice and, therefore, the Dworkinian method requires that they be eliminated.

Ronaldal must find a place to start. She must decide what part of the previous history of transitional criminal justice is most relevant. She has identified a number of relevant rules both domestic and international. She has also identified a number of post-conflict cases. According to Dworkin, Ronaldal must make her judgments of 'fit' 'expand out from the immediate case before [her] in a series of concentric circles'.<sup>82</sup> This feature of Dworkin's interpretive method stems from his concerns with the common-law doctrine of precedent. In Dworkin's theory, it is called the principle of local priority. Ronaldal decides to follow a similar approach. However, the difficulty is that States have no previous experience of transitional justice situations. Thus, States must look elsewhere at other situations.

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<sup>82</sup> Ronald Dworkin, *Law's Empire*, (Portland, Oregon, Hart Publishing: 2006) 250.

#### **5.4.3.2 Issues of ‘fit’: the principles of maturity and responsibility**

The *jus post bellum* as integrity suggests that Ronalda could look at previous post-conflict situations which exhibit similar elements to the Colombian case. Ronalda finds that the case before her finds the most immediate parallel in post-conflict Sierra Leone. She sees herself in a similar position to that in which Chief Prosecutor David Crane found himself. There are important parallels in terms of the use of child soldiers. More than 48,000 of the soldiers involved in Sierra Leone were children.<sup>83</sup> They participated in a non-international armed conflict. The conflict ended in the signing of a peace agreement which led to the establishment of the Special Court for Sierra Leone. In Colombia, thousands of children were involved in the conflict as part of non-State armed groups. A peace agreement has been signed and this has led to the creation of a Special Jurisdiction for Peace, which includes a Special Tribunal for Peace. Ronalda considers that, in so far as she needs to consider the post-conflict criminal accountability of children for international crimes, Sierra Leone has some useful precedential value with respect to the rules of international law on the issue. She may do so, owing to the fact that she wants the Colombian transitional justice situations to be coherent as a matter of international law with other transitional justice situations.

Thus, she finds that article 7 of the Statute of the Special Court for Sierra Leone (SCSL) provided the SCSL with jurisdiction over child soldier perpetrators over 15 years of age.<sup>84</sup> However, the minimum age of criminal responsibility in Sierra Leone is 14. The setting of 15 as the minimum age of criminal responsibility for the purposes of child soldier accountability, suggests that 14 year olds are too young to be prosecuted for the commission of international crimes. This suggests that post-conflict accountability depends on reaching

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<sup>83</sup> Mohamed Gibril Sesay and Mohamed Suma, Research Unit of the International Center for Transitional Justice, ‘Transitional Justice and DDR: The Case of Sierra Leone’, June 2009, available online at: <https://www.ictj.org/sites/default/files/ICTJ-DDR-Sierra-Leone-CaseStudy-2009-English.pdf> (last accessed 15 August 2017).

<sup>84</sup> Article 7, Statute of the Special Court for Sierra Leone, established pursuant to UN Security Council Resolution 1315 (2000), 16 January 2000, available online at: <http://www.refworld.org/docid/3dda29f94.html> (last accessed 15 August 2017).

15 years of age at the time of the commission of the international crimes. Ronalda interprets this rule as giving rise to a principle of ‘global transitional justice’: child soldier accountability is subject to a principle of maturity.

It appears to Ronalda that interpretation (5) can be dismissed. It prohibits all prosecutions of child soldier perpetrators. It does not appear to ‘fit’ with history of child soldier accountability in Sierra Leone. Ronalda, in following the Dworkinian method, is attempting to find coherence in the interpretation of international rules across jurisdictions, not only within Colombia. For her, the case of Sierra Leone demonstrates that international law in post-conflict situations does not prohibit prosecutions for child soldiers. It permits States to prosecute the commission of international crimes by under-18s. Thus, as a matter of global transitional justice, interpretation (5) is incorrect.

Interpretations (1), (2) and (3), therefore, also appear incorrect. They make reference to the minimum age of criminal responsibility. The minimum age of criminal responsibility in Sierra Leone is 14. However, post-conflict criminal responsibility was raised to 15. Of course, interpretations (1) (2) and (3) may be plausible but only if a post-conflict State has a minimum age of criminal responsibility over 15. In Colombia, the minimum age of criminal responsibility is 14. Therefore, because interpretations (1) (2) and (3) do not fit the practice in Sierra Leone, Ronalda believes that she needs a very good reason to consider them as the right interpretation. In this respect, the issue of ‘fit’ can be outweighed by issues of ‘justification’.

However, before considering whether there are good reasons to consider the validity of these interpretations, Ronalda also finds that in Sierra Leone the chief prosecutor decided that child soldiers in Sierra Leone were not ‘persons who bear the greatest responsibility’ for

the international crimes committed during the armed conflict in that country.<sup>85</sup> He, therefore, refused to indict any child soldier perpetrators. Thus, there is a discrepancy between the law in the books and the law in action. The prosecutor's refusal to prosecute in Sierra Leone (despite being permitted to act) appears to give rise to a different principle: that transitional *criminal* justice is reserved for those most responsible for the commission of international crimes.

Ronalda has identified two principles. She thinks that post-conflict law on child soldier accountability is founded on the one hand on a principle of maturity. In Sierra Leone, the relevant age was set at 15 which was a year above the minimum age of criminal responsibility in the State. On the other hand, the refusal by the chief prosecutor to prosecute any child soldiers can be justified according to the principle of responsibility. This suggests to her that the law on child soldier accountability is based on two interrelated principles. The child must be mature enough to understand the consequences of his actions. However, at the same time, the acts committed by the child must be serious enough for the child to be seen as one of those most responsible for the commission of international crimes.

This is not to deny that there may be other reasons for the decisions not to prosecute in Sierra Leone. The high number of child soldier perpetrators may have made things difficult in terms of funding issues. Further, pressure from NGOs that control reintegration programmes can be a significant deciding factor. International NGOs were against prosecution owing to their view that the prosecution of child soldiers would be detrimental to their efforts. These and other issues may explain and justify post-conflict law in Sierra Leone. However, for present purposes, Ronalda tries to find principles that can be used for the purposes of deciding the case before her.

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<sup>85</sup> Press Release, Special Court for Sierra Leone, Public Affairs Office, (2 November 2002), available online at: <http://www.rscsl.org/Documents/Press/OTP/prosecutor-110202.pdf> (last accessed 7 August 2017).

Ronalda takes another look at the interpretations of the law with which she started. The fact that the prosecutor in Sierra Leone did not prosecute any child soldiers seems to rule out interpretation (1) which *requires* prosecutions of child soldier perpetrators as a matter of post-conflict law. This interpretation does not fit the practice of child soldier accountability and, in fact, is diametrically opposed to the precedent set in the closest comparable case. Interpretation (5) has already been rejected because the Statute of the SCSL, and the peace agreement in Colombia, do not support the view that the prosecution of child soldiers is prohibited as a matter of post-conflict law. Further, there are many rules of international law which support the possibility that child soldier perpetrators can be prosecuted.

Ronalda notes that international human rights law does not prohibit the prosecution of children. Instead, it sets out rules for their protection in the event of prosecution. For example, article 12 of the CRC States that, ‘the child shall be provided with the opportunity to be heard in any judicial [...] proceedings’.<sup>86</sup> Article 40 sets out a range of measures to protect children who are prosecuted including the right to be presumed innocent (art. 40 (2)(b)(i)); the right to a fair trial (art. 40(2)(b)(iii) and the right not to be compelled to give testimony (art. 40 (2)(b)(iv)).<sup>87</sup> Ronalda finds that all that is required as a matter of international human rights law is the ‘promotion’ of a set of laws directed toward the protection of children including ‘the establishment of a minimum age of criminal responsibility’.<sup>88</sup>

Further, in relation to participation in armed conflict, Ronalda notes that international human rights law accepts the participation of under-18s. Article 38(2) CRC asserts that States parties ‘shall take all feasible measures’ to ensure under-15s do not take part in armed

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<sup>86</sup> UN Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990), 1577 UNTS 27531, (CRC), article 12.

<sup>87</sup> UN Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990), 1577 UNTS 27531, (CRC), article 40.

<sup>88</sup> UN Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990), 1577 UNTS 27531, (CRC), article 40.



conflict.<sup>89</sup> The particular language of this provision leaves open the participation of under-15s open as a matter of human rights law. Further support for this view is found in international humanitarian law which sets the minimum age of participation at 15.<sup>90</sup> Also, international criminal law sets the limit on participation at 15. Under article 8(2)(b)(xxxvi) of the Rome Statute, ‘conscripting or enlisting children under the age of fifteen years’ is a war crime in non-international (and international) armed conflicts.<sup>91</sup> The implication is that those aged between 16 and 18 are able to participate in hostilities. This view is further supported by the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY). In *Orić*, the defence raised an argument to the effect that children could not be prosecuted for war crimes. This was based on the view that the International Criminal Court has no jurisdiction over under-18s. However, the Tribunal rejected the argument and asserted that ‘no such rule exists in conventional or customary international law’.<sup>92</sup> Ronalda concludes that interpretation (5) simply cannot be supported.

This is not to say that prosecutions of child soldiers can never be prohibited as a matter of post-conflict law. The parties in Colombia may have decided that 14-18 year olds were to be considered as victims and could never be prosecuted. This would be post-conflict law in Colombia and other post-conflict situations could consider whether this is an approach they want to follow in terms of the interpretation of international law on point. Thus, it bears repeating, this thesis is not setting out to identify the global law on transitional justice as a matter of concrete reality. It is only presenting what an interpretive approach that focuses on integrity could look like. Coherence with other post-conflict scenarios is a part of such an interpretive process with respect to the international rules on the issue.

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<sup>89</sup> UN Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990), 1577 UNTS 27531, (CRC), article 38(2).

<sup>90</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), ((adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609, article 77(2).

<sup>91</sup> Rome Statute of the International Criminal Court, (adopted 17 July 1998, entry into force 1 Jul 2002) UNTS 2187, Article 8(2)(b)(xxxvi).

<sup>92</sup> *Prosecutor v Naser Orić*, Judgment, IT-03-68-T, (30 June 2006) para. 400.

Ronalda decides that interpretations (2), (3) and (4) are the only ones left. These interpretations ‘permit’ but neither ‘require’ nor ‘prohibit’ the prosecution of child soldier perpetrators. They appear as the only possible interpretations. Ronalda must decide which of these interpretations of the law is correct. She decides to consider the extent to which they reflect the principles of responsibility and maturity. There are two differences between these interpretations in this respect. The first relates to whether prosecuting child soldier perpetrators is discouraged. The second relates to the minimum age of criminal responsibility. Interpretation (2) makes no mention of whether the practice is discouraged. It merely sets out a permissive rule that is subject to a minimum age requirement. Ronalda notes that interpretations (3) and (4) state that the practice is discouraged and they are also different in relation to their minimum age requirements.

Ronalda thinks that each of the two principles identified are reflected in the three available interpretations. However, they reflect different conceptualizations about how these principles ought to be integrated. Interpretation (2) assumes that those over the minimum age of criminal responsibility in the post-conflict society can be prosecuted. But it makes no reference to prosecutions being discouraged. The principle of responsibility is bound up in the question of the minimum age. As long as the perpetrators reach the minimum age, then a prosecution is permitted (but not required). However, Ronalda wants to find coherence across transitional justice societies. She doubts whether this is coherent with the approach in Sierra Leone which she assumes had separated out issues of maturity and responsibility.

Interpretations (3) and (4) assert that prosecutions are to be discouraged. In order to decide, Ronalda must, therefore, examine the practice to identify whether it gives rise to a principle that calls for restraint in transitional criminal justice as it relates to child soldiers. The most important part of the practice that indicates restraint is the chief prosecutor’s decision in Sierra Leone that only those ‘most responsible’ should be prosecuted for their

crimes. As mentioned, interpretation (2) fails to separate this requirement from the principle of maturity. Therefore, Ronalda decides that it must be rejected. The principle of responsibility is not simply a matter of reaching the minimum age. The law requires that the prosecutor consider the crimes that have been committed and the corresponding justice demands that arise from the commission of these crimes from victims.

This leaves interpretations (3) and (4). The difference between these interpretations relates to the minimum age of criminal responsibility. Interpretation (3) makes reference to the minimum age of criminal responsibility. Interpretation (4) sets 15 as the minimum age. In Sierra Leone, the minimum age was set at 15 despite the fact that the ordinary criminal justice system sets 14 as the minimum age. This suggests that something important turned on setting the age at 15 in Sierra Leone. Consistency would require that Ronalda identify 15 as the minimum age. However, in order to be sure, she wants to extend her enquiry to see which of the two interpretations best resonates with the wider practice of post-conflict justice. She begins by looking at other relevant parts of the post-conflict process in Sierra Leone as it relates to child soldiers.

She discovers that in post-conflict Sierra Leone, the UN Secretary-General, Kofi Annan Stated that although it was ‘inconceivable that children could be in a political or military leadership position [...] the gravity and seriousness of the crimes they have allegedly committed would allow for their inclusion within the jurisdiction of the Court.’<sup>93</sup> Annan alluded to serious calls for child soldier accountability from within Sierra Leone. He stated that ‘the Government of Sierra Leone and representatives of Sierra Leone civil society clearly wish to see a process of judicial accountability’.<sup>94</sup> Also, according to these voices, ‘the people of Sierra Leone would not look kindly upon a court which failed to bring to justice

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<sup>93</sup> Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Security Council, S/2000/915, (4 October 2000), 7.

<sup>94</sup> Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Security Council, S/2000/915, (4 October 2000), 7.

children who committed crimes of that nature and spared them the judicial process of accountability'.<sup>95</sup> Kofi Annan, therefore, declared that those 'most responsible' did not exclude those between the ages of 15 and 18.<sup>96</sup>

Thus, Ronalda notes that setting the age at 15 was supported by the UN Secretary-General. She decides that this lends extra support to setting the age of 15 because it reflects a broader consensus among States about maturity at this age. Of course, this is very selective. There is other evidence that can be adduced to deny any consensus by States on the question of legal maturity. Therefore, she decides that the correct interpretation is (3). She thinks this interpretation is the best way to continue the story of post-conflict law as it has been told by previous prosecutors in her position. Post-conflict law does not require nor prohibit prosecutions. It permits but discourages prosecutions for those children most responsible over the age of 15 at the time of the alleged offences.

#### **5.4.3.3 Balancing 'fit' with 'justification'**

Ronalda's interpretation is based on two principles: the principle of maturity and the principle of responsibility. These principles emerge from her interpretation of the law of child soldier accountability in Sierra Leone. But following a Dworkinian approach, Ronalda may think that they should also explain and justify 'the community's' legal order. Ronalda notes that post-conflict law straddles two communities: the domestic community (Colombia) and the international community.<sup>97</sup> Therefore, she tests whether these principles are coherent with an account of law and legal practice in domestic law and international law as it relates to

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<sup>95</sup> Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Security Council, S/2000/915, (4 October 2000), 7.

<sup>96</sup> Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Security Council, S/2000/915, (4 October 2000), 7.

<sup>97</sup> chapter 6 deals with the problem of identifying an 'international community' as required by Dworkin's theory.

children. In seeking coherence across national and international legal orders Ronalda is attempting to pursue the ‘unity of value’ described in Dworkin’s later work.<sup>98</sup>

Ronalda first examines the peace agreement in Colombia to see if the principles that she has identified explain and justify the rules on children as agreed between the negotiating parties. The agreement reiterates in several places that special attention and protection be afforded to children (defined as under-18s).<sup>99</sup> The Preamble to the peace agreement asserts that the agreement affords special attention to ‘the rights of girls, boys and adolescents’.<sup>100</sup> There are repeated references throughout Part 5 of the agreement (on Victims) that ensure that the special needs of children are taken into account in the implementation of any transitional justice measures. She also notes that the parties to the peace agreement have been commended by the UN Security Council Working Group on Children and Armed Conflict for making sure that the best interests of the child is a guiding principle of the peace agreement.<sup>101</sup>

Ronalda then examines the rules of the Constitution of Colombia. Article 44 protects children against forms of physical and moral violence.<sup>102</sup> Further, the Constitution affirms in

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<sup>98</sup> Ronald Dworkin, *Justice for Hedgehogs* (Cambridge: The Belknap Press of Harvard University Press, 2011) 1.

<sup>99</sup> As a signatory to the CRC, Colombia defines ‘the child’ as an individual who has not yet attained 18 years of age, UN Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990), 1577 UNTS 27531 (CRC) art 1.

<sup>100</sup> Preamble, ‘Final Agreement for the End of Conflict and the Construction of a Stable and Long Lasting Peace’ signed on 24 November 2016 and ratified by Congress 1 December 2016. The full text of the peace agreement is available at: <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf>

<sup>101</sup> UNSC, Working Group on Children and Armed Conflict, ‘Conclusions on the situation of children and armed conflict in Colombia’, S/AC.51/2017/1 (7 March 2017) at 5 (a); see Joint Communiqué #70, Havana, Cuba, 15 May 2016, (Agreement on Minors) available at: <http://www.altocomisionadoparalapaz.gov.co/mesadeconversaciones/PDF/comunicado-conjunto-70-version-ingles-1-1463432344.pdf> (last accessed 21 June 2017), point 2; ‘Final Agreement for the End of Conflict and the Construction of a Stable and Long Lasting Peace’ signed on 24 November 2016 and ratified by Congress 1 December 2016. The full text of the peace agreement is available at: <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf>

at point 3.2.2.5.

<sup>102</sup> Constitution of Colombia of 1991, (available online at: <http://www.corteconstitucional.gov.co/Inicio/Constitucion%20politica%20de%20Colombia%20-%202015.pdf> (last accessed 7 August 2017), art. 44.

article 44 that ‘the rights of children take precedence over the rights of others’.<sup>103</sup> This suggests a principle that children require special protection. Children are afforded special constitutional rights to ‘life, physical integrity, health and social security...to have a family and not be separated from it, [and] instruction and culture’.<sup>104</sup> Further, article 45 of the Constitution extends the right to ‘protection and integral development’ to adolescents.<sup>105</sup>

Ronalda examines the Colombian Penal Code. The principle that children deserve special protection is reflected in the special measures of the Colombian Penal Code that set out a special system of juvenile justice.<sup>106</sup> This system offers those aged between 14 and 18 a special system of juvenile justice designed to ensure that the Colombian criminal justice system complies with international human rights norms. For example, article 140 of the System for Adolescent Criminal Responsibility asserts that ‘in cases of normative conflict between the provisions in this law and those of other laws, and for all interpretive purposes, the judicial authorities must always privilege the superior interests of the child’.<sup>107</sup>

Ronalda then decides to consider previous attempts at transitional justice in Colombia. She looks at ‘Justice and Peace Law’ (Law 975) which encouraged the demobilization and reintegration of the paramilitary AUC forces in 2005. The law provided that access to the amnesties involved in that law were subject to the relevant armed groups handing over to the

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<sup>103</sup> Constitution of Colombia of 1991, (available online at: <http://www.corteconstitucional.gov.co/Inicio/Constitucion%20politica%20de%20Colombia%20-%20202015.pdf> (last accessed 7 August 2017), article 44.

<sup>104</sup> Constitution of Colombia of 1991, (available online at: <http://www.corteconstitucional.gov.co/Inicio/Constitucion%20politica%20de%20Colombia%20-%20202015.pdf> (last accessed 7 August 2017), article 44.

<sup>105</sup> Constitution of Colombia of 1991, (available online at: <http://www.corteconstitucional.gov.co/Inicio/Constitucion%20politica%20de%20Colombia%20-%20202015.pdf> (last accessed 7 August 2017), article 45.

<sup>106</sup> See *Sistema de Responsabilidad Penal Juvenil*, see: <https://www.ramajudicial.gov.co/web/portal-ninos-y-ninas/sistema-de-responsabilidad-penal-para-adolescentes> (in Spanish, last accessed 8 August 2017).

<sup>107</sup> *Sistema de Responsabilidad Penal Juvenil*, see: <https://www.ramajudicial.gov.co/web/portal-ninos-y-ninas/sistema-de-responsabilidad-penal-para-adolescentes> (in Spanish, last accessed 8 August 2017), art 140.

Colombian authorities all child soldiers recruited into the armed group.<sup>108</sup> Failure to do so would render the relevant group unable to access the relevant amnesties. Finally, Ronalda considers that children are prohibited from being recruited (voluntarily or compulsorily) into the Colombian army until they reach the age of 18 according to Law 548 of 1999.<sup>109</sup>

At this stage, Ronalda notes that the domestic legal order in Colombia, insofar as it relates to child protection, does not fit with her interpretation of post-conflict law. The domestic legal order tends to protect under-18s. She thinks that this reflects a principle that under-18s attract special consideration and protection. There is a tension, therefore, in setting the minimum age for prosecutions at 15. Her interpretation of the principle of maturity appears not to explain and justify the rest of the domestic legal order which appears to favour 18 as the relevant age. Of course, this may, in turn, be explained by reference to principle. She may decide that there is a principle which states that the age of maturity depends on the issue in question. A child at 16 may be permitted to smoke, at 18 marry but be tried for a criminal offence at 10. Thus, she may decide that her interpretation is not deficient. Nevertheless, a line of reasoning must be taken. Ronalda decides that Colombian law usually sets 18 for the age of maturity and that this is in conflict with her setting the age of prosecution at 15.

In order to decide how the principle of maturity should be understood, Ronalda looks at the international legal order. Ronalda, as a Dworkinian prosecutor, is attempting to find coherence across different systems and categories in considering transitional justice from a global perspective. She is unconstrained by legal ‘departments’ and thinks that interpretations of Colombian post-conflict law must be coherent with the interpretations of international law in other transitional situations. The peace agreement states that the law of

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<sup>108</sup> Ley 975 de 2005, (25 July 2005), Official Diary, available online at: [https://www.cejil.org/sites/default/files/ley\\_975\\_de\\_2005\\_0.pdf](https://www.cejil.org/sites/default/files/ley_975_de_2005_0.pdf) (last accessed 24 August 2017)

<sup>109</sup> Article 2, Law 548 of 1999, available online at: <http://www.fiscalia.gov.co/jyp/wp-content/uploads/2012/05/Ley-548-de-23-de-Diciembre-de-1999.pdf> (last accessed 17 August 2017).

transitional criminal justice in Colombia is based on domestic and international law. Further, in relation to their criminal accountability, the 2016 Amnesty Law attached to the peace agreement states that it is up to Ronalda to ‘decide whether those who were under 18 at the moment of the commission of international crimes incapable of amnesty, will be exempted from criminal prosecution, *in conformity with the principles adopted by the UN* in this field (my translation and emphasis)’.<sup>110</sup> The reference to the UN is important. Ronalda interprets this as a provision which indicates that she must seek to integrate the principles which justify her interpretation and the relevant rules of the international legal order as they relate to child soldiers. She sees a parallel between her interpretation and the rules of the Special Court for Sierra Leone. Article XXX of the Sierra Leone peace agreement states that the special needs of child soldiers would be dealt with by the ‘international community’, through the Office of the ‘UN Special Representative for Children in Armed Conflict, UNICEF and other agencies’.<sup>111</sup> Of course, there may be other ways to explain and justify the reference to the UN in the peace agreements. Parties to a non-international armed conflict often turn to a neutral third party to broker the deal that is made.

Ronalda asks whether her interpretation fits with the international legal order. If it does, then the principle of maturity as it is reflected in domestic and international legal orders would appear to be in conflict. This may mean that, as a Dworkinian, she would then need to find a way of overcoming the conflict according to principle. She may need to find a higher principle that justifies the apparent inconsistency. It is a personal concern on the part of Ronalda to make her interpretation coherent with other transitional justice situations. If her interpretation does not ‘fit’ the international legal order, she could then doubt her

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<sup>110</sup> Amnesty Law, Article 27, Point 10, chapter 4, ‘Final Agreement for the End of Conflict and the Construction of a Stable and Long Lasting Peace’ signed on 24 November 2016 and ratified by Congress 1 December 2016. The full text of the peace agreement is available at: <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf>

<sup>111</sup> *Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone*, 7 July 1999, (Lome Accords) available online at: <http://www.sierra-leone.org/lomeaccord.html> (last accessed 15 August 2017), article XXX.



interpretation of the law. She may then need to adjust her interpretation so that it explains and justifies the domestic and international legal orders. She finds that her interpretation cannot be right on a Dworkinian approach if it conflicts with both orders.

Ronalda turns first to the UN Convention on the Rights of the Child (CRC). This sets out a number of rules which can be justified by the principle that under-18s attract special protection. Article 3 of the Convention affirms the most important rule: that ‘in all actions concerning children...the best interests of the child shall be a primary consideration.’<sup>112</sup> She then notes other relevant rights: the right to non-discrimination (art. 2); the right to life, survival and development (art. 6); the right to be heard (art. 12) and dignity (art. 40(1) which includes ‘promoting the child’s reintegration and the child assuming a constructive role in society’.<sup>113</sup> These rules appear to reflect a principle that 18 is the relevant age of maturity.

Ronalda then decides to check other international norms on the issue. She considers the ‘Beijing Rules’ (see section 3.6.2).<sup>114</sup> Although these rules are not ‘binding’ on Colombia in a formal sense, Ronalda interprets these rules as indicative of an emerging norm that under-18s require special protection in all matters. Her view is supported in the signing by Colombia of the Optional Protocol on the Involvement of Children in Armed Conflict (OPAC) which declares that non-State armed forces ‘should not, under any circumstances, recruit...persons under the age of 18 years’.<sup>115</sup> The emerging rule that she identifies is also supported by a great number of international NGOs that form the ‘straight-18’ movement.<sup>116</sup>

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<sup>112</sup> Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990), 1577 UNTS 27531, (CRC) Article 3.

<sup>113</sup> UN Committee on the Rights of the Child (UNCRC), ‘General Comment No. 10 on Children’s Rights and Juvenile Justice’ (25 April 2007), CRC/C/GC/10, at 5.

<sup>114</sup> UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), General Assembly Resolution 40/33 of 29 November 1985, available at: <http://www2.ohchr.org/english/law/pdf/beijingrules.pdf>

<sup>115</sup> UN General Assembly, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, (adopted 25 May 2000, entered into force 12 February 2002),

<sup>116</sup> UNICEF, Coalition to Stop the Use of Child Soldiers, ‘UN Guide to the Optional Protocol on the Involvement of Children in Armed Conflict’ (UNICEF, New York: 2003) available online at: [https://www.unicef.org/sowc06/pdfs/option\\_protocol\\_conflict.pdf](https://www.unicef.org/sowc06/pdfs/option_protocol_conflict.pdf) ; Child Soldiers International, see a range of resources available online at: <https://www.child-soldiers.org/>

Ronalda also notes that neither the International Criminal Tribunal for the Former Yugoslavia (ICTY) nor the International Criminal Tribunal Rwanda (ICTR) had jurisdiction over persons less than 18 years of age. She considers whether other post-conflict courts permitted the prosecution of under-18s. She notes that the Extraordinary Chambers in the Courts of Cambodia (ECCC) were set up for the purposes of trying the ‘senior leaders of Democratic Kampuchea’ and ‘those who were most responsible for the crimes and serious violations’ during the period from 1975 to 1979.<sup>117</sup> Although the language of the Statute does not discard the possibility that child soldiers will be prosecuted each of the five persons prosecuted so far have been senior leaders of the Khmer Rouge.<sup>118</sup> RONALDA surmises that it is highly unlikely that child soldiers will be brought to trial. She thinks this information is persuasive from the perspective of principles of ‘international transitional justice’.<sup>119</sup>

So far, the review of the principle of maturity in the international legal order appears to favour 18 as the age of maturity. This suggests that RONALDA’s interpretation is wrong. She considers whether to change her interpretation of the law. It now appears that in order to explain and justify the domestic and international legal orders, her interpretation of the principle of maturity ought to reflect 18 as the appropriate age. Her interpretation of post-conflict law appeared suitable when she only considered post-conflict Sierra Leone. However, a principle of maturity that sets 15 as the minimum age of criminal responsibility cannot be said to explain a number of relevant rules from domestic and international law. These rules reflect a principle of maturity that sets 18 as the relevant age for protection. The

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<sup>117</sup> Law on the Establishment of the Extraordinary Chambers, with the inclusion of amendments as promulgated on 27 October 2004, NS/RKM/1004/006) (Statute of the ECCC), established by Agreement between the UN and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea, 6 June 2003, UNGA Resolution, A/Res/57/228, available online at: <http://www.refworld.org/cgi-bin/txis/vtx/rwmain?docid=3f49dd8f2> (last accessed 15 August 2017).

