Choosing an International legal Regime: How much justice would you trade for peace?

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ABSTRACT

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My thesis focuses on the problem of civil wars, which are marked by high levels of violence and an extreme inability to bargain for peace. The literature on bargaining failure in civil wars has identified several reasons to explain this situation: asymmetric information, problem of credible commitment, and issue indivisibility. These studies, however, neglect to consider the legal/institutional environment where bargaining occurs. In contrast, I argue that this is a crucial factor in determining whether or not bargaining might be successful. In my thesis, I start off by formalizing the situation of conflict: this consists of two interdependent games, a War Game and a Bargaining Game, whose specifications incorporates the distinguishing features of civil wars: the nature of the actors involved, the way they fight (i.e. fighting without committing crimes and fighting by committing crimes), the type of government (democratic, non-democratic), etc. The key observation is that the full specification of these games (i.e., action available, payoffs, etc) depends on the legal regime in place. The study of how the War/Bargaining game varies with the legal regime in place allows one to compare the different regimes with respect to their ability of achieving the goals of peace and/or justice. I, then, apply these ideas to compare the relative performance of international criminal tribunals designed according to the principles of state sovereignty, human/cosmopolitan rights, and domestic tort litigation. A novel result is that the careful choice of the legal regime might substantially reduce the problems associated with the

presence of asymmetric information in civil wars. I give an example of a situation where the domestic tort litigation model outperforms the other legal models, thus lending support to a thesis proposed by Anthony D'Amato (1994) during the civil war in the former Yugoslavia.

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Acknowledgements

This thesis came out two years too late. Upon completion of this manuscript, my initial goal was to send it off immediately to an international legal scholar and practitioner I greatly admired. On October 22, 2011, I opened up my e-mail account to find the distressing news of the passing of Antonio Cassese, Italian jurist, scholar of international law, and the first president of the International Criminal Tribunal for the former Yugoslavia. I wondered what he would have thought about this thesis. Given its content, I truly hope that he would have considered me a partner in the pursuit of peace and justice.

This project is a result of many years of reflecting on the atrocities committed against civilians during civil conflicts, and on how to cease hostilities so as to spare the lives of innocent people, who through no fault of their own are caught in the midst of conflict. There are many I wish to thank for helping me hone in on this problem and for guiding me through the process of research and scholarship. I wish to thank my main advisor, Andrew Nathan, who made sure that I completed my doctorate degree by guiding my intellectual development and getting me through some of the toughest times in my graduate student experience. I also wish to thank my other advisors, Massimo Morelli and Jack Snyder, and the other members of my defense committee, Lori Damrosch and Michael Doyle. I am indebted to so many who encouraged and supported me at various points of my research. Among them are Erik Gartzke, Virginia Page Fortna, Tanisha Fazal, and Shanker Satyanath. I was fortunate to be a visiting student at the Collegio Carlo Alberto, University of Torino. I thank my academic sponsors there, Pablo Ghirardato and Massimo Marinacci, for their support. My thesis would not have been possible without the financial assistance from the National Science Foundation Graduate Research Fellowship, the

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Choosing an international legal regime: How much justice would your trade for peace? would not have come to fruition had it not been for the love and support (emotionally, mentally, and intellectually) of my husband, Massimiliano Amarante, who taught me what it means to think and research as a true scholar. Without his guidance, patience, and unfailing dedication to me and my intellectual pursuits, I would not have completed my doctorate degree. I dedicate this thesis to him.

To my husband, Massimiliano Amarante

Chapter I

Introduction

Nobody knew how she ended up in New York City. The authorities found her aimlessly wandering the streets. What they were able to gather was that she was from Sierra Leone, and given her incoherence and a ghastly slash across her stomach, she was probably a victim of the war. Her name was Haja Kalle.

Somehow or another, several victims of the civil war in Sierra Leone found their way to New York City. Several were illegal immigrants and were, therefore, incarcerated. In 2001, I joined Nah We Yone (It [Sierra Leone] belongs to us), an organization that helped victims of war and refugees from Sierra Leone by providing support through legal counsel, translators, medical and psychological assistance, shelter, etc. Haja Kalle was one of Nah We Yone's clients. The organization got her admitted to a hospital. I do not recall the condition that she had. All I remember was that no one could get the full story of what had happened to her during the war. Members of Nah We Yone took turns visiting her at the hospital. Eventually, my turn came up, and I went to see her.

I tried to speak to her in my broken, heavily American accented Krio. Fortunately, she understood me. She looked tired, listless, and bored. I found out that she did not have access to any form of distraction like television at the hospital, because she did not have the means to pay for it. I grabbed a twenty dollar bill from my purse and handed it to her. She took the bill, stared at it and screamed. She buried her face in her hands and began to cry. In between sobs, she lifted her head from her hands, pointed a finger upward as if scolding someone and yelled, "Deng go

pay, dem rebel dem, deng go pay." Although I am unable to speak Krio well, I understand it perfectly. "They will pay," she said, "those rebels will pay."

After a couple of months in the hospital, her condition improved. On one of my other visits, I saw her up and about taking walks with a nurse guiding her. Nah We Yone managed to contact her family in Sierra Leone. Needless to say, she was thrilled to hear their voices and to know that they had survived the war. A few days after the phone conversation with her family, Haja Kalle passed away. I paid her a last visit at her funeral in a mosque in New York City. She has become yet another number in the growing statistic of non-combatant casualties of civil wars.

From 1945 to 1999, there have been 127 civil wars as opposed to 25 interstate wars.[1] Civil wars[2] have caused the death of more than 16.2 million people, five times more the toll of interstate wars.[3] Most of these causalities are non-combatants, which makes it all the more pressing to thoroughly explore mechanisms that can potentially bring these conflicts to an end.[4] Why are civil wars characterized by such high levels of violence? Some of the reasons can be traced to the nature of the actors involved and the means and methods of warfare they employ during civil wars.

In interstate wars, the main actors are usually states, who fight each other conventionally using heavy weaponry such as field artillery and armor. Military confrontation is direct and across well-defined front lines. In conventional type warfare, the main target is military objectives, in other words, the aim of this type of warfare is to kill, disable, and capture military personnel, and to destroy and disable or capture military equipment.[5]

Instead in civil wars, the main actors are usually rebel groups and government forces. Rebels are usually at a military disadvantage relative to government forces due to the fact that

the government has legitimacy, sovereignty, allies, and access to resources.[6] This military imbalance "compels rebels to resort to unconventional and unlawful means and methods of warfare as the only way to redress the military imbalance they face".[7] Thus, rebel groups often refuse to directly engage the government forces and, instead, target non-military objectives, such as the destruction of civilian assets which entail killing and injuring non-combatants and/or destroying or damaging means of production.[8] In turn, to confront the rebels, government forces themselves resort to unconventional and unlawful methods of warfare as often this is the best counter-strategy to those employed by the rebels. This results in additional killing of civilians.[9] Furthermore, the problem of informational asymmetry, which is present in any conflict, is exacerbated in civil wars by the recourse to unconventional methods of warfare. According to the literature on bargaining and war, engaging in direct battle (conventional warfare) often reveals information regarding the strength, capabilities, and resolve of each faction.[10] This information allows each actor to assess correctly the value of going to war, and ultimately leads opposing parties to make mutually acceptable offers at the bargaining table. In contrast, indirect methods of warfare (unconventional warfare) prevent opponents from accurately assessing information: parties tend to overestimate their chances of winning the war and are, therefore, less willing to make concessions. Ultimately, this leads to bargaining failure and war often continues in the most brutal way. In sum, the nature of the actors involved, their incentives to resort to unconventional means and methods of warfare, and the consequent persistence of information asymmetry are the main reason for the high levels of violence observed in civil wars.

1. International Criminal Tribunals

To redress the violence perpetrated during civil wars, in the 1990s the international community[11] decided that it would take a similar approach as the Allies after WWII and create

international tribunals to prosecute those most responsible for committing atrocities during war. In the immediate aftermath of WWII, the Allies created International Military Tribunals (IMT) at Nuremberg and Tokyo to prosecute Axis state and military leaders most responsible for violations of international law, specifically for crimes against peace and war crimes. IMT's primarily had jurisdiction over laws dealing with state to state relations during the war (humanitarian laws).[12]

In 1992, the international criminal tribunal approach re-emerged to redress violations of international law but this time in the context of the conflict that was taking place in the former Yugoslavia. The United Nations Security Council (UNSC) established and imposed the ad hoc International Criminal Tribunal for the former Yugoslavia (ICTY) with the intended goal to establish justice and to some extent peace by punishing those parties most responsible for violating humanitarian and human rights law. The ICTY had jurisdiction over genocide and crimes against humanity and could prosecute complicit heads of state, other government officials as well as non-state actors for crimes perpetrated against the civilian population.

After the creation of the ICTY, a similar approach was used to deal with the high level of atrocities taking place in other civil wars around the world. In 1994, upon the request of the Rwandan government, the UNSC created the International Criminal Tribunal for Rwanda (ICTR), in the aftermath of the genocide in Rwanda to bring the most responsible perpetrators of genocide to account. In 2002, after sixty states ratified the Rome Statute, a permanent International Criminal Court (ICC) came into force to assist states in investigating and prosecuting violators of international criminal law. Signatories of the Rome Statute also agreed to adhere to the statute to prevent themselves from violating humanitarian and human rights of their nationals and other individuals. Currently, the ICC is investigating eight situations:

Uganda, Democratic Republic of Congo, Darfur (Sudan), Central African Republic, Kenya, Libya, Cote d'Ivoire, and Mali.[13]

Following the creation of the ICC, another wave of tribunals has come about: the Special Court for Sierra Leone, the Kosovo court system established under the auspices of the United Nations Interim Administration Mission in Kosovo, United Nations Serious Crimes Unit under the United Nations Transitional Administration in East Timor, the Extraordinary Chambers in the Courts of Cambodia, and more recently the Special Tribunal for Lebanon.[14] These courts are typically referred to as "hybrid" courts because of "their legal status applicable law, composition and organizational structure had to be negotiated and agreed upon between the parties [state and the international drafters]".[15] That is, rather than the international community determining at the aggregate level how justice should be pursued in one single legal model, each country determines how justice is pursued in the negotiation process between individual states and diplomats and lawyers of the UN Secretariat.

In all cases, the underlying political/ideological/legal views have imposed heavy constraints on the courts' operations, hence on the international community's attempt to obtain peace. For instance, the adherence to certain principles of international criminal law has often hindered the ability of achieving peace. In particular, the core principle of (international) criminal law of the duty to prosecute (war) crimes has often favored the achievement of justice at the expense of peace.

These observations along with the high numbers of civilian casualties in civil wars suggest that one should probably rethink this point of view. Rather than taking as a given a certain political/legal environment and derive the tribunals' design from those premises, one

should fix the goal of achieving peace and design tribunals in order to maximize the chance of achieving this goal. The present thesis can be viewed as an attempt in this direction. In this thesis, I will explore the problem of designing an international criminal tribunal from a strategic point of view. Specifically, I will examine whether or not an international criminal tribunal can provide warring parties with the right incentives to end violence and successfully negotiate for peace.[16]

It is important to note that the determination of the "optimal" tribunal design will always depend on the underlying structural conditions of the conflict, international humanitarian and human rights laws, and the characteristics of the parties involved, etc. Moreover, contrary to popular belief, the determination of the optimal court design does not reduce to simply endowing the court with sufficiently high enforcement power. In fact, both the historical evidence in Chapter IV (the case of Yugoslavia) and the theoretical analysis of Chapter V show that endowing a court with sufficiently high enforcement power might as well lead (other things being equal) to catastrophic outcomes (i.e. the Srebrenica massacres discussed in Chapter IV).

2. Incentives, Information Transmission, and Tribunal Design

The theoretical edifice of this thesis consists of three levels of increasing conceptual complexity. At the first level, I introduce the basic idea that international criminal tribunals can be viewed as devices which impose costs and provide rewards for the warring parties. By doing so, they may alter the profitability of the various options available to warring parties and change the parties' choices. At this level, the problem of the thesis becomes that of assessing whether or

not there exists a feasible system of costs/rewards which would induce the desired outcome of peace.

The basic idea is refined at the second level with the recognition that the determination of which systems of costs/rewards are feasible depends, in an essential way, on the underlying political and legal environment. This shifts the thesis' focus from the determination of the optimal system of costs/rewards to the determination of the optimal political/legal environment according to which tribunals are designed. This idea is further developed at the third level where the question becomes whether or not the choice of the political/legal environment may lead to successfully alter those circumstances leading to bargaining failure.

In any conflict one of the main reasons for bargaining failure is the presence of asymmetric information[17] and that this is all the more true in civil wars for reasons discussed above. One of the main results of this thesis, and perhaps the least intuitive, is that different legal regimes favor information transmission across the parties involved in a conflict to a different extent. That is, while certain regimes may exacerbate the problem of asymmetric information, thus leading to continued warfare, others might sensibly reduce the problem and increase the likelihood of successful negotiations. Thus, the present work leads to the novel conclusion that the ability of reducing asymmetric information is an important and perhaps decisive factor in determining the optimal legal regime.

3. D'Amato's proposal

During the war in the former Yugoslavia, when it was decided that a court would be created and would issue indictments for complicit leaders in tandem with peace talks,

international lawyer Anthony D'Amato immediately understood that to achieve a long-term peace in the former Yugoslavia would be impossible. In 1994, at the height of hostilities and numerous attempts at peace negotiations, D'Amato, wrote a telling article, "Peace vs. Accountability in Bosnia," cautioning the international community not to issue indictments for complicit leaders in tandem with ongoing peace talks.[18] An instructive debate ensued.[19] D'Amato maintained that once leaders had been indicted, it would have been more profitable for those leaders to take their chances and keep fighting rather than agreeing to cease hostilities and subject themselves to punishment. D'Amato realized that the measures proposed by the international community posed an *incentive problem*: even with the threat of punishment, the system provided no incentives for the warring parties to cease hostilities. In order to remedy this situation, D'Amato proposed a model of an International Criminal Tribunal based on the principles of the *domestic tort litigation model* (DTL). This is based on the notion that culpable parties would not be prosecuted once they settle *inter se*.[20] The rationale for this model is that "exact justice" can be attained among individuals in conflicting situations without necessarily involving a court. That is, the DTL model creates the right incentive for opposing parties to bargain for a mutually beneficial agreement in order to avoid that either one of the parties call the court. In D'Amato's view, it is almost a definition that a system inspired by these principles would remove the incentive problem described above.

Noticeably, D'Amato's proposal of using the DTL model for the international management of civil wars implies a far reaching extension of the classical DTL model as: (1) the DTL would operate in an international setting rather than a domestic one, and (2) the DTL would operate in a *criminal* setting rather than a *civil* one. Yet, the basic logic would be the same: just like in civil matters, the court would not be an actual threat, but only a potential one. In a

nutshell, a party's threat of calling the court determines what the other party would obtain if it refuses to negotiate, and this would set the grounds for a successful bargaining process.

Extending the domain of applicability of the DTL model to the international management of civil wars raises several types of concerns. The most common, perhaps, is of a moral nature as one of the outcomes of the DTL model is that perpetrators might go unpunished. Unlike civil law, where parties are encouraged to settle disputes before resorting to legal procedures, in criminal law it is generally held that the state has an obligation to punish perpetrators in the interest of deterring future transgressions like murder. This idea finds its application in an international setting with the principle of Human Rights (HR) law. In such a setting, the international community claims the right to prosecute heinous crimes for the sake of deterring the commission of future crimes. Thus, the general idea is that analogies can be drawn between domestic criminal law and international HR law but not between civil law and international HR law. This criticism, however, does not seem especially sound. First, recent history shows that states have often given up their obligation to punish perpetrators for certain crimes in order to achieve goals that appeared more advantageous. For instance, the International Criminal Court refused to indict members of the Ugandan government for committing crimes during the civil war on the basis that they were going to assist in the apprehension of more culpable criminals primarily from the Ugandan rebel group the Lord's Resistance Army (see Chapter IV).[21] Second, and perhaps more importantly, a system that by punishing perpetrators leads to more atrocities would be associated to severe moral concerns as well. In the Yugoslavian war, the application of the idea of the "duty to prosecute" led to, or at least did not prevent, the genocide of Srebrenica (see Chapter IV), a fact that leads one to wonder, as did D'Amato, whether or not it would be more advantageous if criminal law were built on the same principles ruling civil law.

Another concern regarding the applicability of the DTL model to the international management of civil wars stems from the (international) legal status of the parties involved in the conflict. The parties in a domestic civil dispute have the same legal rights. Typically, this is not the case in International Criminal Law. Under the current international legal system, while rebels do have the right to petition an international court, the process is not as automatic or direct as the states right to petition a court. For instance, state parties to the Rome Statute creating the ICC can directly refer cases to the Court under Article 14, but rebel groups do not enjoy the same status as states or the same right of referral and would have to resort to other mechanisms to persuade the Prosecutor to investigate crimes committed by states or to persuade the Security Council to refer such cases to the Court. Given the *modus operandi* of the DTL model, one might fear that these asymmetries in the status of disputing parties might severely limit the effectiveness of the DTL model in the international setting. This is a serious concern, which I will address in subsequent chapters, in particular Chapter III.

4. The approach of the thesis

In this thesis, I will explore the validity of D'Amato's idea. More generally, my aim is that of introducing a formal setting where the performance of alternative legal regimes – such as the State Sovereignty (SS) model, the Human Rights (HR) model, the Cosmopolitan Rights (CR) model and the DTL model -- could be evaluated on the basis of their ability to alter combatants' incentives from fighting to bargaining for peace.

My approach can be summarized as follows. I will start off by formalizing the situation of conflict by means of a war/bargaining game (Chapters II and V). For the sake of simplicity, I

will focus on the case of two players, the rebel group (R) and the government (G). The extension to more than two players is briefly considered in Chapter VI. The players' payoffs in the war/bargaining game are determined by the underlying structural conditions of the conflict, such as the military capabilities of each player, the types of resources available to them, and their resolve. [22] The war/bargaining game can be viewed as a stylized model of any conflict. From this stylized model of war, by incorporating, in the form of assumptions, the empirical regularities identified by the literature on violence during civil war and the bargaining failure during civil war, I will obtain a model of civil war. Since these regularities pertain to civil wars, it follows then that my results do not necessarily extend to other types of war.

Once a formal model of civil war is established, I can then inquire into how different legal regimes affect the conflict. The key observation for this inquiry is that the type of legal system in place affects the war/bargaining game because it affects the options available to the combatants as well as their payoffs. Moreover, different legal regimes affect the war/bargaining game in different ways. In order to briefly illustrate this point, let us consider the following example. We have seen (section 1.2) that a court might be seen as a device that imposes costs/rewards on conflicting parties. For this to be true it is necessary that the court be allowed to act by the rules of each specific legal regime. Now, consider two possible legal regimes, A and B, which differ because the rebels are recognized as an international legal subject in A but not in B. Thus, in legal regime A, the rebels have the right to call an international criminal tribunal if their opponent commits crimes. Formally, the game played in A differs from the game played in B because a player in A has an action ("call the court") which is not available in B. The presence of this action in A alters the players' incentives (with respect to legal regime B) as follows: the value of the action "commit crimes" for the government is potentially reduced by the fact that the

international court will impose a cost (a punishment) on the government if it chooses such action. Thus, at least in certain cases, the government might be less inclined to commit crimes in A than in B.

In fact, the effect of the legal system on the war/bargaining game may be more subtle than what the example suggests. In Chapter V, we shall see that information transmission from one party to another is more likely to occur under certain types of regimes. As information transmission reduces the asymmetry in the parties' information, it then follows that successful bargaining is more likely to be obtained under these regimes. Specifically, in Chapter V, I will give an example where the DTL system outperforms the HR system exactly because it favors information transmission between warring parties. I will use this example to provide the rationale for two different phases of the war in Yugoslavia. The first phase that I consider is the one immediately preceding and ending with the massacres at Srebrenica in July 1995. When referring to this phase my example lends support to D'Amato's thesis that the DTL system should have been chosen over the HR system. I must stress, however, that the reason is more complex than what D'Amato envisioned, as the inability to successfully bargain was due not only to the costs imposed by the HR system (as D'Amato observed), but also, and more importantly, by the lack of information transmission, which is caused by the HR system. The second phase that I consider comprises of the events that took place starting from 1994 and ending in November 1995 with the Dayton Peace Accords. In 1994, the US intervened to form an alliance between the Croats and Bosnians (Croat-Muslim Federation). Following the formation of the alliance, a strike took place, "Operation Storm," in August 1995 whereby the Croats and Muslims retook Krajina and twenty percent of Bosnia back from the Serbs. I will present evidence that will allow me to claim that a *de facto* DTL was in place during this phase of the war.[23] In Chapter V, we shall see that

all the events taking place during this phase -the formation of the Croat-Bosnian alliance, Operation Storm, the role of the US as well as the successful peace negotiations at Dayton -have a natural and straightforward interpretation within the context of my example. In particular, we shall see that with the US acting as an enforcer (in the DTL sense), Operation Storm delivered the amount of information necessary to reach the Dayton Peace Accord.

5. Organization of the thesis

The thesis unfolds as follows. In Chapter II, *Civil Wars and Jurisdictions: Formalizing the Problem*, I start off by discussing the literature on violence during civil wars and bargaining for peace in civil wars. Then, I incorporate the findings of this literature into a war/bargaining game with asymmetric information, which formalizes civil wars. Finally, I introduce a court into the picture and give a brief sketch of how the court is likely to change the war/bargaining game. For the purpose of this chapter, I just present a general idea of how courts can change the nature of the game and the bargaining process. I will provide a more thorough evaluation of how courts affect the war and bargaining game under each legal regime in Chapter V.

In Chapter III, *Legal and Political Views*, I look at the legal and political underpinnings of international criminal tribunals that have emerged as a result of the egregious acts of violence during civil wars. I present the political and legal views that correspond to the different principles of state sovereignty, human rights/global cosmopolitan law, and domestic tort litigation, which underlie the various international legal regimes. I start off by tracing the evolution of state sovereignty from the beginning to the modern day conception. I describe how the concept of state sovereignty evolved from a very strict interpretation, which I classify as pure

state sovereignty, to a more permissive one, which contains several elements inspired by the ideas of human rights and cosmopolitan rights. Furthermore, I discuss the political and legal underpinnings of the domestic tort litigation model and make preliminary considerations as to how it would fare as an alternative international legal regime to redress the violence perpetrated during civil wars.

Chapter IV, *Legal Regimes*, sees how the different ideological views described in Chapter III translate into substantially different legal regimes. The common thread running through these regimes is the overall goals of securing peace and justice. One of the main objectives of this chapter is to consider whether these two goals can be pursued in tandem or are incompatible as D'Amato's claims. He argued that while justice was a commendable goal to pursue it was inconceivable to obtain in practice. I explore this claim by first considering debates between two camps: 1) those who believe there is a duty to prosecute in order to fulfill the goals of justice and peace, and 2) those who do not believe that international law would impose such duties on a state in precarious situations like civil wars and focus instead on ways to secure peace. I examine specific design features of each legal regime coming from the human rights perspective, namely the International Criminal Tribunal for the former Yugoslavia (ICTY), the state sovereignty perspective, namely the International Criminal Court (ICC), a hybrid court model, the Special Court for Sierra Leone (SCSL), and a "possible" legal regime based on the principles of the domestic tort litigation model (DTL) to determine whether or not such design features account for both the goals of justice and peace. To ascertain whether each regime can or have actually obtained peace and/or justice, I look at specific case studies: for the ICTY, I analyze the war in the former Yugoslavia; for the ICC, I analyze the war in the Uganda; for the hybrid court model, I analyze the Special Court for Sierra Leone, and for the DTL, I revisit the war in the former

Yugoslavia and show that a *de facto* DTL was at work and that it led to a peaceful outcome (Dayton Accords).

Using the war/bargaining game of Chapter II, in Chapter V, *Optimal Court Design: A Comparative Analysis*, I undertake the formal study of how different legal regimes affect the parties' ability to successfully bargain for peace. The logic underlying this study is as follows. The literature on civil wars has identified a number of issues that prevent parties to successfully bargain for peace. I ask whether or not it is possible to design a legal regime that could eliminate these issues or at least substantially mitigate their effects. The main message of this chapter is that this can be accomplished. I apply these ideas to compare the relative performance of the legal regimes previously considered: SS, HR/CR and DTL. A novel and non-trivial result of this chapter is that the DTL system reduces (relative to the other systems) the problem associated with the presence of asymmetric information as the DTL favors information transmission from one party to another. Thus, successful negotiations, hence peace, are more likely to occur under the DTL than under other regimes. As discussed in section 1.4, I will argue that a *de facto* DTL was indeed at work during the second phase of the war in the former Yugoslavia, and I will show that my theoretical analysis provides a rationale for the events that took place in that phase.

Chapter VI concludes. I begin with a summary of the thesis and then briefly sketch the direction of future research I intend to pursue. Stemming from the model generated from this thesis there are three extensions I would like to study: The first (section 1: *Multiple players and the Public Interest Variable*), consists of adding more players to the game. Additional players may be needed, for instance, if there is more than one rebel group. A case of special interest obtains when the additional player is the civilian population. A delicate problem of representation may arise in this case. For instance, the UNSC or the Chief Prosecutor of the ICC

could represent the civilian population, but the civilian interest may not be aligned with their interests. It may be the case that the latter prefers an immediate end to the war, while the former may want to pursue justice. In such a case, does the Chief Prosecutor of the ICC or the UNSC duty to prosecute such crimes override the rights/desires of the civilians? Following these observations, one should probably distinguish the case where the interests of the Chief Prosecutor or UNSC are aligned with the civilian population from those where the interests are at odds. Most likely, the outcomes would be very different.

The second extension is considered under the heading *Time and Dynamic Jurisdiction*. This extension is based on the observations that the effectiveness of a court's design depends on the structural conditions of the conflict and that these conditions change over time. In this context, I suggest that the design of a court should not be regarded as a rigid object but rather as a flexible one that optimally responds to the changes in the underlying structural conditions. I sketch a brief example illustrating this point.

Finally, as a third possible extension (section 3, *Credibility*), I notice that the emphasis I have placed on choosing legal regimes may have interesting implications on the classic problem of ascertaining the credibility of courts' threats. In fact, I observe that the choice of legal regime automatically limits the set of threats that might be credible. Moreover, threats might be credible in certain regimes might not be credible in other regimes.

Chapter II

Civil Wars and Jurisdictions: Formalizing the Problem

In this chapter, I describe how to undertake the formal study of civil wars. In Section 1, I begin by reviewing the literature on type of warfare and violence in civil war. In Section 2, I introduce a war game and a bargaining game with incomplete information which constitute a stylized representation of any armed conflict. The war game and bargaining game are interdependent in that the players' decisions in one game depend on the possible outcomes in the other game. From this general model, I obtain a model that specifically applies to civil wars by incorporating, in the form of assumptions, the findings of the literature discussed in Section 1. In Section 3, I introduce a court in the picture. This is viewed as a device that imposes costs on certain actions in the war game. As such, a court has the capability of changing the outcomes of the war/bargaining game. In particular, it can affect the relative profitability of bargaining with respect to going to war. This lays the foundation for determining (given some parameter of the game such as the underlying conditions of war, the types of players, etc.) the optimal court design with respect to the goals (peace, justice, etc.) one wants to pursue. In Section 4, I outline a dynamic version of this model in order to account for the temporal dimension of the war. Issues such as the credible commitment problem can be fully addressed within this framework. The considerations of Section 3 about the role as well as the potential of a court can readily extend to the dynamic setting and lead to the concept of "dynamic jurisdiction", which I introduce in Section 5.

1. Nature of Civil Wars

What makes civil wars a distinct case is the amount of violence directed against the civilian population.[24] Kalyvas argues that "[t]he relation between warfare and violence is not a trivial issue because most victims of civil war are civilians rather than soldiers".[25] Similarly, Humphreys and Weinstein observe that "civil wars are commonly associated with significant suffering particularly for non-combatant populations…as warring factions target non-combatants through campaigns of violence".[26] This begs the question of why civil wars are more violent towards the civilian population than other types of war. It is generally held that the reason for the high level of violence is the structural asymmetry among combatants which is present in civil wars. While the government has legitimacy, sovereignty, allies, and access to resources, rebel groups do not and are usually at a military disadvantage relative to government forces. This structural asymmetry not only exacerbates some of the issues which appear in any type of war, but also gives rise to altogether new phenomena.

We shall see that the literature on warfare in civil wars has isolated at least two important regularities. First, the structural asymmetry between combatants leads rebel groups to choose unconventional methods of warfare, and this is so independent of the combatants' relative strength from a military standpoint. Second, directly targeting civilians is a strategy that is commonly adopted in civil wars both by the government and rebel groups. Once again, this is independent of combatants' relative strength.

As in any conflict, one of the main issues in civil wars is the lack of information about the opponents' strength. Several scholars observe that this type of uncertainty combined with the above mentioned structural asymmetry is one of the main reasons why parties resort to

unconventional methods of warfare (namely, indirect military engagement usually targeting non-military objectives i.e. civilians).[27] In turn, this results into acts of war which are less informative about parties' strength, thus exacerbating the problem of asymmetric information.[28] Kalyvas maintains that "…a focus on warfare is essential in understanding how civil wars endogenously affect the strategies and identities of the political actors as well as the individuals involved in wars".[29] In most conventional interstate wars, both players have the technological wherewithal to potentially disarm each other.[30] In contrast, civil wars are characterized as conflicts with inferior opponents (typically rebels), who lack technologically advanced weapons. Despite the lack of military technological wherewithal, rebel groups that fight unconventionally, particularly those groups that employ guerilla tactics, "…can … inflict significant military and political costs on an opponent, even when the opponent is capable of fielding vastly superior conventional forces".[31] In such situations, the rebels know that they are not fighting to disarm the government, but rather to impose significant costs on the government. These wars frequently turn into wars of attrition, where insurgents seek to win by imposing unbearable costs on their opponents.[32]

It is generally assumed that the government is the stronger party from a military standpoint. Fearon and Laitin find that this is not always the case. One of their main findings is precisely that "financially, organizationally, and politically weak central governments render insurgency more feasible and attractive due to weak local policing or inept and corrupt counterinsurgency practicing".[33] Under these circumstances, the rebels know that the government is weak and decide to go to war against it. Even in this case, however, the rebels would resort to unconventional methods. If the rebels were going to confront the government in battlefield combat (in other words, in conventional combat), then the government, despite its political weakness, would still be at a more advantageous position than the rebels because it is a

legitimate, sovereign state with access to allies and resources. Instead, by fighting unconventionally, the rebels would take advantage of the government's weakness. In fact, due precisely to its lack of resources, the government would be unable to determine the identity and the location of the rebels, which is relevant information to determine their movements and to encourage direct engagement with them. In sum, due to the government's weakness and overall inability of acquiring information about its rebel counterpart, unconventional warfare would prevail even in this situation.

A recent literature has identified another channel through which the structural asymmetry between the government and the rebel group leads to unconventional warfare. In conventional wars, civilian fatalities usually occur as a result of indirect collateral damage rather than as a direct result of combat.[34] In contrast, from a military standpoint, targeting civilians in civil war appears as an effective strategy to redress the imbalance of military power. Hultman argues that rebels use violence strategically to compensate for failing military performance. When the rebel group loses battles to the government, it is at risk of being disarmed and has no leverage at the bargaining table.[35] In contrast, rebels, who have strong resolve to fight despite their weakened stance, may find it effective to raise the government's cost of fighting as this might make continued warfare unappealing for the government. Hultman argues that killing civilians is one such strategy by which rebels can impose extra costs: by attacking civilians, the rebels create a state of fear that makes social control and military efficiency more difficult for the government.[36] Ultimately, targeting civilians does not improve the rebels' capacity to disarm or defeat the government, but it increases the government's cost of winning.[37] This is an effective strategy in that it reduces the government's value of winning the war (formally, this is the government's

outside option in the bargaining game below) and makes the government more willing to make concessions.

The recourse to targeting civilians is not limited to those situations where rebels are at a military disadvantage relative to the government. In 1999, during the civil war in Sierra Leone, the rebel group, the Revolutionary United Front (RUF), invaded Freetown, the capital of Sierra Leone. Prior to the attack on Freetown, the RUF defeated the Sierra Leone Army (SLA) in several military battles in the outskirts of Freetown, a testament to its military fortitude. Despite its unabated strength, the RUF still felt the need to resort to mass violence against the civilian population. This proved to be an effective strategy as it drew the attention of the international community, which forced the Government of Sierra Leone to make substantial concessions to the RUF in the Lomé Peace Agreement. [38]

Valentino et. al. observe that targeting civilians might be an effective strategy for the government as well. When guerrilla insurgencies pose a military threat, the government is likely to respond by massively killing the rebel civilian support base. This is an effective military strategy since defeating well-organized guerrilla army in direct battle is extremely difficult in civil war settings.

Morelli et. al. argue that targeting the civilian population support base of the rebels by either mass killing or displacement, might be an indicator of a strong government.[39] In fact, these authors argue that mass killings perpetrated by the government are to be expected in the presence of large natural resources, significant proportionality constraints for rent sharing, and low productivity of labor in other sectors. In the case of Sudan, they observe that these conditions were met and that the Government of Sudan targeted the Darfur population, whose rebels had

been challenging it over scarce natural resources and marginalization issues. Morelli et. al. along with Straus claim that these "killings were clearly strategic, [since it is] 'directed by the state, targeted at a particular ethnic population, and intended to destroy that ethnic population in substantial part' ".[40]

In sum, the distinguishing feature of civil wars is the high level of violence perpetrated against the civilian population. The source of this violence is the structural asymmetry existing between combatants: the state/government and the rebel/insurgent group(s). On the one hand, rebels are at a military/institutional disadvantage relative to the government, and redress this imbalance by resorting to unconventional means and methods of warfare; typically, this entails military strategies that do not necessarily aim to disarm their military counterparts, but rather aim at only imposing costs on them. One of these strategies consists of directly targeting the civilian population. On the other hand, governments (irrespective of their strength) often resort to unconventional means and methods of warfare that entail targeting the civilian population, either because this is the best strategy against an opponent that fights unconventionally, or simply because this is the most profitable strategy from the government's viewpoint.

2. A formal model of civil wars

In this section, I formalize civil wars. I begin by introducing a war/bargaining game with incomplete information. This is a stylized representation of any war model. From this I will obtain a model of civil wars by incorporating, in the form of assumptions, the findings of the literature on civil wars discussed in the previous section.

The actors involved in a civil war are the government, G, and one or more rebel groups. For simplicity, I will assume that there is only one of these groups and will denote it by R. The set of decisions available to G and R as well as the potential outcomes associated with these decisions are modeled as a game. It is convenient to think of such a game as being constituted by two interrelated parts, **W** and **B**, each is a game in and of itself. The first part, **W**, is a war game. A war game is a contest where two players engage in military combat where each tries to wield force or disarm the other.[41] Typically, this is a game of incomplete information: each party knows its own military capabilities, resolve, etc. but has only partial information about the other party's military capabilities, resolve, etc. Needless to say, the uncertainty surrounding the opponent's strength is one of the main factors determining whether or not the parties would go to war. The asymmetry in parties' information has another important consequence: when we think of wars and negotiations as a process that takes place over time, acts of war as well as bargaining offers convey information about parties' capabilities and resolve.[42] Thus, these actions are also "signals" that induce each party to revise its own beliefs about the other party, and consequently to revise its chosen course of action. For now, I will focus on a static description. I will get back to the dynamic issues in Sections 4 and 5.

The second part of the game **B**, is a bargaining game. A bargaining game marks the period before a war actually takes place or before the combat reaches a decisive outcome. Parties can prevent war if they bargain at the onset of war, or if they fail to agree on a settlement, they go to war. Parties can end the war if they can both agree to some terms of a negotiated settlement. If the war ends in a negotiated settlement then both parties must prefer the terms of the settlement to the expected value of continuing the war.[43]

As I observed, the war game **W**, and the bargaining game, **B,** are interrelated. The players' decision in one game depends on the possible outcomes in the "other" game. On the one hand, expected military outcomes of military battle affect the possible bargains that G and R would agree to.[44] On the other hand, when G and R fail to agree at the negotiation table, one of the options available to them is to go to war. We can think of this as corresponding to the players "exiting" the bargaining game and "entering" the war game. More formally, the players' outside option in the bargaining game, **B,** are the players' expected outcomes in the war game, **W**. [45]

This general description applies to any type of armed conflict. In Section 1, we have seen that the literature on civil wars has identified a number of features that distinguish civil wars from other types of conflicts. Once these are incorporated in the form of assumptions into the formal game, one obtains a formal model of civil wars. Essentially, one has to account for the fact that, in civil wars, there is one party, G, who holds power that the other aims at overtaking, and that the asymmetry in the contenders' status produces an incentive for the parties to resort to unconventional methods of warfare.

2.1 The War Game

2.1.1. The players' actions

In wars fought conventionally, both parties confront each other militarily by using heavy weaponry such as field artillery and armor. Military confrontation is direct and across well-defined frontlines and takes the form of set battles, trench warfare, and town sieges.[46] This implies that when conventional type warfare is employed the main target is military objectives, in other words, the aim of this type of warfare is to "kill, disable, or capture military personnel, and to destroy or disable or capture military equipment".[47]

In contrast, we have seen that one of the characteristic features of civil wars is the resort to unconventional means and methods of warfare such as guerilla or irregular warfare. The weaker group, usually R, refuses to directly engage the stronger group G.[48] "[G]uerrilla tactics seek to avoid decisive set-piece battles in favor of prolonged campaigns focusing on hit and run attacks, assassinations, terror bombing, sabotage, and other operations designed to increase an opponents' political, military, and economic costs as opposed to defeating the opposing military forces directly".[49] In particular, targets are often non-military objectives, i.e. the destruction of civilian assets, which entail killing and injuring non-combatants and/or destroying or damaging material items, such as means of production.[50] Thus, in order to describe the war game in a civil war context, we must, at the very least, account for the players' option of choosing either conventional methods of warfare or unconventional ones. Of course, a large variety of warring strategies is typically available to opposing parties in an actual conflict. I will make a drastic simplification which is, nonetheless, justified in view of the main focus of this thesis. In my stylized description of the war game, I will endow each player with only two possible actions: fight conventionally and fight unconventionally. These actions should be thought of as a coarse classification of the strategies available to combatants in actual conflicts. For my purposes, this is the relevant classification. As outlined above, the strategies in the first group (conventional methods) do not entail violations of international humanitarian or human rights law[51], while strategies in the second group (unconventional methods) do. Thus, the way wars are fought (conventionally or unconventionally) is a crucial factor with regard to the problem of determining the optimal legal regime, which is the scope of this thesis.