<sup>118</sup> See from the website of the court, the ‘ECCC at a glance’ available online at: [https://www.eccc.gov.kh/sites/default/files/ECCC%20at%20a%20Glance%20-%20EN%20-%20April%202014\\_FINAL.pdf](https://www.eccc.gov.kh/sites/default/files/ECCC%20at%20a%20Glance%20-%20EN%20-%20April%202014_FINAL.pdf) (last accessed 16 August 2017).

<sup>119</sup> There is no recognised category of law known as ‘international transitional justice’. However, this is what is presupposed by RONALDA in adopting a view of post-conflict law that is Dworkinian and seeks coherence across post-conflict societies.

point is that Ronalda's interpretation no longer adequately explains and justifies the political morality of domestic and international communities.

Ronalda decides to explore further. She considers that there may be a difference between a general principle of maturity and the principle of maturity as it arises in transitions. In order to discover whether this is the case she looks at a number of other post-conflict situations. She notes that the Bosnian War Crimes Chamber has jurisdiction over individuals who have attained the age of 14.<sup>120</sup> In East Timor, the Special Panel for Serious Crimes has jurisdiction over 12 year olds.<sup>121</sup> As cases of post-conflict law, she notes that the principle of maturity in these cases strongly contrasts with the general principle of maturity as reflected in the international legal order.

However, Ronalda notes that in Bosnia and East Timor, there have been (almost) no prosecutions. Only one child has been prosecuted, albeit, not for war crimes.<sup>122</sup> Therefore, Ronalda reaches two conclusions. The first is that the principle of maturity is subject to different understandings in different post-conflict societies. The second is that there appears to be a general disparity between a legal power to prosecute and a reticence to use that power. In each of the cases that she has considered, Sierra Leone, Bosnia and East Timor, the principle of maturity appears to have been interpreted differently by those who negotiated the Statutes for the post-conflict courts and those tasked with prosecuting. The same pattern appears in the Colombian peace agreement which asserts that the prosecutor will decide on

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<sup>120</sup> Bosnia and Herzegovina: Criminal Code, (entered into force 1 March 2003) art. 8, available online at: <http://www.refworld.org/docid/4d2dbb212.html>

<sup>121</sup> UN Transitional Administration in East Timor (UNTAET), Regulation 2001/25 on the Amendment of UNTAET Regulation no. 2000/11: On the Organization of Courts in East Timor and UNTAET Regulation no. 2000/30: On the Transitional Rules of Criminal Procedure, Doc. UNTAET/REG/2001/25, (14 September 2001), Section 45(1).

<sup>122</sup> Noelle Quénivet 'Does and Should International Law Prohibit the Prosecution of Children for War Crimes', 28 *EJIL* (2017) 433, 448.

the issue of criminal accountability of child soldier perpetrators between the ages of 14 and 18.<sup>123</sup>

Ronalda thinks there is something important about the discrepancy between the law as it appears in the statutes in post-conflict courts, and the general refusal of prosecutors to prosecute children. She thinks that this is not reflected in her interpretation of the law. It is something other than the principles of maturity and responsibility. She must find a way of reconciling her interpretation with the principles which best justify the rules of the domestic and international legal orders. The principle of maturity has been interpreted in different ways in different contexts. Some rules in each order reflect the fact that maturity is attained at 15. Other rules reflect the principle that maturity is only attained at 18. Ronalda thinks this tells her something important about the principles upon which post-conflict law is based. Ronalda interprets the foregoing as evidence that another principle which was missing from her earlier analysis: the principle of local ownership over the issue of child soldier accountability. Ronalda thinks that this principle explains and justifies the diversity in approaches. Of course, there may myriad other reasons. Chief among these is the fact that different post-conflict societies are subject to different domestic legal regimes. However, in attempting to distil a coherent picture of ‘post-conflict law’ Ronalda assumes that there is a principled reason. For the purposes of this chapter, these other reasons for the discrepancy are left to one side.

#### **5.4.3.4 The principle of local ownership**

Ronalda declares that local ownership means that transitions from conflict to peace must respond to the needs of local populations. This could mean that post-conflict law in

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<sup>123</sup> See Joint Communiqué #70, Havana, Cuba, 15 May 2016, (Agreement on Minors) available at: <http://www.altocomisionadoparalapaz.gov.co/mesadeconversaciones/PDF/comunicado-conjunto-70-version-ingles-1-1463432344.pdf> (last accessed 21 June 2017), point 2

Colombia needs to be interpreted according to the needs of Colombians. This principle justifies the domestic legal order insofar as the peace process is primarily for the benefit of Colombian citizens. It must respond to their needs in the same way that the Colombian legal order is directed at their rights and responsibilities. However, Ronalda also tries to extend the Dworkinian reading so that this new principle also explains and justifies the international legal order.

Ronalda looks for support for this new principle. She finds that it is also reflected in the central rule upon which the entire international legal order is founded: the principle of sovereign equality.<sup>124</sup> The principle of sovereign equality is further reflected in article 2(7) which states that ‘nothing contained in the present Charter shall authorize the UN to intervene in matters which are essentially within the domestic jurisdiction of any State.’<sup>125</sup> Ronalda concludes that the principle of local ownership in transitions is a reflection of a more general principle that represents the foundation of the international society of States.<sup>126</sup>

Ronalda has identified three principles that explain and justify the law of transitional criminal justice in relation to child soldier perpetrators. The principle of maturity is reflected in the requirement that a minimum age of criminal responsibility is set. Every post-conflict situation reflects this principle in rules that do not allow the prohibition of child soldier perpetrators below a certain age. However, there is also a further principle of responsibility which reflects the fact that, for the most part, prosecutors have not used the permission to prosecute. This is because, as children, post-conflict prosecutors have not thought that they represent those most responsible for the commission of atrocities. Thus, Ronalda sees this as meaning that the principle of maturity is tempered by a principle of responsibility. This is

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<sup>124</sup> UN Charter, (signed 24 October 1945, entered into force 24 October 1945) 1 UNTS XVI, art. 2(1).

<sup>125</sup> UN Charter, (signed 24 October 1945, entered into force 24 October 1945) 1 UNTS XVI, art. 2(7).

<sup>126</sup> On the concept of international society see Andrew Hurrell, ‘Vattel: Pluralism and its Limits’ in Ian Clark and Iver B. Neumann (eds.) *Classical Theories of International Relations* (London, Macmillan Press Ltd: 1999) 233; Hedley Bull, *The Anarchical Society – A Study of Order in World Politics* (Palgrave Macmillan, Basingstoke: 2012) 38.

supported by the fact that international law generally sets 18 as the minimum age of protection for children. Any divergence from this approach, though permitted, appears to be discouraged. In terms of the minimum age of criminal responsibilities, and the fact that prosecutors have not generally prosecuted child soldiers, Ronalda has found that the principle of local ownership must also be added to the post-conflict interpretive framework. Every post-conflict situation will give rise to different post-conflict constitutional settlements. For this reason, the decision to prosecute or not is ultimately one for the post-conflict society itself. This principle reflects the fact of an international system of States that respect each other's sovereignty over domestic matters.

Ronalda must think on how these principles are reflected in her interpretations of the law. She is aware of the need to balance the three principles. She needs to choose an interpretation of the law which can integrate the three different principles: the principle of maturity, the principle of responsibility, and the principle of local ownership. Ronalda also notes that, in a general way, the need for a balanced and integrated approach gives rise to a new principle: the principle of proportionality.

#### **5.4.3.5 The principle of proportionality**

Before turning to consider the case at hand, Ronalda thinks she should attempt to integrate and balance the principles together. She identifies a trend towards accountability in post-conflict justice. She notes that peace agreements can no longer ensure impunity for previously 'at-war' military elites.<sup>127</sup> The emergence of an international criminal court, and international humanitarian law, prescribe a duty to punish international crimes committed by

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<sup>127</sup> Diane Orentlicher, "'Settling Accounts' Revisited: Reconciling Global Norms with Local Agency" 1 *International Journal of Transitional Justice* (2007) 10; see also Naomi Roht-Arriaza, 'After Amnesties are Gone: Latin American National Courts and the new Contour of the Fight Against Impunity', 37 *Human Rights Quarterly*, (2015) 341.

those who participate in armed conflict.<sup>128</sup> At the same time, she notes that the practice of post-conflict amnesties is also permitted (see section 3.2.1). In Spain, Mozambique, El Salvador and Colombia, amnesties are a conflict resolution tool which provides security for cease-fires and the end of armed conflicts. Thus, Ronalda notes the development of a middle-course in transitional justice which interprets ‘accountability’ in a way that allows former fighters to lay down their weapons.

In attempting to steer a middle-path between accountability and amnesty, Ronalda identifies a principle of proportionality in post-conflict law. Ronalda notes that in Colombia, the ‘Justice and Peace Law’ (Law 975) provided an example of a proportional response to the requirements of justice and peace.<sup>129</sup> In an attempt to demobilize the paramilitary AUC forces, the Colombian law asserted that its aims were to ‘facilitate the peace process’ and the ‘reintegration of individuals’ as well as to ‘guarantee the rights of victims to truth, justice and reparations’. Thus, in exchange for coming forward and confessing their crimes, individuals were able to access ‘alternative punishments’ which indicated a deprivation of liberty of between 5 and 8 years.<sup>130</sup> This proportional approach to transitional justice is reflected in the present peace agreement rules. The Colombian peace agreement constructs an elaborate and innovative system that provides for a system of ‘limited justice’. It encourages fighters to demobilize and confess to their crimes in exchange for a lenient sentence with limited deprivation of liberty. Ronalda interprets this approach as giving rise to a principle that post-conflict law must be proportional between the demands of peace and the demands of justice. Of course, this need not be expressed as a principle of post-conflict law. It is also very much

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<sup>128</sup> *Prosecutor v. Tadić*, ICTY-94-1-A, (26 January 2000); Statute of the International Tribunal for the Former Yugoslavia 1993, \_ (ICTFY Statute), Statute of the International Tribunal for Rwanda 1995 (Rwanda Statute) and Rome Statute of the International Criminal Court 1999 (Rome Statute).

<sup>129</sup> Ley 975 de 2005, (25 July 2005), Official Diary, available online at: [https://www.cejil.org/sites/default/files/ley\\_975\\_de\\_2005\\_0.pdf](https://www.cejil.org/sites/default/files/ley_975_de_2005_0.pdf) (last accessed 24 August 2017)

<sup>130</sup> chapter 5, Ley 975 de 2005, (25 July 2005), Official Diary, available online at: [https://www.cejil.org/sites/default/files/ley\\_975\\_de\\_2005\\_0.pdf](https://www.cejil.org/sites/default/files/ley_975_de_2005_0.pdf) (last accessed 24 August 2017)

a practical necessity. The very point of transitions may be damaged by a rigid adherence to criminal justice. Thus, as May has argued, transitions tend to give rise to situations where achieving anything is only possible if everyone accepts that they need to compromise. Nevertheless, in expressing this as a principle, Ronalda hopes that it will be useful in resolving Juan's case.

Ronalda sees the principle of proportionality reflected in the rules on juvenile justice in Colombia. The requirements for criminal justice are balanced with the requirements of child protection. For example, the System for Adolescent Criminal Responsibility (SACR) is based on pursuing three inter-related aims: restorative justice, truth, and reparations for the wrong committed.<sup>131</sup> This indicates that the system is based on a proportional response to the crime and punishment. For this reason, under-18s in Colombia subject to the SACR are tried in private in order to avoid 'psychological damage to the child' and any deprivation of liberty is founded on the need to re-educate and achieve 'pedagogic' aims.<sup>132</sup>

Ronalda notes that the principle of proportionality is also reflected in rules of the international legal order. Proportionality is an ubiquitous standard in the doctrinal approach to legal reasoning that suggests it is a general principle of law and, therefore, a rule of international law by virtue of article 38 (1) (c) of the Statute of the ICJ.<sup>133</sup> From the perspective of criminal justice, Ronalda interprets the principle as requiring that the power of the State is exercised 'in a way which is suitable to achieve the purpose intended'.<sup>134</sup> Further it ought not to 'impose burdens or cause [disproportionate] harm to other legitimate

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<sup>131</sup> *Sistema de Responsabilidad Penal Juvenil*, see: <https://www.ramajudicial.gov.co/web/portal-ninos-y-ninas/sistema-de-responsabilidad-penal-para-adolescentes> (in Spanish, last accessed 8 August 2017), art 140.

<sup>132</sup> *Sistema de Responsabilidad Penal Juvenil*, see: <https://www.ramajudicial.gov.co/web/portal-ninos-y-ninas/sistema-de-responsabilidad-penal-para-adolescentes> (in Spanish, last accessed 8 August 2017), art 147.

<sup>133</sup> Article 38 (1) (c) of the Statute of the International Court of Justice, UN Charter, chapter XIV, (signed 26 June 1945, adopted 24 October 1945) UNTS I XVI, available at: <http://www.refworld.org/docid/3ae6b3930.html>, last accessed 15 June 2018). See also Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' 47 *Columbia Journal of Transnational Law* (2008) 73, 'proportionality-based rights adjudication now constitutes one of the defining features of global constitutionalism...', at 74.

<sup>134</sup> Lord Hoffman, 'The Influence of the European Principle of Proportionality upon UK Law' in Evelyn Ellis, (ed.) *The Principle of Proportionality in the Laws of Europe* (Portland, Oregon, OUP: 1999) 107.



interests'.<sup>135</sup> This principle of proportionality is also reflected in the use of restorative justice measures such as truth and reconciliation commissions as a way of providing for truth, justice and accountability.<sup>136</sup> The peace agreement in Colombia also provides for a new truth and reconciliation commission indicating a commitment to restorative justice.<sup>137</sup> The alternative punishments in Colombia are subject to the individuals telling the truth about what happened and their involvement in the atrocities committed. This approach is thought to partly satisfy the rights of victims to justice in a context where full criminal retribution may not be feasible for a number of reasons.<sup>138</sup>

#### **5.4.3.6 Integration: the overarching principle of peace**

The principle of peace seeks to balance the principle that States have the right to decide how to proceed in post-conflict situations with the principles of maturity and responsibility identified earlier. This principle explains and justifies a great part of the law and practice of domestic and international legal orders as they relate to children. It represents an approach to child soldier accountability based on the principle of proportionality. It explains and justifies her interpretation of post-conflict law. It is also reflected in the domestic law of Colombia and the international legal orders.<sup>139</sup> Ronalda now looks for a principle which justifies her

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<sup>135</sup> Lord Hoffman, 'The Influence of the European Principle of Proportionality upon UK Law' in Evelyn Ellis, (ed.) *The Principle of Proportionality in the Laws of Europe* (Portland, Oregon, OUP: 1999) 107.

<sup>136</sup> In Sierra Leone see, Gibril Sesay M., and Suma M., Research Unit of the International Center for Transitional Justice, 'Transitional Justice and DDR: The Case of Sierra Leone', June 2009, available online at: <https://www.ictj.org/sites/default/files/ICTJ-DDR-Sierra-Leone-CaseStudy-2009-English.pdf> (last accessed 15 August 2017); Christine Bell, *On the Law of Peace – Peace Agreements and the Lex Pacificatoria* (New York, OUP: 2008), 250.

<sup>137</sup> Part 5.1.2, Point 45, 'Final Agreement for the End of Conflict and the Construction of a Stable and Long Lasting Peace' signed on 24 November 2016 and ratified by Congress 1 December 2016. The full text of the peace agreement is available at: <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf> (I use my translations from Spanish to English throughout).

<sup>138</sup> For example, the number of perpetrators, or the weakness of the criminal justice system during transitions. See

<sup>139</sup> As a matter of international law, the principle of peace is reflected in the general prohibition of the use of force between States in Article 2(4) of the Charter of the United Nations, see UN Charter, (signed 24 October 1945, entered into force 24 October 1945) 1 UNTS XVI. In Colombia, the principle of peace is reflected in the various rules that prevent interpersonal violence.

approach to post-conflict law, domestic law and international law. This principle will necessarily be very abstract. She decides that her interpretation of the law, the peace agreement, the domestic and international legal orders are best explained and justified by the principle of peace.

She wonders whether the principle of peace fits with the post-conflict legal order. Ronalda interprets the peace agreement as the signal that Colombia intends to construct a ‘community of principle’ and move away from open political conflict. This is a sign that it endorses the principle of peace. Ronalda interprets the peace agreement, therefore, as a break with the past. It represents a commitment to compromise. She sees it as a commitment to working through political differences according to a scheme of coherent principles. This ensures that every citizen is afforded ‘equal concern’.<sup>140</sup> The peace agreement is, therefore, a blueprint for the future development of the new political community. The ‘Introduction’ to the peace agreement declares that the agreement aims to ‘open a new chapter’ in Colombia’s history.<sup>141</sup> It invites ‘all parties, social and political movements and all live forces in the country’ to agree to a ‘National Political Agreement’ which is tasked with implementing peace in Colombia.<sup>142</sup> The fact that the agreement was adopted, therefore, reflects a commitment on the part of the government and the FARC-EP to peace rather than armed conflict. The very existence of the peace agreement, therefore, is interpreted as Ronalda as demonstrating a commitment to a principle of peace.

This principle ‘fits’ other rules in domestic law. It is reflected in certain provisions of the Colombian constitution. Article 22 of the Constitution sets out the following rule: ‘Peace

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<sup>140</sup> Ronald Dworkin, *Law’s Empire*, (Portland, Oregon, Hart Publishing: 2006) 213.

<sup>141</sup> Introduction, ‘Final Agreement for the End of Conflict and the Construction of a Stable and Long Lasting Peace’ signed on 24 November 2016 and ratified by Congress 1 December 2016. The full text of the peace agreement is available at: <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf>

<sup>142</sup> Introduction, ‘Final Agreement for the End of Conflict and the Construction of a Stable and Long Lasting Peace’ signed on 24 November 2016 and ratified by Congress 1 December 2016. The full text of the peace agreement is available at: <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf>

is a right and a duty with which compliance is mandatory'.<sup>143</sup> Article 95 (6) of the Constitution states that every citizen must 'strive toward achieving and maintaining peace'.<sup>144</sup> Further, and in relation to children, article 44 of the Constitution protects children against 'all forms of...physical and moral violence'.<sup>145</sup>

Finally, the principle of peace is reflected in certain rules of the international legal order. Ronalda looks at the UN Charter (UN Charter). In article 1, the Charter sets out the purposes of the organization which are to 'maintain international peace and security'.<sup>146</sup> Article 4 of the Charter asserts that membership is open to 'peace-loving' States. Ronalda, therefore, concludes that the peace agreement, the Constitution of Colombia and the UN Charter are all founded on a principle of peace. Ronalda concludes that this principle explains and justifies her approach to child soldier accountability. It explains and justifies each of the three principles identified earlier in her analysis. Further, on Dworkin's account, a community of principle is also a pre-requisite to the emergence of the principle of integrity. Dworkin argues that 'people are members of a genuine political community only when they accept that they are governed by common principles' and that people in this kind of community,

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<sup>143</sup> Constitution of Colombia of 1991, (available online at: <http://www.corteconstitucional.gov.co/Inicio/Constitucion%20politica%20de%20Colombia%20-%202015.pdf> (last accessed 7 August 2017), art. 22.

<sup>144</sup> Constitution of Colombia of 1991, (available online at: <http://www.corteconstitucional.gov.co/Inicio/Constitucion%20politica%20de%20Colombia%20-%202015.pdf> (last accessed 7 August 2017), art. 95 (6).

<sup>145</sup> Constitution of Colombia of 1991, (available online at: <http://www.corteconstitucional.gov.co/Inicio/Constitucion%20politica%20de%20Colombia%20-%202015.pdf> (last accessed 7 August 2017), art. 44.

<sup>146</sup> UN Charter, (signed 24 October 1945, entered into force 24 October 1945) 1 UNTS XVI, art. 1.

...each accept political integrity as a distinct political ideal and [treat] the general acceptance of that ideal, even among people who otherwise disagree about political morality, as constitutive of political community<sup>147</sup>

#### **5.4.3.7 Summary of interpretive stage**

Ronalda has followed an approach that self-consciously looks for principles that justify the post-conflict law on child soldier accountability. Her approach has allowed her to identify the following principles which she takes to be the foundation of a ‘global law of transitional justice’ as it relates to child soldier accountability.

- i) The principle of maturity
- ii) The principle of responsibility
- iii) The principle of local ownership
- iv) The principle of proportionality
- v) The principle of peace

These principles are taken as the foundation upon which post-conflict law in Colombia is constructed. They provide a view of the Colombian legal order that reflects a commitment to a community that is based on principles. They are also reflected in rules of the international legal order.

In identifying those principles supported by rules in each legal order, Ronalda has attempted to implement the peace agreement which states that the rules of domestic and international law are relevant. In this regard, she has performed a split role in constantly considering how her interpretation of the rules in the domestic order fit with her interpretation of the rules in the international order and vice-versa. On a Dworkinian account, Ronalda

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<sup>147</sup> Ronald Dworkin, *Law's Empire*, (Portland, Oregon, Hart Publishing: 2006) 211.

seeks to find a compromise between these different principles in a way that makes the post-conflict system as a whole appear coherent. Ronalda strikes the following compromise between the principles in the interpretation of the post-conflict law in Colombia:

Post-conflict law permits the prosecution of child soldier perpetrators. However, the prosecution of children will almost never be justified and is reserved for those most responsible for the commission of international crimes.

Ronalda decides to ‘flesh out’ the requirements of this principle as it applies in Colombia.

1. Post-conflict law in Colombia permits the prosecution of child soldiers who are at least 15 years of age at the time of the commission of international crimes.
2. The prosecution of 15 – 18 year olds must be pursued as a last resort and only in relation to child soldiers in leadership positions and/or those ‘most responsible’ for the commission of international crimes.
3. The prosecution of 15 – 18 year olds is subject to trials in private and through a separate juvenile justice court which ensures safeguards for child soldier defendants.
4. If found guilty, the punishments for 15 – 18 year olds other forms of deprivation of liberty are permitted but they must be proportional to the re-integrative and rehabilitative aims and respond to the best interests of the child.
5. If found guilty, punishments for international crimes committed between 15 and 18 years of age will be proportionate as between the rights of victims to justice and reparation and the mitigating factors involving the young age of the offenders. Incarceration is prohibited. Punishments will be based on the principle of restorative justice.

6. For lesser offenders, full participation and confession in the Colombian Truth and Reconciliation commission is sufficient for the purposes of satisfying the rights of victims to justice and attracting post-conflict amnesties.

#### **5.4.4 The post-interpretive stage**

Ronalda has interpreted the law and practice of transitional criminal justice. She must now apply the principles to decide Juan's case.<sup>148</sup> This is what Dworkin calls the 'reforming' stage.<sup>149</sup> It requires Ronalda to think about the consequences of her interpretation. She must decide what her interpretation means for Juan's case. According to Dworkin, this stage requires Ronalda to think substantively about which principles actually do show the practice of post-conflict law in Colombia in its best light. Consistency would seem to require that the Ronalda refrain from prosecution. In Dworkinian terms, integrity is linked to consistency in principle. Integrity demands more. It allows Ronalda to depart from past decisions in order to be faithful to 'principles conceived as more fundamental to the scheme as a whole'.<sup>150</sup>

The facts show that Juan volunteered to join the FARC-EP at a young age. However, they also provide details about his motivation at this time. There are a number of reasons for why he joined. He was motivated by the desire to improve the economic position of his mother. He was motivated by the desire to follow others in his situation that had gone before him into the FARC-EP. He was motivated out of a desire for revenge for his father's death. He was motivated out of a desire to leave his own socio-economic poverty. All of these reasons must be considered in assessing Juan's willingness to join a rebel group. There is no single reason that Juan joined the guerrilla. However, Ronalda considers that it cannot be

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<sup>148</sup> Ronald Dworkin, *Law's Empire*, (Portland, Oregon, Hart Publishing: 2006) 67.

<sup>149</sup> Ronald Dworkin, *Law's Empire*, (Portland, Oregon, Hart Publishing: 2006) 67.

<sup>150</sup> Ronald Dworkin, *Law's Empire*, (Portland, Oregon, Hart Publishing: 2006) 219.

easily assumed that a life in the guerrilla was what he wanted. It may be that there was little alternative and this is a problem in terms of Juan's moral agency. This must be taken into account when considering Juan's crimes and the principle of responsibility.

He committed war crimes while he was between the ages of 15 and 18. Ronalda reflects that whether he is to be prosecuted for these crimes or not is a question of looking at whether Juan was one of those 'most responsible' for crimes committed. Ronalda notes that Juan's incorporation into the FARC-EP is problematic owing to his educational and socio-economic circumstances. The only issue that raises a question of responsibility is his participation as a 'leader' when he was older. The crimes he committed at 15 appear to fall below the threshold required in terms of responsibility. The evidence shows that he was a young member of the rebel forces. However, as he grew older, he came to order executions as he rose through the ranks. The question for Ronalda, therefore, is what the principle of responsibility requires in this context. It might be that the nature and number of his crimes as a leader suggests that there is scope for prosecuting Juan for these later crimes. In ordering other recruits to commit war crimes, he may have crossed the threshold of responsibility. However, this view must be tempered by the fact that Juan would have been in the rebel forces for over three years at this point. He may have been socialized into the roles assigned to him. As a spy, and a porter, he would have complied with orders from superior command. As a leader of a number of younger recruits, he would also have felt obliged to comply. Therefore, even if 'a' leader of some, this need not necessarily set him out as 'most responsible' for the crimes. The leaders of the FARC-EP command, Juan's superiors, those in charge of strategy and tactics may be 'most responsible' for the purposes of the law.

In considering Juan's case, Ronalda notes that neither Juan, nor his family, has ever known peace. She notes that post-conflict law is based on a principle of peace. Thus, any decision on Juan must try to ensure that his rights to peace are not put in jeopardy. In this

sense, transitional criminal justice is aimed at ‘peace’ and must be instrumental to that end. Thus, Ronalda must also consider whether Juan’s prosecution would likely affect his ability to reintegrate. A proportional approach to punishment requires that accountability is tempered by the principle of peace. Ronalda thinks that although Juan was young he has committed crimes that cannot attract amnesties. In deciding to prosecute Juan, Ronalda hopes that he will fully atone and confess his crimes in order to access the regime of alternative sanctions.<sup>151</sup> This reduces any sentence that he may attract to a maximum of eight years.<sup>152</sup> The appropriate sanction, however, must be proportional. The sentence is likely to be far less given the various extenuating circumstances. Thus, the main aim in prosecuting Juan need not be retribution. It may be that it is the easiest way for Juan to reintegrate with the communities he left as a 12 year old.