2.1.2 The Payoffs associated to the Actions

As a general matter, the payoffs associated with the players' choice of how to conduct warfare are determined by the underlying structural conditions of war. These include a wide range of factors such as 1) type of civil war: religious, ethnic, nationalist, war of greed, war for control; 2) type of government: nascent democracies, full-fledged democracies, oligarchies, monarchies, bureaucratic strength, etc.; 3) military capabilities of each player: weak, strong, fight using conventional or unconventional (guerrilla) methods of warfare; 4) timing of war, onset duration, aftermath; 5) territory; 6) poverty level; 7) population support base (large or small etc.).[52] As I said, for the purpose of focusing on what is more relevant to my thesis, I will make the dramatic assumption that the strategies of each player can be grouped into two broad categories "fight conventionally" and "fight unconventionally". The underlying conditions of the war are then reflected in the payoffs corresponding to the various combinations of these actions.

For instance, in the special case of a game with complete information, where parties are aware of not only their own strength and resolve but also that of the other players; G and R have two actions available to them, α_c= fight conventionally, or β_u = fight unconventionally. The war game would then look like a 2x2 bi-matrix game, where G chooses "rows," R "columns" and the payoffs' (x_i's for G and y_i's for R) are determined by these choices.

		R: α_c	R: β_u
G	α_c	x_1, y_1	x_2, y_2
	βu	x_3, y_3	x_4, y_4

Example 1:

A possible specification of the players' payoff is as follows:

		R: α_c	R: β_u
G	α_c	9, 15	5, 25
	βu	40, 0	**30, 10**

In this example, the strategy β_u (=fighting unconventionally) is a dominant strategy for both players. Hence (βu, βu) is the unique Nash Equilibrium of the game.

Usually a party does not have perfect knowledge of the other party's strength and resolve. Thus, the game with complete information has to be replaced by one with incomplete information, whereby each party knows that the conflict is not described by a single bi-matrix game but rather by a collection of those, each corresponding to the possible "types" of opponents. Moreover, the party assigns to each such game a certain probability of being the correct one. For instance, suppose that G thinks that R can be either "weak" or "strong" with equal probabilities. Then, G would envision two bi-matrix war games, one corresponding to R being "weak" and one corresponding to R being "strong," and assigns probability ½ that each game represents the true scenario.

R_S

	α_c	β_u
α_c	x_{11}, y_{11}	x_{12}, y_{12}
β_u	x_{13}, y_{13}	x_{14}, y_{14}

R_W

	α_c	β_u
α_c	x_{21}, y_{21}	x_{22}, y_{22}
β_u	x_{23}, y_{23}	x_{24}, y_{24}

I have denoted by Rw, the "weak" type of R and by Rs, its "strong" type. Clearly this description has to be paired with a similar one that expresses the point of view of R. These two descriptions can be represented compactly by means of the following table. We can imagine that the games appearing in the table correspond to the possible scenarios (all the possible combinations of the

players' type). Then G is informed of the row where the true game lies (i.e. G knows its own type) and R is informed about the column where the true game lies (i.e. R knows its own type). The specification of the players' beliefs completes the description.

THE WAR GAME WITH INCOMPLETE INFORMATION

R_S | R_W

G_W

	α_c	β_u
α_c	x_{11},y_{11}	x_{12},y_{12}
β_u	x_{13},y_{13}	x_{14},y_{14}

	α_c	β_u
α_c	x_{21},y_{21}	x_{22},y_{22}
β_u	x_{23},y_{23}	x_{24},y_{24}

G_S

	α_c	β_u
α_c	x_{31},y_{31}	x_{32},y_{32}
β_u	x_{33},y_{33}	x_{34},y_{34}

	α_c	β_u
α_c	x_{41},y_{41}	x_{42},y_{42}
β_u	x_{43},y_{43}	x_{44},y_{44}

I have stressed several times that the main distinguishing features of civil wars is the asymmetry in the combatants status, and that this translates into the fact that unconventional warfare is more likely to occur in civil wars than in international wars. To account for this, we must then make an assumption expressing that in civil wars there is an incentive for parties to choose unconventional warfare over conventional warfare. For the sake of simplicity, I will make this incentive quite strong and assume that in each bi-matrix war game, fight unconventionally is a dominant strategy for each player. In particular, this implies that in each bi-matrix game (considered in isolation) the pair (fight unconventionally, fight unconventionally) is a Nash Equilibrium. In fact, this assumption is stronger than what is needed. For instance, all of the conclusions of this thesis would go through under the milder assumption that fight unconventionally is a dominant strategy only for R and that fight unconventionally is a "best response" for G to R fighting unconventionally. In fact, this is the assumption commonly accepted in the literature: *when R fights unconventionally G has no choice but to resort to unconventional methods of warfare because conventional military tactics are inappropriate to combat enemy forces who seek to avoid direct confrontation.*[53] Further "weakenings" are possible but only at the price of a more cumbersome exposition.

2.2 The Bargaining Game

The second part of the game, **B**, is a bargaining game. In the formal representation of the bargaining game, the players are still G and R, and the actions available to them consist of the possible proposals that they can make about the division of a pie. This represents the worth of the country's resources, territory, and other assets over which G and R dispute. It is possible and

allowed in the model, that the two parties value the pie differently. If they divide the pie in a manner that is mutually beneficial, then they will opt to bargain, if not they will fight. The important feature of this bargaining game **B** is the specification of what happens if the players fail to agree, that is the specification of the players' outside option.

As stated above, each party's outside option is their expected outcome in the war game. Since each party has private information about its strength and resolve, this expectation is not known to the other party. Thus, the bargaining game is also a game with incomplete information. In actual situations, a party's inability to correctly determine the other party's outside option is a major factor leading to bargaining failure. I will discuss these issues in more detail in the next section.

2.2.1 Reasons for bargaining failure

The central puzzle in the literature on bargaining for peace during civil war is why can't parties find a division of the pie that is less costly than war? In a seminal paper explaining the rational causes of war, Fearon defined this problem as the inefficiency puzzle.[54] He argued that there are three sources leading to this outcome: private information, commitment problem, and issue indivisibility. As I observed above, typically both parties in a conflict have private information about their strength and resolve. As a consequence, both the war game and the bargaining game are games with incomplete information. I have also stated that both acts of war and bargaining offers can be viewed as signals in that they convey information about the parties' capabilities and resolve. A sizable literature has focused both on the implications of the presence of private information and on the different "informativeness" of the various actions.

Private information is discussed in terms of the information a party has over its capabilities and resolve and the benefits it receives by withholding or misrepresenting this information. It is argued that war occurs because information is withheld, which creates uncertainty about each parties capabilities and resolve. Information can also be used to suppress or exaggerate each party's capabilities and resolve in order to pursue better settlement deals. Blainey (1973), Fearon (1995), Wagner (2000), and Reiter (2003) argue that there is a consistent bias in the way parties estimate each other's outside option in the bargaining game: they tend to overestimate their strength and/or resolve and underestimate that of their adversary.[55] This results in bargaining proposals that are never mutually beneficial, and leaves war as the only outcome. A corollary to their claim is that information acquisition would improve the chance of peace. How the information is acquired and what can be gleaned from it is an issue of much debate in the literature. Morrow argues that disputants learn from the outcomes of the negotiation process.[56] Wagner, on the other hand, believes that war is but a continuation of the bargaining process and that parties are more likely to learn from battlefield outcomes. Like Wagner, Smith and Stam argue that battlefield outcomes in general convey more information.[57] Filson and Werner (2002) attribute importance to both battlefield outcomes and what goes on at the negotiation table.

Another strand of the literature attributes the failure of negotiations to what is referred to as the "credible commitment problem": bargainers cannot credibly commit to an agreement over time for fear of shifts in relative power. Any potential change in the distribution of power among bargainers in the future can lead to bargaining failure: if a weaker bargainer expects to be the stronger in the future, the weak needs to promise the strong not to exploit it when it becomes the stronger party in the future.[58] Thus, the uncertainty surrounding future relative power concerns

impede not only the possibility of designing self-enforcing agreements but also prospects for bargainers to commit to any type of agreement that would prevent or end war.

It is generally argued, however, that the inability to credibly commit to an agreement is a feature of situations characterized by the presence of anarchy at the international level. In fact, the credible commitment problem is dramatically mitigated with the presence of a third party enforcer. Even in highly unbalanced contests, a third party can intervene to help enforce the terms of the agreement by a) verifying and monitoring compliance, b) providing security for combatants as they transition to civilian life, and c) reducing the incentives to cheat.[59] Studies have also shown that civil wars are more likely to end in a negotiated settlement if third party peacekeepers assist in implementing the agreement.

Because of these reasons, the problem of credible commitment will not be a major issue in this thesis, which is exclusively concerned with situations involving a third party enforcer (a court). I will get back, however, to the problem of credible commitment several times, later in this chapter (when talking about dynamics in Section 5) and when talking about the domestic tort litigation model. In that context, I will complement the findings of Walter, Doyle and Sambanis, Fearon, Hartzell and Hoodie, and Fortna by observing that under the domestic tort litigation regime one might obtain the same outcomes but in a possibly different way.[60] This would involve a third party that is only a potential enforcer but that, in fact, does not necessarily intervene to enforce the agreement. [61]

3. Introducing a court

Thus far, I have been discussing the nature of the war/bargaining game in civil wars under anarchy, that is when no agency or supra-state entity can credibly threaten to punish a state/party for using force to settle disputes. Under the state of anarchy, the qualification of whether or not crimes against humanity are committed during warfare is irrelevant since there is no court capable of punishing the parties. When the court enters the picture, however, this qualification becomes important because such acts constitute international crimes and, as such, are punishable by a court. It is easy to formalize the role of a court: it can be seen as a mechanism that sanctions players in the war game, **W,** for the use of certain actions. For instance, in the games described above, a court can impose a cost for playing the action, "fight by committing international crimes". Clearly, different laws and courts would impact the war game differently, both from a qualitative viewpoint and a quantitative one. They would do so by sanctioning different actions or by sanctioning the same actions on different measures/scales. I will come back to this point in Chapter 5. For now, it is important to stress that a court, no matter its type *is a mechanism that alters the payoffs achievable in game* ***W.***

Example 1 (continued)

In section *2.1.2*, we saw an example of a war game with complete information, whose only NE was for both parties to fight unconventionally. In order to highlight the impact a court might have on the way a war is fought, let us think of it as a mechanism that imposes a cost of 30 on those parties who decide to fight unconventionally. The game in section *2.1.2* now becomes

G		R: α_c	R: β_u
	α_c	9, 15	5, -5
	βu	**10, 0**	0, -20

Now G no longer has a dominant strategy. R still has a dominant strategy which now is α_c (fight conventionally) rather than βu. Hence, the only NE is now (βu, α_c), that is G fights unconventionally while R fights conventionally. As the example makes clear, the crucial point is not that the court changes the players' payoffs, but rather the fact that the court has the ability of altering the relative profitability of the various actions. As such, it has the ability of altering the outcomes of the game.

In the previous section, I stressed that the war game and the bargaining game are interdependent in that the outside option in the bargaining game is precisely the parties' expected outcome of the war game. Hence, we can conclude that by altering the outcomes in the war game, a court is going to alter the parties' outside option in the bargaining game. This leads to the following observation that will play a crucial role throughout the thesis: *the ability of imposing costs on certain actions in the war game,* ***W,*** *ultimately translates into the ability of altering the relative profitability of bargaining with respect to going to war.*

Example 2:

In order to see how the introduction of a court may alter the relative profitability of bargaining with respect to going to war, let us consider the following example. Suppose that, in principle, each player may be one of two types, weak or strong. Suppose also that it is common knowledge that G is strong (Gs). R is also strong (Rs) but this information is not available to G, who attributes equal probability to R being either weak or strong. In a situation of anarchy, the payoffs from the war game are shown in the tables below, where the table on the left corresponds to the situation where both players are strong, and the table on the right to the situation where G is strong and R is weak

R_S

	α_c	β_u
α_c	15,10	0, 25
β_u	25,-10	**15,20**

R_W

	α_c	β_u
α_c	30, 5	10,10
β_u	40,-20	**35,-10**

Thus R knows that the potential conflict is described by the table on the left, while G is uncertain as to which of the two descriptions apply. To complete this description assume that both parties agree that the total value of the resources they fight to seize control of is 40.

In this situation, (βu, βu) is the only NE in each of the two tables; the expected value of going to war for G is ½ x 15 +½ x 30 = 22.5, while the value for R is 20. We then conclude that at the bargaining table, R will not accept any offer below 20, and that G will not agree to give any concession higher than 17.5. Hence there is no bargaining range, bargaining will be unsuccessful and both parties will decide to go to war.

Let us now see how a court may alter this outcome. Just like we did before, suppose that a court enters the above picture in the form of a device that imposes a cost of 20 on the parties who choose the action βu (fight unconventionally). Then, the above description is altered as follows

R_S

	α_c	β_u
α_c	**15,10**	0, 5
β_u	5,-10	-5,0

R_W

	α_c	β_u
α_c	**30, 5**	10,-10
β_u	20,-20	15, -30

Now, in the game on the left (considered in isolation) α_c is a dominant strategy for G. It follows that this game (again considered in isolation) has the unique NE (α_c, α_c). Similarly, in the game

on the right, α_c is a dominant strategy for R and (α_c, α_c) is the only NE of the game. From this, we can conclude that in the game of incomplete information, the expected value of going to war for G is ½ x 15+½ x 30=22.5 while for R is 10. Now, we have a bargaining range: R is willing to accept any offer above 10, and G is willing to go up to 17.5.

The example gives us a rough idea of what a court can do in terms of altering the probability of bargaining relative to war. In general given a court's specification, its effectiveness depends both on the underlying conditions of the conflict (as expressed by the players' payoff in the game) and on the players' private information (as expressed by the players' beliefs in the game of incomplete information). In Chapter V, in the context of a richer model, I will show that different court designs might affect these dimensions differently. As a consequence, depending on the situation under study, certain designs may prove more effective than others.

4. Timing and the Dynamic Game

Thus far, I have given a very crude description of the war/bargaining game. In order to give a more thorough description, one must begin by acknowledging that war/bargaining games occur over time, that is one must factor in the temporal dimension of the war. The most important consequence associated with this extension is the recognition that, as acknowledged by Goemans, Wagner, Werner and Filson, Reiter, every action, be it a negotiation proposal or an act of war, also plays the role of a signal transmitted from one player to the other about the player's strength and resolve, its beliefs about its opponent strength and resolve, etc.[62] Hence, in the

dynamic version of the game, one must explicitly take these signals into account as well as the way players use them to update their beliefs.

Schematically, one can think of the dynamic war/bargaining game as being described as follows

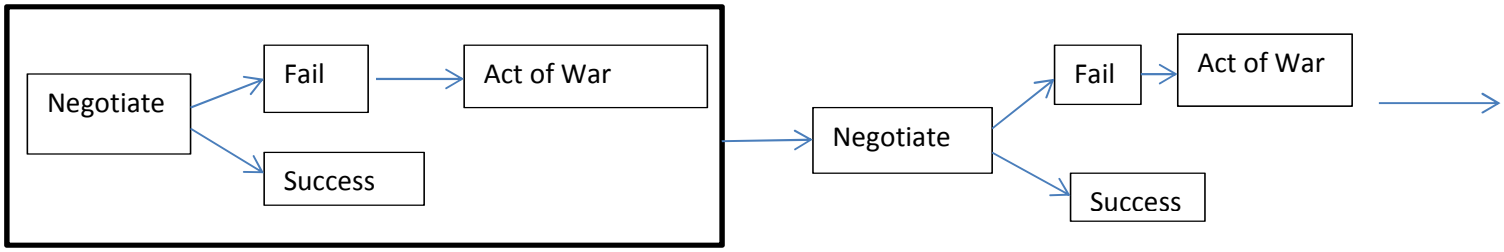

Figure 2.1
A "big block"

Note that the dynamic war/bargaining game conceptually consists of the repetition over time of the "big block," with the chain coming to an end if negotiations are successful (the case of a player being "defeated" in the war can be modeled as a successful negotiation where the other player takes it all). Two qualifications are in order. First, at the beginning of each "big block," the players hold certain beliefs about each other's strength. As noted, these beliefs will be updated during the negotiation phase as well as following acts of war. Thus, in particular, players will enter each big block with different beliefs as they update their information. Second, the value of those parameters that I have been referring to as the underlying structural conditions of the war change as a consequence of acts of war and negotiations. Hence, the underlying structural conditions of the war will be different from one big block to another. In sum, a complete analysis of the full dynamic game would consist in determining what happens in a generic "big block" and of keeping track of the evolution of the players' beliefs as well as the underlying conditions of war.

The main goal of the present thesis is to address the question of what is the optimal court design (in terms of pursuing given objectives, for instance peace) at a given point in time, that is given the players' beliefs and the underlying conditions of the war. Because of this, I will only need to focus on analyzing the "big block," and I will do so in Chapter V. One should think of the contribution of the present thesis as follows. Given an ongoing conflict under consideration, at a certain point in time, one would gather data about the players' beliefs and the underlying costs of war. Then, inputting these data in the model of Chapter V, one would determine the optimal court design given these data. Of course, because of the dynamic aspect of the conflict, it is possible that a design that is optimal at a certain time would no longer be optimal at another time/date where the beliefs and the other conditions have changed. The ideas of Chapter V, however, would still provide the ability of determining the new optimal design given the new data.

5. Dynamics, commitment and "Dynamic Jurisdictions"

In section 2.2.1, we encountered what is known as the *credible commitment problem*, that is the problem that a party would renege on a negotiated settlement in light of new structural conditions that are more favorable to it. This is a problem that is inherently dynamic. We can visualize it by using the "big blocks" of the previous section. Consider two big blocks associated with different dates, t_o and t_1, with $t_o > t_1$. Suppose that, given the structural conditions at t_o, the parties find it profitable to sign a peace agreement. Suppose now that at t_1 these conditions have changed, not necessarily as a consequence of the actions taken by the players at t_o. For instance, the conditions might change as a consequence of demographic factors or of a shift in the

international balance of power. It is then possible that in correspondence of the new situation one or both parties would no longer find the peace agreement profitable. In this case, they would either sign a new agreement or decide to go to war.

Conceptually, one could fully analyze this type of problem by further enriching the description of the dynamic game outlined in the previous section. Essentially, this would be done as follows. Going from one big block to the next, one recognizes that the underlying structural conditions may change not only as a consequence of the players' actions but also as a consequence of external factors such as those mentioned above. In order to keep track of all these potential changes, one can picture different big blocks, one for each set of possible future structural conditions. It is possible, and perfectly in line with the literature discussed in this chapter, that different players would have different expectations as to which conditions (equivalently, which big block) will prevail in the future. In this dynamic game, a strategy for a player is a rule specifying how players behave in response to the underlying structural conditions. Equilibrium strategies would then specify not only the players' behavior today but also their future behavior, which depends on the conditions that will realize. In this way, the notion of equilibrium expresses the property that prescribed strategies are optimal from the players' viewpoint not only in today's situation, but also in all possible future situations. Thus, this takes care of all the dynamic issues including that of credible commitment. In particular, any peace agreement drawn up at a given time will incorporate rules and guidelines on how to deal with future changes so as to prevent the problem of credible commitment. In game theory "lingo," a model of this sort would fall under the heading of stochastic games with incomplete information. Unfortunately, there are no known general methods of solving such games, and it is

likely that the assumptions necessary to solve even a simple example would be so unrealistic to make the exercise futile.