However, prosecution also brings special consequences. If Juan reneges on the peace agreement, he will be open to the ordinary criminal justice system. Juan is no longer a child. His prosecution need not be subject to safeguards. The requirements in relation to a special juvenile justice system no longer apply to him so Ronalda decides to investigate and prosecute Juan in the Special Tribunal for Peace. This allows Juan an opportunity to access the alternative sentences as set out in the peace agreement. The law asserts that restorative justice methods ought to be preferred as these are most conducive to reconciliation and the establishment of peace.<sup>153</sup>

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<sup>151</sup> Point 60, Part 5, ‘Final Agreement for the End of Conflict and the Construction of a Stable and Long Lasting Peace’ signed on 24 November 2016 and ratified by Congress 1 December 2016. The full text of the peace agreement is available at: <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf> (I use my translations from Spanish to English throughout).

<sup>152</sup> Point 60, Part 5, ‘Final Agreement for the End of Conflict and the Construction of a Stable and Long Lasting Peace’ signed on 24 November 2016 and ratified by Congress 1 December 2016. The full text of the peace agreement is available at: <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf> (I use my translations from Spanish to English throughout).

<sup>153</sup> Point 60, Part 5, ‘Final Agreement for the End of Conflict and the Construction of a Stable and Long Lasting Peace’ signed on 24 November 2016 and ratified by Congress 1 December 2016. The full text of the peace agreement is available at:



#### **5.4.5 Summary of post-interpretive stage**

Ronalda has decided that post-conflict law requires her to prosecute Juan in the Special Jurisdiction for Peace. This is because it allows for a limited form of justice and the best opportunity for peace. It provides victims with a full account of what occurred to their partners and loved ones. It fosters a culture of openness and accountability in post-conflict Colombia. Above all, the limited form of justice allows for a rejection of impunity for international crimes while at the same time supporting the joint commitment by military elites in the government and the FARC-EP to peace.

#### **5.5 Conclusion**

This hypothetical exercise demonstrates what an approach to the *jus post bellum* as integrity could look like in a concrete case. As a methodology, it may be useful to try to interpret the law as based on principles. Integrity may urge post-conflict actors to consider certain questions at every stage of the interpretive process. It may urge an interpreter to ask herself how her interpretation of the law explains and justifies other rules of the legal order. It also may suggest an approach that requires an interpreter to ask herself whether the system as a whole can be justified by reference to the specific approach taken. Thus, an approach based on integrity could try to ‘unify’ the values and purposes of the legal system under a single analytical methodology. In this example, this method was also extended to cover coherence across national and international legal orders. As explained, a Dworkinian approach means that there is a legal obligation to find coherence *within* Colombia and, insofar as international law is concerned, *across* post-conflict societies. The discussion, therefore, raises several

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<http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf>

(I use my translations from Spanish to English throughout).

questions. These may affect the overall decision on the usefulness of the *jus post bellum* as integrity.

The first doubt takes the shape of an ‘internal objection’.<sup>154</sup> This is the idea that integrity must also be interpreted and, therefore, that it cannot ‘guide’ interpretations in the way which is implied by a Dworkinian *jus post bellum*. This chapter has applied the *jus post bellum* in order to see the shape of the interpretive exercise. However, at every stage of the discussion, Ronalds was tasked with interpreting what integrity required. This objection suggests that Ronalds’s approach would always necessarily comply with the *jus post bellum* as integrity because she would always assume her interpretation would be the best in terms of the interpretive community of which she is a part.<sup>155</sup> This objection emerges out of Stanley Fish’s criticism of Dworkin’s theory of interpretation. Whether Fish’s critique is successful is evaluated in the next chapter. As will be seen, the position advocated in this thesis is a purely Dworkinian line that rejects Fish’s critique.

The second objection is ‘external’. It argues that whatever the merits of Dworkin’s theory as a matter of domestic law, it is unsuited to post-conflict law. Ronalds’s presentation of a coherent account of domestic and international law is necessarily selective. It presupposes that there is an international community which has a political morality against which her interpretations can be tested. The *jus post bellum* as integrity asks Ronalds to imagine that she can balance domestic and international legal orders in a way that makes them appear coherent from the perspective of a universal political morality. If either of these objections is valid, then the usefulness of the *jus post bellum* as integrity must be doubted. In this regard, this thesis will have shown that two very different theories of the *jus post bellum*

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<sup>154</sup> I take the language of ‘internal’ and ‘external’ objections from Basak Çali ‘On Interpretivism and International Law’, 20 *EJIL* (2009), 805.

<sup>155</sup> Stanley Fish, *Is There a Text in this Class? – The Authority of Interpretive Communities* (Cambridge, Massachusetts, Harvard University Press: 1980) 342; ‘Working on the Chain Gang: Interpretation in the Law and Literary Criticism’, 9 *Critical Inquiry* 1 (1982) 201; ‘Wrong Again’ 62 *Texas Law Review* (1983) 299; ‘Still Wrong After All These Years’, 6 *Law and Philosophy – Dworkin’s Law’s Empire* (1987) 401.

are unhelpful from the perspective of identifying post-conflict law. This would lead to the conclusion that the concept of the *jus post bellum* is not useful and that the attention it has received from international lawyers is not justified.

## **CHAPTER 6: INTERNAL AND EXTERNAL OBJECTIONS TO THE *JUS POST BELLUM* AS INTEGRITY**

### **6.1. Introduction**

The previous chapter applied the *jus post bellum* as integrity to a hypothetical concrete case that could arise in post-conflict Colombia. The point was to discover what a Dworkinian approach to the interpretation of post-conflict law may look like. RONALDA's interpretation of the law and practice relevant to child soldier perpetrators identified a number of principles. These principles were selected as the best explanation of and justification for the rules on child soldier perpetration in domestic and international legal orders. For RONALDA, these principles are as much a part of 'post-conflict law' as the posited rules of Colombian law, the provisions of the peace agreement, and the relevant international treaties on human rights and humanitarian law. Therefore, the principles could be used to interpret the requirements of post-conflict law in view of Juan's case. In this way, the *jus post bellum* as integrity demonstrated a path out of rule-fragmentation.<sup>1</sup> It provided a way to interpret the various rules that showed the law to be coherent with a conception of political morality that honours the domestic and international legal orders. However, it would be premature to conclude that the way RONALDA carried out her task proves that the law on child soldier perpetrators can be identified by the *jus post bellum* as integrity. This chapter focuses on two objections to the *jus post bellum* as integrity which the previous chapter hinted at but did not discuss in any detail. It evaluates these objections in order to come to a conclusion about the usefulness of the *jus post bellum* as integrity.

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<sup>1</sup> See U.N. Doc. A/CN.4.L.682, Report of the Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, International Law Commission, 58th Session (2006).

The first is an ‘internal objection’.<sup>2</sup> It is internal because it challenges the validity of Dworkin’s theory of ‘law as integrity’ *per se*. It is based on Fish’s objection to the role that the concept of integrity plays in legal interpretation. For Fish, Dworkin is wrong in arguing that integrity can ‘guide’ interpretations of law. Therefore, this internal objection argues that the *jus post bellum* as integrity cannot help Ronalda to identify the law. Section 6.2 evaluates the internal objection. It argues that although Fish’s arguments are a serious challenge to Dworkin’s thesis, the idea that power is the sole arbiter of ‘correct’ interpretations of law is not accurate, nor desirable in normative terms.

The second is an ‘external objection’. It is external because it does not challenge Dworkin’s theory of ‘law as integrity’ but only the extent to which it can be useful in terms of identifying post-conflict law. As explained, post-conflict law is a mixture of two legal orders. Dworkin’s theory links particular interpretations of the law to the political morality of a community. Thus, this objection focuses on what is presupposed by the *jus post bellum* as integrity: an international ‘community of principle’. Section 6.3 evaluates the external objection. Section 6.4 makes some concluding remarks on the practical usefulness of the *jus post bellum* as integrity.

## **6.2. Internal objection: The role of integrity in interpretations of law**

This section discusses the debate between Dworkin and Fish on the nature of legal interpretation. It then evaluates the consequences of this debate for the *jus post bellum* as integrity and Ronalda’s approach in chapter 5.

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<sup>2</sup> I take the language of ‘internal’ and ‘external’ objections from Basak Çali ‘On Interpretivism and International Law’, 20 *EJIL* (2009), 805.

Dworkin and Fish agreed that law is an interpretive concept.<sup>3</sup> They agree that what the law is in relation to any issue is not simply explained by reference to a set of posited rules (see chapter 4). Instead, they argue that propositions of law are always interpretations of the community's legal practice. For this reason, they also agree that interpretations of law necessarily reflect the political and moral principles of 'an interpretive community'.<sup>4</sup> However, this is where the differences between Dworkin and Fish emerge. By 'interpretive community', Fish means 'those who share interpretive strategies [...] for *writing* texts, for constituting their properties [my emphasis]'.<sup>5</sup> The reference to 'writing' is important. In relation to law, Fish means that a number of strategies are shared by people who interpret the law. These may be strategies shared by judges, lawyers, and prosecutors. These strategies 'exist *prior to the act of reading* and therefore determine the shape of what is read rather than [...] the other way around [my emphasis]'.<sup>6</sup> The difference between Fish and Dworkin is the extent to which legal interpretation does depend on looking at things 'the other way around'. That is, the extent to which what is read constrains the strategies. This thesis argues that *in law* what is read does, to an important extent, constrain the strategies of interpretation. The principle of integrity, therefore, is capable of constraining the possible interpretation of the law.

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<sup>3</sup> Ronald Dworkin 'Law as Interpretation' 9 *Critical Inquiry* 1 (1982) 179; Stanley Fish, 'Working on the Chain Gang: Interpretation in the Law and Literary Criticism', 9 *Critical Inquiry* 1 (1982) 201, 202.

<sup>4</sup> Ronald Dworkin 'Law as Interpretation' 9 *Critical Inquiry* 1 (1982) 179; Stanley Fish, *Is There a Text in this Class? – The Authority of Interpretive Communities* (Cambridge, Massachusetts, Harvard University Press: 1980) 342.

<sup>5</sup> Stanley Fish, *Is There a Text in this Class? – The Authority of Interpretive Communities* (Cambridge, Massachusetts, Harvard University Press: 1980) 14.

<sup>6</sup> Stanley Fish, *Is There a Text in this Class? – The Authority of Interpretive Communities* (Cambridge, Massachusetts, Harvard University Press: 1980) 14.

### **6.2.1 Integrity as a constraint**

The element of constraint in interpretation can be explained by reference to the ‘chain novel’ analogy that Dworkin utilized (see section 4.3.4). Dworkin explained that the first person in the chain novel enterprise is less constrained than those further down the line of the chain novel.<sup>7</sup> The first person has a more creative task. This is because they have more choice about the point and purposes of the novel. But subsequent interpreters are less creative and more interpretive because more decisions have been made about the point and purposes of the novel.<sup>8</sup> In time, it becomes very difficult to change direction too much (in terms of plot, character or genre, for example) without damaging the integrity of the novel as a piece of writing. Therefore, the writers of the later chapters are obliged to make the best sense of the novel by ensuring that their chapter is coherent with what has come before. In this way, the chain novel ‘thickens’ as time goes on and there is a decrease in possible interpretations of the novel.

Dworkin argued that this imagery works as an explanation for and a justification for law. He discussed the law on emotional damages in tort.<sup>9</sup> This thesis evaluates this account of law in relation to the *jus post bellum* and child soldier accountability. It evaluates whether the *jus post bellum* as integrity means that, as time goes on, the potential interpretations of the law on child soldier accountability narrow. Ronald decided that pursuing integrity meant that she was limited in how she could interpret the law on child soldier accountability. For her, integrity meant that she should try to find an interpretation of the law which is coherent in principle with how children are treated in domestic law more generally. Presumably, whatever decision she makes on child soldier accountability would impact future judges in

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<sup>7</sup> Ronald Dworkin ‘Law as Interpretation’ 9 *Critical Inquiry* 1 (1982) 179.

<sup>8</sup> Although, Dworkin admits that even the first person is also interpreting to some degree, see Ronald Dworkin ‘Law as Interpretation’ 9 *Critical Inquiry* 1 (1982) 179, 192.

<sup>9</sup> See discussion of *McLoughlin* in *Law’s Empire*, (Portland, Oregon, Hart Publishing: 2006), 240.

Colombian and constrain the decisions they can make. Integrity, after all, holds within legal communities. Ronalda must assume that her decision will be part of a chain of ‘innumerable decisions, structures, conventions, and practices’ that reflect principles which explain and justify Colombia’s political morality.<sup>10</sup> The point is that over time, it may become easier to identify the ‘right answer’ in relation to questions of child soldier accountability because of previous decisions. This is because it becomes easier to see the ‘point or value’ of the law on child soldier accountability as the history of the practice lengthens and repeated iterations are identified.<sup>11</sup> However, Ronalda also attempted to find coherence with other post-conflict situations, i.e. with the way Sierra Leone and other post-conflict societies dealt with the same issues of international law.

Ronalda followed this methodology in the previous chapter. The upshot of this account of law is that integrity provides an overarching principle against which interpretations must be assessed.<sup>12</sup> Those interpretations of the law which exhibit more integrity are better than those which exhibit less. This can be explained by reference to every stage in the interpretive process. However, as mentioned, what integrity means in post-conflict law is itself a matter of interpretation. This raises doubts about whether it can constrain interpretations of law.

#### **6.2.1.1 Stages of constraint**

Integrity emerges when interpreters identify the relevant rules to be interpreted at the pre-interpretive stage. For example, Ronalda made a list of a number of possible sources for the relevant law. Her initial selection tried to adhere to the kind of case that she is considering.

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<sup>10</sup> Ronald Dworkin ‘Law as Interpretation’ 9 *Critical Inquiry* 1 (1982) 179, 193; whether the Sierra Leone situation, and the Colombian situation are capable of being described as ‘the community’ is a problem discussed below.

<sup>11</sup> Ronald Dworkin ‘Law as Interpretation’ 9 *Critical Inquiry* 1 (1982) 179, 194.

<sup>12</sup> Ronald Dworkin, *Law’s Empire*, (Portland, Oregon, Hart Publishing: 2006), 246.



A case on child soldier accountability means that she has to identify rules relevant to this issue. She would not have considered the rules on property law, for example. There is a set of rules beyond which Ronalda would not stray. This is because, in Dworkinian terms, a ‘great deal of consensus’ is needed for the interpretive attitude to ‘flourish’.<sup>13</sup> This means that there is a threshold level below which the relevant interpretive community would not accept that Ronalda was interpreting the law on child soldier accountability. However, unlike domestic tort law or constitutional issues with which Dworkin was concerned, the ‘practice’ of transitional criminal justice is much harder to define. It is, therefore, a matter of interpretation from the very beginning, whether Ronalda considers other post-conflict situations as ‘part of the history of the practice’.

Integrity then constrains interpreters at the interpretive stage. In the first place, the previous chapter explained how Ronalda would assign different weights to the different rules and sources of law. One way Dworkin explains this happens is according to the principle of ‘local priority’.<sup>14</sup> This means that those cases most like the present case are considered more important from the perspective of interpretation. This is because integrity demands that very similar cases be treated in similar ways.

Ronalda, therefore, identified the principles which emerge from the most similar cases. However, the most similar in terms of post-conflict child soldier accountability may depend on different variables. Integrity does not suggest which variables are most important. In the example, Ronalda chose post-conflict Sierra Leone as providing the best precedential value in terms of child soldier accountability. However, she may have chosen the AUC demobilization process following the 2005 Justice and Peace Law. Integrity, working through the principle of local priority, is supposed to constrain Ronalda’s approach at this second stage. It is supposed to urge that Ronalda approach the question of child soldier

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<sup>13</sup> Ronald Dworkin, *Law’s Empire*, (Portland, Oregon, Hart Publishing: 2006) 66.

<sup>14</sup> Ronald Dworkin, *Law’s Empire*, (Portland, Oregon, Hart Publishing: 2006) 250.

accountability as if she were deciding a case at the common law. However, the method does not translate easily to the context of post-conflict justice. The practice is not so well-defined as to offer a constraining line of precedent. Much depends on what she thinks the practice *is*. This was hinted at in terms of her dual role as a domestic and international legal actor. Of course, once this initial decision is taken, it is possible to demonstrate how a pursuit of integrity may proceed. Yet, this initial decision, whether transitional criminal justice is the practice, or whether it is primarily a question of child soldier accountability, or again, whether this is a question of Colombian criminal law is crucial.

It is not clear how integrity helps to decide this initial question. After all, Dworkin does say that his method is about ‘seeing’ a practice and interpreting the same. But once a decision is made about what an interpretation must be coherent *with* then a line of precedent may be identified and integrity may be able to constrain interpretations. In the current scenario there is consensus, in the relevant interpretive community, that transitional justice is a field of practice that includes the interpretation and application of legal rules. Therefore, the decision by Ronalda to look at other transitional justice situations is not controversial from the perspective of international law. Further, an interpretation which departs from previous practice is also possible. This is so long as it is justified by reference to a principle which is desirable from the perspective of the community’s legal order. The ‘justification’ dimension must outweigh the dimension of ‘fit’. Ronalda decided that her task was to make her interpretation coherent with other post-conflict situations. But her decision to prosecute Juan departed from the approach of other child soldier accountability situations such as Sierra Leone. She presented this as a principled departure and, therefore, acceptable even if it departs from previous practice in Sierra Leone. In this respect, integrity is an attitude that Ronalda takes up for the purpose of interpretation.

It would admittedly be difficult for other Colombian judges to depart from Ronalda's interpretation of the question. However, integrity, even in departing from the requirement of 'fit', reasserts itself in the dimension of 'justification'. Thus, in the local context, integrity demands that once Ronalda has decided whether or not to prosecute child soldiers, others should need very good reasons (dimension of justification) not to follow suit.

Finally, at the post-interpretive stage, integrity requires that the principles which support the justification for the decision in the specific case echo those which justify the entire legal order. That interpretation is best which can show most of the system as coherent. Again, the initial question of 'what must be coherent with what' arises here. Ronalda may argue that her decision to prosecute Juan exhibits a desire for truth-telling and accountability and a respect for the victims of the Colombian armed conflict. She may think this means that these values (accountability, truth and justice for victims of international crimes) are foundational principles of the domestic order.<sup>15</sup> They emerge from Colombian legal practice, including the peace agreement, and they justify Ronalda's interpretation in the light of the how the community's legal order is best understood.

This interpretation allows Juan's guilty plea and confession to be exchanged for a 'limited punishment' which reflects the need to secure the transition from conflict to peace in Colombia. In this respect, neither Juan nor his victims receive everything that they require from their own perspectives of justice.<sup>16</sup> However, a commitment to integrity in legal interpretation reflects a commitment to justification of decisions according to a community's accepted principles. This reinforces the confidence that Juan, Juan's victims and others can have in the post-conflict legal order.

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<sup>15</sup> Whether this claim is defensible is evaluated in section 6.3 and in relation to the external objection.

<sup>16</sup> In this respect, Larry May's principle of *meionexia*, is a natural law version of Dworkin's principle of integrity, see *After War Ends*, (New York, CUP: 2012).

### **6.2.2 Fish's Critique**

For Fish, the Dworkinian account of interpretation is wrong in one important respect: the constraining role of integrity. Fish argues that history does not 'weigh' more heavily on subsequent interpreters in legal interpretation.<sup>17</sup> Instead, he turns this argument on its head and says that the very act of interpretation recreates that history. As explained in relation to interpretive communities, it is the community's accepted strategies that 'write' the texts. For Fish, it makes no sense for Dworkin to propose an interpretive theory of law *and* a principle which constrains interpretations (the principle of integrity). For Fish, law is only interpretive. Nothing in 'the law' constrains the relevant interpreters.<sup>18</sup> The only constraints for Fish are political constraints.<sup>19</sup>

Thus, for Fish, Ronald's interpretation can be more or less convincing or persuasive, but it makes no sense to say that it is 'correct' as a matter of law. Rather when Dworkin says that an interpretation is 'correct' as a matter of law, this is 'rhetoric'. There is no right answer. The way Ronald interprets the law is only subject to the political constraints of the 'interpretive community'.<sup>20</sup> The result of Fish's critique is that all appeals to principle are rhetorical. There simply are no principles that constrain the practice of interpretation beyond those which will be accepted as persuasive.<sup>21</sup> Politics and power are the only reasons for relying on principles or arguments for coherence. Fish argues that it is the process by which interpretations are accepted that matters. The fact that certain interpretations are not acceptable does not mean that the law excludes the interpretation. It only means that 'there is

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<sup>17</sup> Judith Schelly, 'Interpretation in Law: The Dworkin-Fish Debate (Or, Soccer Amongst the Gahuku-Gama) 73 *California Law Review* (1985) 158, 159.

<sup>18</sup> References to 'the text' in this chapter simply mean the law and legal practice which must be interpreted.

<sup>19</sup> Stanley Fish, *Is There a Text in this Class? – The Authority of Interpretive Communities* (Cambridge, Massachusetts, Harvard University Press: 1980) 342.

<sup>20</sup> Stanley Fish, *Is There a Text in this Class? – The Authority of Interpretive Communities* (Cambridge, Massachusetts, Harvard University Press: 1980) 342.

<sup>21</sup> Stanley Fish, *Is There a Text in this Class? – The Authority of Interpretive Communities* (Cambridge, Massachusetts, Harvard University Press: 1980) 342.

as yet no elaborated interpretive procedure for producing that text'.<sup>22</sup> Therefore, as contingencies change, so possible interpretations of law change.

In relation to the *jus post bellum*, Fish's critique begins to 'bite' at the pre-interpretive stage. For Dworkin, pre-interpretation is simply case of 'seeing' those rules which are relevant and part of the practice. At the 'pre-interpretive stage', Ronalds made a list of all the relevant legal materials. Dworkin argues that the interpretive community constrains the possible rules Ronalds can select because otherwise they would not accept that she was 'interpreting' but rather 'inventing' a new practice. Fish, again, looks at this issue the other way around. For Fish, this stage of 'seeing' the most relevant rules is interpretive in the sense that the practice is created by Ronalds's interpretation.<sup>23</sup> Therefore, the extent to which the interpreter is 'inventing' or 'interpreting' is itself a matter of interpretation. For Fish, nothing in the history of law and practice of child soldier accountability constrains Ronalds from selecting any range of legal materials. There simply is no history until she interprets it. For example, she may have looked at the approach to juvenile justice in the domestic law of other Latin American countries. This would have depended on her interpretive community accepting that this was relevant from the perspective of the question she has to deal with. This contradicts Dworkin's account because Dworkin presumes that there is an independent history of a practice.

However, some practices are easier to identify than others. In this case, to think about 'post-conflict child soldier accountability' as an existing practice in Dworkinian terms is an interpretation of that practice. For Fish, it is only at the point of interpretation that the practice can be said to exist in any meaningful sense of the term. On Fish's account, Ronalds is not constrained by a previous *actually existing* history. Rather the facts of the previous

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<sup>22</sup> Stanley Fish, *Is There a Text in this Class? – The Authority of Interpretive Communities* (Cambridge, Massachusetts, Harvard University Press: 1980) 345.

<sup>23</sup> Stanley Fish, 'Working on the Chain Gang: Interpretation in the Law and Literary Criticism', 9 *Critical Inquiry* 1 (1982) 201; 'Wrong Again' 62 *Texas Law Review* (1983) 299.

history are a product of her interpretation. This is what Fish means by interpretive communities ‘writing the text’: Ronalda writes ‘the law and practice of child soldier accountability’ by the act of looking at the relevant legal materials and previous experiences. For Fish, new interpretations recreate history at every turn. In short, there is no history, no ‘raw data’, which exists independently of the act of interpretation. Ronalda can interpret her task as requiring an interpretation that demonstrates coherence across different post-conflict societies. For Fish, the ‘correctness’ in this interpretation depends on how persuasive it is in the relevant interpretive communities. Ronalda’s interpretation depends on how many in the Colombian legal community agree with her interpretation. Fish argues that there are no rules which can constrain her interpretation of the law.

However, Fish’s argument begs the question of how and why an interpretive community would find a particular interpretation persuasive. One plausible answer is that it is more faithful to the history of the practice. Dworkin’s integrity is a ‘rule’ which disciplines the possible interpretations interpreters can make because it presupposes that the community is engaged in a practice. This is how we, as legal actors, self-describe our craft, i.e. as international lawyers, or criminal lawyers, etc. Thus, integrity is a rule that emerges from our interpretive communities. But, in relation to these kinds of rules Fish has argued,

If the rules are to function [...] to “constrain the interpreter” – they themselves must be available or “readable” independently of interpretation [...] they must directly declare their own significance to any observer, no matter what his perspective.<sup>24</sup>

If they do not then Fish argues that they would ‘constrain individual interpreters differently’.<sup>25</sup> This may be so. Dworkin concedes Fish’s point but argues that it is not a problem as long as any interpreter ‘confirms and reinforces the principled character of [the]

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<sup>24</sup> Stanley Fish, ‘Fish v. Fiss’ 36 *Stanford Law Review* (1984) 1325, 1326.

<sup>25</sup> Stanley Fish, ‘Fish v. Fiss’ 36 *Stanford Law Review* (1984) 1325, 1326.

association by striving, in spite of the disagreement, to reach his own opinion'.<sup>26</sup> Thus, even if different prosecutors can interpret integrity differently, as Dworkin accepts, the point is that they agree to aim for principled coherence. They accept the objective character of law in terms of its uniform and equal applicability to citizens. Thus, they depart from a shared understanding that they are lawyers and not Professors of English Literature. This is important. Therefore, Dworkin's view of a rule of interpretation can be discussed as urging a particular attitude which is a part of judging cases *at law*. In seeking to make sure that the law decides (and not the judge) a humble approach that seeks principled coherence is the best way forwards given the fact that there are disagreements about how the law ought to be interpreted. These disagreements, however, do not extend so far as to deny that there is any law, as a practice or concept, at all.

Even this softer image of the constraining rule would be insufficient for Fish. Fish argues that the interpretive attitude, insofar as this is the foundation of the constraint, is a product of the strategies that the interpretive community adopts. This, in turn, is a result of the power relationships in these communities. Therefore, there is a fundamental disagreement between Fish and Dworkin on the extent to which there are rules for interpretation which constrain interpreters.

These two views appear irreconcilable. Dworkin asserts that a commitment to integrity constrains and guides Ronald's interpretation of the law. His justification stems from a view of political community that suggests that the best response to disagreements on matters of principle is a commitment to find principled coherence in interpretations of the law. Fish thinks integrity cannot 'sit outside' the interpretive scheme and that appeals to 'principles' are rhetorical. They are part of a political power game. Fish argues that integrity is just as much a part of interpretation as anything else and, therefore, the extent to which it

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<sup>26</sup> Ronald Dworkin, *Law's Empire*, (Portland, Oregon, Hart Publishing: 2006) 264.

does guide (or does not guide) Ronalda's interpretation of post-conflict law is a matter of politics and power.