In the previous section, I said that the main goal of this thesis is to study and determine the optimal court design as a function of the underlying structural conditions of war. Essentially for each possible big block, one would like to determine the optimal court. Conceptually, this study has an immediate extension to the full dynamic setting. In fact, it allows one to "attach" to each potential future big block the optimal court. In this setting, a player, when envisioning potential future changes in the structural conditions, would know that the court's design could change in response to the new conditions, and would take this into account when deciding its course of action(s). While I am going to leave this extension for future research, a few considerations on its policy implications are important, nonetheless. I have already noted that different structural conditions may lead to different optimal court designs. This opens up the possibility that, moving from a date to another, the court's design has to change in response to new conditions. Thus, the extension of this thesis' ideas to a dynamic setting leads us to shift from an idea of *static jurisdiction* to *dynamic jurisdiction*, where the jurisdiction itself adapts in response to changes in the structural conditions.[63] I will venture to give a brief example of this point.

After several years of war between the Ugandan government and the rebel group, the Lord's Resistance Army (LRA), the Ugandan parliament passed an Amnesty law, which granted immunity from prosecution to all rebels including leaders who renounced, abandoned the rebellion, and surrendered their arms. At first the Amnesty Act seemed to be effective, the LRA terror tactics diminished and mainly lower level rebels surrendered. A couple years later, the President of Uganda, Yoweri Museveni, aborted the peaceful efforts by joining the international

"anti-terrorist" coalition led by the United States and signed the Anti-Terrorist Act, which classified several rebel movements as "terrorists" and allowed the government to re-arrest former rebels who had been pardoned under the Amnesty Act.[64] This led to a resurgence of violence against the rebel group and the civilian population. With the rebels being classified as terrorists, the state sovereignty model is fully in place, and we can conclude that the only way (if any) of restraining the government from committing war crimes and crimes against humanity against the rebels and their civilian support base would be to introduce a court design based on the principles of human rights.

In contrast, in Chapter V, I will give an example where a court designed according to the principles of the domestic tort litigation model outperforms a human rights court model. By combining these examples, we can envision situations where the idea of a dynamic jurisdiction might produce court designs that are different at different stages of ongoing war, ranging, for example, from domestic tort litigation oriented models (possibly in the early stages of a war) to human rights oriented models (possibly toward the final stages of war).

CHAPTER III

Legal and Political Views

In Chapter II, I showed that the introduction of a court in a civil war setting may substantially alter the parties' incentives. In particular, I showed that, in principle, a court may alter the relative profitability of bargaining with respect to going to war. In this and the next chapters, I am going to dig deeper into the potential role played by a court in a civil war setting by exploring different court's designs. This study constitutes the core of this thesis, and will come to full fruition in Chapter V. There, I will show that different court designs may have a very different impact on the parties' incentives: depending on the underlying structural conditions, while a certain design might prove very effective in leading parties to bargain for peace another design might prove completely ineffective. In this chapter, I begin by reviewing the political and legal views underlying the various court designs. I look specifically at the concepts of state sovereignty (SS), human rights (HR), cosmopolitan rights (CR), and the domestic tort litigation (DTL). I do so not only to see how these principles lead to differently designed courts but also to historically trace the emergence of international courts as an essential international mechanism to manage warfare and redress violence perpetrated against the civilian population during civil war. Formally speaking, we will see that different principles lead to variations in the specific parameters of each court model and hence to different conclusions regarding the courts' ability of achieving the goal of peace (see Chapter V).

In Section 1, I present the political and legal views that correspond to the principles of state sovereignty. I do the same in Sections 2, 3, and 4, but from the viewpoints of human rights,

cosmopolitan rights, and the domestic tort litigation, respectively. A theme that unfolds throughout the chapter is the evolution of the concept of state sovereignty from a very strict interpretation, which I classify as pure state sovereignty, to a more permissive one, which contains several elements inspired by the ideas of human rights and cosmopolitan rights. Inevitably, this will produce a certain amount of overlap across the various sections. It will be important, nevertheless, to keep the various principles separate for the purposes of modeling them into different legal regimes.

1. State Sovereignty

In this section, I begin by surveying the early conception of sovereignty and its focus on the internal dynamics between the state and the population on its territory. I then look at how the discourse of sovereignty shifted from the internal to the external dimension where the focus is mainly on state's freedom from outside intervention. After observing the existence of an intrinsic tension between the internal and the external dimension, I show that the concept of state sovereignty has over time lent itself to a much more permissive interpretation. Finally, I study the position of the state vis-à-vis other international subjects such as individuals, international organizations, and insurgents to determine which entities will have full legal status, that is the ability to be vested with rights, powers, and duties[65] beyond those which are afforded by the state. This is important for the purposes of modeling a legal regime because it determines not only who the relevant actors are but also what kinds of legal actions are available to them. For the purposes of modeling a court design on the basis of state sovereignty, we will see that the state 1) can create or subscribe to institutions like an international criminal tribunal to further its'

interests, 2) can solicit an international court to assist the state only, and 3) can determine the legal status of all other entities, i.e. insurgent, individuals/citizens under its jurisdiction.

1.1 The Internal and External dimension of State Sovereignty

The concept of sovereignty originates from the notion that states have absolute control and authority within their territory and domestic policy domain. Early writers on the subject such as Bodin, Grotius, and Hobbes focused mainly on the internal dimension of sovereignty, which encompasses the relationship between the state and the population within its territory. The state's external relations were deemed of secondary concern.[66] While these writers held that state power was absolute, they also acknowledged that the state's preponderance of power was not unfettered. The population could call the state into question should it abuse its power. Thus, it was held that individuals were the primary holders of sovereignty, and would designate the state as the sovereign power.

The notion of sovereignty included not only the two core components of territory and population, but also the notion of justice. The concept of justice and its compatibility with the notion of state sovereignty is already studied in Grotius. This problem then became prominent during the French Revolution. As Dacyl puts it, "revolutionist claimed that any abuse of state power in relation to the populace constituted a violation of the 'first social contract' between the ruler and the population upon which the very idea of sovereignty was built".[67] In this sense, *sovereignty* is conceptualized as an internal dynamic: On the one hand, it focuses on the authority of the state to maintain control over the territory and population; on the other hand, it accounts for the authority that individuals possess to keep the preponderance of state power in

check. In particular, the authority afforded to individuals legitimates insurgency against abusive states.

The focus of the debate shifted to the problem of territorial sovereignty as the state's external relations became of paramount concern. Krasner classifies the external dimension of sovereignty as the Westphalian state, which was conceptualized around two core components: territory and autonomy. Territoriality means that state authority is exercised over a defined geographic space rather than people; while autonomy means that no external actor can exercise authority within the border of the state.[68]

The notion of the Westphalian state finds its origin in the 1648 Peace of Westphalia, in which it was agreed that belligerent countries would refrain from meddling in each other's internal affairs after the Thirty Years War. From this agreement, the concept of states and the interactions between them changed significantly: while it was commonly accepted that states were different from each other in terms of size and capabilities, the Treaty emphasized that this did not render stronger states the right to interfere in the internal affairs of smaller and weaker states. As a consequence of this view two main principles emerged, which were to guide the relations between states: the *principle of non-interference* and the *principle of state equality*.

The principle of non-interference has been upheld in several legal instruments from the French Constitution of 1793 to the 1823 Monroe Doctrine, where the United States declared not to intervene in European affairs and requested that Europeans refrain from intervening in the Western Hemisphere.[69] In the 19th century, South American states were strong proponents of the principle of non-intervention following their independence from European colonization. African and Asian states followed suit in the 1960s and 70s when they too gained independence from

colonization. After WWII, states vowed to adhere to the principle of non-intervention through the United Nations (UN) Charter Article 2 (7) except when there were threats to peace and security.[70]

While upheld in theory, the principle of non-interference has been severely "compromised" in practice. Examples abound of unlawful interference of one sovereign state in another sovereign states internal affairs. Cassese (2001) attributes such interference to states' pursuit of their national interests. Prior to 1945, states did not adhere to the principle of non-intervention especially when their interests overrode this rule. It was commonly accepted that if a state's interests were paramount then it could legally intervene in another state's affairs by force or the threat to use force in the external and internal affairs of another state.[71] Such violations were also prevalent during the period of the Cold War and particularly poignant during state independence from colonization. Several countries coming out of independence experienced civil strife where insurgent groups were being generally backed by foreign governments (communist and democratic alike) promulgating their ideological views. Moreover, these foreign states would typically make claims to the principle of non-interference and the domestic jurisdiction clause to shield themselves from external scrutiny of human rights abuses committed within their territory.

1.2 Tensions between the internal and external dimensions of state sovereignty

After the breakdown of communism and the end of the Cold War, matters of state sovereignty became murky due to the international community's attempt to make it legal, under

certain circumstances, to interfere in the internal matters of a state. In this phase, it became of paramount importance to determine who could call into question a state's unjust actions against its population. For many scholars, *who is attributed this right* is the main factor in determining the degree of sovereignty of a state. According to the early view, international law regulated only state to state relations and had no authority on how a state dealt with its own citizens. This situation started to change after the Second World War with the emergence of the human rights movement, following the trials of Nuremberg and Tokyo. At first, the practical effect of these transformations was somewhat limited due to the power politics of the Cold War (see below). But, as the Cold War came to an end, dramatic changes took place with the institution of Nuremberg-inspired international war crimes tribunals aiming to combat and prosecute human rights atrocities in war torn countries.

Consequently, these developments have been accompanied by a monumental change in the theorization on the notion of state sovereignty. The human rights movement blurred the distinction between the internal and external dimension of state sovereignty, for the state no longer had sole authority over its citizens. This authority now was assumed by the community of states, who could take measures to legitimately intervene in the internal matters of a state. In other words, how a state treated its individuals in its territory became a matter of international concern, and international measures could be taken to protect these individuals.[72]

Krasner (1999) points out that this depletion of the concept of state sovereignty had historically already taken place in at least two other circumstances: the abolition of slavery and the protection of minority rights. Great Britain unilaterally abolished slavery in several states and the League of Nations required states to uphold laws with regard to the fair treatment of minorities within a state's territory in order to become a member. Krasner explains that

"compromising Westphalian sovereignty" or rather violating states autonomy, is and has been the norm in international relations, and in some cases such compromises has led to more peaceful and stable outcomes.[73] In a more restrictive form, that is, when there is a threat to international peace and security, the UN Charter upholds a similar belief that is enshrined in Chapter VII provision, which permits the abrogation of the principle of non-intervention. The interpretation of what constitutes a threat to peace and security has expanded to include human rights atrocities, namely how a government mistreats its' own citizens.

It is to be stressed that these theoretical and legal changes have recently found concrete applications. With the rise of internal armed conflict coupled with the violence towards civilians during these conflicts, the international community has employed Chapter VII provision in several circumstances. For the first time since the Nuremberg Trials and the creation of the United Nations, the United Nations Security Council has labelled human rights atrocities in countries like Bosnia and Rwanda as threats to peace and security, and has allowed the community of states to intervene either through military force (Bosnia) or through international judicial institutions (i.e. International Criminal Tribunals for Yugoslavia and Rwanda, ICTY and ICTR respectively).[74]

1.3 Legal Status of States

Since states are no longer the sole arbiter of how to cope with their own internal, and to some extent, external problems, it can be contended that states are no longer sovereign. Closer inspection of the relation between states and the other entities recognized in the international system reveals, on the contrary, that the notion of sovereignty is far from being obsolete. In fact,

states still remain the primary players in the international system. For instance, with regard to the relations between the state and other international subjects such as insurgents, individuals, and international organizations, we see that states and only states possess *full legal capacity,* i.e. the ability to be vested with rights, powers, and obligations.[75] All other international subjects possess *limited legal capacity*. All the more, these subjects are also limited in their capacity to act; unlike states, they cannot put into effect their rights and powers in judicial and other proceedings or to enforce their rights.[76] In short, states are the only actors that can dictate, create, and decide upon the fate of other international subjects—this is precisely how states exercise their sovereign right. The remainder of the section will describe in more detail the current (legal) status of the relations between states and other international subjects.

1.3.1 States in relation to Insurgents

Insurgents come into being through their opposition and subsequent struggle against the state to which they belong. Because of their transient nature, they either become the state or are defeated, and therefore, have limited legal capacity.[77] To become an international subject, insurgents should have effective control over the territory, and civil commotion should reach a certain degree of intensity and duration.[78] It is the state that decides whether or not the above requirements are met. According to Cassese, "If a state against which the insurgents are fighting grants them the recognition of belligerency, that is, admits that the conflict under way is an *international* armed conflict, or else third States so recognise it, then rebels are automatically upgraded to international subjects entitled to all the rights and obligations deriving from *jus in bello"*.[79] Cassese observes that "[S]tates are loath to grant such recognition, as is shown by the fact that it has very seldom been given".[80] Thus, rebels' status is contingent on the state's appraisal of the situation. The principle of state sovereignty, again the ability for a state to decide

how it will deal with its internal and external problems, is upheld by the state's sovereign right to determine the legal status of insurgents---they can either be common criminals or combatants. Third states can recognize rebels as international subjects, but such recognition does not mean that they can provide assistance to rebels. Under customary law, third states are duty bound from supplying assistance to rebels. They can engage in dealing with them, i.e. negotiate with them over the protection of third states nationals on rebel territory, help broker peace between the insurgent group and governments and even "…enter into agreements with those States that are willing to establish rapport with them,"[81] or provide humanitarian assistance, but only to the extent that they are not assisting them to gain strategic military advantages. States, on the other hand, can receive assistance of any kind from third states, "including the dispatch of armed forces for wiping out the rebels".[82] (For more on the legal status of rebels see Section 3.5 below).

1.3.2 States in relation to International Organizations

International organizations depend on states for their creation and execution. For the most part, they are instruments created by states to pursue their mutual interests; international organizations cease to exist once states decide to do away with them. When creating international organizations, states agree to delegate some of their authority to external forces. States might want to do so either in the hopes that such a move will assist them in pursuing some of their goals or because they might want to "tie their hands". Hathaway points at the creation of the United Nations and international human rights organizations as examples of these two types of motivations. In the first case, a state agrees to adhere to the United Nations' main provision purporting the principle of non-intervention in return for the United Nations collective protection should the state's security be compromised. In the second case, a state adheres to those organizations to prevent itself from violating the rights of its nationals and/or other individuals.

Whatever the motivation for adhering to international organizations, it must be stressed that any kind of intervention from international organizations in a state's affairs is contingent upon *a priori* acceptance by the state.[83] As Waltz puts it, "to say a state is sovereign means that it decides for itself how it will cope with its internal and external problems, including whether or not to seek assistance from others and in doing so to limit its freedom by making commitments to them. States develop their own strategies, chart their own courses, make their own decisions about how to meet whatever needs they experience and whatever desires they develop".[84] Thus, external intervention of any sort is seen as illegitimate. International law and its core principles of sovereign equality, territorial integrity, non-intervention and domestic jurisdiction dictate that since states are the principal actors in the international scene, they are the only official entity that can petition an international body to intervene in its internal affairs.

1.3.3 States in relation to Individuals

Traditionally, individuals were under the exclusive control of the state. As we have seen, this is no longer the case: individuals now possess international legal status (see Section 3 on cosmopolitan rights below). This means that individuals not only have rights and obligations at the international level, but also that international rules do not have to go through the medium of national legal systems but reach individuals directly.[85] In fact, as a consequence of an ongoing trend in customary international law, the current relation between states and individuals is rather complex. On the one hand, states are responsible for bringing individual perpetrators of crimes against humanity, genocide, aggression, and terrorism to account either in national courts or international criminal tribunals. [86]On the other hand, being recognized as international subjects, individuals have the right to call states into account for violations of these values as well. The relation, however, displays a certain asymmetry. In fact, while individuals have the right to

petition international bodies regardless of whether this right is authorized by national legislation, this right is subject to limitations. Individuals only have the right to initiate proceedings against a state before an international body (i.e. the Inter-American Commission on Human Rights and the European Court of Human Rights), and they are not allowed to participate in the international proceedings.[87] Ultimately, the state still maintains the sovereign right to decide how to deal with problems vis-à-vis an individual on its territory regardless of the international body's ruling.

In sum, the idea of state sovereignty has evolved from a very strict interpretation, whereby the principle of non-intervention was upheld to ensure that it was the states' prerogative to decide how to govern their territory and citizens without outside interference, to a more permissive stance, whereby external entities could interfere in the domestic affairs of the state. The crucial feature, however, is that this can happen *only if the state consents to such interference*. In other words, only the state can request outside interference and if any other entity does so, it is because the state has allowed it to do so. Thus for the purposes of modeling a court based on the principle state sovereignty, we derive the following from this section: 1) only the state can request outside interference such as an international criminal tribunal, in other words the court cannot automatically intervene without state consent, 2) even if the state solicits the court, it does not have to adhere to court decisions if it is not aligned with the states' interests, and 3) no other entity be it individual within the state and/or insurgents can call the court.

2. Human Rights

Scholars in the human rights camp call for strategies that serve the interest of global justice; certain crimes cannot go unpunished because they are so heinous that they affect not just the victims but society as a whole.[88] Specifically, crimes against humanity by definition are of universal concern, thus holding perpetrators accountable becomes an international responsibility. The strategy they deem necessary to deal with such heinous crimes are international courts inspired by principles of universalized rule of law that can be imposed on any state whenever such laws are violated.

In this section, I'm going to explore the notion of crimes against humanity and how it has emerged and developed overtime. This notion is of utmost significance because it has single handedly challenged the principle of state sovereignty. Crimes against humanity along with acts that violate international humanitarian laws are now the basis for individual criminal responsibility. In other words, states are duty bound to respect the rights of their citizens and are no longer shielded by sovereignty if these rights are infringed upon or denied. The international community can derogate from the principle of non-interference to protect the rights of individuals within a sovereign state and indict, apprehend, and prosecute any individual including heads of states for violating such rights.

2.1 Crimes against humanity vs. state sovereignty: A brief historical summary

Certain rights are attributed to every individual or groups of individuals and, by their very nature, are more fundamental than other rights. This is the defining viewpoint of the idea of

crimes against humanity. While everyone would probably agree with this definition, it is too vague to be of any use. The matter becomes slippery as soon as we try to be more precise. To begin, c*rimes against humanity* means anything atrocious committed on a large scale.[89] Upon reflection, this leaves us with more questions than answers. For instance, the word "crime" implies reference to a law (actual, moral, etc.), but what is this "law"? And if any such law exists, does it codify the meaning of "atrocious" and "large scale"? And, even more fundamentally, who codifies such a law and who enforces it? It almost goes without saying that unless we take a strong ideological position, we will have to look for complex and manifold answers. I will begin by re-tracing the historical development, and will focus mainly on the creation of the Nuremberg Tribunal, as most of the principles inspiring today's courts have emerged from the reflections generated by the Nuremberg experience.

At an abstract level, the most fundamental issue is the compatibility of the idea of crimes against humanity with that of state sovereignty. Both the idea of crimes against humanity and of state sovereignty, rather than being abstractly defined, have dramatically changed over time. In the traditional view, state sovereignty is understood as "absolute" within the "bounds provided by international laws," which suggest crimes against humanity matter only in that they find an explicit recognition in international laws, and only those actions that violate existing international laws are to be prosecuted by the international community (*nullun crimen sine lege, nulla poena sine lege).* To illustrate, the 1907 Hague Convention preamble codified the customary law of armed conflict, and marks the first (official) appearance of the concept of crimes against humanity. After the First World War, the Allies, in connection with the Treaty of Versailles, established a commission to investigate war crimes that relied on the 1907 Hague Convention as the applicable law. The Russian Foreign minister, Serfie Sazonov, coined the term

crimes against humanity, in reference to the Turkish officials who committed crimes against the laws of humanity for killing Armenian nationals and residents during WWI.[90] Several countries, including the United States and Japan, opposed the idea of crimes against humanity on the ground that the violations were moral and did not regard positive international law. Their opposition hindered the international prosecutorial process of Turks and other war criminals after WWI.