In terms of the *jus post bellum* as integrity, the question is whether it can help to identify interpretations of post-conflict law in relation to the issue of child soldier accountability. On Fish's account, the answer is no, because the interpreter will naturally believe their interpretation is 'best' and that it adheres to the principle of integrity. Ronalda may have chosen to focus on different principles or interpreted what the principles mean in a different way. Further, whatever interpretation she chose would necessarily be capable of being described as based on a set of principles which she thinks best fits and justifies the relevant practice (in this sense, child soldier accountability). So, Ronalda can choose to prosecute, not prosecute, or take another course (such as compulsory participation in a truth and reconciliation commission), and all the while argue that she is complying with the *jus post bellum* as integrity. For Fish, integrity is not capable of stabilizing the interpretive activity.<sup>27</sup>

On a Dworkinian reading, the answer is 'yes'.<sup>28</sup> Post-conflict law is messy insofar as it involves a number of different legal categories and there are strong political imperatives that may displace a rigid adherence to law in finding practical solutions to the problems.<sup>29</sup> In this messy legal and political context, there is no single interpretation of integrity. For example, Gallen's interpretation is the easiest to imagine as practically useful. Thus, it may be that integrity urges Ronalda to be aware of a legal duty to interpret the law on child soldier accountability in a way that makes it coherent with a wider scheme of principles that justify the law in post-conflict Colombia. The more difficult approach may ask for coherence across

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<sup>27</sup> On 'disciplining rules' and constraint see Owen Fiss, 'Objectivity and Interpretation', 34 *Stanford Law Review* (1982) 739; Stanley Fish, 'Fish v. Fiss', 36 *Stanford Law Review* (1984) 1325.

<sup>28</sup> See also Owen Fiss, 'Objectivity in Interpretation', 34 *Stanford Law Review* (1982) 739.

<sup>29</sup> In this respect, I simply mean that an end to the fighting will often require something less than full accountability for international crimes (and it would not if 'peace' were such a strong political imperative).



interpretations of transitional criminal justice in different post-conflict societies. In chapter 5, Ronalda thought that this was also what integrity meant. This was because she identified ‘transitional criminal justice’ as a practice with a global history insofar as it incorporates rules of international law. In terms of whether the *jus post bellum* is helpful, therefore, there are two points to make. It may be helpful in that it provides a methodology (interpretivism) to apply to the issues at hand. It may also be helpful in providing an overarching normative principle (integrity) as guidance. To accept that Colombian post-conflict legal actors are engaged in a global practice (called transitional criminal justice) implies that they accept their participation in the interpretation of international law relevant to transitions. This may be termed the *jus post bellum* as integrity. It may also be given other names (i.e. the *lex pacificatoria*). The point is the same. A global practice that involves international law is affects the question of child soldier accountability and post-conflict actors have a legal duty to find the best interpretation of that practice and apply the law to the domestic issues at hand.

### **6.2.3 Can Fish and Dworkin be reconciled?**

This thesis argues that Dworkin’s view of the interpretation of law is more persuasive in descriptive and normative terms than Fish’s interpretation. However, there also exists the possibility of reconciling their arguments. For example, Judith Schelly has argued that Fish and Dworkin are both partly right.<sup>30</sup> For Schelly, their positions represent ‘two sides of the

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<sup>30</sup> Judith M. Schelly, ‘Interpretation in Law: The Dworkin-Fish Debate (Or, Soccer amongst the Gahuku-Gama) 73 *California Law Review* (1985) 158; see also Ronald Dworkin, ‘Law as Interpretation’, 9 *Critical Inquiry* 1 (1982) 179; Stanley Fish, ‘Working on the Chain Gang: Interpretation in the Law and Literary Criticism’, 9 *Critical Inquiry* 1 (1982) 201;

same coin'.<sup>31</sup> She argues that, 'each side is an antidote to the real moral dangers of the other'.<sup>32</sup> For Schelly,

An appreciation of each is essential to a sophisticated understanding of legal hermeneutics. On the one hand, Dworkin envisions [...] a 'judge' model of legal interpretation, in which an adjudicator seeks the 'best' (most coherent and integrated) reading of a case guided by a context of contingent premises and principles [...] Fish offers a 'lawyer model' of legal interpretation, in which discrete arguments constitute legal practice, and 'forceful and polemic urging of particular points of view is the means [...] by which the truth is established.'<sup>33</sup>

Of the two accounts, Fish's account seems easier to interpret as a 'moral danger'. It seems to suggest that everything in interpretation is reducible to power. The more powerful an interpreter, the more likely their interpretation is seen as 'correct'. Thus, Ronalda may notice that in other Latin American countries, juvenile justice appears to discriminate between children depending on political allegiance. Children from families that are supporters of socialist and liberal parties tend to be prosecuted. Children from families that support conservative parties tend not to be prosecuted. Fish argues that the only constraints on her following this line of reasoning are political. For Fish, if the political situation in post-conflict Colombia permits an interpretation of child soldier accountability that discriminates as between child soldiers according to their political allegiance then that would be an acceptable interpretation of the relevant law.

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<sup>31</sup> Judith M. Schelly, 'Interpretation in Law: The Dworkin-Fish Debate (Or, Soccer amongst the Gahuku-Gama) 73 *California Law Review* (1985) 158; see also Ronald Dworkin, 'Law as Interpretation', 9 *Critical Inquiry* 1 (1982) 179; Stanley Fish, 'Working on the Chain Gang: Interpretation in the Law and Literary Criticism', 9 *Critical Inquiry* 1 (1982) 201;

<sup>32</sup> Judith M. Schelly, 'Interpretation in Law: The Dworkin-Fish Debate (Or, Soccer Amongst the Gahuku-Gama) 73 *California Law Review* (1985) 158, 161.

<sup>33</sup> Judith M. Schelly, 'Interpretation in Law: The Dworkin-Fish Debate (Or, Soccer Amongst the Gahuku-Gama) 73 *California Law Review* (1985) 158, 161.

But Dworkin would be able to disagree with that (very undesirable) interpretation of post-conflict law. A law that allowed arbitrary and unprincipled distinctions to be made on child soldier accountability would violate the principle of integrity.<sup>34</sup> Dworkin's theory provides a language with which to illustrate this point. The interpretation would not reflect enough of the Colombian legal order to be correct as an interpretation. It would violate much of human rights law and the 1991 Constitution of Colombia. It makes no sense for Fish to deny that there is a history of the legal practice that constrains the interpreter in this sense. It may be that the rules of the legal system are the result of political accommodation. It may also be that lawyers, arguing in front of judges, as they interpret their practice, to some extent, re-write it. However, if a rule becomes a rule of law, the interpretation of those rules cannot re-write the history in a way that makes a mockery of the entire system. It may be that politics infiltrates the legal system at every stage. To the extent that this is seen as an unwarranted infiltration into the system is proof that an objective legal practice exists. Thus, as mentioned in section 4.5, in relation to the false positives cases, an approach that lacks integrity is likely to attract criticism not because 'enough powerful actors disagree' but because a community accepts that it is wrong in law.<sup>35</sup> This includes identifying the view of the political morality of the community. Integrity is founded on the principle of equality as between members of a community of principle.<sup>36</sup> It arises out of a personal obligation that 'commands that no one be left out, that we are all in politics together for better or worse, that no one may be sacrificed, like wounded on the battlefield, to the crusade of justice for all'.<sup>37</sup> Of course, there will be disagreements between the members of the community. However, the disagreements about the correct interpretation of the law do not imply that there is no law.

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<sup>34</sup> Ronald Dworkin, *Law's Empire*, (Portland, Oregon, Hart Publishing: 2006) 183.

<sup>35</sup> Of course, it may attract criticism also because 'enough powerful actors disagree'. This would be 'in addition to', and not 'constitutive of', the criticism it would attract for being wrong in law.

<sup>36</sup> Ronald Dworkin, *Law's Empire*, (Portland, Oregon, Hart Publishing: 2006) 212.

<sup>37</sup> Ronald Dworkin, *Law's Empire*, (Portland, Oregon, Hart Publishing: 2006) 213.

Accepting that there is a lack of clarity in a legal position, is not a denial of the legal system and a reduction of the system to politics. Fish's arguments simply claim too much. In relation to the 'emerging' notion of 'global transitional criminal justice' there is a history of a practice, beginning in the 1980s in Latin America, against which dimensions of 'fit' are tested and, therefore, a crucial point in the interpretive process. Therefore, Ronalds assumes that there is a history of a practice which extends beyond post-conflict Colombia. She accepts that international law forms part of this practice because previous transitional societies have referred to international law in designing and managing their post-conflict mechanisms. Therefore, she may also assume that legal events in Sierra Leone, insofar as they relate to the rules and principles of international law, reflect principles of an international community with which her interpretations of international law must be coherent.

Schelly attempts to steer a mid-way between Fish's radical subjectivism (all interpretation are equally valid subject to their persuasive force) and Dworkin's objectivism (the history of the practice or community morality constrains interpretations). For Schelly, the 'lawyer-model' explains the fact that lawyers must make whatever arguments they can to win the case for their clients. When they do, then legal practice is changed, the 'truth' is created or invented by the specific arguments put forward. The 'judge-model' is concerned with providing convincing reasons why the law, and not the judge, decides the specific case in a particular way. The judge-model is based on a view of judges as humble servants of the law. It engenders a respect for the judicial function, the principles of legal certainty, and predictability in legal systems. It also reflects a view that everyone in the community is subject to scheme of coherent principles which everyone accepts. Therefore, law cannot be merely a question of power. This would mean that law would lose its commitment to the 'equal concern and respect' of individuals. Thus, in the *jus post bellum*, the decision to prosecute or not to prosecute cannot simply be a matter of a prosecutor's personal preference.

It must be justified according to the law in order to give expression to Colombia as a community of principle. Thus, for Schelly, the rival accounts of legal interpretation are a function of the roles on which they are focused. Dworkin developed his views in the context of judicial interpretation in American constitutional law. His interests in literary interpretation were secondary to his primary aim of demonstrating how judges decide and ought to decide difficult cases: according to a particular moral reading of the law which takes the community's principles as constitutive of the legal order. Fish's background in literary criticism defends against a view of 'the text' which constrains the imagination of the critic. In this regard, Dworkin's arguments about the possible interpretations of an Agatha Christie novel are easily dismantled by Fish.<sup>38</sup>

For Schelly concludes that there is a middle ground. Context is important. This means that there may be a text in some situations but not in others. Different actors may display different interpretive strategies depending on what they are aiming to achieve. The nature of legal interpretation is dependent on those tasked with interpreting. Thus, the argument that there is *only one way* to characterize interpretation (legal or otherwise) is very ambitious. The reality may be more muddled. Sometimes, legal officials may act more like judges and seek to justify their interpretation on the basis of their integrity. At other times, legal officials may reject integrity for pragmatism, or the search for an innovative response to novel problems. Thus, Schelly concludes, that neither Dworkin not Fish's account is likely to tell the whole story about such a complex practice. But this thesis argues that for the purposes of the *jus post bellum*, Dworkin's arguments are more convincing. Even when innovative solutions are required, this does not mean that lawyers abandon the text. Instead, Dworkin argues that the issue of 'fit' is balanced with 'justification'. This allows the political morality of the community to re-shape the direction of the interpretive practice. It allows a

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<sup>38</sup> Stanley Fish, 'Working on the Chain Gang: Interpretation in the Law and Literary Criticism', 9 *Critical Inquiry* 1 (1982) 201, 210.

post-interpretive result to differ and move away from previously accepted interpretations. The capacity for innovation and change is present in Dworkin's theory. It is not blind consistency. Thus, in the present case, as mentioned, much depends on the choices Ronalda makes about the practice itself. In chapter 5, her motivation has been to decide Juan's case in a way that can be explained and justified in relation to a global approach to transitional criminal justice. It was an approach that presupposes that there is a 'unity' in questions of value that cut across the legal systems of States. It posits an objective and universal moral truth about coherence in value according to Dworkin's theory. In Dworkinian theory, this is a moral obligation that she accepts as part of her interpretive attitude. A different prosecutor with different motivations may have rejected any notion of a comparative approach across different transitional societies. They may argue that there is no obligation in law and no 'global transitional justice law' that binds Colombian legal actors in a direct way as a judge (Hercules) in a common law system would be bound. However, international law does constrain post-conflict actors. Thus, even as a domestic legal actor, i.e. as the chief prosecutor in the Special Jurisdiction for Peace, Ronalda is constrained insofar as her decision in Juan's case cannot violate the 1991 Constitution of Colombia and the relevant provisions of domestic and international law which apply. She is also constrained by the peace agreement and the rules that are relevant to amnesty and accountability. She is also constrained by the vigilance of the ICC and Colombia's international obligations with respect to international criminal law.

In normative terms, and given the fragility and highly politicized nature of post-conflict States, including Colombia, the principles that best explain and justify her decision ought to be drawn from the peace agreement and from previous peace agreement practice in other post-conflict States. These documents, more than any other, are capable of representing a recommitment to community after decades of conflict. These constraints mean that

Ronalda fits closer to the ‘judge’ model than the ‘lawyer’ model in Schelly’s analysis. Thus, *contra* Schelly, this thesis argues that the *jus post bellum* as integrity is capable of withstanding Fish’s critique. Fish’s critique simply states that Ronalda will be pursuing integrity regardless of the way she decides the issue because she will have interpreted integrity to fit with her decision. This is too easy. It empties language of all its objective force. The fact that power influences the interpretation of the law may be important. However, this does not mean that there is no law and no legal practice. As a member of a legal community, Ronalda’s interpretation of post-conflict law in Colombia cannot violate the peace agreement without attracting criticism as being wrong according to law, international or domestic. Further, non-lawyers, engaged in the practical aspects of conflict resolution would also be able to criticize Ronalda’s decision on the basis of the agreement and previous practice. There is, of course, a difficulty in that Ronalda attempts to mix coherence in two directions. The first is coherence with the Colombian legal order. She looks for principles that she can apply to the child violence case before her. The other is the international legal order. Here she decides that other post-conflict situations are important for her to consider and that she ought to look to make her interpretation fit those situations.

In both situations, integrity is useful in terms of ‘coaching’. If all post-conflict actors in all post-conflict societies attempted to find an approach to the law that resonated in other post-conflict situations this may produce a coherent set of principles. In this respect, Ronalda’s attempt to make her decision coherent with other transitional criminal justice decisions is a policy choice. It colours her interpretation of the law even when she has to decide what to consider and what not to consider. However, insofar as international law is concerned, there is also a legal requirement to ensure that the rules are applied in the way that the community has applied them. To do otherwise, say for example, in the field of command responsibility, would be to invite criticism on the basis of incoherence. Colombian actors

would then need to justify their divergence in some principled way. In this respect, the decision to prosecute Juan and incorporate his case in the Special Jurisdiction for Peace may be controversial. However, it is difficult to argue that it violates the principle of integrity. Ronalda's reasoning clearly values accountability and the effects this can have on reconciliation, peacebuilding and as its deterrent effect.

#### **6.2.4 Schelly's 'middle way' and Bell's constructivism**

This thesis adopts a Dworkinian approach to the interpretation of post-conflict law. But it also accepts that there are interesting parallels between Schelly's 'middle way' argument and Bell's analysis of post-conflict law as the *lex pacificatoria*. Bell's work is based around the emergence of a transnational law that applies to transitions. Thus, it merits discussion in relation to this section of the thesis and it is relevant to the question of whether the principle of integrity helps post-conflict actors.

To recap, for Schelly, Dworkin and Fish are engaged in a dialogue, both sides of which contribute to (a more plausible) 'truth' about law and legal reasoning. Schelly thinks that Fish is partly right in that the interpretation constitutes 'the text'. Thus, legal actors do not 'choose' interpretations but instead they necessarily identify their interpretation as 'best'. But she also argues that Dworkin is partly right in that the text measures what is possible by providing interpreters with normative parameters.

For Bell, post-conflict law is also the result of ongoing dialogue. The dialogue among 'peacemakers' is over what international law requires in post-conflict situations.<sup>39</sup> Local actors interpret what international law requires in a way that suits their immediate needs. Thus, they can be seen as adopting a 'lawyer-model' whereby what the law requires is an interpretation that arises out of their political aims. In this regard, the post-conflict 'moment'

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<sup>39</sup> I define 'peacemakers' as those involved in negotiating and implementing peace agreements.



situates local actors in a political battle over what ought to be done in relation to a range of issues. International law is a part of their argumentative tool-kit. It is part of the argument of what is possible in transition.

Ronalda, tasked with implementing the peace agreement is a player in the same political battle. Her interpretation of what the law requires depends on her views on the conflict, the peace agreement and the future of post-conflict Colombia. These interpretations of what law requires can also be understood as *constitutive* of a set of post-conflict norms. Interpretations create the ‘text’ of post-conflict law and child soldier accountability. In adopting this method to design transitional justice mechanisms they also change the scope and content of the international legal rules.

However, these new understandings may become part of the ‘chain’ of understandings of what post-conflict law in Colombia means. This amounts to an acceptance that there is a ‘text’ to be interpreted from a Dworkinian perspective. Future cases in post-conflict Colombia can be understood as constrained by previous interpretations of what post-conflict law is. Ronalda can decide to prosecute Juan and justify this interpretation. But this interpretation would make it easier for other judges in Colombia to arrive at similar interpretations of what post-conflict law means to them. Thus, rather than seeing different post-conflict situations in Colombia as discrete situations, Ronalda could see them as linked, as telling a single story. It may be useful to think of the relationship between Ronalda’s interpretation and other post-conflict societies. Different post-conflict political situations tend to reproduce similar responses to specific post-conflict issues.<sup>40</sup> This can be seen in the way that peace agreements reflect similar approaches to the post-conflict regulation. Most

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<sup>40</sup> Jennifer Easterday, ‘Peace Agreements as a Framework for *Jus Post Bellum*’, in Carsten Stahn, Jennifer Easterday and Jens Iverson, (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014), 379, 388.

peace agreements (59%) contain detailed rules on security arrangements.<sup>41</sup> Most peace agreements do not contain detailed norms on children (12%).<sup>42</sup> The *jus post bellum* as integrity assumes that peace agreement practice functions as a guide or framework for the next post-conflict State.

This has led Bell to argue that there is an emerging ‘law of peace’, the *lex pacificatoria*, in her words.<sup>43</sup> This may include the ‘global transitional criminal justice’ with which Ronalda was concerned. On Bell’s account, however, the ‘new law’ is not yet fully developed into a coherent legal order. It is, at best, described as ‘developing law’ or a set of international norms. There may be an important difference, therefore, between the *jus post bellum* as integrity and Bell’s *lex pacificatoria*. On a Dworkinian account, the principles of post-conflict law that emerge from an interpretation of law *are* legal principles. Thus, when Ronalda considered the history of transitional criminal justice in Sierra Leone, a purely Dworkinian approach means that she is identifying legal principles. Bell’s account of the *lex pacificatoria* is more limited in that it does not claim full legal force in international law.

At this stage, States do not appear ready to fully endow the principles of post-conflict law with ‘positive law’ status. Therefore, they do not form part of international law as traditionally understood. However, on a Dworkinian reading, the traditional version of international law is deficient and an interpretive argument for international law can be made.<sup>44</sup> This would accept that the principles that justify particular interpretations of international law are a part of international law ‘proper’. This would be possible once theories of international law reject the stranglehold that legal positivism holds on the subject.

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<sup>41</sup> Jennifer Easterday, ‘Peace Agreements as a Framework for *Jus Post Bellum*’, in Carsten Stahn, Jennifer Easterday and Jens Iverson, (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014), 379, 388.

<sup>42</sup> Jennifer Easterday, ‘Peace Agreements as a Framework for *Jus Post Bellum*’, in Carsten Stahn, Jennifer Easterday and Jens Iverson, (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014), 379, 388.

<sup>43</sup> Christine Bell, *Peace Agreements and Human Rights* (New York, OUP: 2000); ‘The “New Law” of Transitional Justice’ in Kai Ambos, Judith Large and Marieke Wierda (eds.), *Building a Future on Peace and Justice* (Berlin-Heidelberg, Springer Verlag: 2009), 105; *On the Law of Peace – Peace Agreements and the Lex Pacificatoria* (New York, OUP: 2008).

<sup>44</sup> Ronald Dworkin, ‘A New Philosophy for International Law’, 41 *Philosophy & Public Affairs* (2013) 2.

Dworkin's final publication argues that the legal positivist theory of international law (as detailed in 2.1.2) is simply wrong. Instead, Dworkin constructs an interpretive theory of international law that attempts to explain why, in normative terms, the rules of international law are binding on States without relying on the fact of their consent. Dworkin identifies international law as part of a larger question of political morality that asks 'what morality and decency can require of states and other international bodies in their treatment of one another...' <sup>45</sup> In this respect, Dworkin argues that a proper conception of international law must be based on the notion that States have a moral duty to accept the limitations of their own power. <sup>46</sup> Of course, there may be different ways of achieving this, and States may legitimately disagree on the best way. Therefore, Dworkin develops the principle of salience, to explain that once a number of States have agreed on a code of practice, other States have a duty to subscribe to the practice, as long as that would improve the legitimacy of the subscribing State and the international order as a whole. Thus, Dworkin concludes that

...we should interpret the documents and practices picked out by the principle of salience so as to advance the imputed purpose of mitigating the flaws and dangers of the Westphalian system...[T]he correct interpretation of an international document...is the interpretation that makes the best sense of the text, given the underlying aim of international law,...the creation of an international order that protects political communities from external aggression, protects citizens of those communities from domestic barbarism, facilitates coordination,...and provides some measure of participation by people in their own governance across the world. <sup>47</sup>

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<sup>45</sup> Ronald Dworkin, 'A New Philosophy for International Law', 41 *Philosophy & Public Affairs* (2013) 2, 13.

<sup>46</sup> Ronald Dworkin, 'A New Philosophy for International Law', 41 *Philosophy & Public Affairs* (2013) 2, 14.

<sup>47</sup> Ronald Dworkin, 'A New Philosophy for International Law', 41 *Philosophy & Public Affairs* (2013) 2, 22.

This is a normative argument for interpretivism in international law. It is very similar to that made by other prominent international lawyers, such as Hersch Lauterpacht.<sup>48</sup> Ultimately, the interpretation of law must keep in sight the point of the practice itself. In this respect, the Dworkinian interpretation of post-conflict law must resonate with the political aims of transition and the wider aims of international law in general.

#### **6.2.5 Internal objection: conclusion**

This section has argued that a Dworkinian *jus post bellum* is plausible and that Dworkin ought to be favoured in the Fish-Dworkin debate. Of course, post-conflict law can be understood as reflecting subjective and objective sides of the Fish-Dworkin debate. On the one hand, post-conflict actors interpret international law and create norms as they proceed to solve post-conflict issues. On the other hand, they are constrained by the domestic legal system in which post-conflict law ‘happens’ and previous interpretations of international legal norms in similar situations. Dworkin would also argue that they are constrained by the principle of salience and that there is a moral argument that overarches the legal dimension which forces States to adhere to the ‘emerging’ rules of international law in transitions. It may, thus, be argued that a transnational practice of post-conflict norm production is slowly being constituted by these repeated experiences. These norms, however, are not yet ‘positive’ legal norms. In time, they may harden and function in a similar way to the positive law. However, on a Dworkinian reading, this would be unnecessary as the principles that support the rules are just as much ‘law’ as the rules themselves. In becoming aware of the similar solutions crafted to recurring post-conflict issues, post-conflict actors can consider themselves as joining a continuing story of post-conflict law-making. This creates a self-

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<sup>48</sup> Patrick Capps, ‘Lauterpacht’s Method’ 82 *British Yearbook of International Law* (2012) 248 – 280.

critical approach that allows for a view of law as providing coherent solutions to similar issues.

Fish is right that the *jus post bellum* as integrity is a concept which must be interpreted. However, the possible interpretations are limited by the 'text' being interpreted. Post-conflict actors are engaged in a legal practice, 'the law' which is being interpreted must be told as part of a linked story where similar situations ought to produce similar solutions. In this regard, finding the common principles of justice that underpin the different rules that deal with children in Colombia may be a worthwhile exercise and approach. A commitment to principled coherence ought to help foster confidence in post-conflict institutions and also help the implementation of peace agreements. The significance of Dworkin's argument lies in its moral claim. It urges post-conflict actors to think of themselves as part of a 'community of principle'. It urges post-conflict actors to think about how their interpretations of the law are coherent with the approaches of the past and their community's aims for the future. At the very least, it urges post-conflict actors to ask questions about how they ought to proceed. It asks them to understand that responses to post-conflict situations can be measured by the history of post-conflict practice.<sup>49</sup> For interpretive purposes, this may include responses in other post-conflict societies. On a Dworkinian approach, better answers result from a commitment to integrity in the interpretation of post-conflict law. In the end, integrity demands an ongoing dialogue between the creative and reflective processes of legal interpretation.<sup>50</sup> This means, simply, that the specific interpretations made are always a part of a larger, shape-shifting whole. In this regard, every interpretation of post-conflict law in Colombia is a starting point which demands development by the very act of interpreting.<sup>51</sup>

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<sup>49</sup> Walter A. Davis, 'Offending the Profession' 10 *Critical Inquiry* (1984) 706; Judith M. Schelly, 'Interpretation in Law: The Dworkin-Fish Debate (Or, Soccer Amongst the Gahuku-Gama)' 73 *California Law Review* (1985) 158, 168

<sup>50</sup> Andrei Marmor, 'Coherence, Holism, and Interpretation: The Epistemic Foundations of Dworkin's Legal Theory', 10 *Law and Philosophy* (1991) 383.

<sup>51</sup> Walter A. Davies, 'Offending the Profession (After Peter Handke)' 10 *Critical Inquiry* (1984) 706.

These starting points offer parameters for future development in the story of post-conflict peacebuilding in Colombia.

In relation to the specific question set, the *jus post bellum* as integrity may not provide Ronalda with absolute certainty. But the *jus post bellum* as integrity is an important lens through which the past can be seen to provide legal and moral parameters for the interpretation she must make. It is an invitation to see post-conflict law and those interpreting the law as part of a broader political process. This can also be considered as an international and transnational process.<sup>52</sup> The interpretation that Ronalda chooses is constitutive of post-conflict law for the purposes of the Colombian transition. But the *jus post bellum* as integrity also requires Ronalda to accept her role as part of a community of transnational peacebuilders insofar as international law affects these disparate situations in similar ways. Ronalda, if she accepts the *jus post bellum* as integrity, must try to make her interpretation in Juan's case fit with other rules and principles relating to children in Colombia. She must also find a way to make her interpretation coherent with the peace agreement signed between the government and the FARC-EP. In this way, the *jus post bellum* as integrity urges Ronalda to present post-conflict law as a coherent legal order by which she is bound and from which she can identify the best answers in specific cases.

This section has explored the nature of integrity and its role in interpretation. It concluded that interpretation is a mixture of subjective and objective elements. This means that integrity is a concept that can guide interpretations as a matter of post-conflict law in Colombia. This is not an easy or mechanical task. It is an argumentative practice and it asks questions about the attitude to legal interpretation. The *jus post bellum* as integrity can guide post-conflict actors insofar as they are made aware of how previous post-conflict societies

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<sup>52</sup> On transnational law see, Phillip Jessup, 'Transnational Law' (New Haven, Yale University Press: 1956); Harold Koh, 'Transnational Legal Process' 75 (1996) *Nebraska Law Review* 181; Paul Schiff Berman, 'Global Legal Pluralism' 80 *Southern California Law Review* (2007) 1155.

resolved similar kinds of problems relating to international law. In becoming aware of their participation in a complex and evolving story, an obligation to pursue integrity in interpretations of the law appears as a *moral* obligation. Integrity is a normative value that can be used to identify, interpret and justify what legal interpretations ought to be in post-conflict situations.<sup>53</sup> In this sense, it does guide interpretations and Fish's radical subjectivism can be overcome.

### **6.3 External objection: The role of community morality in interpretations of law**

This section deals with the second objection to the *jus post bellum* as integrity. It focuses on the role a community's political morality plays in Dworkin's method of interpretation. This is important because, for Dworkin, an interpretation must not only fit legal practice, it must also be justifiable from the perspective of the political community's morality. The two are linked because for Dworkin law is a branch of political morality.<sup>54</sup> He argues that an action at law is inevitably moral because there is always a risk of an interpretation giving rise to 'a distinct form of public injustice'.<sup>55</sup> So, when the law is interpreted incorrectly, 'the community has inflicted a moral injury on one of its members because it has stamped him in some degree or dimension as an outlaw'.<sup>56</sup> This affects Dworkin's view on how judges and other legal actors should decide cases. He argues that when they interpret the law, they should aim to identify the community morality in a way that would justify the 'stamping' of the individual as an outlaw. Further, the more a judge can achieve a principled coherence

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<sup>53</sup> Andrei Marmor, 'Coherence, Holism, and Interpretation: The Epistemic Foundations of Dworkin's Legal Theory', 10 *Law and Philosophy* (1991) 383.

<sup>54</sup> For the classic Statement on the separation of law and morals see H.L.A. Hart, 'Positivism and the Separation of Law and Morals' in H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (New York, OUP: 1988) 49.

<sup>55</sup> Ronald Dworkin, *Law's Empire*, (Portland, Oregon, Hart Publishing: 2006) 1.

<sup>56</sup> Ronald Dworkin, *Law's Empire*, (Portland, Oregon, Hart Publishing: 2006) 1.

between the interpretation of the law in a specific case and the political morality of the community the better they are interpreting the law.<sup>57</sup>

So, in Juan's case, Ronalda can argue that she made the right decision in the following way. The decision to prosecute is the community's way of demonstrating its moral disagreement with the acts committed by Juan despite his young age. In prosecuting, the community reaffirms its commitment to the principle of responsibility. It reaffirms its belief that all individuals ought to account for their crimes as long as they are mature enough to understand the nature of their acts. This reinforces the principle that citizens must be treated equally and according to the law. However, the transitional nature of criminal justice tempers the full effects of the principle of responsibility. In prescribing a more limited form of justice it allows Juan to confess and repair the survivors as a path towards reconciliation. This process reaffirms the community's commitment to demobilization, reconciliation and, ultimately, the principle of peace. The decision explains and justifies the existence of a Colombian legal order founded on certain fundamental principles of political morality.

This community morality dimension of Dworkin's theory gives rise to a problem insofar as the *jus post bellum* is a concept in international law. As the previous section argued, the *jus post bellum* as integrity may represent an 'emerging global law' as identified by Ronalda in chapter 5. For this reason, Ronalda attempted to make her interpretation coherent with the international legal order. Dworkin never properly considered international law.<sup>58</sup> Further, as explained in section 2.1.2, international law is committed to the strict separation between law and morality. As such, insofar as the *jus post bellum* as integrity indicates a 'global law' of transitional criminal justice, there may be problems in identifying the international legal order as one that affirms a community political morality.

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<sup>57</sup> Ronald Dworkin, *Justice for Hedgehogs*, (Cambridge: The Belknap Press of Harvard University Press, 2011).

<sup>58</sup> Although see Ronald Dworkin, 'A New Philosophy for International Law', 41 *Philosophy and Public Affairs* (2013) 1.



### **6.3.1. Dworkinian communities**

Dworkin discussed three different kinds of community.<sup>59</sup> These are a ‘bare’ community, a ‘rulebook’ community and a ‘community of principle’.<sup>60</sup> In a bare community, the members treat their association as a ‘de facto accident of history and geography’.<sup>61</sup> Members of a de facto association may treat each other as means towards selfish ends. They do not share purposes or principles other than those which ensure their mutual coexistence. The second ‘rulebook’ community has members that ‘accept a general commitment to obey the rules established...’<sup>62</sup> However, they do not share a common commitment to the ‘underlying principles that are themselves a source of further obligation...’<sup>63</sup> The only obligations they accept are the rules which are the result of negotiation and compromise between ‘antagonistic interests’.<sup>64</sup> This is important because members of the community cannot insist on members complying with obligations beyond what has been explicitly agreed. Dworkin explains,

If the rules are the product of special negotiation [where] each side has tried to give up as little in return for as much as possible, [...] it would therefore be unfair and not merely mistaken for either to claim that their agreement embraces anything not explicitly agreed.<sup>65</sup>

Dworkin’s final model of community is a ‘community of principle’. In this sort of community, members accept a shared understanding that they are governed by common principles, ‘not just by the rules hammered out in political compromise’.<sup>66</sup> Each member of

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<sup>59</sup> There are different ways of defining a community, this chapter is concerned with whether a Dworkinian community exists, see for example, Thomas Frank *Fairness in International Law and Institutions* (1995) 10: a ‘community is defined by having a corpus of rules which it deems to be legitimate and by having agreed on a process that legitimates the exercise of authority...’, 12.

<sup>60</sup> Ronald Dworkin, *Law’s Empire*, (Portland, Oregon, Hart Publishing: 2006) 208.

<sup>61</sup> Ronald Dworkin, *Law’s Empire*, (Portland, Oregon, Hart Publishing: 2006) 209.

<sup>62</sup> Ronald Dworkin, *Law’s Empire*, (Portland, Oregon, Hart Publishing: 2006) 210.

<sup>63</sup> Ronald Dworkin, *Law’s Empire*, (Portland, Oregon, Hart Publishing: 2006) 210.

<sup>64</sup> Ronald Dworkin, *Law’s Empire*, (Portland, Oregon, Hart Publishing: 2006) 210.

<sup>65</sup> Ronald Dworkin, *Law’s Empire*, (Portland, Oregon, Hart Publishing: 2006) 210.

<sup>66</sup> Ronald Dworkin, *Law’s Empire*, (Portland, Oregon, Hart Publishing: 2006) 211.

the community ‘accepts that others have rights’ and that they ‘have duties flowing from that scheme, *even though these have never been formally identified or declared* [my emphasis].’

Dworkin constructs these three communities for interpretive purposes. A single community might demonstrate elements of all three types. His point is that an interpretation of law will necessarily imply one of these three kinds of community. The existence of a domestic political community in Colombia is relatively unproblematic. The end of the conflict, and the signing of a peace agreement, was taken as a sign that a single political community had come into existence.<sup>67</sup> In any event, even during the armed conflict, the main functions of a legal system (law-making, law-determination and law-enforcement) have been centralized. There has always been a political and legal structure which includes the 1991 Constitution, the central government in Bogotá, a hierarchical judicial system, and State officials which enforce the law. There is also an identifiable ‘people’ (Colombian citizens) that the system governs. Thus, Ronalds can argue that there is a Colombian political community, and that it is based on certain values which, despite all its problems, are based on those of a liberal democratic State. There is little difficulty in arguing that her interpretation of post-conflict law is based on the fact that Colombian citizens are committed to peace, to the principle of responsibility, to the principle of local ownership and proportionality and to the principle of maturity.

However, the *jus post bellum* as integrity may also incorporate international law. International law is the law that regulates international relations between States. Thus, insofar as international law is interpreted in post-conflict societies, a Dworkinian approach may recognise the validity of an interpretation by virtue of the political morality of an ‘international community’. In chapter 5, the existence of such a community was taken as a

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<sup>67</sup> At the time of writing, the second largest guerrilla army in Colombia have agreed a ceasefire and are in peace talks with the Colombian government, see CNN, ‘Colombia’s government reaches ceasefire deal with ELN’, available online at: <http://edition.cnn.com/2017/09/04/americas/colombia-eln-ceasefire/index.html> (last accessed 7 September 2017).

given rather than critically considered.<sup>68</sup> Ronalda never asked whether international law is the law of a community in the Dworkinian sense. She did not consider the nature of the political relationship between sovereign States.<sup>69</sup> This is a unique relationship which has given rise to a legal order that is markedly different to those found in domestic legal orders. Relations between States are horizontal rather than vertical. This means that there is no overarching world government, or constitution, which is comparable to the structures found in Colombia. The functions of the legal system mentioned above are decentralized. No State has the central management authority to impose its will on the whole community. The political situation is one of ‘relative anarchy’.<sup>70</sup> Ronalda’s approach to interpretation assumed that interpretations of post-conflict law had to be coherent with the international legal order. The previous section explained that there is a legal obligation to make post-conflict law coherent across post-conflict States insofar as international law is concerned. This section evaluates the *jus post bellum* as integrity according to Ronalda’s application in chapter 5. She presupposes a Dworkinian version of international law. In this regard, her approach to the *jus post bellum* as integrity depends on the possibility of identifying the values of the international community. Dworkin’s theory urges that questions of value are at the heart of the identification of what the law *is*. As explained in chapter 5, questions of value validate interpretations when they are balanced against the dimension of ‘fit’. Therefore, the external objection challenges the extent to which the theoretical presuppositions of Dworkin’s theory are transferrable to the international society of States.<sup>71</sup>

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<sup>68</sup> The term international community is used here to mean a community of States, see I use international society of States (or international society) in the same way as Hedley Bull, see Hedley Bull, *The Anarchical Society – A Study of Order in World Politics* (Palgrave Macmillan, Basingstoke: 2012)

<sup>69</sup> The terms ‘sovereign State’ can be considered a pleonasm. All States, by virtue of being recognised as States are ‘sovereigns’, see James Crawford, ‘Sovereignty as a legal value’ in James Crawford and Martti Koskeniemi, *The Cambridge Companion to International Law* (Cambridge, CUP: 2012) 117, 118.

<sup>70</sup> Antonio Cassese, *International Law* 2nd Edition, (New York, OUP: 2005) 5.

<sup>71</sup> I use ‘international society’ here to signal a weaker form of international political order which falls below the level of ‘community’, Hedley Bull, *The Anarchical Society – A Study of Order in World Politics* (Palgrave Macmillan, Basingstoke: 2012).

The remainder of this chapter evaluates whether the kind of community that is necessary for Dworkin's theory is identifiable in the international society of States.

### **6.3.2 Is there an international 'community of principle'?**

This section evaluates whether Ronald Bell can justify her interpretation of law on the basis of the political morality of the international community. This may be considered a requirement of a more expansive and ambitious theory of the *jus post bellum* as integrity. It is a theory that asks for coherence across post-conflict societies on the basis of the law of the international community. To the extent that this strong claim can be doubted on the international level, the *jus post bellum* as integrity may lack the explanatory force of the *lex pacificatoria*. As explained, Bell's theory accounts for the emergence of similar practices across post-conflict societies owing to the existence of a transnational community of peacemakers that use international law in their conflict resolution mandates. The *jus post bellum* as integrity must ground the emergence of these norms in Dworkin's theory of associative obligations.

#### **6.3.2.1 Associative Obligations**

Dworkin argues that a community of principle exhibits 'associative obligations'.<sup>72</sup> By this he means 'the special responsibilities social practice attaches to membership in some biological or social group'.<sup>73</sup> Dworkin's key point is that the responsibilities that a person owes to members of the community of principle are not owed as a result of 'deliberate

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<sup>72</sup> Ronald Dworkin, *Law's Empire*, (Portland, Oregon, Hart Publishing: 2006) 196.

<sup>73</sup> Ronald Dworkin, *Law's Empire*, (Portland, Oregon, Hart Publishing: 2006) 196.

commitment’.<sup>74</sup> The responsibilities emerge ‘through a series of choices and events’.<sup>75</sup> So it is the history of the association that attracts the special kinds of obligations as between members.

In relation to international society, this suggests that the kinds of obligations needed for evidence of an international community of principle are not those core principles to which States have freely *consented*.<sup>76</sup> Any legal order contains ‘a relatively small number of principles’ or core elements which ‘make up the fabric of the law’.<sup>77</sup> For example, the principle of autonomy, which is at the heart of the criminal law in the United Kingdom, provides the explanation and justification for other more specific rules, i.e. the rules on capacity.<sup>78</sup> The international legal order also contains a core set of principles.<sup>79</sup> These include the principle of sovereign equality and the principle of non-interference.

However, Dworkin’s theory refers to moral and political principles which explain and justify the legal order as a whole. They emerge out of the political association of a community’s members. These embody the ‘spiritual cohesion’ of the relevant community.<sup>80</sup> A Dworkinian approach to international law needs to ask whether there is an international community that shares moral and political principles by virtue of States having interacted over time as a community. For Dworkin, these principles would reflect the fact that States hold ‘certain attitudes about the responsibilities they owe one another.’<sup>81</sup> They would be

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<sup>74</sup> Ronald Dworkin, *Law’s Empire*, (Portland, Oregon, Hart Publishing: 2006) 197.

<sup>75</sup> Ronald Dworkin, *Law’s Empire*, (Portland, Oregon, Hart Publishing: 2006) 197.

<sup>76</sup> Although State consent would not function to negative the kind of principles that Dworkin refers to. It may be that States have consented to the fundamental principles of the international community, thereby, bringing the relevant norms under the ‘positivist’ international legal order. The point is that Dworkin’s principles emerge purely from the association of citizens (States).

<sup>77</sup> Vaughan Lowe, ‘The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?’ in Michael Byers (ed.) *The Role of Law in International Politics* (New York, OUP: 2000) 207.

<sup>78</sup> Jeremy Horder, *Ashworth’s Principles of Criminal Law*, 8th Edition, (2013) 59.

<sup>79</sup> Antonio Casesse, *International Law*, 2nd Edition, (New York, OUP: 2005) 46.

<sup>80</sup> James L. Brierly, *The Law of Nations* 6th Edition, (Oxford, Clarendon Press: 1963) 41.

<sup>81</sup> Ronald Dworkin, *Law’s Empire*, (Portland, Oregon, Hart Publishing: 2006) 199.

indicators that States consider themselves to be a part, not only of an international society, but also an international community.

Dworkin finds that the kinds of obligations that emerge demonstrate four characteristics. These are:

1. *Speciality*: Members accept that the responsibilities arise distinctly within the group rather than as general duties to those outside the group. This means that ‘each citizen respects the principles of fairness and justice instinct in the standing political arrangement of his particular community, which may be different to those of other communities, whether or not he thinks these the best principles from a utopian standpoint.’<sup>82</sup>
2. *Personality*: Members accept that the responsibilities are personal. They flow directly from one member to another, not only to the group as a whole. It is a community where no one is ‘to be left out’ and where all are ‘in politics together for better or worse’ and that ‘no one may be sacrificed, like wounded left on the battlefield, to the crusade of justice for all’.<sup>83</sup>
3. *Integrity*: Members link the responsibilities they have to other individuals as flowing from a general responsibility of concern for the well-being of others in the group. Dworkin’s community of principle requires that the citizens sacrifice their immediate political concerns in the interest of a commitment to integrity of the legal order as a whole.

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<sup>82</sup> Ronald Dworkin, *Law’s Empire*, (Portland, Oregon, Hart Publishing: 2006) 213.

<sup>83</sup> Ronald Dworkin, *Law’s Empire*, (Portland, Oregon, Hart Publishing: 2006) 213.

4. *Equality*: Members accept that the group's practices are based on an equal concern for all members.<sup>84</sup> A community of principle produces and demonstrates equality as between the individuals. Dworkin's thesis argues that when individuals disagree about justice, the best way forward is to agree on adjudicating the disagreements according to a coherent scheme of principles founded on integrity.

The relevance of these associative obligations for the expansive notion of the *jus post bellum* as integrity is as follows. In order to be capable of generating 'right answers', associative obligations of this kind must be a plausible description of a political community of States. If the conditions of a community of principle are met, then an argument about interpretations of international law may include the rule of integrity.

However, the relationship between States might not plausibly be described in these terms. Rather than a community of principle, the international society of States may resemble a 'bare' or a 'rulebook' community. In this case, the *jus post bellum* as integrity could not 'generate' the right answers across different post-conflict States. Its more expansive meaning would be discarded and its impact and usefulness would remain the commitment to coherence *within* post-conflict States. As a concept in international law, it may still be useful as theory that suggests post-conflict law *ought to be* coherent across different societies. In this respect, it would equate to encouraging a comparative approach.

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<sup>84</sup> Ronald Dworkin, *Law's Empire*, (Portland, Oregon, Hart Publishing: 2006) 200.

### **6.3.2.2. Community among States?**

All societies must exhibit a basic order so that they may continue existing as societies.<sup>85</sup> It is, therefore, possible to identify certain ‘fundamental tenets’ which underpin the political association of the international community.<sup>86</sup> For example, the fundamental principle that underpins all the international legal order is the principle of sovereign equality. This is reflected in the rules of the UN Charter.<sup>87</sup> With the recognition of a number of new States in the 1960s, the principle of sovereign equality was reaffirmed and extended to include all States (not just UN members) in the 1970 UN Declaration on Friendly relations.<sup>88</sup>

The principle of sovereign equality reflects that all States accept, without qualification, that they are all sovereign equals in the international society of States. They enjoy certain rights that no other international actors enjoy.<sup>89</sup> States have the prominent role in international law-making.<sup>90</sup> Most of the rules of international law regulate the behaviour of States.<sup>91</sup> They enjoy a wide range of exclusive powers over individuals in matters that fall within their jurisdiction. Each State must also grant every other State these powers and rights (once Statehood is recognised). A State’s officials, therefore, enjoys immunity before the

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<sup>85</sup> Hedley Bull, *The Anarchical Society – A Study of Order in World Politics* (Palgrave Macmillan, Basingstoke: 2012) arguing that these are a commitment to ‘life, truth and property’, 5; see also Herman Mosler, ‘The International Society as a Legal Community’ 140 *Recueil des Cours* (1974) 1: ‘The collection of subjects participating in the international legal order constitutes a *community*, and all subjects of international law are its members (emphasis in the original)’, 12.

<sup>86</sup> Antonio Cassese, *International Law*, 2nd Edition, (New York, OUP: 2005) 46.

<sup>87</sup> UN Charter, (signed 24 October 1945, entered into force 24 October 1945) 1 UNTS XVI, ART. 2(1).

<sup>88</sup> UN General Assembly, *Declaration on Principles of International Law* concerning Friendly Relations and Cooperation among States in accordance with the UN Charter, 24 October 1970, A/RES/2625 (XXV) at (f).

<sup>89</sup> Though some international organizations, such as the UN, are endowed with some legal personality, for example, in terms of immunities from suit, see UN General Assembly, *Convention on the Privileges and Immunities of the UN*, (adopted 13 February 1946, entered into force 17 September 1946).

<sup>90</sup> Though see Alan Boyle and Christine Chinkin, *The Making of International Law* (New York, OUP: 2007).

<sup>91</sup> Antonio Cassese, *International Law*, 2nd Edition, (New York, OUP: 2005)



courts of other States.<sup>92</sup> Also, an internationally wrongful act accrues to the State itself and not to the individuals that carried out the act in their State official capacity.<sup>93</sup>

This unqualified acceptance by States of their sovereign equality might be taken as evidence that States consider themselves as members of a ‘special kind’ of community. However, the very purpose, or point, of the principle of sovereign equality reflects the fact that States do *not* share principles of justice or fairness. The default position in international society is that States are free to do as they want unless they consent to rules which limit that freedom. The principle of sovereign equality functions to protect States, and especially weak States, from the interference of other more powerful States.<sup>94</sup> Its role is to ‘keep States peacefully apart’ rather than ‘bringing them actively together.’<sup>95</sup> Its development and acceptance is owing to the fact that a universal conception of political community which is accepted by all States has, so far, proved unattainable. Therefore, sovereign equality reflects a commitment to agree to disagree on important matters of principle. It means that, as a matter of domestic law, each State is free to develop its internal political order in the way that it thinks is ‘best’.

Naturally, the rules that States implement in their own legal orders vary widely. The different rules reflect adherence to a number of moral principles, sometimes reflecting secular and liberal tendencies, sometimes religious, or socialist. States are under no legal obligation to make their internal rules coherent in principle (with the aim that they ensure the equal concern and respect of its citizens) in the way that Dworkinian integrity demands.<sup>96</sup> States that flagrantly deny the equal treatment of its citizens are accepted as members of the

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<sup>92</sup> Jurisdictional Immunities of the State (Judgment), I.C.J Rep. (2012) 99.

<sup>93</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (November 2001), Fifty-sixth session, Supplement No. 10 (A/56/10), chp.IV.E.1, art. 2.

<sup>94</sup> Brad Roth, *Sovereign Equality and Moral Disagreement*, (New York, OUP: 2011) 13.

<sup>95</sup> Brad Roth, *Sovereign Equality and Moral Disagreement*, (New York, OUP: 2011) 5.

<sup>96</sup> Basak Çali, ‘On Interpretivism and International Law’, 20 *EJIL* (2009), 805, 817.

international society of States. But a State is no less a State by virtue of its dictatorial, democratic or other internal legal order.<sup>97</sup>

As such, it is doubtful that the overwhelming acceptance of the principle of sovereign equality can be evidence that reflects the ‘special’ character of the association of States. Instead, the principle of sovereign equality is evidence of a ‘rulebook’ community as described above. It asserts that the ‘rules of the game’ for the purposes of international relations are those which States themselves agree should be the rules. The rules are the ‘product of special negotiation’ [where] ‘each side has tried to give up as little in return for as much as possible’.<sup>98</sup> It is hard, therefore, not to conclude that it would be a mistake ‘to claim that their agreement embraces anything not explicitly agreed’.<sup>99</sup> All of this makes it difficult for integrity to arise because ‘[i]ntegrity holds within political communities, not among them’.<sup>100</sup>

One way around this problem is to reconceptualise the international legal order and to question the centrality of the State at the centre of a ‘global society’. States, after all, are not alone in the regulation of world affairs. On the one hand, international organizations, international non-governmental organizations, and individuals have a limited *locus standi* in international law.<sup>101</sup> Further, in the field of international criminal law, States have agreed to impose obligations directly on individuals.<sup>102</sup> Thus, although States are still central, the UN and other international organizations are ‘ancillary’ subjects in international law.<sup>103</sup> Mégret has argued that the emergence of these non-State actors has changed the ‘physiognomy’ of

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<sup>97</sup> Frédéric Mégret, ‘International Law as Law’ in James Crawford and Martti Koskeniemi, *The Cambridge Companion to International Law* (Cambridge, CUP: 2012), 64, 65.

<sup>98</sup> Ronald Dworkin, *Law’s Empire*, (Portland, Oregon, Hart Publishing: 2006) 210.

<sup>99</sup> Ronald Dworkin, *Law’s Empire*, (Portland, Oregon, Hart Publishing: 2006) 210.

<sup>100</sup> Ronald Dworkin, *Law’s Empire*, (Portland, Oregon, Hart Publishing: 2006) 185.

<sup>101</sup> Antonio Cassese, *International Law*, 2nd Edition, (New York, OUP: 2005) 134.

<sup>102</sup> Nuremberg International Military Tribunal, ‘Judgment and Sentence’, 41 *American Journal of International Law* (1947) 172; Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), 2187 UNTS 90, art. 25.

<sup>103</sup> Antonio Cassese, *International Law*, 2nd Edition, (New York, OUP: 2005) 135.

international law.<sup>104</sup> But many of these developments depend on States who have agreed to delegate certain functions to international organizations in pursuit of common interests for reasons of mutual convenience. Therefore, the emergence of non-State actors is not necessarily evidence that there is an international community of principle. International law is, primarily, law that regulates the behaviour and interaction of States.

Another possibility is to ‘look inside’ States and extract evidence of a global community from the actual international behaviour of governmental networks.<sup>105</sup> Thus, sub-State-officials (legislators, courts, administrative agencies) interact transnationally with other sub-State officials, each representing the ‘national interest’.<sup>106</sup> In relation to peace-making in Colombia, the participation of individuals, as peace negotiators or mediators, can be taken as an example of the multi-layered reality of international relations in international society. This view could emphasize a power-shift *within* States towards transnational networks of individuals that are engaged in the process of law-making.<sup>107</sup>

However, it is not clear that a replacement of governments with ‘interest groups’ would be useful from the perspective of ‘law as integrity’. On the one hand, Slaughter’s analysis emphasizes the benefits of trans-governmental networks as ‘fast, flexible and cheap’.<sup>108</sup> There is no indication that the trans-governmental nature of inter-State regulation produces a stronger feeling of ‘community’ as between States. The networks interact according to their interests in order to agree upon rules in the same way that members of a rulebook community would. Slaughter’s point is simply that the traditional recounting of

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<sup>104</sup> Frédéric Mégret, ‘International Law as Law’ in James Crawford and Martti Koskeniemi, *The Cambridge Companion to International Law* (Cambridge, CUP: 2012), 64, 66.

<sup>105</sup> Anne-Marie Slaughter, ‘Governing the Global Economy through Government Networks’, in Michael Byers (ed.) *The Role of Law in International Politics* (New York, OUP: 2000), 177.

<sup>106</sup> Anne-Marie Slaughter, ‘Governing the Global Economy through Government Networks’, in Michael Byers (ed.) *The Role of Law in International Politics* (New York, OUP: 2000), 177, 178.

<sup>107</sup> Anne-Marie Slaughter, ‘Governing the Global Economy through Government Networks’, in Michael Byers (ed.) *The Role of Law in International Politics* (New York, OUP: 2000), 177.

<sup>108</sup> Anne-Marie Slaughter, ‘Governing the Global Economy through Government Networks’, in Michael Byers (ed.) *The Role of Law in International Politics* (New York, OUP: 2000), 177, 179.

international law ought to take cognizance of the new realities of trans-governmental law-making, not that this is indicative of an international community in the way Dworkin's theory requires. For Dworkin's theory to explain international legal order, the transnational law-makers would need to feel that they were governed by political and moral principles, even though they had not ever been posited, or identified, simply as a matter of their trans-governmental association and activity. It would mean that the individuals involved felt they were part of an international community which had 'its own principles it can itself honor, or dishonor, that it can act in good or bad faith, with integrity or hypocritically, just as people can [sic]'.<sup>109</sup> Integrity, for Dworkin, has this personal quality. It is a self-reflective and 'protestant attitude that makes each citizen responsible for imagining what his society's public commitments require'.<sup>110</sup> This theory of associative obligations is ill-suited to a decentralized and horizontal legal order.

As an alternative, therefore, rather than focusing on the members of the international society and how they interact, a more fruitful avenue for evidence of Dworkinian community of principle may be found in the hierarchy of norms that international law endorses. The view that States consider some norms more important than others may be evidence that some values are shared as 'community values'.

In Ronalda's case, she is aware that Colombia has been under the preliminary investigation of the ICC. The ICC can be interpreted as monitoring States' adherence with the community values that shape international criminal justice. In this sense, Ronalda may feel that she is part of a community that goes beyond the Colombian legal community. Therefore, it could be that she feels part of a larger international community in the field of international criminal justice. Other prosecutors may reject the ICC attention and feel that the issue is one for Colombia to address. But in trying to find coherence with the

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<sup>109</sup> Ronald Dworkin, *Law's Empire*, (Portland, Oregon, Hart Publishing: 2006) 168.

<sup>110</sup> Ronald Dworkin, *Law's Empire*, (Portland, Oregon, Hart Publishing: 2006) 413.

international legal order and other post-conflict societies, Ronalda's approach indicates that she does feel part of this larger community. One way that she might justify her interpretation of post-conflict law is by reference to the values which hold a special place in the international legal order.

### **6.3.2.3 Normative hierarchy**

The principle of sovereign equality means that international law is traditionally seen as 'contractual' rather than 'legislative'.<sup>111</sup> In the traditional account of international law, norms are structured horizontally, they bind other contracting parties, and there are no overarching 'constitutional' norms that bind all States regardless of their consent. To the extent that this traditional approach can be doubted, the *jus post bellum* as integrity may find a community of principle in the existence of superior norms of the international legal order. Evidence of a hierarchical legal order may be taken as proof that international law reflects the 'minimum foundations of a common ethical project'.<sup>112</sup> These foundations may then support an interpretation of post-conflict law that is justified according to the principles of the international community.