The situation is somewhat reversed in the period following the Second World War. In this instance, the occurrence of certain crimes, not explicitly recognized by international law, led to the enlargement of the definition of crimes against humanity. With the courts of Nuremberg and Tokyo, crimes against humanity are explicitly recognized as a matter of international positive law; a list of crimes against humanity is given, and most notably, a principle of retro-activity is implicitly adopted. According to Orentlicher, the first two categories of crimes outlined in Nuremberg, crimes against peace and war crimes, did not challenge international law's "bedrock principle of state sovereignty" in the way that crimes against humanity did.[91] Crimes against peace and war crimes concerned, by definition, relations between states. Crimes against humanity, instead included atrocities committed by Nazis against Germans-specifically German Jews, who would not be covered by humanitarian protections of the laws of war. That is, crimes against humanity included conduct of Germans against other Germans in Germany-which was an innovation in international law.

Prior to WWII, how a government treated its own citizens was a matter of sovereign prerogative and not the business of other states. In this sense, crimes against humanity was a profound rupture of international laws deference to state sovereignty, and the justification for this encroachment on state sovereignty was based on moral grounds. King attributes these

developments to Chief Justice Jackson, the Chief prosecutor of the Nuremberg trials.[92] Jackson recognized that if international peace and security were to be the new world order, national sovereignty had to be limited by holding accountable top government officials for criminal behavior. The Allies, however, gave the Nuremberg Tribunal jurisdiction to punish crimes against humanity only when they were committed in connection to war crimes. Orentlicher states, "The nexus requirement provided the principle legal rationalization for what would otherwise be an extreme assault on the citadel of state sovereignty".[93] As we shall see, however, this nexus no longer exists as crimes against humanity are no longer a subsidiary or an accessory for war crimes.

Summarily, the necessity of prosecuting certain crimes led to the international prosecutorial process at Nuremberg and Tokyo, where crimes against humanity was deemed as part of *jus cogens*, which constitute a non-derogable rule of international law. The implication is that perpetrators are subject to universal jurisdiction. All states have the duty to prosecute, extradite, and assist each other to secure evidence to prosecute. As Orentlicher observes, "Correctly understood, the emphasis on permissive international jurisdiction signifies the strength of international laws insistence that crimes against humanity must be punished and that this principle is so important that it justifies an exception to the bedrock principle of international laws respect for national sovereignty".[94] Later, this would be the inspiring principle for subsequent statutes creating ad hoc tribunals like the ICTY, the International Criminal Tribunal for Rwanda (ICTR) and the permanent International Criminal Court (ICC).[95]

2.2 The Idea of Universal Jurisdiction: The International Community as a Guardian of Human Rights

In King's view, Chief Justice Jackson's approach to war crimes and crimes against humanity was an implicit endorsement of universal jurisdiction: international or national courts in any country have the jurisdiction to try cases of genocide and/or crimes against humanity, irrespective of where the accused is from or where the crimes were committed. The idea has become operative with the institution of the ICTY and the ICTR that were imposed on the states of the former Yugoslavia and Rwanda to bring those most responsible for committing international crimes to justice. These tribunals have automatic jurisdiction to prosecute violations of international humanitarian and human rights laws.[96]

According to Henkin, the recognition by the Nuremberg Charter of "crimes against humanity" as a violation of international law was the inspiring principle of the international human rights movement.[97] The international human rights movement heralded the conviction that how human beings are treated anywhere concerns everyone everywhere. This movement not only prompted the incorporation of human rights law in domestic jurisdiction but also sparked transnational acceptance of human rights by the formalization of these rights in declarations and covenants such as the Universal Declaration for Human rights, and the International Convention for Civil and Political Rights, to name a few.[98] The universalization of the ideology of human rights has made it applicable to all human beings in all political societies, while the internationalization of human rights has provided the condition of human rights in every society as a subject of international political concern, and led to the gradual growth of international human rights law. States are now obligated to respect and to ensure human rights of persons subject to their jurisdiction. In Henkin's view "generally, human rights are no longer within a

states' domestic jurisdiction. That which is governed by international law or agreement is ipso facto and by definition a matter of international concern, not a matter of state's domestic jurisdiction."[99]

In sum, the notion of crimes against humanity has categorically ruptured the sanctity of the sovereign state. Now, how a state treats its own citizens has become a matter of international concern rather than just a matter between the state and its citizens. To justify such an encroachment on a sovereign state's internal affairs, crimes against humanity could only be punished if committed in times of warfare. As the human rights movement gained momentum, this nexus requirement began to lose its weight; crimes against humanity are now punishable without any reference to the circumstances under which they were committed.[100] Sovereignty could no longer justify state impregnability, as such state officials are duty bound to 1) refrain from committing crimes against humanity, 2) prosecute violations of such crimes and 3) submit to the international community's authority in the event that the state fails to prosecute violators.

As a consequence of this monumental change in the overall status of the sovereign state, individuals are now international subjects under international law. This implies two things: 1) individuals are no longer mere subjects of a state; they are now directly affected by international law which means that they have duties and obligations to uphold international laws; 2) individuals now have recourse to the international community should the state or any other individual(s) infringe upon their rights. When modeling a court on the basis of human rights principles, we will see that there is a duty to prosecute when the state has violated the human rights of its citizens or individuals within its territory, and as such an external entity such as an international criminal tribunal can automatically intervene to protect the rights of individuals within a sovereign state.

2.3 Cosmopolitan Rights

Another strand of the principle of human rights is cosmopolitan rights. While the concept of cosmopolitan rights is still based on the principles of human rights, the discourse on cosmopolitan rights shifts the focus from the state's duty to protect citizens/individual human rights on their territories to the individuals' rights and duties as citizens of a global community. Global cosmopolitan law rests on the idea that sovereignty resides with the individuals as well as states: if a government fails to protect the rights of its citizens by engaging in widespread killing, then others have an obligation to intervene.[101] According to Donnelly, individuals in this model are seen as members of a single global political community (cosmopolis) rather than as citizens of a state.[102] Since individuals are now legal subjects with fundamental rights under international law, then any individual, whether or not it is a party in the conflict or an individual from the country where the war is taking place, can request external intervention.[103] The doctrine is that a violation of rights anywhere is a violation of rights everywhere and, therefore, must be prosecuted. In this section, we are going to see that the idea of cosmopolitan rights has led to a further weakening of the concept of state sovereignty to the point of calling for a re-conceptualization of the idea of state sovereignty itself.

2.3.1 Organizing Principle of the International System: Re-conceptualizing or Eradicating the concept of State Sovereignty?

With the end of the Cold War, the threat to state survival now mostly comes from within (non-state actors/insurgency) rather than from outside it (other states). As a result, modern international law no longer perceives the violation of sovereignty by outside forces only but also by "indigenous forces".[104] Reisman argues that in modern armed conflict, it is not an outsider

who violates the sovereignty of a state but a "home grown specialist" who seizes and wields authority of the government against the will of the people.[105] Hence, international law has shifted its focus from regulating the behavior of states to securing the rights of individuals within states in times of peace and war.

The prevalence of internal conflicts has been the catalyst for this shift and has become the new security issue. Moreover, civilians have become increasingly vulnerable in internal conflicts. States and sometimes insurgents deliberately target civilians as part of their strategic military calculations during civil wars. In a report issued in 2001 by the International Commission on Intervention and State Sovereignty (ICISS) entitled "The Responsibility to Protect", the Commission correctly located the dilemma. The report states that the UN has to deal with how to reconcile foundational principles of member states sovereignty and the accompanying primary mandate to maintain peace and security with the equally compelling mission to protect the interests and welfare of people within states. The Commission advises the UN to re-conceptualize sovereignty from sovereignty as "control" to sovereignty as "responsibility" and argues that this is not a transfer or dilution of state sovereignty but merely a re-characterization of the concept. This leads one to the following question: who is authorized to determine what the state is responsible for and when it has failed to uphold its responsibilities?

The Commission refers to the UN Charter Article 2.1 which upholds the principle of state sovereignty and defines internal sovereignty as "the capacity to make authoritative decisions with regard to the people and resources within the territory of the state...[and] the authority is constrained and regulated internally by constitutional power sharing arrangements".[106] Even though the Commission acknowledges that international law upholds the principle of state sovereignty, it appears to suggest that this authority be shifted to external actors like the United

Nations Security Council.[107] It explicitly suggests that national authorities are responsible to the citizens and to the international community through the United Nations. By shifting the authority away from the state it is not necessarily making the state responsible as it suggests but accountable for any infractions of the laws protecting the safety and lives of state nationals. Properly understood, state responsibility means shifting authority to new legal subjects such as international organizations, human rights agency, and individuals. Contrary to what the Commission claims, this is a transfer of state sovereignty for now sovereignty no longer resides solely in the state but in international organizations and individuals alike.[108]

2.3.2 The Case for Individual Sovereignty: From legal obligation to legal recourse

According to Reisman , there is a "new constitutive human rights based conception of popular sovereignty".[109] International criminal law crystallizes on popular sovereignty by shifting liability away from a state that does a wrong to another state to placing liability of wrongdoing at the personal level. This marks the transition from individuals being seen as mere subjects of a state to the recognition of individuals as actual "entities" of international law. As legal entities, individuals are not only afforded "rights" but also given "obligations."

Individuals are obligated to comply with some of the most fundamental values of international law; should there be a breach of these values, individuals could then be held accountable. Cassese claims that in recent times a number of international rules have come into being that directly impose obligations upon individuals and that generally these rules crystallize in the area of armed conflict (crimes against humanity, genocide, aggression, terrorism) and also peacetime. This is so whether the national legal system within which individuals live contains similar or the same obligations. The Nuremberg Charter was the catalyst behind this change.[110]

Now international human rights covenants and treaties hold that state officials or private individuals who are in breach of international criminal law during armed conflict or peacetime are criminally liable and can be brought to trial before the courts of any country (that has universal jurisdiction) as well as before international criminal tribunal (if such tribunals have jurisdiction).[111]

The immediate question is who can enforce these obligations? The traditional view holds that only states are entitled to bring violators of such obligations to trial either before national courts or international criminal tribunals. The modern view holds that individuals can enforce these obligations by way of treaty provisions of human rights that confer rights to individuals. Treaty provisions confer the right to petition international bodies on individuals regardless of whether or not they are authorized by the national implementing legislation of those treaties. According to Cassese, "this right is granted to individuals *directly by international rules* and exists whatever the content of national legislature".[112] Cassese outlines some limitations to this particular right: (1) individuals are given only a procedural right which means that they can initiate international proceeding before an international body only to determine whether the state in question violated the treaty to the detriment of the individuals; (2) this right is only granted by treaties illustratively in the following human rights treaties: the Optional Protocol to the United Nations Covenant on Civil and Political Rights of 1966, the Convention on the Elimination of Racial Discrimination of 1965 (Article 14), and regional treaties such as the European Convention on Human Rights, the Inter-American Convention on Human Rights (Article 44) 1969. The Inter-American Convention on Human Rights grants "any person or group of persons or any non-governmental entity legally recognized in one or more member States" of the Organization of American States (OAS) the right to lodge with the Inter-American Commission

on Human Rights petitions containing denunciations or complaints of violations of the Convention by a State party to it".[113] (3) Another limitation is that states must consent to clauses in these treaties that make them accountable to individuals.[114] While some states may refuse to consent to clauses allowing their nationals to bring them to account, this limitation is mitigated by the principles of universal jurisdiction and civilian inviolability that guide the cosmopolitan human rights environment and allows other states, individuals i.e. the Prosecutor of the International Criminal Court, non-governmental organizations, international organizations, and national judiciaries to call on international bodies on behalf of nationals who are legally constrained from doing so.

Thus, under current law, individuals have been granted legal rights that can bypass national legal systems and operate at the international level. The strength of international human rights norms has created new international bodies and agents such as international organizations, civil society groups, non-governmental organizations, who use international human rights norms and instruments as a point of reference from which to judge state conduct.[115] These advancements have empowered individuals, for now they have recourse to these new agents and the legal status to petition international bodies to interfere when violations of human rights and humanitarian laws occur.

In sum, with the prevalence of civil wars along with the rise in the level and number of atrocities committed against civilians in such wars, the idea of state sovereignty has been redefined. This was a necessary step to regulate the conduct of war within states. Now, international law imposes obligations not only on states but also on individuals within states. Individuals also have rights under international law and one such right is the ability to petition international bodies to intervene when states, or other actors for that matter, violate human

rights. The implication derived from this view is that any individual from any country and irrespective of where the atrocities take place can petition an international body to intervene on behalf of victims and prosecute perpetrators without necessarily securing states' consent. Thus from this viewpoint we can automatically assume that anybody, or any "entity" can directly intervene in the internal affairs of a state. This is very much in line with the implications drawn from the human rights perspective. For the purposes of modeling a court based on the cosmopolitan rights, we derive from the above analysis: 1) individuals have legal status and can petition an outside entity, such as an international criminal tribunal, to act on its behalf against the state should the state infringe on their rights, and 2) everybody, including civilians and individuals not directly involved in a war can call the court to intervene. In fact, when we get to modeling the various views, it will be convenient to model simultaneously the human rights view and the cosmopolitan view since in both cases, courts can, in effect, automatically intervene upon grave violations of the law.

3. Domestic Tort Litigation

The principles behind the domestic tort litigation procedure are very different from those seen above. In this section, after highlighting the operational features of the domestic tort litigation procedure, I will consider why this procedure might be a more efficient and viable option to deal with the international management of civil wars. I will also briefly discuss the differences between international armed conflict and non-international armed conflict (civil wars), which is necessary to reify the distinctiveness of civil wars. As we shall see, the issue of the rights and obligations of non-state actors, in particular insurgents, is of special importance in

the context of civil wars. I will observe that an effective transposition of the domestic tort model to the international management of civil wars demands that insurgents should have the same rights as states to petition international courts. In fact, this is a pre-condition for any type of bargaining to take place between insurgents and governments.

3.1 Domestic tort litigation procedure: international management of civil wars

When the international community was called upon to handle the war in the former Yugoslavia (which I will classify as a civil war with international dimensions), international lawyer Anthony D'Amato pointed at the potential advantages of applying the domestic tort litigation model. His main contention was that leaders would not have an incentive to bargain for peace with prosecutions pending. He proposed the domestic tort litigation model, which is based on the notion that "exact justice" can be attained among individuals in conflicting situations without necessarily involving a court. In essence the idea is that an international criminal tribunal would prosecute perpetrators only if they fail to agree *inter se*, and abstain from any intervention otherwise.

In the context of civil wars, it is precisely the parties' ability of reaching a settlement that makes this model suitable for pursuing the goal of a durable peace. Two aspects of this model deserve special attention. Firstly, for this procedure to work in the international management of civil wars, states and more importantly non-state actors (specifically, insurgents) need to be able to petition international courts to intervene. This constitutes a big departure from the strict state sovereignty interpretation because subjects other than the state proper are granted state-like

status (see section 3.5).[116] In conformity with the domestic tort litigation procedure proper, this model, however, is also quite different from the human rights/cosmopolitan model because the court cannot intervene if not requested. Secondly, the prosecutorial power attributed to the international tribunal (that is, the actual prosecutorial ability of the court) is a factor of utmost importance, which ultimately will determine the outcome of the bargaining between the parties. In fact, it is precisely the potential threat of prosecution that would be used by the parties as a "chip" at the bargaining table. I will consider the second aspect of this model in greater detail in Chapter IV and V.

3.2 The Domestic Tort Litigation Procedure Proper

D'Amato transposes the procedure of out of court settlements of civil disputes in the particular area of personal injury litigation to the international management of civil wars. He observes some similarities in the underlying conditions of these two situations. First, in civil law cases as in civil wars there is usually an injured party that can claim redress for injuries caused by another person. Second, at some level, negotiations have to take place in order to settle the dispute. The legal rules which redress claims for damages by accident victims are found in the law of negligence, which is based on the legal principle that, "where an injury has been caused by the negligent behavior of another person the injured plaintiff may bring an action for 'damages' against that third party".[117] Thus, the general idea is that of creating an environment which would lead opposing parties to bargain. D'Amato looks specifically at the domestic tort litigation procedure and at the law of negligence for guidance to create such an environment in the context of international management of civil wars.

The most salient feature of the formal rules of the law of negligence is that a court cannot directly intervene unless solicited by one of the parties involved. This particular feature provides the structure for negotiations because it is under the threat of court proceedings that settlements are ultimately concluded; without the threat of proceedings there is little to no incentives for complicit parties to respond to claims of damages.[118] Cases are settled by means of compromise rather than adjudication because the interests of both parties are best served by avoiding the court. Genn argues that the act of compromise is an efficient solution to the stark difficulties, uncertainties and cost of protracted court proceedings in domestic litigation.[119] If one deems valid this point of view, then one should have no trouble considering the extension of the practice of compromise to the international management of civil wars. For those "difficulties, uncertainties and cost of protracted court proceedings" are highly accentuated in the context of civil conflicts.

Unlike criminal justice, there is no element of (criminal) 'punishment' for negligent parties in the award of damages. The law of negligence, however, covers concerns other than restitution to plaintiffs. Genn again argues that both deterrence and retribution are considered to be important and legitimate functions of the law of negligence.[120] This is especially clear in D'Amato's analysis, which takes into account the international interest of deterring future war criminals when arguing for the use of procedures based on the law of negligence.

D'Amato observes that these principles have already been used in criminal matters. In ancient Roman law, the patricians could avoid punishment for the delicts they committed by paying full compensation to the victims of their crimes or the victims' heirs. The system's logic is that, since patricians had sufficient assets to be able to pay full compensation, the prospect of losing their asset would be sufficient to deter them from committing crimes. In a domestic

setting, the shortcomings of this two-track system are evident as one would imprison the impecunious criminals while allowing wealthy ones to buy their way out of jail.[121] But, as D'Amato explained, these shortcomings are likely to disappear when these principles are applied to the international management of civil wars. In these settings, typically all parties to the peace negotiations have assets that the other side desires; thus, these assets constitute valuable bargaining chips. Furthermore, as long as potential punishment is commensurate to the gravity of the crimes committed, more culpable parties would have a greater incentive to avoid the court and would therefore make more concessions. In D'Amato's words "political and military leaders in future wars would thus be subject to a double-barrelled uncertainty..." possible court proceedings, or loss of valued assets.[122] Either way military and political leaders should be deterred from causing injury for fear of future unfavorable ramifications.

It is clear that the effective transposition of the domestic tort litigation principles to civil wars requires that the same rights would be afforded to all warring parties. Thus, in particular, from the viewpoint of the law both states and insurgent groups should have the same rights. Yet, the situation is quite different under the current legal system where several rights are afforded to states but not to insurgents. The remainder of this section is devoted to examining the current state of affairs.

3.3 The traditional distinction between International armed conflict and Non-international armed conflict (civil wars)

A distinction of fundamental importance is that between international armed conflict and internal armed conflict (see also Chapter IV). Schabas explains that such a distinction exists

because states have historically accepted the obligations to rules that regulate the conduct of war and the treatment of victims, especially non-combatants, when a conflict is between states.[123] On the contrary, states have been reluctant to create and adhere to laws governing the conduct of war in the non-international armed conflict context.[124] In fact, non-international armed conflict is governed by Common Article 3 to the 1949 Geneva Conventions and the Additional Protocol II to the Convention, which provide only minimal standards of norms that are applicable to armed conflict not of an international nature. According to Additional Protocol II, non-international armed conflict (= civil wars) are armed conflicts that take place between a state's armed forces and non-state armed forces, "which under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol" (Article I).

A more recent definition of civil wars appears in the Rome Statute which stipulates that they are "armed conflicts that take place in the territory of a state when there is protracted armed conflict between government authorities and organized armed groups or both such groups" Article 8(2)(f). Schabas notes that the existence of organized non-state armed groups are essential to the definition of internal armed conflict.[125] Common Article 3 does not impose this requirement but Additional Protocol II to the Geneva Conventions and the Rome Statute apply only when non-state actors with a certain level of organizational capacity exist.[126] Additional Protocol II actually calls for the existence of a de facto state, in that the control of the territory by non-state groups must be state-like (yet, recognition by either other states or international organization is not required).[127] The definition also hinges on the level of intensity of the conflict, which must reach a certain threshold before these provisions apply. In fact, this threshold is extremely high which, incidentally, might be one of the many reasons why civil wars

tend to be extremely violent at the onset (because it is only after committing a significant amount of atrocities that combatants would have access to international instruments).

Schabas argues that the significance of the distinction between international and internal armed conflict resides in the punishment of such acts as international crimes.[128] An implication of the view that Common Article 3 is the only provision that addresses internal armed conflict is that the grave breach system does not apply. Thus, it follows that *international crimes do not exist in internal armed conflict* and this provides the grounds for states to maintain that rebels are mere criminals and should be governed by ordinary criminal law.[129]

With the rise in the number of international tribunals with jurisdiction to punish international crimes in the context of civil wars, this view is hardly tenable. Schabas further maintains that, "the recognition that acts committed by non-State actors as well as, of course, by the States themselves and those acting on their behalf- during non-international armed conflict constitute international crimes has...subjected such acts to prosecution by the courts of other States. This has been done under the principle of universal jurisdiction or the jurisdiction of an international court".[130] Since non-state actors and the individuals comprising them can be prosecuted for international crimes during internal armed conflicts, then this implies that non-state actors are obligated to abide by rules governing international humanitarian and human rights laws. What, then, is the legal status of non-state actors such as rebels/insurgents in light of individual criminal responsibility?

3.4 International Legal Status of Insurgents: On the Right to Petition International Courts

Current regulations and conditions on the status of insurgents in international law, as the late Cassese put it, "…is rather confused and rudimentary".[131] As such, I will limit this discussion and focus primarily on the subject matter at hand; that is, the issue on the right of insurgents to petition the intervention of an international court during violent internal armed conflict. It will be recalled that this is a necessary condition for the effective transposition of the domestic tort litigation model to the international management of civil wars, and more importantly, a pre-condition for any type of bargaining to take place.

As we have seen in section 1.5.1, states determine the legal status of rebels and often do not grant rebels recognition of belligerency. According to Moir, "[r]ecognition of belligerency by the parent state brought into effect the *jus in bello* in its entirety between it and the rebels…such recognition was clearly more beneficial to the insurgent than to the government, which was no longer in a position to put down the insurrection in any manner which it saw fit, treating rebels as mere criminals at the mercy of domestic law. Rather, it found that rebels had rights and duties analogous to its own which served to eliminate the inequalities between the sides to some extent…"[132] It is precisely for this reason that neither states nor third states rendered this recognition, and as such the traditional doctrine of "recognition of belligerency has fallen into disuse as a legal concept".[133] Under the current legal system, insurgents have obligations to abide by humanitarian and human rights laws (Common Article 3 and Additional Protocol II) even though they can neither sign nor accede to international agreements. [134] Moreover, the right to petition an international court is a right that is afforded to states; rebel groups do not enjoy the same status as states or the same right of referral and would have to resort to other mechanisms

to persuade the Prosecutor or the UNSC to investigate crimes committed by states. Rebels have equal access as a state to solicit a court only when it has won a decisive victory and has become the state. Rwanda is a case in point. The Tutsi led Rwandan Patriotic Front (RPF), originally rebels in the conflict, overcame the Hutu led government and received recognition from other governments as the official representatives of the state. It also had effective control of Rwandan territory and the conflict had reached a level of intensity that amounted to genocide. During the genocide, the Hutu led government still held a seat at the United Nations Security Council (UNSC) and was considered legitimate despite its ongoing egregious acts. The international community not only feigned ignorance of what was going on in Rwanda but also refused to call the government's actions genocide. Since the international community denied the fact that genocide was indeed taking place, getting outside assistance to end it proved difficult. The only form of effective intervention came only after the RPF won a decisive victory over the Hutu government.

If states are the only entity that can petition a court and there is a potential for rebels to take full control and install themselves in place of the government, it is logical to maintain that they should be able to petition the court before they seize power. According to this view then, international courts should take rebels into account under two conditions, 1) when they have become a full-fledged state, and/or 2) when they have committed international crimes. For instance, in Rwanda, the RPF called the international community to create an international criminal tribunal to intervene only after they had seized power and defeated the Hutu genocidaires. From this assessment, one could reach the strange conclusion that international courts can only come into the picture after a significant level of carnage and atrocities (i.e. genocide) are committed. Allowing rebels to call the court before they seize power and (in some

cases) become the official state may not only curb the level of intensity and atrocities committed in civil conflicts but also hold uncontrollable violators of international crimes within their own insurgency group accountable[135] and keep government actions in check. We have seen that in the current legal system, the right to request intervention of international courts is not always granted to actors other than states, and when it is granted, it is only under certain circumstances (i.e. individuals, NGO's in the cosmopolitan viewpoint). Just as opposing actors in a civil system have the same rights; the transposition of the domestic tort litigation to the international setting requires that warring parties have the same rights in order to request intervention in the internal affairs of the state. Thus, laws have to be changed for the domestic tort litigation idea to work in the international setting. One possibility would consist in bringing back some elements of the traditional doctrine of recognition of belligerency as a legal concept, but the right to grant such recognition should not be limited to states. For instance, one could envision a regime inspired by the principles of the domestic tort litigation where the Chief Prosecutor is also attributed the right to declare the status of belligerency. Such a move will "eliminate inequalities of both sides," which implies that both parties could potentially solicit the intervention of the court upon the infraction of the law.[136] Again, this is a big departure from the strict states sovereignty perspective because states can no longer do as they please in such circumstances; the court can be called to bring the state to account by a non-state entity.[137] Thus for the purposes of modeling a court based on the DTL, 1) the court cannot intervene unless solicited by one of the parties directly involved in civil warfare: the government and/or rebels, 2) if the court is solicited, all parties - including the one that called the court - will be tried if complicit, and 3) since the court cannot directly intervene, it cannot prosecute parties for crimes committed if both parties come up with a mutually beneficial agreement.

To conclude, if we were to conceive of a political spectrum where at one end there is strict state sovereignty and at the other end there is human rights/cosmopolitan right, the domestic tort litigation legal view would fall somewhere in between. The domestic tort litigation model is aligned with the interpretation of state sovereignty because international courts cannot intervene without the request of one of the parties directly involved in the conflict, i.e. the state, but departs from the sovereignty viewpoint because rebel groups are granted state like status which gives them the right to petition international courts. Unlike the human rights viewpoint, the court from the domestic tort litigation perspective cannot intervene if not requested.

Chapter IV

Legal Regimes

In Chapter III, I traced the evolution of the concept of state sovereignty, surveyed the ideas of human rights and cosmopolitan rights and, finally, looked into D'Amato's proposal to use the domestic tort litigation procedure to deal with the international management of civil wars. In this chapter, we are going to see how the different ideological views described above translate into substantially different legal regimes. The common thread running through these regimes is the overall goals of securing peace and justice. One of the main objectives of this chapter is to consider whether these two goals can be pursued in tandem or are incompatible as D'Amato claims. He argued that while justice was a commendable goal to pursue it was inconceivable to obtain in practice. I'm going to explore this claim by first considering debates between two camps: 1) those that believe there is a duty to prosecute in order to fulfill the goals of justice and peace, and 2) those that do not believe that international law would impose such duties on a state in precarious situations like civil wars and focus instead on ways to secure peace. I will then examine specific design features of each legal regime to determine whether or not such features account for both the goals of justice and peace.

1. Peace and Justice or Peace vs. Justice

1.1 The Duty to Prosecute: Logics of appropriateness or Logic of consequences?

For the purpose of situating the debate as to whether it is necessary to prosecute perpetrators of international crimes or settle political accounts before dealing with matters of justice, I want to consider two distinct approaches that guide political behavior. Drawing on the works of March and Olsen, it is argued that all political and social environments operate under two alternative logics of conduct, the logic of consequences and the logic of appropriateness.[138] The logic of consequences assumes that there exist different courses of actions with no particular rule dictating what action to take. A person is only being guided by rational calculations determining which action will lead to the political actor's preferred outcome. The logic of appropriateness, instead, assumes that there are rules and roles that guide a political actor's behavior and the type of act chosen is what is appropriate given the particular rules and roles.

Those who advocate the political and legal views of human rights and act according to these international rules and obligations are operating under the logic of appropriateness. In contrast, scholars of the consequentialist persuasion acknowledge the general principles and laws dictating the duty to prosecute international criminal offenders but argue that there may be more pressing goals at stake, like ceasing hostilities and attaining a durable peace.[139] If peace is the preferred goal and the strategy of justice fails to maximize the attainment of peace, then as per the logic of consequences political actors should follow alternative courses of action to obtain the goal of peace.

1.2 Logic of appropriateness

Some scholars contend that there is a duty to prosecute to attain justice no matter what the consequence(s) and cite numerous legal instruments (such as the UN Charter and the Genocide Convention) which obligate states to prosecute international crimes. Doing otherwise is considered illegal.[140] There are numerous international legal instruments, ranging from customary law to treaty based obligations and UN Security Council Resolutions calling for the prosecution of violators of international crimes, which include genocide, war crimes, crimes against humanity, and other international crimes such as aggression, torture, and terrorism. Legal scholars, such as Paust and Orentlicher to name a few, argue that international law does not allow for the abrogation of the duty to prosecute when any of the above laws have been violated.[141]

There are other scholars who push this argument in the direction of the logic of consequences when they argue that individual perpetrators of international humanitarian and human rights crimes should be held accountable and punished to ensure peace. Akhavan (1995) is of the opinion that there is a complementary interrelationship between war crimes prosecution and the peace process. Long term peace cannot be achieved without individual accountability (see below DTL model). He claims that individual accountability will deal with the root causes of the conflict and can create genuine and lasting reconciliation. He further contends that what is needed for a durable peace is the absolution of collective guilt for horrific crimes and that individual accountability for war crimes through an impartial tribunal would be able to accomplish this goal.[142] In short, retributive justice is seen as a means to the end goal of peace.[143] None of these scholars, however, show exactly how justice leads to peace. If anything, what they do show is how retributive justice leads to the attainment of the goal of justice rather than peace.

1.3 Logic of consequences

Scholars on the other side of the debate argue that retributive justice is by no means the only way to achieve peaceful outcomes. Those on the side of Nino seem to understand that what needs to be specified is the goal that one wants to achieve from transitional justice and/or the international management of civil war before one decides that prosecutions are the best way to achieve it. As D'Amato made clear, if one aims for achieving a durable peace, justice, while desirable, might be practically untenable. He questions the assumption discussed above that the prosecution of perpetrators is the best way to deal with past atrocities especially when these perpetrators are usually those leaders instrumental to ending the war and ensuring a durable peace. Advocates of this position recognize that prosecutions are usually impossible in the wake of human rights disasters and may in fact spark future atrocities.[144] Thus, scholars on this side of the debate explore various types of non-prosecutorial mechanisms to attain both the goals of peace and restorative justice.

Bassiouni provides a comprehensive list of accountability measures: international prosecutions, international and national criminal investigatory commissions, investigative truth commissions and reconciliation hearings both national and international, national prosecutions, national lustration mechanisms, national civil remedies, and international mechanisms for the compensation of victims. He argues that "we cannot look at each mechanism exclusively from the perspective of a crime control model but as an instrument of social policy that is designed to achieve a particular set of outcomes that are not exclusively justice based".[145] Bassiouni sees

accountability measures as an indispensable component to peace and eventual reconciliation and has a broad definition of justice which ranges from the prosecution of all potential perpetrators to the establishment of truth.

1.4 Which logic prevailed in practice?

In the 1990's, the views from the logic of appropriateness prevailed. The international community adopted international prosecution as the primary accountability mechanism to deal with perpetrators of international crimes. Consequently, various international legal regimes (see below) were designed with the primary intent of bringing perpetrators to justice. Drafters of the statutes creating these international legal regimes assumed that by endowing the regimes with certain legal powers and jurisdictions, one would be able to prosecute the most complicit individuals and deter potential perpetrators from committing more atrocities. The general assumption was that bringing perpetrators to justice would contribute to the restoration and maintenance of peace.

What the drafters of the statutes failed to realize was that international adjudication mechanisms serve to attain the goal of justice only, especially since such institutions are usually designed with specific legal powers and jurisdictions that make the apprehension and prosecution of international criminals possible.[146] The question of whether subjection to international prosecution creates incentives for warring parties to bargain for a mutually beneficial peace agreement or rather leads them to continue warfare is left hanging. This thesis aims to address this question and, more generally, the problem of whether or not peace and justice can be pursued simultaneously. In this Chapter, I will discuss the salient design features of the legal regimes coming out of the ideas of human rights (HR), state sovereignty (SS), and the domestic

tort litigation (DTL) and analyze case studies, specifically, the war in the former Yugoslavia (HR), and the wars in Uganda and Sierra Leone (SS) to highlight some of the features of each legal regime design.[147]

2. Vertical Cooperation Model: Human and Cosmopolitan Rights (HR/CR) Legal Regimes

The ideas of human rights and cosmopolitan rights are implemented through what international lawyers call the vertical cooperation model. When the relationship between the state and the court is regulated by the vertical cooperation model, the court can intervene upon the violation of any international crime without being solicited by any entity.[148] The international court is a supra-state entity that can be imposed on a state in conflict and can indict, apprehend, and prosecute anyone that violates international law. Neither the principles of non-intervention nor of state consent are fully subscribed to in this model. An international judicial body, usually created by the United Nations Security Council (UNSC), supersedes not only individuals within a sovereign state but the state as well. The legal regimes emanating from the vertical cooperation model are crystallized in the International Criminal Tribunals of the former Yugoslavia and Rwanda (ICTY and ICTR respectively). I will mainly consider the ICTY; the first criminal tribunal of its kind since Nuremberg.[149]

The fundamental difference between Nuremberg and the ad hoc tribunal for the former Yugoslavia is that the former emerged as a result of an international conflict while the latter was the result of a civil conflict with international dimensions. As a consequence, there are some substantial differences in the drafting of the two statutes (see Security Council Resolution 827 (1993), which instates the ICTY). Yet, the inspiring principle of both the ICTY and of the

Nuremberg tribunal is the same: the principle of criminal accountability.[150] The international legal paradigm is one whereby individual state elites (leaders both civil and military) are prosecuted for international crimes committed and facilitated by the state. Before I delve into the details of the statute creating the ICTY as a legal regime, I provide a brief case study of the war in the former Yugoslavia and the events that led up to the creation of the ICTY.

2.1 The war in the former Yugoslavia

In June 1991, Slovenia and Croatia declared independence and seceded from Yugoslavia. Serbia, led by Slobodan Milosevic, reacted and declared war to both countries. Since the Serb controlled the state military (JNA) which was mainly comprised of Serbs, it had a military advantage and used its troops stationed in Croatia and Slovenia to make quick military and territorial gains. With the capture of Krajina in Croatia, the Serbs were able to create territorial cohesion for Croatian Serbs.[151]

The following year, Bosnia declared its independence and as a consequence the war spilled over to Bosnian territory. General Ratko Mladic led the Bosnian Serb paramilitaries and set out to ethnically cleanse predominantly Muslim towns in Bosnia. Through mass murder and the internment of Muslim and Croats in camps, Mladic was able to create an ethnically pure Republika Sprska. Serbs were not the only parties in the war that employed ethnic cleansing as a military strategy to gain territory; Croatians used similar tactics against ethnic Serbs and Muslims in Bosnia and Croatia. Because of the use of ethnic cleansing, both Serbs and Croatians had a military advantage over Bosnians: 2 million Bosnians were displaced by the end of 1992[152] and Serb forces had captured over seventy percent of Bosnia.[153]

Once the international community caught wind of the humanitarian and human rights violations taking place in Bosnia, it immediately intervened. In 1991, the United Nations (UN) sent peace troops (UNPROFOR) to establish "safe areas" for the protection of Bosnian refugees. This move did not have an immediate effect. Conflict and the commission of war crimes intensified as the Bosnian Serbs targeted and shelled UNPROFOR safe areas. The Bosnian cities of Srebrenica and Sarajevo, former Yugoslav capital, bore the brunt of war. As a consequence of continued violations of the law, the UN passed financial sanctions against Serbia. Even with international sanctions and direct intervention (through humanitarian assistance), the UN effort failed to deter the Serbs.

In 1993, the Vance-Owen Plan, which divided Bosnia into ethnic cantons, was offered to all parties in the conflict. The main objective of the plan was to force the Bosnian Serbs off cleansed territories. The Plan was ultimately rejected by all sides and as such, no progress was made to end hostilities between the warring parties.[154] Other diplomatic efforts proved futile. The international community began to create alternative courses of action, one of which was the Joint Action Plan, which called for the sealing off of the Bosnian border from further Serbian and Croatian encroachment, and for the establishment of six Muslim "safe areas" throughout Bosnia. Despite these efforts, the warring parties were undeterred: Serbs continued to occupy safe areas and, both Serbs and Croats continued to attain Bosnian territory though ethnic cleansing.[155]

Acting under the Joint Action Plan, in 1994 NATO issued an ultimatum which called for Serbian forces to withdraw from Sarajevo or face bombing. The ultimatum was partially fulfilled: Serb forces lifted the siege of Sarajevo and only partially withdrew. While NATO was dealing with the Serbs, a US led diplomatic initiative formed an alliance between the Croat-

Muslims creating the Croat-Muslim Federation. This led the two sides to sign a peace agreement and allowed the Bosniacs to be fully armed. The alliance served four purposes: 1) it stabilized Bosnia, 2) it ended Muslim-Croat territorial division, 3) it ended Croat-Muslim fighting, and 4) it created a stronger military opponent against the Serbs.[156]

Later on that year, the international community made further strides in its pursuit to end hostilities. A Contact Group consisting of five great powers, France, Germany, Russia, United Kingdom, and the United States issued an ultimatum and offered Serbs an "all or nothing" deal: the Serbs were to surrender territory including territory acquired via ethnic cleansing. The Serbs were divided on which course of action to take. Bosnian Serb president, Radovan Karadzic rejected the ultimatum since it required relinquishing territory that constituted the new Republika Srpska. Serbian president, Milosevic, who sought to ease sanctions and oust Karadzic, wanted to accept the plan. Due to the alignment of interest with the international community, Milosevic became the primary negotiator of the Bosnian Serbs, minimizing the role of both Karadzic and Mladic. Bosnian Serbs conceded to end the war only if they could keep territorial gains, if not, they would continue to fight.

Despite NATO's ban on shelling UN designated "safe areas," Bosnian Serbs forces continued the siege of Sarajevo and as a consequence, NATO took military action and air raided their forces in May 1995. Bosnian Serbs responded by shelling all 6 "safe areas" in Bosnia and took 350 UNPROFOR soldiers hostage. As the international community attempted to release the hostages, NATO halted air strikes. The conflict came to a climax when Bosnian Serbs massacred Muslim men and boys in UN designated safe area of Srebrenica. To shield themselves from further NATO air strikes, Mladic took 450 Dutch UNPROFOR troops hostage. Shortly

thereafter, the Chief Prosecutor of the ICTY, Richard Goldstone indicted Karadzic and Mladic, for the second time, for genocide and crimes against humanity.[157]

2.2 The ICTY

In 1992, the UN Security Council (UNSC) formed a War Crimes Commission to investigate violations of international humanitarian law and human rights law in the former Yugoslavia. While the UNSC thought it unrealistic to expect leaders to negotiate for peace if they knew that shortly after the peace agreement they would be facing potential prosecution and life imprisonment, it still preferred less invasive accountability measures rather than military intervention.[158] Providing amnesties to leaders in exchange for peace was also considered, however, given the nature of the preliminary report issued by the War Crimes Commission, it appeared that the international community was under legal obligation to prosecute war criminals.