Hierarchy in international law can be understood in different ways. As the ILC Study on Fragmentation makes clear, a rule can take precedence over another rule because it is more specific to the issue at hand.<sup>113</sup> A rule may take precedence because it has emerged

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<sup>111</sup> Frédéric Mégret, 'International Law as Law' in James Crawford and Martti Koskenniemi, *The Cambridge Companion to International Law* (Cambridge, CUP: 2012) 64, 69.

<sup>112</sup> Frédéric Mégret, 'International Law as Law' in James Crawford and Martti Koskenniemi, *The Cambridge Companion to International Law* (Cambridge, CUP: 2012) 64, 67.

<sup>113</sup> Report of the Study Group of the International Law Commission, 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law', 58th Session, A/CN.4/L.682, (13 April 2006), 34.

more recently.<sup>114</sup> But these kinds of functional hierarchies imply that questions of priority of rules are determined by the will of States. Therefore, these are not the kinds of hierarchy that are needed for the *jus post bellum* as integrity.

Some have argued that a hierarchical legal order is found in the UN Charter as the constitution for all the international community.<sup>115</sup> According to Fassbender, there is evidence that those who drew up the UN Charter intended it to function as a constitution that ‘grows and develops and expands as time goes on’.<sup>116</sup> In this regard, it ought to be considered as the material constitution of the international legal order because it ‘consists of those rules which regulate the creation of the general legal norms’.<sup>117</sup> The UN Charter does, indeed, contain the most important rule of the international legal order: the principle of sovereign equality.<sup>118</sup> Therefore, for the reasons explained above, this is an interpretive dead-end. Arguments in favour of viewing the UN Charter as the constitution of the international community quickly come up against the fact that the Charter entrenches the main obstacle towards such a community (the sovereign equality of States).

A better approach for hierarchy is to argue that international law is explained and justified by certain inalienable community interests.<sup>119</sup> In this regard, the international community is based on the ‘structuring power of norms’.<sup>120</sup> So-called ‘peremptory norms’

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<sup>114</sup> Report of the Study Group of the International Law Commission, ‘Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law’, 58th Session, A/CN.4/L.682, (13 April 2006), 125.

<sup>115</sup> Bardo Fassbender, ‘The UN Charter as Constitution of the International Community’ 36 *Columbia Journal of Transnational Law* (1998) 531.

<sup>116</sup> Bardo Fassbender, ‘The UN Charter as Constitution of the International Community’ 36 *Columbia Journal of Transnational Law* (1998) 531.

<sup>117</sup> Hans Kelsen, *General Theory of Law and State* (Cambridge, Harvard University Press: 1945), 124.

<sup>118</sup> UN Charter, (signed 24 October 1945, entered into force 24 October 1945) 1 UNTS XVI, art. 2(1).

<sup>119</sup> Christian Tomuschat, ‘Obligations Arising for States Without or Against Their Will’ 241 *Recueil des Cours* (1993) 195; Bruno Simma, ‘From Bilateralism to Community Interest in International Law’ 250 *Recueil des Cours* (1999) 217; Erika de Wet, ‘International Constitutional Order’ 55 *International and Comparative Law Quarterly* (2006) 51; Monika Hakimi, ‘Constructing an International Community’ *American Journal of International Law*, (2017) 1, available online doi:10.1017/ajil.2017.22.

<sup>120</sup> Bruno Simma, ‘From Bilateralism to Community Interest in International Law’ 250 *Recueil des Cours* (1999) 217.

are supposed to sit at the top of the normative hierarchy.<sup>121</sup> States have explicitly accepted the existence of these fundamental norms in international law.<sup>122</sup> Article 53 of the Vienna Convention asserts that a treaty will be void ‘if, at the time of its conclusion, it conflicts with a peremptory norm of general international law’.<sup>123</sup> So, for Orakhelashvili, ‘[p]eremptory norms prevail not because the States involved have so decided but because they are intrinsically superior and cannot be dispensed with through standard inter-State transactions.’<sup>124</sup> In turn Cassese argued, ‘these peremptory norms have a rank and status superior to those of all the other rules of the international community’.<sup>125</sup> Similarly, the ILC Study on Fragmentation commented that ‘the practice of international law has always recognized the presence of some norms that are superior to other norms...’<sup>126</sup> In *Furundžija*, the ICTY accepted that the prohibition of torture ‘has evolved into a peremptory norm or *jus cogens* [...] a norm that enjoys a higher rank in the international hierarchy than treaty law and even, “ordinary” customary rules.’<sup>127</sup>

These superior norms can be thought of as norms of ‘international public order’.<sup>128</sup> The concept of public order norms is recognized as a matter of necessity in all domestic legal systems.<sup>129</sup> They have been recognised as an indispensable instrument of the ‘interpretation, application and development’ of all law by the International Court of Justice.<sup>130</sup> From the perspective of the *jus post bellum* as integrity, these norms could be identified as the

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<sup>121</sup> Alexander Orakhelashvili, *Peremptory Norms in International Law* (New York, OUP: 2006) 8.

<sup>122</sup> Vienna Convention on the Law of Treaties, (adopted 23 May 1969, entered into force 27 January 1980), UNTS 1155, art. 53. The core rules on treaty interpretation are binding on all States as a matter of customary international law, see *Case Concerning the Dispute Regarding Navigational and Related Rights* (Costa Rica v Nicaragua), Judgment of 13 July 2009, General List No 133, para 47.

<sup>123</sup> Vienna Convention on the Law of Treaties, (adopted 23 May 1969, entered into force 27 January 1980), UNTS 1155, art. 53.

<sup>124</sup> Alexander Orakhelashvili, *Peremptory Norms in International Law* (New York, OUP: 2006), 8.

<sup>125</sup> Antonio Cassese, *International Law* 2nd Edition, (New York, OUP: 2005) 199.

<sup>126</sup> Report of the Study Group of the International Law Commission, ‘Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law’, 58th Session, A/CN.4/L.682, (13 April 2006), 167.

<sup>127</sup> *Prosecutor v. Anto Furundžija*, (Judgment) 10 December 1998, Case No. IT-95-17/1, Trial Chamber II, 260.

<sup>128</sup> Alexander Orakhelashvili, *Peremptory Norms in International Law* (New York, OUP: 2006), 9.

<sup>129</sup> Although the content and scope of such public order provisions do not neatly overlap, see Alexander Orakhelashvili, *Peremptory Norms in International Law* (New York, OUP: 2006), 11.

<sup>130</sup> See *Guardianship of Infants*, (Separate Opinion of Judge Lauterpacht), I.C.J. Reports, (1958) 456.

foundational norms of the international political morality. The expansive notion of the *jus post bellum* as integrity may require that States interpret post-conflict law according to a scheme of principles that is consistent with these *jus cogens* norms. The potential for the disciplining rule of integrity is related to the superior/inferior character of rules in a vertical legal order. As Orakhelashvili has argued, '[t]he superior rules determine the frame within which the inferior rules can be valid, while the inferior rules must comply with the content of superior rules'.<sup>131</sup> Therefore, for the purposes of the *jus post bellum* as integrity, and the existence of a community of principle, the necessary step is to identify the norms and their effects.

Necessarily, these norms cannot be identified by State consent. The entire point of the *jus cogens* doctrine is that they are not dependent on the consent of States. In Dworkin's theory, associative obligations are the consequences of the political morality of the community. Thus, *jus cogens* norms are those which protect community interests and from which derogation is prohibited. Orakhelashvili argues that in order to qualify as *jus cogens* a norm must 'safeguard interests transcending those of individual States' and that they have a 'moral or humanitarian connotation'.<sup>132</sup> The importance of these norms must be identified by the categorization of their breach as 'so morally deplorable as to be considered absolutely unacceptable by the international community as a whole...'<sup>133</sup> A tentative list that has received academic and judicial support would include: the prohibition of the use of force, the principle of self-determination, fundamental human rights, and most of humanitarian law.<sup>134</sup> In the *Barcelona Traction* case, the ICJ distinguished between an obligation that a State has to another State, and obligations which a State owes 'towards the international community' as

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<sup>131</sup> Alexander Orakhelashvili, *Peremptory Norms in International Law* (New York, OUP: 2006), 9

<sup>132</sup> Alexander Orakhelashvili, *Peremptory Norms in International Law* (New York, OUP: 2006) 51.

<sup>133</sup> Alexander Orakhelashvili, *Peremptory Norms in International Law* (New York, OUP: 2006) 51.

<sup>134</sup> Ian Brownlie, *Principles of Public International Law*, 8th Edition, James Crawford (ed.) (New York, OUP: 2012) 595.



a whole'. As Brownlie notes, the list of norms it gave bears similarities with the *jus cogens* norms. It asserted,

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.<sup>135</sup>

In theoretical terms, if these norms are taken as the basis of a community of principle, Ronald's interpretation of the law might be measured by how coherent it is with these norms. This would be consistent with an expansive version of the *jus post bellum* as integrity. Her references to the principles of peace, local ownership and responsibility could be explained and justified as reflecting the morality of the international community.

States might agree that some norms are important. However, this does not say anything about why States think that they are important. The history of the negotiations surrounding the Vienna Convention demonstrates that many States (mostly Western) were against the creation of *jus cogens* norms.<sup>136</sup> It was clear that once it was accepted (in the law of treaties) that certain norms could not be derogated from, that there would be important repercussions for general international law.<sup>137</sup> Perhaps for this reason, States have not yet referred to *jus cogens* norms in an attempt to resolve a legal dispute.<sup>138</sup> This damages their value as a sign that the international community is a community of principle. The very point of identifying moral values of a Dworkinian community is so that they are then invoked in the resolution of disputes. Cassese argues that States 'hesitate to raise crucial issues of

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<sup>135</sup> *Barcelona Traction*, Second Phase, I.C.J. Reports, (1970), §34; see also a similar list in the Report of the Study Group of the International Law Commission, 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law', 58th Session, A/CN.4/L.682, (13 April 2006), §33.

<sup>136</sup> Antonio Cassese, *International Law* 2nd Edition, (New York, OUP: 2005) 200.

<sup>137</sup> Ian Brownlie, *Principles of Public International Law*, 8th Edition, James Crawford (ed.) (New York, OUP: 2012) 603.

<sup>138</sup> Antonio Cassese, *International Law* 2nd Edition, (New York, OUP: 2005) 200.

alleged deviance from the basic values accepted in the world community'.<sup>139</sup> In this way, they remain a 'potentiality' rather than a fundamental part of the international legal order. States prefer to act according to the 'bilateralist' paradigm. Although some norms are considered more important, therefore, the rudimentary nature of the international legal order means that there are many doubts about the scope and effects of the *jus cogens* norms. There is still an unresolved tension between a legal order that protects a diversity of beliefs and one that proposes the notion that some values do transcend borders.<sup>140</sup>

The *jus cogens* norms demonstrate a potential in terms of Ronald's more expansive interpretation of the *jus post bellum* as integrity. But the relative operational weakness of the *jus cogens* norms means that it is still too ambitious, from a theoretical and practical perspective, to argue that States are *legally bound* by the principle of integrity. The associative obligations between States would need to be much stronger for Dworkin's theory to be a potential explanation and justification of international law. Ronald's interpretation of the *jus post bellum* as integrity cannot be founded on a descriptive theory of community morality. The *jus post bellum* as integrity provides a normative argument to interpret the law in a way that makes it coherent with other post-conflict States and the international legal order as a whole. In truth, this would almost certainly be difficult task. The lack of an authoritative interpreter at the centre of the international legal system suggests that the rulebook community version is to be preferred as an explanation of the international society of States. This, however, does not deny the normative power of the *jus post bellum* as integrity as a rule that urges interpretive coherence across different communities in respect of international legal norms. Further, none of the above is to deny that a rulebook community may produce non-legal norms with certain constraining effects. As mentioned in chapter 2,

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<sup>139</sup> Antonio Cassese, *International Law* 2nd Edition, (New York, OUP: 2005) 210.

<sup>140</sup> Frédéric Mégret, 'International Law as Law' in James Crawford and Martti Koskeniemi, *The Cambridge Companion to International Law* (Cambridge, CUP: 2012) 64, 67.

Lowe argues that international law produces ‘interstitial norms’ which are secondary and parasitic on the primary norms of the system.<sup>141</sup> Interstitial norms, although not legally binding, can help to identify the law as a matter of interpretation and the resolution of conflicts. Integrity could be presented as an interstitial norm. States may be legally bound (in the Dworkinian sense) to pursue integrity. They can rely on the principle in order to resolve conflicts. It may also have some use for practitioners, in identifying post-conflict law, and as expressing a desire to negotiate and implement post-conflict law according to an appealing interpretation of the global community. This could be understood as the ‘expressive’ function of ‘law as integrity’.

#### **6.3.2.4 Summary: From ‘right answers’ to ‘expressive integrity’**

Alex Schwartz has argued that law as integrity is not only about generating the right answers. It also can be useful to think of the *jus post bellum* as integrity in terms of fostering a culture of a ‘community of principle’.<sup>142</sup> Dworkin argued that if legal actors understand themselves as acting in a community of principle they can ‘strive to improve [their] institutions in that direction’.<sup>143</sup> Schwartz argues that this is possible even in divided societies.<sup>144</sup> This depends on ‘public interpreters’ focusing on the ‘expressive value’ of integrity rather than its capacity to ‘generate right answers’.<sup>145</sup> This has clear implications for Gallen’s more limited version of integrity *within* a legal system. It suggests that if Ronald accepts integrity then a divided

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<sup>141</sup> Vaughan Lowe, ‘The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?’ in Michael Byers (ed.) *The Role of Law in International Politics* (New York, OUP: 2000) 207.

<sup>142</sup> Alex Schwartz, ‘Patriotism or Integrity? Constitutional Community in Divided Societies’ 31 *Oxford Journal of Legal Studies* (2011) 503, 518.

<sup>143</sup> Ronald Dworkin, *Law’s Empire*, (Portland, Oregon, Hart Publishing: 2006) 215; Alex Schwartz, ‘Patriotism or Integrity? Constitutional Community in Divided Societies’ 31 *Oxford Journal of Legal Studies* (2011) 503.

<sup>144</sup> Alex Schwartz, ‘Patriotism or Integrity? Constitutional Community in Divided Societies’ 31 *Oxford Journal of Legal Studies* (2011) 503. Though see Dworkin’s doubts in that regard, Ronald Dworkin *Law’s Empire*, (Portland, Oregon, Hart Publishing: 2006) 208, n. 24.

<sup>145</sup> Alex Schwartz, ‘Patriotism or Integrity? Constitutional Community in Divided Societies’ 31 *Oxford Journal of Legal Studies* (2011) 503.

Colombia can be pushed towards a community of principle. The assumption that she is acting as part of a community of principle provides for the improvement of institutions and this pushes a divided community towards a community of principle. Here, integrity takes on a constructivist tone in terms of the relationship between norms and practices. The norm (integrity) is strengthened by the practice. But, in turn, the strengthening norm drives and directs the same practice. If Ronalda self-identifies as a member of a community of principle, this will affect her practice, which will in turn create those institutions and norms which are constitutive of a community of principle.<sup>146</sup> Dworkin's thesis, in broad terms, is that integrity is what law *is* when law is done well.

According to Schwartz, this is one way that the expressive function of integrity can help overcome divisions in divided societies. As an expressive concept, the *jus post bellum* as integrity may move post-conflict States towards the equal treatment of its citizens. The notion of integrity encapsulates equal treatment of citizens. According to this view, integrity rather than 'norm-identification' can be understood as a concept or norm that is useful for 'norm-generation'.

This may also help the notion of the *jus post bellum* as integrity from the perspective of international law. From the perspective of international law, the problem is that there are no public interpreters accepted as valid for *all* the community. As explained in chapter 5, Ronalda could be considered as carrying out a dual role, active in domestic and international legal orders. Thus, she may be considered as a public interpreter for the purposes of the international society. This approach means that there is an overwhelming proliferation of such interpreters in international society. One difficulty, therefore, is to ascertain which values make the international society the 'best' for interpretive purposes and how this is to be ascertained authoritatively. This does not mean that all agreement is impossible. To the

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<sup>146</sup> See for a review of constructivism in International Relations theory, Christian Reus-Smit, 'Constructivism', in Scott Burchill and Andrew Linklater (eds.), *Theories of International Relations*, 5th Edition, (Basingstoke, Palgrave Macmillan: 2013) 217.

extent that transnational peace-making communities can agree on certain fundamental human rights requirements, then an interpretive method which attempts to find principled coherence with ‘global community’ values may ‘steer’ a community towards the protection of those same values. In this limited sense, integrity may be a useful ‘chimera’; relatively implausible as a matter of descriptive theory, but alluring and useful in normative terms nonetheless.

#### **6.4 Concluding Remarks**

This chapter has evaluated two challenges to the *jus post bellum* as integrity. In the first case, Fish’s critique was found less than convincing. Interpretation in law is not only about the subjective intentions of the interpreter. There is an extent to which the object that is being interpreted also constrains the possible avenues of interpretation. It is theoretically possible to describe this dynamic as ‘integrity’ in post-conflict law *within* the Colombian State and *across* post-conflict States in respect of the norms of international law.

The more ambitious characterization of integrity as descriptive of international legal order runs into problems. It may mean simply that over time, certain norms can emerge from a repeated practice. Thus, most post-conflict situations may reproduce similar responses to the issues that arise in transitional justice. In turn, these responses can strengthen a particular set of post-conflict norms, perhaps, the ‘norm of integrity’ in post-conflict law. Importantly, this is not ‘law’ in the traditional positivist sense. Instead, integrity can function as a normative lens that practitioners may adopt in approaching the identification of post-conflict law.

The Dworkinian system was not designed for a horizontal association of States. The lack of a central authoritative interpreter means that an interpretive approach to international law is still ‘under construction’ at this stage in the development of global and transnational regulation. However, introducing issues of value and purpose directly into the interpretation

of the law is not necessarily likely to reduce the legitimacy for law in international society. It is true that States assign a central role to the principle of sovereign equality. This expresses a commitment to bounded disagreement between equal sovereigns. However, the law is never static. Certain values, especially in international criminal law, are difficult to subject to a cultural relativist critique. No State would argue against the prohibition of genocide, war crimes, and crimes against humanity. Nevertheless, international society remains fundamentally different from domestic society. This is important in terms of the enforcement, scope, interpretation and application of the accepted rules. The introduction of substantive moral concerns into the interpretation of international law must be done carefully lest the potential of international law in regulating international relations and internal relations is damaged. There is no evidence that the international society of States is moving towards a cosmopolitan community.<sup>147</sup> Yet, this does not mean that the wider interpretive community should not project core values into the heart of the interpretation of international law. Is it so controversial to say, that when States agree to a set of norms, they may also be said to agree to the principles which best explain those norms? To answer ‘no’ is to accept that a Dworkinian vision of international law (and post-conflict law) is more plausible than the traditional positive conceptualization of international law would allow.

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<sup>147</sup> Anne Marie-Slaughter, ‘The Return of Anarchy?’, *Journal of International Affairs* (March 2017) available online: <http://content.ebscohost.com/ContentServer.asp?T=P&P=AN&K=124139955&S=R&D=buh&EbscoContent=dGJyMMvI7ESeprI40dvuOLCmr0%2BepRVsK64SLeWxWXS&ContentCustomer=dGJyMPGrt0qr7VKuePfgeyx44Dt6fIA> (last accessed 15 August 2017)

## **CHAPTER 7: SITUATING THE *JUS POST BELLUM* AS INTEGRITY IN THE INTERNATIONAL LEGAL ORDER**

### **7.1 Introduction**

This thesis asks whether the *jus post bellum* is a useful concept for practitioners. The intention was to decide whether or not it is even worth international lawyers discussing the concept any further. In order to complete the answer to this question, this chapter, fleshes out how a Dworkinian approach to international law fits with different approaches to international legal scholarship. The aim of the chapter is to demonstrate that a Dworkinian approach to the *jus post bellum* fits with other existing approaches to the interpretation of international law. This raises the plausibility of the *jus post bellum* as integrity as a concept of international law. It also helps to answer the overall thesis question. If the *jus post bellum* as integrity fits within these alternative visions, then it is worth discussing and it may be useful for practitioners in resolving interpretive difficulties. Thus, this helps to reinforce the argument made in the previous chapters which asserts that a Dworkinian conceptualization of post-conflict law is not altogether implausible. Fundamentally, how one understands the nature of the international legal order affects the evaluation of the *jus post bellum* as integrity in international law. There are several ways of understanding international law which differ from the ‘mainstream’ view explained in section 2.1.2. Neil Walker calls these competing ‘meta-narratives’.<sup>1</sup> Some of these interpretations of international law are quite well suited to the Dworkinian approach. Among the approaches that Walker mentions, the most important for present purposes are: ‘natural law’ (section 7.2), ‘liberal international law’ (section 7.3) and ‘international law as a project of global administration’ (section 7.4). These three

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<sup>1</sup> Neil Walker, ‘Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders’ 6 *International Journal of Constitutional Law* (2008), 373.

approaches are good fits for the Dworkinian version of international law (and post-conflict law). An evaluation of how well they fit and why helps to explain the relevance of the *jus post bellum* as integrity for practitioners and others working with international law.

This chapter describes these different approaches and then evaluates how the *jus post bellum* as integrity might be understood from their different perspectives. As evident from chapters 4, 5 and 6, the *jus post bellum* as integrity is capable of being read as urging coherence within a State (Gallen's theory) or as between States (more expansive, global integrity). This section emphasizes the latter. Ronalda's attempt to find interpretive coherence between post-conflict Colombia and post-conflict Sierra Leone in child soldier accountability may be required by these different approaches to international law. However, these different approaches to international law present Ronalda's obligation to find coherence in different ways.

## **7.2. Natural Law and the *jus post bellum***

Natural law has been the subject of human investigation for over two millennia.<sup>2</sup> It should not be surprising, therefore, that a number of versions of natural law exist.<sup>3</sup> It has been defined negatively as that part of the law which is 'not laid down by the human authority'.<sup>4</sup> On the other hand, it can be defined ('positively') as a body of norms and principles that are deducible from 'nature, reason, or the idea of justice'.<sup>5</sup>

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<sup>2</sup> For a general overview see M.D.A. Freeman (ed.) *Lloyd's Introduction to Jurisprudence* (London, Sweet & Maxwell: 2008), chapter 3; see also Neil MacCormick, 'Natural Law Reconsidered' 1 *Oxford Journal of Legal Studies* (1981) 99.

<sup>3</sup> Though natural law theory holds that the natural law *itself* is universal, valid and in force regardless of human attempts to recognise and elucidate its principles, see Stephen Hall, 'The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism', 12 *EJIL* (2001) 269, 270.

<sup>4</sup> Alexander Orakhelashvili, 'Natural Law and Justice' *Max Planck Encyclopaedia of Public International Law* (available at: [www.mpepil.com](http://www.mpepil.com)), article last updated August 2007 (Oxford, OUP: 2015).

<sup>5</sup> Alexander Orakhelashvili, 'Natural Law and Justice' *Max Planck Encyclopaedia of Public International Law* (available at: [www.mpepil.com](http://www.mpepil.com)), article last updated August 2007 (Oxford, OUP: 2015).



Early international lawyers, such as de Vitoria (see section 2.1.2) thought that international law (the *jus gentium*) could be derived from the natural law (*jus naturale*) through the use of ‘right reason’.<sup>6</sup> This may, at least in part, be owing to the existence of a long and continuous tradition of natural law thinking that stretched back to classical Greek and Roman civilizations.<sup>7</sup> However, the turn towards an objective and scientific approach in the 19th century began to separate international law from its natural law origins. Thus, by the 20th century, the positivist school of international law found the law in the acceptance of norms by States (see section 2.1.2). The classic statement of this approach to law is from the 1927 *S.S. Lotus Case* where the Permanent Court of International Justice decided that ‘the rules of law binding upon States...emanate from their own free will...’ and that ‘[r]estrictions on the independence of States cannot ... be presumed’.<sup>8</sup> Thus, States were free to act as they liked unless a rule had come into existence that prohibited them from so acting.

Nevertheless, Stephen Hall and others have argued that this positivism does not provide a ‘complete account of legal reality’ in the international legal order.<sup>9</sup> Instead, the precise nature, essence and scope of natural law norms change according to the ‘sentiment’ of the modern epoch.<sup>10</sup> Thus, a broadly positivist approach to modern international law does not have to eschew all naturalistic language which can endow it with a certain humanist spirit.<sup>11</sup> In this respect, natural law ideas can be considered as a ‘gloss’ on the positive international law.<sup>12</sup> As Hall argues, ‘[t]he positive law lacks coherence and authority without the natural

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<sup>6</sup> Anthony Anghie, ‘Francisco de Vitoria and the Colonial Origins of International Law’, 5 *Social and Legal Studies* (1996) 321, 325.

<sup>7</sup> Stephen Hall, ‘The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism’, 12 *EJIL* (2001) 269.

<sup>8</sup> *Case of the S.S. “Lotus”* (France vs. Turkey) PCIJ 1927 (series A) No. 10, 18.

<sup>9</sup> Stephen Hall, ‘The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism’, 12 *EJIL* (2001) 269, 307.

<sup>10</sup> Alexander Orakhelashvili, ‘Natural Law and Justice’ *Max Planck Encyclopaedia of Public International Law* (available at: [www.mpepil.com](http://www.mpepil.com)), article last updated August 2007 (Oxford, OUP: 2015).

<sup>11</sup> Robert Cryer, ‘International Criminal Tribunals and the Sources of International Law - Antonio Cassese’s Contribution to the Canon’, 10 *Journal of International Criminal Justice* (2012).

<sup>12</sup> A useful analogy is the emergence and operation of the law of equity upon the administration of the common law of England and Wales.

law, and the natural law lacks most of its ability to coordinate human society effectively...without the positive law.’<sup>13</sup>

As an example, the development of international criminal law, especially through judicial opinions in cases before international tribunals, has depended on the persuasiveness of natural law ideas.<sup>14</sup> For example, Judge Cassese in *Tadić* argued that

A State-sovereignty-oriented approach has been gradually supplanted by a human-being oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well.<sup>15</sup>

Judge Cassese did not actually ground his opinion in humanitarian principles but in the emergence of rules in customary law and treaty law.<sup>16</sup> However, in several places, the judgment refers to ‘the elementary rights [or considerations] of humanity’, which are recognized as ‘the mandatory minimum for conduct in armed conflicts of any kind’.<sup>17</sup> Judge Cassese’s opinion never strays from the positivist approach in finding rules in the practice of States. However, the tone of the judgment resonates with a natural law approach that finds the law as it is very close to the law as it ought to be.<sup>18</sup>

International law’s ‘natural law origins’ are also evident in the field of international humanitarian law. The Martens clause was inserted into the Preamble of The Hague Regulations of 1899 and 1907 on conduct during armed conflict. It States that.

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<sup>13</sup> Stephen Hall, ‘The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism’, 12 *EJIL* (2001) 269, 305.

<sup>14</sup> Robert Cryer, ‘International Criminal Tribunals and the Sources of International Law - Antonio Cassese’s Contribution to the Canon’, 10 *Journal of International Criminal Justice* (2012).

<sup>15</sup> *Prosecutor v. Dusko Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), IT-94-1-AR72, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, 2 October 1995, §97.

<sup>16</sup> *Prosecutor v. Dusko Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), IT-94-1-AR72, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, 2 October 1995, §98ff.