The report described in detail the commission of war crimes in Croatia and Bosnia. It concluded that the atrocities in Yugoslavia could be characterized as grave breaches to the Geneva Convention and the Genocide Convention.[159] The categorization of the crimes as grave breaches and genocide, both crimes that do not allow any derogation from prosecution, triggered the obligation for the international community to prosecute and obliterated any possibility for granting amnesties. On February 22, 1993, the UNSC adopted Resolution 808, creating an International Criminal Tribunal for the former Yugoslavia (ICTY), which would prosecute individuals responsible for violations of international humanitarian law committed on the territory of the former Yugoslavia since 1991.[160]

2.2.1 Salient Features of the Human Rights Legal Regime: The International Criminal Tribunal for Yugoslavia (ICTY)

The human rights and cosmopolitan rights legal regimes are based on the vertical cooperation model which means that a supra-state entity, like the UNSC, dictates that the pursuit of justice will be taken out of the hands of the state. There are two particular provisions in the statute creating the ICTY that illustrate this point: UN Chapter VII powers and subject matter jurisdiction. First, the court is endowed with UN Chapter VII powers, which means that the tribunal is not only imposed on the former state of Yugoslavia, but requires its full cooperation. In addition, it obligates all states party to the United Nations Charter to cooperate with the international tribunal. Second, the statute is also endowed with an extended subject matter jurisdiction, which means that it can regulate the conduct of war in the former Yugoslavia by applying laws that govern international armed conflict to civil wars as well. This implies that acts that violate international law, while committed in the civil war context, are now considered international crimes and are, therefore, subject to international prosecution.

2.2.2 UN Chapter VII powers

In the UN Charter, Chapter VII calls for the Security Council to decide what measures to take to stabilize situations that constitute a threat to international peace and security (UN Charter, Article 39). In the case of the former Yugoslavia, an international court was established to deal with these threats. With UN Chapter VII powers, the Security Council also calls on member states to assist in fulfilling its decision(s) (UN Charter, Article 41). In fact, member states are obligated to give effect to the decisions made by the Security Council under Chapter VII, because these states ceded some of their sovereignty to the Security Council to act on their behalf on matters of peace and security (UN Charter, Article 24(1)). This implies that all member states of the UN are obligated to cooperate with the court and have to abide by any request of the court such as arresting or surrendering indictees and handing over evidence.[161]

This provision is further reinforced by judge-made rulings in specific cases. Cassese illustrates the vertical relations of states and international courts in his analysis of *Blaškić (subpoena)* case.[162] In this case it was upheld that: (1) the Statute of the tribunal imposes upon states an obligation to cooperate, and in the case of non-compliance by a state the sanctioning powers of the Security Council would take effect; (2) states cannot refuse to comply with the court based on the traditional clauses of interstate judicial cooperation such as double criminality, political offense, nationality of the person request for surrender; [163] (3) the tribunal has a final say as to whether states can refuse handing over documents or evidence on grounds of national security concerns; and (4) the collection of such evidence may be conducted by the relevant state, but the prosecutor of the international court can conduct investigation on the territory of the states of the former Yugoslavia and on territories of other states that have implemented legislation authorizing Tribunal activity.[164] Overall, the international court has primacy over individuals, states and their national courts, which implies that those indicted by the tribunal can be implicated and apprehended by any state in accordance with the ICTY mandate.

2.2.3 Extended Subject Matter Jurisdiction

The second salient feature in the statute creating the ICTY is the provision of extended subject matter jurisdiction. This provision enables the tribunal to prosecute perpetrators for crimes ranging from war crimes, genocide, crimes against humanity, and other violations of international criminal law during an internal armed conflict. According to Cassese, "Traditionally... [v]iolations of international law committed in the course of internal armed conflicts were not criminalized. Thus a glaring and preposterous disparity existed" [between the laws governing international and internal armed conflicts].[165] This changed with the seminal

judgment of the ICTY Appeals Chamber in *Tadić (Interlocutory Appeal)*. Tadić was charged with committing acts that constitute grave breaches of the Geneva Convention (Article 2 of the Statue establishing the ICTY), violating the laws or customs of war (Article 3 of the Statute), and committing crimes against humanity (Article 5 of the Statute).[166] He claimed that such crimes were inapplicable to his case because these acts only applied to international armed conflicts and the war in Yugoslavia was internal. The Chamber did not find the conflict to be purely internal in nature. It did not only conclude that internal wars have international dimensions, but also that war crimes could be committed in both international and internal armed conflicts. Moir writes that "[t]he Chamber began by outlining the traditional dichotomy between the regulation of international and internal armed conflicts, but felt that the approach of international law had, over time, become less State-oriented, inevitably leading to the following question" Moir quotes *Tadić* (Jurisdiction):

> Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted 'only' within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.[167]

Thus, individuals could be held accountable for international crimes committed in both types of wars.

This was an extremely important ruling for two reasons: 1) international law initially designed to regulate interstate relations could now regulate how wars were fought within states and 2) the minimal standards of humanitarian law no longer solely applied to internal armed conflicts (Article 3 of the Geneva Conventions), it was now coupled with higher standards of humanitarian law which are provided for by the 'grave breach' provision.[168] Because of this

extension, the potential threat of prosecution is higher since the 'grave breach' provision is subject to the principle of universal jurisdiction.[169] This means that perpetrators of such crimes can be prosecuted in any state that adheres to this principle. The principle of universal jurisdiction dictates that states are obligated to prosecute grave breach offenders in their national courts or extradite them to the international tribunal, regardless of the offender's nationality, the place of the commission of the crime, and the nationality of the victim. Thus, perpetrators of such crimes are unlikely to escape prosecution if they are charged with committing acts that constitute 'grave breaches.'

2.2.4 Temporal Jurisdiction and the Principle of Primacy

There are other salient features in the statute creating the ICTY which ensure that violators of international crimes are held accountable. They are crystallized in the temporal jurisdiction, which marks the time period in which the court has jurisdiction to prosecute, and the principle of primacy, which gives the international court primacy over national courts to deal with violations of international law.

The temporal jurisdiction of the ICTY begins on 1 January 1991 which marks the start date of the war in the former Yugoslavia (Article 1). It does not have an end date because the court came into effect during the war. Thus the court can account for all violations of international law from the start date of the war in 1991 and onwards. This provision reinforces the threat of prosecution by sending a signal to perpetrators that past and future transgressions will be brought to account.

The provision of primacy has also shaped the international community's response to war crimes: criminals have to be prosecuted by the international community without regard to the

underlying local/ethnic tensions that give rise to the offenses. In the statute creating the ICTY, Article 9 provides that the tribunal has concurrent jurisdiction with national courts to prosecute perpetrators of international crimes but that the tribunal "shall have primacy over national courts". Cassese claims there are two reasons behind this decision: 1) the ongoing civil conflict in the former Yugoslavia and 2) the ethnic tension and animosity in Yugoslavia rendering national courts unable and unwilling to conduct fair trials.[170] What matters is the principle of criminal accountability; considerations of civil/ethnic nuances of the war are antithetical to the principle. This idea has important implications for the practical design of the court: neither local judges nor lawyers are part of the proceeding nor are local laws incorporated in the statute creating the ICTY. Once again, the need was felt to affirm the overriding authority of the international tribunal by stressing its primacy over national courts which have the proclivity to allow local/ethnic factors to affect court proceedings. To ensure independence and impartiality, an international tribunal seemed the appropriate venue for such cases.[171] In sum, to secure the prosecution of the most culpable perpetrators and avoid possible immunity, the provisions of temporal jurisdictions and of primacy enable the tribunal to account for the most egregious crimes and penalize perpetrators according to international standards.

2.3 Preliminary evaluation of the ICTY's ability of achieving justice and peace in civil wars

To ensure that perpetrators would be brought to justice, the ICTY was designed with certain legal powers and jurisdictions that, in principle, make it difficult for perpetrators to escape prosecution both nationally and internationally. All of the following provisions, Chapter VII power, extended subject matter jurisdiction, extended temporal jurisdiction, and the principle

of primacy, are a reflection of the ideas coming out of human and cosmopolitan rights perspective. In principle, the incorporation of all of these design features in the statute creating the ICTY makes the threat of apprehension and prosecution credible. In principle, under this regime all culpable parties should be prosecuted at some point in time.[172]

As of today, the ideas of human rights and more specifically universal jurisdiction have become dominant and are the inspiring principles of international courts. Yet as they are inherently tied to concerns of absolute nature, they abstract from the specifics of any given historical or political situation and their application may lead to some undesirable outcomes. For instance, by prosecuting the very leaders needed to secure local peace and stability, such regimes may obtain the goal of justice but may undermine the attainment of peace. To attain the goal of peace, legal regimes need to be designed to create incentives for combatants to bargain for peace. Under the legal powers and jurisdictions afforded to the HR legal regime, neither the government nor insurgent groups are likely to have an incentive to bargain for peace knowing they will both be automatically prosecuted for the crimes they have committed. To illustrate, I continue to analyze the war in the former Yugoslavia.

2.3.1 Justice vs. Peace

In 1994, international lawyer Anthony D'Amato asked the following question: "If they [war criminals], or their close associates and friends, face potential life imprisonment by simply signing a peace treaty, what incentive do they have to sign it?"[173] He predicted that given the legal regime in place (HR), for peace or any semblance of peace to ensue, UN officials (in this case US officials), "…may have to extend some form of assurance to the leaders in the former Yugoslavia that, one way or another, the war crimes trial will not take place[.]".[174] D'Amato's

thesis consists of two main points: 1) on the one hand, justice oriented systems like those on HR, create disincentives to negotiate for peace, and 2) on the other hand, domestic tort litigation (DTL) like systems generate the appropriate incentives to bargain for peace even though they might fail in the dimension of justice. I will show that both points ended up being correct. With the indictments of war criminals and the subsequent massacres at Srebrenica, the shortcomings of the justice-based systems appear clearly in the first phase of the Yugoslavian war. In contrast, the virtues of the DTL-like system appear in the second phase of the Yugoslavian war. I will argue that in that phase the US intervention created a *de facto* DTL, which eventually led the conflicting parties to sign the Dayton Accords (see below section 5.5).

2.3.2 Trading Peace for Justice

Between 1993 and 1994, the war continued in the most brutal way. According to William and Scharf, "The same week that the Secretary-General submitted the Legal Office's proposed statute [for the ICTY], Croatian defense forces had rounded up thousands of Muslim men in raids on the city of Mostar and had deported them to detention centers, which were little better than the Serb-run concentration camps. Meanwhile, the Bosnian Serbs were conducting a fierce assault on the Muslim towns of Zepa and Srebrenica, which had swollen with thousands of refugees from surrounding villages".[175] The following year (25 July 1995), the Chief Prosecutor of the ICTY, Richard Goldstone indicted Karadzic and Mladic for the first time for genocide and crimes against humanity. On the same day of the indictment, Karadzic and Mladic forces took Zepa, another UN "safe area".[176]

Most critics argue that the presence of the court failed to deter Mladic and Karadzic because neither perceived the court as an actual threat; however, subsequent actions by both men

suggest a different interpretation. It was not so much that the courts threat of prosecution proved to be not credible, but instead since both men had been indicted, neither had an incentive to stop fighting. It made more sense for them to keep fighting and secure as much territory as possible no matter what the cost. In fact, following the first indictment, Bosnian-Serb forces carried out one of the most brutal attacks in the war. In mid-July 1995, they attacked a UN safe area of Srebrenica murdering as many as 7,000 men and raping and torturing women and children.[177]

2.3.3 Trading justice for peace

When the American delegation intervened in the war in 1994, it recognized that the presence of the ICTY thwarted any possibility of attaining a durable peace, and hence made assurances to leaders instrumental to securing peace in the former Yugoslavia that they would not be apprehended or prosecuted. In fact, the American delegation made sure that no mention of apprehension and/or prosecution of war criminals appeared in the Dayton Accords that all parties to the conflict eventually signed. [178] I will discuss this phase more thoroughly in section 5.5 below, where I will argue that a *de facto* DTL was in place.

In sum, consistent with the human rights and cosmopolitan viewpoints, when international crimes have been violated in civil wars, entities other than the state proper, i.e. international criminal tribunals, have legal status that can override state sovereignty. To ensure justice in the former Yugoslavia and redress the international crimes committed during the war, the UNSC created the ICTY and endowed it with the necessary legal powers and jurisdiction that serves to constrain any state from neither derogating from the duty to prosecute nor affecting the tribunal's ability of prosecuting culpable parties. Hence, HR legal regimes, such as the ICTY, are

afforded provisions such as Chapter VII powers, extended temporal and subject matter jurisdiction, and primacy that make the threat of prosecution credible. In civil wars, since both the state and the insurgent groups are prosecuted upon violating the law, neither one is likely to have an incentive to negotiate. As such HR legal regimes ensure the attainment of the goal of justice but not necessarily peace.

3. Horizontal Cooperation Model

In recent years, an attempt has been made to reconcile the idea of state sovereignty with that of human rights. The principle is as follows: a state maintains its sovereignty but it is entitled to willingly give away part of it by signing a treaty with other states. Thus, in particular, a state can sign a treaty whereby it agrees to allow intervention of external entities such as an international court in its own domestic affairs in the face of violations of international criminal law. This model is referred to as the horizontal model in that after a treaty is signed, both the domestic court and the international court operate at the same level or have the same legal rights to redress such violations. These ideas found their application in the Rome Statute of 1998 which instituted the International Criminal Court (ICC). The ICC came into force in 2002 after sixty states ratified the Rome Statute. [179] According to the Statute, states 1) agreed to delegate some of their authority to the ICC to directly intervene and assist the state in investigating and prosecuting violators of international criminal law; and 2) agreed to adhere to the statute creating the ICC to prevent themselves from violating the human rights of their nationals and other individuals.

As we shall see, however, the application of this court model did not stay true to its original intent and ended up, in practice, being reminiscent to the old idea of state sovereignty.[180] For instance, while the ICC has legal power and jurisdiction through the chief prosecutor to directly intervene and indict, apprehend, and prosecute individuals subject to state sovereignty (more in line with HR), in practice, this does not occur without states' consent.

3.1 Salient Features of the Horizontal Regime: The International Criminal Court (ICC)

3.1.1 The Role of the State

Cassese (2003) argues that the Rome Statute contains specific design features that put limits on the ICC's ability of apprehending and prosecuting perpetrators. Thus, for all practical purposes, the state is the entity that can easily petition a court's intervention to bring perpetrators to justice, and the ICC is merely ancillary to the state.[181]

To begin, Article 86 of the statute creating the ICC provides that there is a general obligation for states to cooperate with the court. This provision was intended to mitigate the judicial power of interpretation of the duty to cooperate and to lay down "legislative safeguards" for the state.[182] Unlike the ICTY, where such issues were left for the judges to decide (i.e. *Blaškić (subpoena)* case), the Statue creating the ICC spells out the general obligations of the state to cooperate to restrict as much as possible *Blaškić (subpoena)* case outcomes (see above Salient features of ICTY). But this provision is sidetracked by the lack of enforcement power in the event that a state fails to cooperate. According to Article 87, if a state fails to cooperate, the court may make a finding to this effect and can only refer the matter to the Assembly of States

Parties or the Security Council. Cassese argues that there is no enforcement power to make states cooperate by way of acts or countermeasures put forth by the Assembly of States, or by way of the UNSC stepping in and imposing sanctions. He further questions why the Security Council should not act under Chapter VII powers especially when a state's refusal to cooperate could amount to the threat to peace and security. In fact, while the Statute does not exclude these possibilities, it does not explicitly mention them.[183] The lack of countermeasures in the event that states fail to cooperate with the ICC is testimony to the state centric approach taken to deal with matters of international justice. In other words, it is the state's prerogative to decide whether or not to cooperate with the court.

On matters of collecting evidence, issuing summonses and warrants, the statute does not specify who is responsible for these tasks: whether the ICC prosecutor with the assistance of state authorities or state enforcement with the assistance of judicial authorities. Cassese believes that given the tone of the Statute, particularly on its insistence to comply with requirements of the national legislature, the statute intended for the latter.[184] Again the intent is, first and foremost, to maintain state sovereignty, thus delegating such matters to the authority of the state.

With regards to the statute's stipulation on the possible surrender of persons, the relation is subject to interstate judicial cooperation which is stated in Article 10 (1) of the statute creating the ICC. This relation is based on similar treaty provisions between states; that the offense be considered as such in both the requested state and the requesting state on matters of extradition. In matters of competing request for surrender and extradition of persons, the court does not have primacy as stipulated in Article 90 (6) and (7). Cassese argues that this is one of the major misgivings of the statute creating the court, for instead of giving the court primacy, which would have established a universal criminal court mechanism over bilateral treaty agreements, the

statute gives primacy to state control over these matters. [185] A state party can even comply with the extradition request by a non-party state to the statue of the ICC instead of complying with the request of the ICC.

Finally, the statute again submits to states concerns in matters dealing with the protection of national security information under Article 93(4). It provides that a state party may refuse to assist the court if the assistance requires disclosure of evidence that relates to matters of national security. This provision clearly adheres to the fundamental guiding principle of interstate and now state-international court relations which is based on the principle of non-interference. As Huth et al. (2006) would argue, the Rome Statute creating the ICC is but a "covenant without the sword", a regime that caters to the concerns of state sovereignty, has little to no enforcement power (should a state fail to cooperate), and whose function is entirely dependent on the consent and cooperation of the accused state and of other states.[186] These features are all the more telling with the principle of complementarity, which the ICC Statute upholds.

3.1.2 The Principle of Complementarity

The principle of complementarity (Article 1 of the Rome Statute) states that the ICC is a subsidiary or complementary to national courts. In other words it does not have primacy over national courts. The priority in the exercise of jurisdiction is given to national courts. Cassese points out two reasons for this approach. The first reason is based on matters of practical concerns. The ICC cannot handle all cases from all over the world. It is deemed conducive to leave the majority of cases to national courts that are a) better positioned to collect the necessary evidence, and b) can efficiently exercise their jurisdiction on grounds of territoriality, nationality, and universality.[187] The second reason is that it respects state sovereignty. Consistent with the

principles of non-intervention and state consent, the state has the authority to handle its domestic affairs including matters that deal with the pursuit of justice without outside interference. Cassese observes that,

"complementarity even applies whatever the trigger mechanism of the Court's proceedings, that is, when a case (i) has been brought to the Court by a State party (Article 13(a) and 14), or (ii) has been initiated by the Prosecutor…and the Prosecutor has been authorized by the Pre-Trial Chamber to commence a criminal investigation (Article 13(c) and 15), and when (iii) it is the UN Security Council that has referred to the Court a 'situation in which one or more of …[the] crimes [falling under the Court's jurisdiction] appears to have been committed' (Article 13(b) and 52(c)."[188]

Moreover, if the state does require the involvement of an outside intervener, the complementarity provision allows the state to request the intervention of the ICC in the event that it is "unable" to prosecute (Article 17 (3)). A state is "unable" to bring a person to trial when the judicial system is in shambles, which is usually the case during and after most civil wars. States devastated by civil strife find it difficult to detain the accused, collect necessary evidence, and to carry out criminal proceedings.[189] Under such circumstances a state can request ICC intervention to commence judicial proceedings.