<sup>17</sup> *Prosecutor v. Dusko Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), IT-94-1-AR72, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, 2 October 1995, §129.

<sup>18</sup> See Robert Cryer, ‘International Criminal Tribunals and the Sources of International Law - Antonio Cassese’s Contribution to the Canon’, 10 *Journal of International Criminal Justice* (2012) for a fuller account of Judge Cassese’s approach.

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilised nations, from *the laws of humanity, and the requirements of the public conscience* [my emphasis].<sup>19</sup>

This clause has been reiterated in a number of international treaties (such as the Geneva Conventions and its Additional Protocols) and it has been incorporated into a number of military manuals.<sup>20</sup> The reference to the ‘laws of humanity’ has been adapted and is now usually referred to as the ‘principles of humanity’.<sup>21</sup> Thus, as Mégret has argued, this ‘quasi-metaphysical’ norm in international humanitarian law is a signal that international law, as law, oscillates between the positivist method and a certain progressivity in the ‘basic values’ that any system of law protects.<sup>22</sup> This view of international law as based on basic values can be termed ‘idealist’.<sup>23</sup> On this view, international law is law because ‘it must be’.<sup>24</sup> The obligation of lawyers is to be ‘true’ to the idea of law.<sup>25</sup> So, for example, in relation to sovereign equality, idealist discourse posits something higher than the sovereignty of the State as providing the legitimacy and the ‘right to sovereignty’.<sup>26</sup>

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<sup>19</sup> Preamble, Hague Convention II, with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 29 July 1899, available online, see the ICRC database, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=9FE084CDAC63D10FC12563CD00515C4D> (last accessed 17 August 2017)

<sup>20</sup> Theodor Meron, ‘The Martens Clause, Principles of Humanity, and Dictates of Public Conscience’, 94 *American Journal of International Law* (2000) 78.

<sup>21</sup> Theodor Meron, ‘The Martens Clause, Principles of Humanity, and Dictates of Public Conscience’, 94 *American Journal of International Law* (2000) 78, 79.

<sup>22</sup> Mégret F., ‘International Law as Law’ in James Crawford and Martti Koskeniemi (eds) *The Cambridge Companion to International Law* (Cambridge, CUP: 2012), 64, 69.

<sup>23</sup> This is more owing to the power of ‘ideas’ rather than ‘ideals’, see Mégret F., ‘International Law as Law’ in James Crawford and Martti Koskeniemi (eds) *The Cambridge Companion to International Law* (Cambridge, CUP: 2012), 64, 75.

<sup>24</sup> Mégret F., ‘International Law as Law’ in James Crawford and Martti Koskeniemi (eds) *The Cambridge Companion to International Law* (Cambridge, CUP: 2012), 64, 75.

<sup>25</sup> Mégret F., ‘International Law as Law’ in James Crawford and Martti Koskeniemi (eds) *The Cambridge Companion to International Law* (Cambridge, CUP: 2012), 64, 75.

<sup>26</sup> Anne Peters, ‘Humanity as the A and Ω of Sovereignty’, 20 *EJIL* (2009), 513.

In terms of the *jus post bellum*, an idealist approach would equally emphasize that regardless of the ‘posited’ rules and principles that are relevant during transitions from conflict to peace, a body of ‘elementary’ or ‘basic’ principles of humanity regulate what ought to happen in relation to every issue. In Colombia, this has been accepted by States insofar as the FARC-EP and the government decided to include a version of the Martens clause in the Preamble to the peace agreement. They agree explicitly that in matters not mentioned in the peace agreement, ‘the individual remains under the protection of the principles of humanity and the exigencies of public conscience’.<sup>27</sup> It is not yet clear what scope or effect this provision will have. It may be merely a symbolic recognition on both sides that they intend to proceed in good faith and that they intend to cooperate. But a natural law approach to the *jus post bellum* might interpret the provision as evidence that the parties accepted that the peace agreement did not exhaust their rights and obligations which derived also from ‘elementary principles of humanity’ or ‘justice’.

This link between a conception of justice and the law brings a natural law/idealist approach to the *jus post bellum* as integrity very close to the just war theory attempts to discuss the law of transitions (see section 2.2). Each defines the ‘*jus*’ in a way that expands its meaning beyond ‘positive’ law and towards a substantive theory of justice derived from the basic ‘principles of humanity’. These may be linked to a particular political or moral philosophy, so for Orend, post-conflict law ought to include moral prerogatives derived from Kant’s categorical imperative.<sup>28</sup> For May, the law ought to develop along a body of post-conflict principles which are regulated by the overarching principle of proportionality, and/or *meionexia*.<sup>29</sup> In this regard, the *jus post bellum* as integrity posits ‘integrity’ as the

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<sup>27</sup> Preamble, ‘Final Agreement for the End of Conflict and the Construction of a Stable and Long Lasting Peace’, (hereafter the Peace Agreement) signed on 24 November 2016 and ratified by Congress 1 December 2016. The full text of the peace agreement is available at: <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf>.

<sup>28</sup> Brian Orend, ‘Kant’s Just War Theory’ 37 *Journal of the History of Philosophy* (April 1999) 2, 323.

<sup>29</sup> Larry May, *After War Ends* (New York, CUP: 2012).

disciplining moral value upon which post-conflict law must be based. This approach to international law emphasizes ‘universal reason’ as the source of legal obligations and it might be susceptible to the same criticisms raised before in section 2.1.2. Integrity may make sense to international lawyers well-versed in the jurisprudence taught in Anglo-American law schools. However, it may not resonate with international lawyers from different (non-Western) legal traditions.

The discussion in the previous chapter, in relation to Dworkinian principles of a community morality, may be reframed as a search for a ‘natural law’ approach to international legal order. Dworkinian principles are positivist in the sense that they emerge from the practice of communities. However, they are also basic moral principles of a particular community in the sense that they are identified through constructive interpretation. A Dworkinian international law means a moral reading of international law. Therefore, the identification of basic values is bound up with a theory of a community morality that shows that community’s practice in its ‘best’ light.

But rather than emphasizing such ‘higher’ law, the natural law approach to the *jus post bellum* might also emphasize the ‘lower’ law. In this respect, the *jus post bellum* as integrity could also be understood as embodying those *minimal* requirements that would make post-conflict law acceptable as a body of law. A natural law approach could also emphasize that the *jus post bellum* embodies those norms which are fundamental to the perception of post-conflict law as law. Lon Fuller argues that these principles could be ‘like the natural laws of carpentry, or at least those laws respected by a carpenter who wants the house he builds to remain standing and serve the purpose of those who live in it’.<sup>30</sup> This view of a ‘procedural’ natural law would emphasize that the *jus post bellum* had to commit to a certain morality in the law and legal system. It could be termed the morality of interpretation.

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<sup>30</sup> Lon Fuller, *The Morality of Law* (1969), excerpt in M.D.A. Freeman (ed.) *Lloyd’s Introduction to Jurisprudence* (London, Sweet & Maxwell: 2008), 163ff.

Integrity, the Dworkinian disciplining rule of interpretation, could form a part of this bigger moral picture of post-conflict law.

The *jus post bellum* as integrity, urges that the rules applicable after conflict be complemented by a certain mind-set. This mind-set emphasizes procedural fairness, interpretive coherence with international law and a commitment to humanity over the immediate requirements of States. In this regard, the best prospect for the development of the Dworkinian *jus post bellum* according to a natural law framework is to focus on those aspects of international law that already do mix natural law ideas into the positive law. In relation to transitional criminal justice, for example, this approach could then try to reconcile the ‘naturalistic elements’ in international law with the concept of integrity. In particular, this could include the principle that all individuals everywhere are entitled to equal concern and respect in terms of the constraining norms of international law. Thus, States, and post-conflict actors, must endeavour to find interpretive coherence across post-conflict situations in order to explain and justify the binding moral force of international law as a whole.

### **7.3 Liberal international law**

The previous section ended by discussing the notion of the equal concern and respect for individuals. This conclusion also links the *jus post bellum* as integrity to a tradition of ‘liberal international law’. It should be noted that ‘there is a great deal of disagreement about what exactly one has to believe in order to qualify’ as a liberal.<sup>31</sup> Indeed, ‘[s]elf-declared liberals’ have supported a wide and divergent variety of political missions throughout political history.<sup>32</sup> Therefore, it is safer to theorise about *a* theory of liberal international law

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<sup>31</sup> Stephen Mulhall and Adam Swift, *Liberals and Communitarians*, 2nd Edition, (Blackwell Publishers, Oxford: 1996), ‘Preface’, xii.

<sup>32</sup> Duncan Bell, ‘What is Liberalism?’, 42 *Political Theory* (2014) 682.

rather than *the* theory of liberal international law.<sup>33</sup> A general distinction must be made between two ways of understanding the relationship between liberalism and international law.<sup>34</sup> Gerry Simpson has termed these ‘charter liberalism’ and ‘liberal anti-pluralism’.<sup>35</sup>

### **7.3.1 Two Liberalisms**

Charter liberalism reasserts the concept of sovereignty and the foundational principle of sovereign equality which underpins the international legal order.<sup>36</sup> It has its origins in the initial reluctance of the UN to question the ‘democratic or humanitarian credentials’ of its members.<sup>37</sup> Even today, the only formal requirement for membership of the UN is that a State be a ‘peace-loving’ State.<sup>38</sup> The internal political structure of the State is not open for analysis in terms of its membership of the organisation. It has little impact on their international legitimacy of a State *qua* States once they have been recognized as such. For this reason, there is no discussion about whether North Korea is a State for the purposes of international law despite their illiberal domestic regimes. As Simpson argues, the principle of sovereign equality reflects a liberal philosophy of ‘tolerance, diversity and openness’ in international relations.<sup>39</sup> In terms of international relations theory, it fits well with the ‘realist’ view that international society is anarchic and that law is instrumental of State interests.<sup>40</sup>

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<sup>33</sup> Anne-Marie Slaughter, ‘A Liberal Theory of International Law’, 94 *ASIL Proceedings* (2000), 240.

<sup>34</sup> Gerry Simpson, ‘Two Liberalisms’, 12 *EJIL* (2001), 537.

<sup>35</sup> Gerry Simpson, ‘Two Liberalisms’, 12 *EJIL* (2001), 537.

<sup>36</sup> Benedict Kingsbury, ‘Sovereignty and Inequality’, 9 *EJIL* (1998) 599.

<sup>37</sup> *Membership Case*, ICJ Reports, (1948).

<sup>38</sup> Gerry Simpson, ‘Two Liberalisms’, 12 *EJIL* (2001), 537, 552.

<sup>39</sup> Gerry Simpson, ‘Two Liberalisms’, 12 *EJIL* (2001), 537, 539.

<sup>40</sup> Neil Walker, ‘Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders’ 6 *International Journal of Constitutional Law* (2008), 373.

Yet, as Kingsbury and Roth have argued, the principle of sovereign equality has come under attack in recent times.<sup>41</sup> According to Kingsbury, a commitment to certain aspects of ‘global public policy’ means that a certain pressure is put on the regulatory freedom of States.<sup>42</sup> He identifies a commitment to ‘markets, civil society, liberal peace, the rule of law, untrammelled communication, and transnationalism’ by way of illustration.<sup>43</sup> For Roth, this global public policy has led to the ‘erosion’ of the principle of sovereign equality.<sup>44</sup> This erosion of untrammelled sovereignty reflects the other relationship between ‘liberalism’ and international law which Simpson identifies as ‘liberal anti-pluralism’.

The *jus post bellum* as integrity could be interpreted as constraining interpretations of the law according to this anti-plural liberalism. Liberal anti-pluralism has its historical origins in the 19th century exclusion of non-Western States from the international legal community. More recently, a liberal anti-pluralist philosophy was the basis for scholarship that emerged in reaction to the end of the Cold War. An anti-plural liberalism asserts that the post-Westphalian legal order promotes, or perhaps requires, liberal democratic Statehood.<sup>45</sup> In an early example, Thomas Franck noted that in response to failed anti-democratic coups in Russia and Haiti, ‘the leaders of States constituting the international community vigorously asserted that *only* democracy validates governance’.<sup>46</sup> The key analytical shift is the focus on *individuals* as the central subject of international law rather than ‘States’. For example, Andrew Moravcsik has argued that international relations theory should recognise that ‘the

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<sup>41</sup> Benedict Kingsbury, ‘Sovereignty and Inequality’, 9 *EJIL* (1998) 599; Brad R. Roth, ‘Sovereign Equality and Non-Liberal Regimes’, in J. E. Nijman and W. G. Werner (eds.) *Netherlands Yearbook of International Law* (2012).

<sup>42</sup> Benedict Kingsbury, ‘Sovereignty and Inequality’, 9 *EJIL* (1998) 599, 600.

<sup>43</sup> Benedict Kingsbury, ‘Sovereignty and Inequality’, 9 *EJIL* (1998) 599, 600.

<sup>44</sup> Brad R. Roth, ‘Sovereign Equality and Non-Liberal Regimes’ in J. E. Nijman and W. G. Werner, (eds.) *Netherlands Yearbook of International Law* (2012), 25; though Roth notes that no replacement for the State-sovereign system has emerged.

<sup>45</sup> Thomas Franck, ‘The Emerging Right to Democratic Governance’, 86 *AJIL* (1992) 46.

<sup>46</sup> Thomas Franck, ‘The Emerging Right to Democratic Governance’, 86 *AJIL* (1992) 46, 47; see also Anne-Marie Slaughter, ‘International Law in a World of Liberal States’, 6 *EJIL* (1995) 503; Andrew Moravcsik, ‘Taking Preferences Seriously: A Liberal Theory of International Politics’, 51 *International Organization* (1997), 509; Susan Marks, ‘What has Become of the Emerging Right to Democratic Governance?’, 22 *EJIL* (2011), 507.



configuration of State preferences matters most in world politics'.<sup>47</sup> This view asserts that States are not 'opaque billiard balls' but instead 'collections of actors with concrete interests'.<sup>48</sup> Thus, liberal anti-pluralism in international law emerges from a socio-empirical claim in international relations theory about actual real-life 'State-to-State' interaction.

According to Anne-Marie Slaughter, accepting this socio-empirical claim should have great implications for how international lawyers understand their subject. In her view, international issues, which lawyers have become accustomed to seeing as 'State-to-State', ought to be reframed 'in terms of the interaction between individuals and specific government institutions'.<sup>49</sup> This is the essence of her theory of State 'disaggregation'.<sup>50</sup> A de-emphasis on 'States' allowed lawyers to re-focus on 'the individual human being' or 'humanity' as the primary subject of the international legal order.<sup>51</sup> This has important implications for questions such as why States obey international law because it redefines the notion of a 'State interest'.<sup>52</sup> But it can also have implications for the way positive State rights and obligations are interpreted. For example, fundamental principles of the international legal order such as sovereign equality have been open to an anti-plural re-interpretation. Anne Peters has argued that sovereignty is not only 'limited by human rights' but also 'from the outset determined and qualified by humanity'.<sup>53</sup> For Peters this means that sovereignty 'has a legal value *only to the extent* that it respects human rights, interests and needs [emphasis added]'.<sup>54</sup> This interpretation comes very close to a Dworkinian (or Lauterpachtian) reading of international law because it presupposes that the moral/political

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<sup>47</sup> Andrew Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics', 51 *International Organization* (1997), 509, 513.

<sup>48</sup> Jose Alvarez, 'Interliberal Law: Comment', 94 *American Society of International Law Proceedings* (2000) 249.

<sup>49</sup> Anne-Marie Slaughter, 'A Liberal Theory of International Law', 94 *ASIL Proceedings* (2000), 240, 241.

<sup>50</sup> Anne-Marie Slaughter, 'A Liberal Theory of International Law', 94 *ASIL Proceedings* (2000), 240, 241.

<sup>51</sup> Anne Peters, 'Humanity as the A and Ω of Sovereignty', 20 *EJIL* (2009), 513.

<sup>52</sup> See Eric Posner, 'International Law and the Disaggregated State', 32 *Florida State University Law Review* (2005) 797.

<sup>53</sup> Anne Peters, 'Humanity as the A and Ω of Sovereignty', 20 *EJIL* (2009), 513.

<sup>54</sup> Anne Peters, 'Humanity as the A and Ω of Sovereignty', 20 *EJIL* (2009), 513, 514.

value and the purpose of the rules are constitutive of their legal value. Thus, a theory of international law is only a part of a wider political theory of international morality. Therefore, on this reading, a State's right to non-intervention depends on the extent to which it follows the path of liberal democracy.

Of course, there are problems with this approach which will be dealt with below. Suffice it to mention here that Peters does not make clear how much a State must violate human rights norms before its sovereignty is lost. State-sponsored genocide may be a clear example of a loss of State sovereignty (and the corresponding shield of non-intervention).<sup>55</sup> However, on Peters' account, it is not clear why lesser violations of civil, political or socio-economic human rights would not also allow liberal intervention. It is also not clear how Peters accounts for the selectivity in the practice of States in terms of enforcing this version of anti-pluralism.

This anti-plural functional approach to sovereignty is evident in Gallen's version of the *jus post bellum*.<sup>56</sup> For Gallen, the 'principle of stewardship' is one of the foundational principles of the *jus post bellum*. He argues, however, that it 'is predicated on a conception of sovereignty that acknowledges that sovereignty is 'functional' and designed for the equal benefit and protection of the individual citizens of that society'.<sup>57</sup> Here, State-sovereignty is demoted from its primary place in the international legal order. Law is subject to an overarching interpretive calculus: international law must preserve the liberal principle of the equal treatment of human beings. If a State fails to observe the basic fundamental rights of individuals, its sovereignty is affected.

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<sup>55</sup> Though even State-sponsored genocide may be tolerated as in Darfur, Sudan, see Harry Verhoeven, Ricardo Soares de Oliveira and Madhan Mohan Jaganathan, 'To Intervene in Darfur, or Not: Re-examining the R2P Debate and Its Impact', 30 *Global Society* (2016) 21.

<sup>56</sup> James Gallen, 'Jus Post Bellum: An Interpretive Framework' in Carsten Stahn, Jennifer Easterday and Jens Iverson, (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014) 58, 65.

<sup>57</sup> James Gallen, 'Jus Post Bellum: An Interpretive Framework' in Carsten Stahn, Jennifer Easterday and Jens Iverson, (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014) 58, 75.

The emphasis on equality as the overarching legitimising meta-principle is a prerequisite of Dworkin's philosophy of law. In discussing legitimacy in government, Dworkin argues that two principles are relevant: the demonstrable 'equal concern for the fate of every person' (equal treatment) and full respect for the 'responsibility and right of each person to decide for himself how to make something valuable of his life' (liberty).<sup>58</sup> This is a liberal political philosophy which emphasizes the central role of the individual in questions of political legitimacy. Integrity, for Dworkin, was about increasing the equal treatment of individuals before the law. In eliminating the possibility for judicial discretion in adjudication, Dworkin sought to demonstrate how all legal actors are under an obligation to carry out their function in a way that maximizes the equal treatment of citizens. The idea that difficult decisions ought to be made according to a scheme of principles is Dworkin's answer to how best to think of equality in societies where disagreements are likely to be pervasive. It can, therefore, be argued that a Dworkinian version of the *jus post bellum* fits within (anti-plural) liberal international law.

The *jus post bellum* in this sense privileges the equal treatment of individuals in post-conflict trade-offs between peace and justice. In practice this means that the coercive authority of peace agreement provisions depend, and ought to depend, on their justification according to higher order principles of liberalism. However, this conception of the *jus post bellum* fits uneasily with the idea that local communities must design their own *jus post bellum*. This is owing to what has been discussed as an inevitable 'bottom-up resistance' which emerges from 'indigenous power structures'.<sup>59</sup> The liberal principles of the *jus post bellum* can be accommodated within the first conception of liberalism as political freedom and tolerance. Charter liberalism remains relevant insofar as the *jus post bellum* requires

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<sup>58</sup> Ronald Dworkin, *Justice for Hedgehogs*, (Cambridge: The Belknap Press of Harvard University Press, 2011) 1.

<sup>59</sup> Christine Bell, 'Of *Jus Post Bellum* and *Lex Pacificatoria* – What's in a Name?' in Carsten Stahn, Jennifer Easterday and Jens Iverson, (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014), 181, 203.

principles to be drawn from the political morality of the relevant community. An example from practice may be that for some transitional societies, post-conflict law may include the direct involvement of a religious authority. This seems ill-fitting with liberalism's avowed laicism.<sup>60</sup>

In Colombia, the Pope had been appointed (by the negotiating parties) as one of a five-member Selection Committee. This institution is, in turn, directed to appoint the members of a number of post-conflict institutions. These institutions will have a significant impact on the success or failure of the post-conflict peacebuilding process. They include the magistrates that will sit on the new Special Jurisdiction for Peace and those that will organise and administer the new Truth and Reconciliation Commission.<sup>61</sup> There is a strong affiliation for the Catholic Church felt by many ordinary Colombians. Yet, the idea that it should play some important role in defining the terms and parameters of international law in the context of transitional justice may sit uneasily with other liberals. It is compatible with a charter liberalism which supports a view of the *jus post bellum* that urges every transitional society to create its own *jus post bellum* institutions according to their own local culture.<sup>62</sup>

Thus, while the *jus post bellum* faces 'outwards' towards a supposed 'international community' it also faces 'inwards' towards the transitional society itself. These two dimensions of the *jus post bellum* create a tension which is difficult to resolve. For example, there may be practices and principles which are so illiberal (in the anti-pluralist sense), that the *jus post bellum* as integrity could not support them without losing a connection to Dworkin's theory. In a hypothetical situation, a particular community in Colombia may in good faith hold the principle that communities ought to physically abuse child soldier

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<sup>60</sup> See Eoin Daly, 'The Ambiguous Reach of Constitutional Secularism in Republican France: Revisiting the Idea of Laïcité and Political Liberalism as Alternatives', 32 *Oxford Journal of International Law* (2012) 583.

<sup>61</sup> It should be noted that the Pope has declined to participate, see (Spanish): <http://cnnespanol.cnn.com/2016/08/31/papa-francisco-declina-participar-en-seleccion-de-tribunal-de-paz-de-colombia/>

<sup>62</sup> James Gallen, 'Jus Post Bellum: An Interpretive Framework', in Carsten Stahn, Jennifer Easterday and Jens Iverson, (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014) 58, 69.

returnees as part of their reintegration into the community. This would not be acceptable for liberal theory even if it were repackaged as part of an ‘endogenous restoration programme’. This suggests that there are limits to the amount of local variation which is permitted by the *jus post bellum* as integrity. Even allowing for a ‘margin of appreciation’ among local communities, the *jus post bellum* as integrity is difficult to separate from a ‘thick’ liberal ethic that reflects a theory of justice drawn from Rawls’ and Dworkin’s political philosophy.

But if only liberal democratic values validate post-conflict governance then non-liberal democratic States enjoy less legal rights than post-conflict democratic States according to liberal international law. This amounts to promoting a view of post-conflict law that says: ‘Democracies do law better-especially with each other’.<sup>63</sup> It explicitly contradicts charter liberalism’s principle of tolerance and openness. According to Jose Alvarez, it amounts to placing a ‘standard of civilisation’ ethic over the sources of international law.<sup>64</sup> As a result, law can easily become a tool for powerful States in justifying unwanted (and repeated) pro-liberal democratic interventions (economic, military or cultural) in conflict, and post-conflict societies. Of course, Slaughter and others may argue that (anti-plural) liberalism is the foundation of the post-WWII international legal order as evidenced by the emphasis in the UN Charter on the protection of human rights. Since the end of the Cold War, the collapse of communism and the triumph of free market capitalism might also demonstrate that international society is converging on liberal democratic Statehood. This may be owing to the realisation by all States that peace between democracies is almost always assured.

However, there ought to be a more general unease in founding a theory of international law on a ‘liberal (anti-plural) / illiberal’ distinction. Firstly, the practice of self-declared beacons of liberalism makes the liberal/illiberal distinctly unstable and, subsequently,

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<sup>63</sup> Jose Alvarez, ‘Interliberal Law: Comment’, 94 *American Society of International Law Proceedings* (2000) 249.

<sup>64</sup> Jose Alvarez, ‘Interliberal Law: Comment’, 94 *American Society of International Law Proceedings* (2000) 249, 250.

susceptible to abuse. In this respect, it is only necessary to mention the atrocities of Abu Ghraib and the violations of human rights promoted by professional experts on detention and rendition. The liberal/illiberal dichotomy permits (powerful) self-declared liberal States to justify intervention in (less powerful) non-liberal States. Following on from the disaggregated State theory, this can occur in a number of ways. For example,

...legal professionals decide on retaliatory measures, pinpointing houses in Afghanistan, or persons in Yemen or Gaza, or [...] striking targets in the former Yugoslavia. The former reasonably clear anti-torture norm [...] is now being artfully dismantled by inventing new categories, such as ‘unlawful combatant’, and by invoking supreme necessity in the war on terror. Thus, the suspicion arises that ‘law’ might have become part of the problem rather than the solution...<sup>65</sup>

In terms of transitional justice, too strong a focus on anti-plural liberalism also leaves the *jus post bellum* as integrity open to critique on pragmatic terms. For example, a pragmatist from the international community would argue that too strong a focus on integrity in the peace agreement negotiations actually causes the conflict to drag on causing more loss of life.<sup>66</sup> This suggests that variations between peace agreements and post-conflict processes which are difficult to justify according to the principle of integrity may be permitted, or even required. In theory, therefore, each kind of liberal (charter and anti-plural) is likely to see a role for the *jus post bellum*. It is possible to situate the *jus post bellum* as either ‘charter’ or ‘anti-plural’ liberalism depending on the way the *jus post bellum* is ‘facing’: outwards towards a potential ‘international community’ or inwards towards the values of the transitional society itself.

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<sup>65</sup> Friedrich, Kratochwil, *The Status of Law in World Society*, (New York, CUP: 2014), 2.

<sup>66</sup> Anonymous, ‘Human Rights in Peace Negotiations’ 18 *Human Rights Quarterly* (1996) 249.

## **7.4 The *jus post bellum* as global administrative law**

A number of scholars have argued that the post-Westphalian system is characterized less by a pro-liberal democratic bias and more by the fact that law is created ‘beyond the State’.<sup>67</sup> The general argument is that the State has lost its place as the central site of legal authority. Instead, it has split into its ‘component parts’ each of which is part of ‘a larger, and often less formal, system of global law.’<sup>68</sup> For the *jus post bellum* as integrity, this may be relevant if the principles which shape peace agreements are understood as part of the ‘global administrative law’ project.<sup>69</sup> Thus, as Bell has argued, the *jus post bellum* might be regarded more as a ‘discursive legal project’ to be used by peace negotiators in the work of designing peace agreements.<sup>70</sup> This section explains how global administrative law imagines the post-Westphalian legal order. It evaluates how the *jus post bellum* fits into this version of ‘global law’. It ends with a critique of this version of the *jus post bellum* as integrity.

### **7.4.1 Legal Pluralism**

In descriptive terms, global administrative law relies on a theory of legal pluralism.<sup>71</sup> In 1981, Marc Galanter argued that ‘the relation of law to other normative orderings has been central

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<sup>67</sup> See Andreas Fischer-Lescano and Gunther Teubner, “Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law,” 25 *Michigan Journal of International Law* (2004) 999; William W. Burke-White, “International Legal Pluralism,” 25 *Michigan Journal of International Law* (2004) 963; Brian Z. Tamanaha, ‘Understanding Legal Pluralism: Past to Present, Local to Global’, *St. John’s University, Legal Studies Research Paper Series*, Paper 07-0080 (2007); Martti Koskenniemi, ‘The Fate of Public International Law: Between Technique and Politics’ 70 *Modern Law Review* (2007) 1; Paul Schiff Berman, “Global Legal Pluralism,” 80 *Southern California Law Review* (2007) 1155; Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*, (Oxford, OUP: 2010); Patrick Capps & Dean Machin, ‘The Problem of Global Law’, 74 *Modern Law Review* (2011) 794.

<sup>68</sup> Patrick Capps & Dean Machin, ‘The Problem of Global Law’, 74 *Modern Law Review* 794, 795.

<sup>69</sup> Christine Bell, *Of Jus Post Bellum and Lex Pacificatoria – What’s in a Name?* in Carsten Stahn, Jennifer Easterday and Jens Iverson, (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014), 181, 204.

<sup>70</sup> Christine Bell, *Of Jus Post Bellum and Lex Pacificatoria – What’s in a Name?* in Carsten Stahn, Jennifer Easterday and Jens Iverson, (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014), 181, 204.

<sup>71</sup> Gordon R. Woodman, “Ideological Combat and Social Observation: Recent Debate About Legal Pluralism,” 43 *Journal of Legal Pluralism* (1998) 21; Brian Z. Tamanaha, ‘A Non-Essentialist Version of Legal Pluralism’ 27 *Journal of Law and Society* (2000) 296.

to many thoughtful explorations of social order from ancient times to the present.<sup>72</sup> More recently, Brian Tamanaha has argued that ‘the coexistence of more than one body of legal norms and systems was the normal State of affairs for at least two thousand years of European history’.<sup>73</sup> As such, legal pluralism has a relatively long history in legal scholarship. John Griffiths defined legal pluralism as ‘the presence in a social field of more than one legal order’.<sup>74</sup> It was presented as a challenge to the traditional ‘legal centralism’ which had long dominated scholarship in socio-scientific studies (including international law). Legal centralism asserts that ‘law is and should be the law of the State, uniform for all persons, and administered by a single set of State institutions’.<sup>75</sup> This view emphasises the State as the fundamental unit of political organisation. In this respect, legal centralism has some obvious similarities with the State-sovereigntist model of international law.<sup>76</sup> As Kingsbury notes, the post-WWII architecture of the international legal order begins with the axiom that: ‘The Organization [UN] is based on the principle of the sovereign equality of all its Members.’<sup>77</sup> The principle of sovereign equality emphasises that law derives from the consent of sovereign States.<sup>78</sup> Thus, sovereign equality emphasise the principle of voluntarism that was first enunciated by the Permanent Court of International Justice in the *Lotus* case.<sup>79</sup> States have agreed a set of material sources which can serve as the evidence for their consent.<sup>80</sup> These are listed in Article 38 of the International Court of Justice. Thus, legal centralism

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<sup>72</sup> Marc Galanter, ‘Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law’ 19 *Journal of Legal Pluralism* (1981), 28.

<sup>73</sup> Brian Z. Tamanaha, ‘Understanding Legal Pluralism: Past to Present, Local to Global’, St. John’s University, *Legal Studies Research Paper Series*, Paper 07-0080 (2007), 7.

<sup>74</sup> John Griffiths, ‘What is Legal Pluralism?’, 24 (1986) *Journal of Legal Pluralism*, 1.

<sup>75</sup> John Griffiths, ‘What is Legal Pluralism?’, 24 (1986) *Journal of Legal Pluralism*, 1, 3.

<sup>76</sup> See Francisco Orrego Vicuña, ‘Has the Nature of International Law Changed? Le Plus Ça Change...’, 8 *Austrian Review of International and European Law*, (2003) 221; Brad R. Roth, ‘Sovereign Equality and Non-Liberal Regimes’, in J. E. Nijman and W. G. Werner (eds.) *Netherlands Yearbook of International Law* (2012).

<sup>77</sup> UN Charter, (signed 24 October 1945, entered into force 24 October 1945) 1 UNTS XVI, article 2.

<sup>78</sup> Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law*, (New York, OUP: 2008), 3.

<sup>79</sup> *The Case of the S.S. Lotus*, (France v. Turkey) (Judgment) [1927] PCIJ Rep Series A No. 10: the rules of international law which bind States ‘emanate from their own free will’, at 18.

<sup>80</sup> Ian Brownlie, *Principles of Public International Law*, 7th Edition, (New York, OUP: 2008).



account is also fundamentally based on the principle of positivism.<sup>81</sup> Positivism in international law asserts that all international law must be *lex lata*, and that the division between *lex lata* and *lex ferenda* must be strictly maintained.<sup>82</sup> Values are not accepted as part of international law.<sup>83</sup> For example, ‘peace and security’ or ‘sustainable development’ are, at most, ‘guide[s] in understanding the content of legal rules that exist independently of these values, ... on the basis of inter-State agreement’.<sup>84</sup>

For Griffiths, as with other pluralists, such legal centralism provides too narrow a view of what law is. The pluralist narrative asserts that ‘although “official” norms articulated by sovereign entities obviously count as “law”, such official assertions of prescriptive or adjudicatory jurisdiction are only some of the many ways in which normative communities arise’.<sup>85</sup> Thus, pluralism emphasises a particular socio-empirical observation - that law exists outside or beyond the State. Early scholarship on legal pluralism focused on hybrid legal systems which were the result of colonialism.<sup>86</sup> In this context, an imperial legal system was imposed on an indigenous legal system creating a hybrid legal system, for example, the Dutch and Indonesian legal systems being imposed on the tribal Kapauku of New Guinea.<sup>87</sup> Another site of scholarship is the relationship between ‘territorial law’ and ‘personal (religious) law’. For example, Chibli Mallat’s work on constitutionalism in the Middle East which argues that ‘the question of personal, as against territorial law, [...] affects the Middle East in the arguably most significant challenge of constitutional law since Montesquieu’.<sup>88</sup>

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<sup>81</sup> Prosper Weil, ‘Towards Relative Normativity?’, 77 *AJIL* (1983), 413, 420.

<sup>82</sup> Prosper Weil, ‘Towards Relative Normativity?’, 77 *AJIL* (1983), 413, 421.

<sup>83</sup> Though they may be relevant to the interpretation of international law.

<sup>84</sup> Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law*, (New York, OUP: 2008), 181.

<sup>85</sup> Paul Schiff Berman, “Global Legal Pluralism,” 80 *Southern California Law Review* (2007) 1155, 1158.

<sup>86</sup> See Leopold Pospisil, ‘Modern and Traditional Administration of Justice in New Guinea’, 19 *Journal of Legal Pluralism* (1981) 93.

<sup>87</sup> Leopold Pospisil, ‘Modern and Traditional Administration of Justice in New Guinea’, 19 *Journal of Legal Pluralism* (1981) 93; interestingly, Pospisil’s conclusion is that after the colonial dismantling of the Kapauku legal system, ‘[l]aws are obeyed because of fear of punishment rather than conviction of their justice and necessity’, 114.

<sup>88</sup> Chibli Mallat, ‘On the Specificity of Middle Eastern Constitutionalism’, 38 *Case Western Reserve Journal of International Law*, 13 (2006) 56.

For international lawyers, the focus has been on the overlapping normative communities caused by ‘globalization’.<sup>89</sup>

#### **7.4.2 International legal pluralism**

Global legal pluralists build their theory of global law on the basis of a number of socio-empirical factors. These include, *inter alia*, the increased mobility of capital through transnational trade networks and the ‘fluidity of social networks’ through new and better information technologies.<sup>90</sup> The impact on law is that there are now a large number of globally active yet independent, ‘courts, quasi-courts and other forms of conflict-resolving bodies’.<sup>91</sup> These decision-making bodies operate according to ‘sector’ rather than ‘territory’. This means that ‘human rights’, the ‘law of the sea’ or ‘international sport’ defines the scope of the relative tribunal. This leads to a dilemma. These courts and tribunals are evidence of a ‘world of normative communities’.<sup>92</sup> The proliferation of normative communities will increase the likelihood of normative conflicts (as discussed in chapter 5 in relation to the ‘ILC Report on Fragmentation’). For Berman, the multiplicity of normative communities means that international lawyers need to rethink their subject in terms of ‘managing hybridity’.<sup>93</sup> The alternative is to try to reassert a territorially-focused international law underpinned by the principle of sovereignty or attempt to universalise global regulation. In his view, neither strategy is capable of helping communities to deal with the problems that arise for international lawyers in contemporary society. In his view, ‘hybridity may at times

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<sup>89</sup> I define ‘globalisation’ as a process characterised by global interconnectivity in a range of different areas such as law, economics, politics, civil society, journalism, security and others.

<sup>90</sup> Neil Walker, ‘Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders’ 6 *International Journal of Constitutional Law* (2008), 373, 374.

<sup>91</sup> Andreas Fischer-Lescano and Gunther Teubner, ‘Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law,’ 25 *Michigan Journal of International Law* (2004) 999, 1000.

<sup>92</sup> Paul Schiff Berman, ‘Global Legal Pluralism,’ 80 *Southern California Law Review* (2007) 1155, 1157.

<sup>93</sup> Paul Schiff Berman, ‘Global Legal Pluralism,’ 80 *Southern California Law Review* (2007) 1155

be both normatively preferable and more practical precisely because agreement on substantive norms is so difficult'.<sup>94</sup>

#### **7.4.3 The *jus post bellum* and global administrative law**

In terms of the *jus post bellum* this makes some sense. As explained in chapter 5, communities attempting to negotiate peace are faced with a proliferation of norms. As acknowledged in the Colombian peace agreement, most relevant may be traditional international law such as human rights law and humanitarian law. However, global administrative law might suggest other norms which fix the parameters of peace. In relation to transitional justice, a global administrative law perspective would argue that the peace negotiators in Havana are 'bound' to include certain norms in the transitional justice accord. These are drawn from the practice of other peace agreements and transitional justice mechanisms. Also, the *jus post bellum* as global administrative law might include hybrid solutions to certain procedural issues. Berman cites a number of instances of hybrid 'mechanisms, institutions and practices' which may form part of a global legal pluralism perspective.<sup>95</sup> The existence of 'hybrid participation arrangements' in post-conflict societies has been thought to increase the legitimacy to proceedings which may be at risk of becoming politicised. The presence of international judges as 'outsiders' may 'add to a sense of fairness' while the presence of local judges protects against 'rejection of the court as wholly "foreign"'.<sup>96</sup>

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<sup>94</sup> Paul Schiff Berman, "Global Legal Pluralism," 80 *Southern California Law Review* (2007) 1155, 1165.

<sup>95</sup> For example, Berman notes the doctrine of 'margin of appreciation' in European human rights law. A good example is *X v United Kingdom* which considered the parental rights of transsexuals. As Berman notes, the ECHR was happy to argue that the law was in a 'transitional stage' and that the UK, therefore, had a wide margin of appreciation, see Paul Schiff Berman, "Global Legal Pluralism," 80 *Southern California Law Review* (2007) 1155

<sup>96</sup> Paul Schiff Berman, "Global Legal Pluralism," 80 *Southern California Law Review* (2007) 1155, 1221.

Indeed, in Colombia, the parties have agreed to a five-member selection committee which is tasked with agreeing the judges and magistrates which will sit on the Special Jurisdiction for Peace. Foreign judges are a planned feature of the SJP. So there may be evidence that the hybridity in normative regulation has translated into a hybridity of institutional design. However, this would be slightly inaccurate. In formal terms, courts in transitional societies are either international or domestic. This depends on the legal system which provides the legal basis for the court's existence. In Colombia, the SJP will come into existence as a result of the eventual peace agreement. Thus, it will be a domestic court and only 'internationalized' by the presence of foreign judges.

As Kratochwil has argued, those arguing in favour of the emergence of global administrative law need to establish not only that such a body of rules or principles exist. Also, they must establish that 'these principles represent a set of rules that mutually support each other in safeguarding elemental procedural and substantive values inherent in the rule of law'.<sup>97</sup> In failing to respect the rule of law, global administrative law can hardly claim to be 'law' in any reasonable meaning of the word. Disregard for the rule of law means that these norms and principles (if they exist) are more properly defined as non-binding standards or other kinds of 'social norms'. These standards may exist and regulate transnational communities (such as peacemakers, or sporting bodies, or the internet) however, they need not necessarily all exist in conjunction as 'global law'.<sup>98</sup> Kratochwil's critique is that in making this argument the global administrative law project ends up advocating a kind of 'global constitutionalism'. This in turn, is similar to the liberal international law project discussed in the previous section.<sup>99</sup>

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<sup>97</sup> Friedrich, Kratochwil, *The Status of Law in World Society*, (New York, CUP: 2014), 177.

<sup>98</sup> Friedrich, Kratochwil, *The Status of Law in World Society*, (New York, CUP: 2014) 169.

<sup>99</sup> Friedrich, Kratochwil, *The Status of Law in World Society*, (New York, CUP: 2014) 178.

## **7.5 Conclusion**

This chapter has tried to fit the *jus post bellum* as integrity into pre-existing approaches to international law which emphasize values and reject the traditional conception of international law. The *jus post bellum* as integrity could plausibly be developed according to each of these theories of international law. This is evidence of a number of interpretive decisions which must be made in order to transpose the concept of integrity into the international legal order. In terms of Ronald's approach in chapter 5, each of these theories may provide the basis for a development of the expansive notion of integrity across post-conflict societies. Thus, a Dworkinian approach to the *jus post bellum* is useful for practitioners. It is useful in methodological terms. It is useful in terms of comparative law. It is also useful insofar as alternative views of international law exist which can, to a certain extent, accommodate the *jus post bellum* as integrity.

Today, States are joined by a number of other actors. For example, in Colombia, international law regulates a number of different relationships. These include the relationship between the government and the ICC; the relationship between the government and the FARC-EP and the relationship between the government and individual victims of the armed conflict. It is plausible that these relationships are regulated not only by international law but also by a number of different kinds of norms. Some norms may be 'law' in the traditional State-sovereigntist sense. For example, the possibility of offering the 'broadest possible' post-conflict amnesties for the political crime of rebellion is mandated by international humanitarian law.<sup>100</sup> However, other norms may regulate peacebuilding in less formal ways. Here, Bell's work on the *lex pacificatoria* is the best example of the new and 'emerging law'

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<sup>100</sup> Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts, (adopted 8 June 1977, entered into force 7 December 1978), 1125 UNTS 3, Article 6(5).

that regulates peace processes and peace agreements.<sup>101</sup> However, the key to understanding Bell's point is that these norms are not 'law' but *lex*. Their usefulness derives from their flexibility in providing solutions rather than prescribing outcomes. The expansive notion of the *jus post bellum* as integrity, insofar as it urges coherence between post-conflict States, appears to lack this kind of flexibility. It may be that States need flexibility in finding solutions to post-conflict problems. Integrity suggests that an authoritative interpretation must be found with which others must be coherent.

However, there is no authoritative post-conflict State, or post-conflict court that can decide these matters once and for all for States. If there are different kinds of norms which regulate peace agreements, this might suggest that all of the narratives may provide some insights into the nature of the international legal order. This is possible because, as Walker argues, each of the meta-narratives can be reproduced in a 'strong and exclusive' model or a weaker 'more moderate' design.<sup>102</sup> Thus, the traditional State-sovereigntist model posits States as 'ontologically prior' in the global order. In its strong exclusive form, it emphasises the 'old-fashioned realist' position in international relations. Law is identifiable through State consent. This position views other actors as mostly irrelevant for the purposes of law at the international level. This produces a relatively limited and narrow set of rules.<sup>103</sup> A second version of the State-sovereign model is more moderate. States remain the primary actors in the global legal order. However, law is broader than that which is produced by State-consent because of the need to secure 'peace' and 'reliable commitments' (i.e. *pacta sunt servanda*). The more moderate version does not rely on a 'thick' normative consensus (as liberal international law does). It means only that States assume that cooperation and

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<sup>101</sup> Christine Bell, *Peace Agreements and Human Rights* (New York, OUP: 2000).; *On the Law of Peace* (New York, OUP: 2008).

<sup>102</sup> Neil Walker, 'Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders' 6 *International Journal of Constitutional Law* (2008), 373, 386.

<sup>103</sup> Neil Walker, 'Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders' 6 *International Journal of Constitutional Law* (2008), 373, 387.

coexistence depends on ‘mutual respect for overlapping visions of the common good’.<sup>104</sup> This vision of international law may require that judges adhere to a Rawlsian ‘standard of public reason’ in adjudicating in international courts.<sup>105</sup> In terms of legislation, it may mean that States provide, and ought to provide a justification for their law-making activities which they believe is ‘reasonable’ or ‘an appropriate public justification of a binding law.’ In sum, a more modest version of the dominant model accepts that State-consent is not the sole legitimating principle in international law.

There is as yet no international legal theory that purports to present integrity as the disciplining rule of international law. Integrity in common law systems is important because individuals have to be treated equally before the legal system. However, on the international level, integrity may need to be translated into a different principle of legality. Little research has been done in this regard. However, considering that Dworkin’s theory is a liberal theory of law, it may be that international integrity may draw on liberal (understood as anti-plural) values. It may consist of a theory of law that makes the individual the centre of the legal system and not the State. In doing so, it urges that the individuals of the world be treated equally. It may, thus, function as a theory of political justice that underpins interpretations of the law.

This chapter, however, has argued that such a move may be resisted. The law ought not to be decided according to the liberal/illiberal dichotomy. The level of hypocrisy and selectivity that would be evident (considering current international relations) would bring the system under considerable strain. This would be to the detriment of international relations. This thesis advocates instead an acceptance of the limitations of the system without eschewing a critical perspective of the law. The lack of certainty in post-conflict legal

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<sup>104</sup> Neil Walker, ‘Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders’ 6 *International Journal of Constitutional Law* (2008), 373, 387.

<sup>105</sup> Silje Aambø Langvatn, ‘Should International Courts Use Public Reason’, 30 *Ethics & International Affairs* (2016) 355.

situations must be worked out in accordance with the system as it exists. In relation to post-conflict situations, the creation of new legal categories (such as the *jus post bellum*) ought to be considered only insofar as they help practitioners to resolve legal dilemmas. The introduction of integrity into the discourse has brought with it a set of questions which are useful in terms of the Colombian legal order. If post-conflict societies are to be successful in making transitions, its legal system must aspire to try to treat individuals equally. Further, the idea that there ought to be coherence in principle in the decisions made within a post-conflict society may be beneficial and it may build the community of principle that was missing during the conflict. A focus on integrity in international law has also raised questions about interpretive coherence across different post-conflict societies. In this respect, integrity has a normative force which may be limited or supported according to different version of international law and global justice. In all likelihood, different interpreters will decide according to any proposed moral value it may have in the specific situation in question.



## **CHAPTER 8: CONCLUSION**

This thesis has argued that the *jus post bellum* may be practically useful to practitioners within post-conflict societies if it is considered an interpretive framework of principles. In doing so, it has evaluated whether international lawyers and practitioners ought to continue to think about the *jus post bellum*. It has answered this in the affirmative. It has looked at two different versions of the topic in detail. Gallen's more recent *jus post bellum* theory is a useful and practical way to think about what ought to happen after conflict as a matter of law. However, an additional dimension has been added in this thesis in considering how integrity represents the *jus post bellum* across different post-conflict societies.

### **8.1 Research findings**

The first part of the thesis found that the *jus post bellum* as proposed by Orend was not necessary, and not viable, considering the state of contemporary international relations. International relations, at the present time, are unlikely to be conducive to a large and complex multilateral Protocol to the Geneva Conventions. There are several post-conflict situations which would be implicated in the negotiation of a new Protocol, including Colombia. There is a great deal of controversy surrounding the role of the ICC and its excessive focus on African States. Further, ongoing conflicts, such as in Afghanistan and Syria, are causing immense problems in terms of finding post-conflict solutions. As such, the *jus post bellum* needs to be considered in a less assertive and more nuanced way. It considered a 'soft law' document and argued that this has some benefits but also some drawbacks.

The second part identified the *jus post bellum* as integrity as one of the more interesting recent theories of the *jus post bellum*. The *jus post bellum* as integrity has been presented here as a methodology and a normative principle. It allowed for a measured response to unravelling fragmentation of post-conflict law in Colombia. But it should not be thought of as a concept that provides the right answers in post-conflict situations. Instead, a Dworkinian lens might be useful insofar as it emphasizes a certain approach to post-conflict law that aims at equality among the citizens and principled coherence in interpretation of international law during transitions. Future developments in international law may be at the margins of the basic structure of the international legal order. Therefore, one way of thinking about this more expansive notion of integrity is as an ‘interstitial norm’ of the kind propounded by Lowe. Thus, integrity in international law may be useful for the resolution of conflicts and the development of practical solutions to problems. On a Dworkinian reading of international law, it would be a legal requirement for interpreters in post-conflict Colombia to ensure coherence across post-conflict societies in the same way that they must ensure coherence *within* the Colombian legal order.

## **8.2 Areas of further study**

A *jus post bellum* framework, which integrates law, policy, and philosophy, could illuminate the respective obligations of these actors in a post-conflict setting. An interdisciplinary approach could provide useful information in terms of the interpretation of the law as it is, as well as what it ought to be. This section sets out some areas of further study that might be interesting from the perspective of the *jus post bellum* as integrity and international law.

### **8.2.1 The *jus post bellum* as integrity and the Vienna Convention on the Law of Treaties**

The *jus post bellum* as integrity is primarily about interpretation of post-conflict law. Therefore, one interesting area of research would be to compare how a Dworkinian approach to interpretation fits into the debates surrounding treaty interpretation in international law.<sup>1</sup> The rules on how international law ought to be interpreted are already a part of international law and a result of States' agreement. In this regard, article 31(1) of the Vienna Convention on the Law of Treaties sets out the 'General Rules of Interpretation'.<sup>2</sup> It asserts that treaties 'shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.<sup>3</sup> This formulation is a composite of different philosophies and approaches to interpretation of international law. It reflects a tension between a teleological approach to interpretation and a more textual understanding. Thus, how the Dworkinian model interacts with the concept of sovereignty equality in this field might be a fruitful endeavour in order to think comparatively about how the law ought to be interpreted. A tentative analysis suggests that a Dworkinian interpretation of international law would need to take these rules on interpretation into account as part of the dimension of 'fit'. An interpretation of the law is less desirable if it departs from the previous chapters in the 'chain novel'. As such, interpretations of international law that reject or deviate from the rules in the Vienna Convention would be *prima facie* damaging to integrity. Therefore, integrity, in an international context, may require an approach that seeks to balance how an interpretation 'fits' with the rules on interpretation and with the political principles of the international legal order.

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<sup>1</sup> Julius Stone, 'Fictional Elements in Treaty Interpretation – A Study in the International Judicial Process' 1 *Sydney Law Review* (1953) 344.

<sup>2</sup> Vienna Convention on the Law of Treaties, (adopted 23 May 1969, entered into force 27 January 1980), UNTS 1155, art 31.

<sup>3</sup> Vienna Convention on the Law of Treaties, (adopted 23 May 1969, entered into force 27 January 1980), UNTS 1155, art 31.

### **8.2.2 The *jus post bellum* as integrity and specific issue areas**

Another interesting area to pursue is the extent to which the Dworkinian approach highlighted in chapter 5 is useful in helping to identify the law in other issue areas. As chapter 2 mentioned, there are a number of areas of post-conflict law which are unclear. These include the law on post-conflict detention, post-occupation law, the law on self-determination of peoples during transitions and the law on transformative occupations. These areas of law are composites of different legal bodies. In terms of its commitment to systemic coherence, the *jus post bellum* as integrity provides a way to think about how the different issues areas have been resolved and how they ought to be resolved.

A suggestion may be a project on the UN peacekeeping missions. UN peacekeeping forces are one of the main actors in post-conflict situations across the globe. The *jus post bellum* as integrity could evaluate the extent to which different issues that arise in post-conflict UN peacekeeping missions adhere to a concept of principled coherence. This project could look at how they deal with accountability, for example, in the area of sexual abuse by peacekeepers. There is also uncertainty surrounding the law as it relates to the use of force in post-intervention situations.<sup>4</sup> Areas of uncertainty include ‘transformative occupations’, ‘long-term occupations’ and the occupiers’ powers of detention.<sup>5</sup> Another area of research might be to apply a *jus post bellum* framework to other post-conflict actors, such as NGOs, donors and international financial institutions, and multinational enterprises. These actors often play important roles in defining the success or failures of transitions. However, the role

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<sup>4</sup> Charles Garraway, ‘The *Jus Post Bellum*: A Practitioner’s Perspective’, in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008) 153, 156.

<sup>5</sup> Charles Garraway, ‘The *Jus Post Bellum*: A Practitioner’s Perspective’, in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum – Towards a Law of Transition from Conflict to Peace* (T.M.C. Asser Press, The Hague: 2008) 153; Yaël Ronen, ‘Post-Occupation Law’, in Carsten Stahn, Jennifer Easterday and Jens Iverson, (eds.) *Jus Post Bellum – Mapping the Normative Foundations* (New York, OUP: 2014) 428.

of international financial institutions, States, and other private enterprises has not yet been fully explored in *jus post bellum* terms.

### **8.2.3 The *jus post bellum* as integrity and national vs international law**

The Dworkinian approach could be used as a frame with which to investigate extent to which national and international courts diverge in their interpretation of international criminal law. It could be used to evaluate the extent to which the law is interpreted in a way that demonstrates principled coherence in relation to specific issues. For example, the law on command responsibility may be interpreted differently in Colombia when compared to the international standards required by the International Criminal Court. Integrity could be a useful frame with which to evaluate the differences and in terms of the purposes or aims of international law. A Dworkinian approach would look at the principles and the purpose that best explains and justifies the law of command responsibility. In evaluating the Colombian divergence from the international standard, the *jus post bellum* as integrity is a way of criticizing the implementation of peace agreements by transitional actors.

### **8.2.4 Concluding Remarks**

The *jus post bellum* concept has given rise to a considerable amount of research. It has led to the organization and delivery of a number of international conferences. There appears to be growing enthusiasm for the concept. However, some of the fundamentals of the concept are still very unstable. It continues to mean different things to different contributors. This thesis has argued that a Dworkinian approach can be illuminating in implementing peace agreements in relation to transitional criminal justice in Colombia. Insofar as there are conflicts between rules and purposes in transitions, a focus on integrity suggests that those

implementing peace agreements must think of their activities in terms of the principles which best explain and justify their interpretations. Gallen was concerned that post-conflict actors tended to be focused on their specific functions rather than on a holistic view of transitions. Thus, he suggested integrity as a way of finding coherence across the different activities within societies. The focus on an individual, Ronalda, allowed the thesis to evaluate how this might work in reality. The overall aim of the *jus post bellum* as integrity is to promote a view of post-conflict law which tasks Ronalda and others to view themselves as part of a community of post-conflict legal actors. It is, as Dworkin says, a ‘protestant attitude’ that each individual must develop for the benefit of the community with which they identify.<sup>6</sup> The interesting notion that the *jus post bellum* is also a global emerging law leads to questions about whether and how interpretive coherence between different post-conflict societies is also plausible. The structure of the international legal order reflects the legitimate differences between States in matters of justice. Thus, integrity across post-conflict societies may appear as a step too far in terms of the normative force of the *jus post bellum*. Nevertheless, insofar as different post-conflict actors are interpreting and applying international law, interpretive coherence must be pursued so that the moral legitimacy of the international legal order is maintained. Thus, post-conflict actors would do well to adopt a comparative approach to the interpretation of post-conflict law and a focus on integrity may function as a lens that will aid in this task.

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<sup>6</sup> Ronald Dworkin, *Law's Empire*, (Portland, Oregon, Hart Publishing: 2006) 413.

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