Matters become murky when the state is "unwilling" to intervene and the ICC wants to intervene anyway (Article 17 (2)). This may happen not only when the state refuses to prosecute but also when it has taken measures to shield the person concerned from criminal responsibility. Such measures include amnesties. States can also refuse to prosecute by delaying proceedings without any intention of bringing the person to justice. Other examples of state unwillingness to prosecute are show trials, which are often used to satisfy international concerns to bring a person to justice, but such trials are usually neither independent nor impartial.

3.1.3 Subject matter jurisdiction and temporal jurisdiction

On matters of subject matter jurisdiction, the Rome Statute governing the ICC is credited for going beyond the laws governing internal armed conflict, when it included other war crimes as violations of internal armed conflict. Moir is of the opinion that the Rome Statutes inclusion of other serious violations of the laws of internal armed conflict beyond that which is contained in Additional Protocol II is consistent with the 'gradual blurring of the fundamental difference between international and internal armed conflicts', which is short of the approach taken by the ICTY. The Appeals Chamber of the ICTY maintained that "what is inhumane and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife,"[190] and suggests that only one corpus of law, specifically laws that govern international armed conflict, apply to all conflicts. Cassese, on the other hand, believes that the Rome Statute takes a step backwards since it still maintains the distinction in the rules regulating the two types of wars in the first place.[191] The distinction between the two types of wars is upheld in the following provisions of the Rome Statute Article 8(2) (c-f): where it determines when an internal armed conflict exists. For the relevant laws to apply to an internal armed conflict, the conflict between state officials and insurgent groups has to be 'protracted'. While Moir welcomes this provision because it significantly lowers the threshold from that of Additional Protocol II,[192] Cassese, instead, still perceives this decision as somewhat retrograde in light of the developments to abolish the distinction between the two types of war (i.e. *Tadic Interlocutory Appeal)*. He attributes the decision to maintain this distinction to the majority of the states gathered at the Rome Conference, who "preferred to tread gingerly so as to take due account of States' concerns" and argues that the ICC is "marred by being too obsequious to State sovereignty".[193]

ICC submission to state sovereignty concerns is further compounded by Article 124 of the Rome Statute. This provision allows states to declare that the ICC's jurisdiction over war

crimes committed by their nationals or on their territory "shall not become operative for a period of seven years".[194] Since states can delay prosecutorial activity of their nationals for quite some time, this provision is likely to decrease the possibility of any kind of prosecution, national or international, in the long run.

In addition, the ICC's temporal jurisdiction begins on the day the court entered into force, 1 July 2002. It does not have jurisdiction over crimes committed before this date. Given the ICC's temporal jurisdiction, states can easily avoid prosecuting violations of international laws that took place before 2002, especially those that the state itself may have violated. Unlike the regimes coming out of the human rights and cosmopolitan rights perspectives, there appears to be ample room for immunity in legal regimes reflecting the pure state sovereignty viewpoint.

3.2 Preliminary evaluation of the ICC's ability of achieving justice and peace in civil wars

On matters of justice, it is the state that determines how it will achieve this goal. International legal regimes are there to serve their interests only. Should a state decide not to bring perpetrators to justice, the ICC can attempt to intervene, but as the state-centric provisions of the Rome Statute clearly show above, states can avoid cooperating with the ICC without necessarily being sanctioned for their lack of cooperation.

It is important to emphasize that the ICC needs the cooperation of states to exercise its own jurisdiction effectively. State cooperation does not, however, guarantee the ICC's effectiveness in rendering full justice. To ensure that certain crimes fall under the jurisdiction of the ICC, it may have to turn a blind eye on the states own violations in order to secure state

cooperation to prosecute the crimes of insurgents within the state (see The Case of Uganda below). In this set up, justice is one-sided and the duty to prosecute can be partially fulfilled at best. If the court is triggered by any other entity, be it by the Security Council, the Prosecutor of the ICC, or other state(s), to prosecute state officials in particular, then the state concerned is unlikely to cooperate with the ICC to bring such culprits to justice.

Thus, in this legal system justice is likely to be fully rendered under two circumstances: 1) in the event that the state calls the court when it is not culpable for perpetrating international crimes but other parties to the conflict are; or 2) in the event that the state concerned is complicit and its interests are aligned with the ICC, in which case it would willingly subject state officials to national or international prosecution. However, in the event that the state has violated international law and its interests are not aligned with the ICC, it is unlikely that the ICC will be able to bring the state to justice without the cooperation of the said state and other states. In the civil war context, unless other states have some stake in the conflict, the ICC is unlikely to secure the cooperation of other states especially since there are no provisions that specify the necessary procedure to sanction other states for failing to cooperate.

Under this legal regime, then, the ability of rendering full justice seems to be just as unattainable as creating incentives for combatants to bargain for a durable peace. Since the state is can directly call the court to intervene, the state sovereignty legal regime is not neutral. Such regimes generate a bias toward the government and make insurgents more susceptible to prosecution than government forces. This is extremely problematic because the state will 1) have an incentive to commit crimes as part of their military strategy to fight off insurrection[195] and 2) will not have an incentive to bargain with insurgents especially when an international court can potentially assist the state in getting rid of them. Since insurgents cannot call the court to punish

the government and other states are unlikely to do so for fear of being accused of violating the principle of non-intervention in matters of civil strife, the government has a clear incentive to go to war. Under these circumstances, peace is unlikely to occur and the commission of international crimes is likely to increase (see The Case of Uganda below).

Under this system, insurgent groups are the only entity that has an incentive to bargain for peace. Given that the state can directly call the court among the warring parties, it makes the cost of war higher for the rebel group relative to the government, thus strengthening the government's position at the bargaining table. If they do negotiate, it is unlikely that both parties will reach a mutually acceptable agreement and insurgents will have more of an incentive to resume warfare. Knowing that they can be prosecuted if the government decides to call the court, insurgents will not have anything to lose by resuming warfare and may commit more international crimes as a result (similar effect of the HR model but the effect is only felt by insurgents in the SS legal regime). Since the ICC is so dependent on some third party (be it the concerned state, other states, even insurgent groups[196]) in order to function properly, it is unlikely to create incentives for warring parties to bargain for mutually acceptable agreement. In sum, the ICC is unlikely to render full justice or assist combatants to bargain for a durable peace during civil conflicts. Below, we are going to see that all of these potential drawbacks emerged in the case of the civil war in Uganda.

3.3 The Case of Uganda

In December 2003, the ICC received its first referral from the Government of Uganda to investigate the crimes perpetrated by the insurgent group, the Lord's Resistance Army (LRA)

that had been causing havoc in the northern part of Uganda for the past nineteen years. The chief prosecutor of the ICC, Luis Moreno-Ocampo, put aside the case of the Democratic Republic of Congo, which was the first case the ICC wanted to investigate, and instead, welcomed the opportunity to assist the government that directly petitioned its intervention to bring perpetrators to justice. After preliminary scrutiny of the case, the ICC accepted the referral on 29 July 2004. Chief Prosecutor Moreno-Ocampo determined that the crimes allegedly committed in northern Uganda fell within the subject matter jurisdiction under Article 7 (crimes against humanity) and the temporal jurisdiction (July 1, 2002) of the court, and concluded there was a reasonable basis to commence an investigation.

The fact that the state of Uganda willingly petitioned the ICC to intervene on matters of purely internal affairs have led many to argue that the president of Uganda, Yoweri Museveni, is merely using the ICC as an instrument to further his political interests.[197] In particular, Arsanjani and Reisman (2005) cautioned those who perceived the referral by a state government as a sign of confidence in the ICC to temper their enthusiasm. They forewarned that the implications that one can derive from the referral were far from laudatory for three reasons: 1) it could encourage governments to defer domestic problems that they were unable and unwilling to settle to the court; 2) it allows governments to "co-opt the ICC in a confrontational criminal context for what ---despite all the attendant violence ---may essentially be political struggles, for which negotiation and settlement might be the only practical mode of restoring minimum order"[198] ; and 3) it falls short of the requirements of admissibility under Article 17 of the Statute. I will focus mainly on the first two stipulations and show that each time the government of Uganda and the LRA are at the brink of bargaining for peace, the government employs some external mechanism to sabotage the peace process and then in turn uses military force to attempt to defeat

the LRA. The government's inability to defeat the LRA militarily has led it to use the ICC not only to further militarize itself but also to gain more bargaining leverage should renegotiations take place.

3.3.1 The War in Uganda

Northern Uganda has been a region of particular contention since Yoweri Museveni, leader of the National Resistance Army (NRA), ousted an Acholi dominated government in 1986. The LRA, led by Joseph Kony and composed ethnically of Acholi from northern Uganda, main objective was to oust and replace the current government. Over the years their aims have become more obscure as most of their military aggression has been directed against their own people. Being the most powerful rebel group in the region since the early 1990s, the LRA enjoyed the support from the Acholi civilian population.[199] Because of rebel military failure, brutal government counterinsurgency against the civilian population, and overall war fatigue, the Acholi support of the LRA waned.[200] It perceived the reduced support from the Acholi as a change of allegiance to the government and as such inflicted inane violence from indiscriminate killing, rape, pillage, to the abduction of children, on the Acholi population. The LRA was mainly supported by the government of the Sudan, where it was allowed to retreat to camps and bases to recuperate and rearm in the south of Sudan.[201]

Government counterinsurgency did little to protect civilians. The Uganda People's Defence Force (UPDF), the successor of the NRA, has been accused of using force to destroy suspected rebel support among civilians.[202] Throughout the 90's, government forces carried out a number of massacres and other atrocities, including forced displacement of Acholi from their villages to camps "through campaign of murder, intimidation, and the bombing and burning of

entire villages," threatening to kill anyone who attempted to leave the camp.[203] According to Branch, "the total population of these camps have grown from few hundred thousand in 1996 to almost a million by the time of the ICC's intervention, encompassing nearly the entire rural population of the Acholi subregion".[204]

In 2000, an Amnesty Act, backed primarily by the Acholi community and civil society groups, passed in the Ugandan parliament. The Act granted immunity from prosecution to all rebels including leaders who renounced, abandoned the rebellion, and surrendered their arms. A bargaining space opened up with the passage of the Act; Acholi religious leaders launched a peace initiative calling both sides to resolve the conflict in the north via negotiations. An internationally backed amnesty commission was established to resettle rebels who voluntarily surrendered.[205] At first, the initiative seemed to be effective: as of 2001, LRA terror tactics diminished significantly. It is reported that fewer than 100 children were abducted and attacks against civilians waned.[206] Despite the progress that was being made toward a peaceful conclusion, top LRA leaders did not take immediate advantage of the amnesty. Instead of further backing the Amnesty Act and peace initiatives emanating from the Act, in 2002, President Museveni [207] in turn, aborted the peaceful efforts by joining the international "anti-terrorist" coalition led by the United States and signed the Anti-Terrorist Act. The Anti-Terrorist Act not only classified several rebel movements as "terrorists" but also allowed the government to re-arrest former rebels who had been pardoned under the Amnesty Act.[208]

Furthermore, Uganda and Sudan signed a protocol allowing Ugandan soldiers to hunt for members of the LRA inside southern Sudan thus launching military Operation Iron Fist. As a consequence, military pressure on the LRA increased leading to the resurgence of full-blown violence against the civilian population in the north of Uganda and the south of the Sudan.[209] It is

reported that “from June to December 2002, an estimated five thousand children were abducted, more than in any other year since the conflict began…”[210] Abductions went unabated through 2003 and into 2004; it is estimated that 12,000 children were abducted from mid-2002 to 2004.[211]

As violence escalated and government forces failed to decisively defeat the LRA, on December 2, 2003, President Museveni referred the case to the ICC. Shortly, thereafter, “Uganda and Sudan renewed their bilateral military protocol resulting in ‘Operation Iron Fist II’ [, which] allowed Ugandan troops to pursue the LRA across Sudanese borders”.[212] The LRA experienced several setbacks as it was progressively weakened by government forces that overran their military camps in southern Sudan. This led the LRA to cross from Sudan to Uganda attacking villages and refugee camps in pursuit of food and new recruits.

With some military success of government forces and backing of the ICC, the government was able to redraft the Amnesty Act by granting immunity to lower level rebels and exclude only the top LRA leadership from the legislation, “thereby ensuring that those bearing the greatest responsibility for crime against humanity committed in northern Uganda are brought to justice”.[213] With LRA leadership in a state of flux, the dynamics changed between the top leaders, who were divided on whether or not to accept amnesty and whether to recommence negotiations. Among lower level and medium level LRA members, the referral to the ICC prompted significant defection from the LRA, thus incapacitating and weakening it militarily. As a result of a weakened LRA, a bargaining space opened up yet again.

In November 2004, Betty Bigombe, former minister in the Ugandan government and peace negotiator during the peace talks in 1993-94 which eventually failed, was again engaged in

peace talks with the LRA and the government.[214] She attempted to get the rebels to sign a ceasefire agreement at the end of December 2004, but they refused and fighting broke out again. Bigombe was able to 'rebuild the eroded trust' and continue mediation between the warring parties. Bigombe intended on persuading the LRA to end the rebellion and accept the amnesty offer from the government, however, her efforts were undermined when the ICC issued arrest warrants for five of the top LRA leadership including Joseph Kony in October 2005. Bigombe, herself, abandoned the peace talks identifying the ICC's move as a deterrent for the top LRA leaders to negotiate. It was inconceivable for them to surrender and seek amnesty with prosecutions pending.

3.3.2 ICC intervention in Uganda: Rendering Justice?

Above, when I evaluated the state sovereignty legal regime's ability of achieving justice, I argued that in this system justice is fully rendered when 1) the state itself is not complicit in the commission of international crimes but other parties are, in which case it would call the ICC to prosecute the complicit party or 2) when the state concerned is complicit and its' interest are aligned with the court, in which case it would willingly subject state officials to national or international prosecution. Regrettably, neither requirement was met in the case of Uganda.

For starters, in the Ugandan case the government itself is complicit of war crimes. According to Branch, "[Ugandan] government internment of over a million people without necessity and without adequate protection and aid constitutes a grave violation of the laws of war and certainly fall within the ICC's temporal jurisdiction".[215] The ICC accepted the referral from the Ugandan government on the basis of gravity; thus while acknowledging that international crimes were indeed perpetrated by the government, the ICC will only focus on the crimes

perpetrated by the LRA because they are graver then those committed by the government. Chief Prosecutor, Moreno Ocampo explains: "The criteria for selection of the first case was gravity. We analyzed the gravity of all crimes in northern Uganda committed by the LRA and Ugandan forces. Crimes committed by the LRA were much more numerous and of much higher gravity than alleged crimes committed by the UPDF. We therefore started with an investigation of the LRA."[216] By focusing the investigation on LRA crimes only, many scholars believe that the ICC played into the political machinations of the government and hence argue that the ICC has become an ancillary of it.

President Museveni has been quoted as saying "that he is prepared to cooperate with the prosecution with regard to the allegations: 'I am ready to be investigated for war crimes… and if any of our people were involved in any crimes we will give him up to be tried by the ICC. And in any case, if such cases are brought to our attention, we will try them ourselves'.[217] This statement is telling because the government admits to being capable and willing to try its own perpetrators of war crimes in its own courts, indicating that the Ugandan judicial system is operational.[218] This has led many scholars to ask why the Ugandan government referred the case to the ICC in the first place and why the ICC agreed to accept the referral in light of the fact that it is not a body that was intended or equipped "to resolve through judicial means, a long standing political problem of a government".[219] What is more, the case does not meet the requirement of admissibility under Article 17 of the Rome Statute. Recall, that Article 17 underscores the ICC as a court of last resort. In other words, if a state is "unable" to bring a person to trial due to an incapacitated judicial system, or a state is "unwilling" to intervene, then it can call the court to exercise jurisdiction. From the president's statement above, Uganda has neither demonstrated inability nor unwillingness to prosecute perpetrators.

The government cites the following motivation for its referral: it has exhausted all other measures to bring to an end the terrible suffering of the Ugandan people and it pledges full support and cooperation to the Prosecutor in the investigation and prosecution of LRA crimes.[220] Despite initial promises of cooperation, the Ugandan government has threatened several times to withdraw the referral to the court, suggesting that it would halt further cooperation should its own military become subject to prosecution. According to Branch, the government retracted its claim of complicity when "Attorney General Amama Mbabazi stated categorically that the UPDF is not guilty of crimes and will not be tried by the ICC".[221] This is problematic for the ICC because without government cooperation the investigation is at risk of closing down completely. It is important to emphasize that the ICC needs the full cooperation of the state to exercise its own jurisdiction effectively. This is an objective limitation of the ICC, for in order to elicit some form of cooperation from the government, the ICC had to turn a blind eye on the crimes perpetrated by it.

The Ugandan referral to the ICC illustrates how legal regimes emanating from the principle of state sovereignty fail to render full justice. The justice that is rendered is one-sided or partial at best. Moreover, under this system it is the state that determines how it will use international instruments such as the ICC as a mechanism to resolve internal problems and fulfill political interests.

3.3.3 The ICC intervention in Uganda: Achieving Peace?

When evaluating the state sovereignty legal regimes (SS) ability to achieve peace, I argued that the SS regime fails to create incentives for a government to bargain with rebel group(s) for a durable peace. Practically, since the state is the only entity that can call the court to

intervene, the SS regime generates a bias toward the government, as such, the government will 1) have an incentive to commit crimes as part of their military strategy to fight off insurrection and 2) will not have an incentive to bargain with insurgents since the court can potentially assist the government in prosecuting them. In this section, I will argue that by soliciting the ICC to intervene, President Museveni has a) delegitimized the LRA as a political force to be dealt with via peaceful means; b) emboldened the government to militarily defeat the LRA; and c) created a disincentive for the LRA to continue peaceful negotiations while creating an incentive to resume warfare.

Given the classification and parlance of the ICC on matters dealing with the LRA, one can see how legal regimes emanating from SS grant legal status to the government of Uganda only. It appears that the LRA does not have any legal status and the ICC confirms and supports this stance by classifying the LRA as common criminals. Chief Prosecutor Moreno-Ocampo depicts the LRA in the following manner: "The Lord's Resistance Army, the LRA, is an armed rebel group, claiming to fight for the freedom of the Acholi people in northern Uganda. For nineteen years the people of northern Uganda have been killed, abducted, enslaved, and raped".[222] He further refers to the group and their actions as a "criminal campaign" thus reducing it to a criminal group rather than as a potential party with whom one can negotiate. Moreover, the ICC did not take heed of any of the reparation demands of the LRA some of which are aligned with the Acholi community. The demands include, "the return to their homes, the end of government violence and repression, and the political and economic equalization of the north and south [of Uganda]…"[223] Instead, the ICC legitimizes the government to hunt down and capture members of the LRA, effectively calling for their disintegration.

It has been argued that the referral has emboldened the Ugandan army. Akhavan notes that after the referral, "[t]he resulting military advances were unprecedented and included the reported capture in September 2004 of Kony's bodyguard and intelligence officer, as well as the injury of deputy Vincent Otti, near the town of Pakanyara, 160 kilometers north of Uganda's border with Sudan".[224] This coupled with the renewal of a bilateral military protocol between Uganda and Sudan and culminated in Operation Iron Fist, which weakened the LRA, prompted renewed willingness to negotiate for peace. For instance, in February 2005, LRA top negotiator, Brigadier Sam Kollo, surrendered to the Ugandan Army. Kollo had earlier suggested that the LRA had wanted to negotiate for peace but noted that the "Ugandan government is never serious".[225] Kollo's comment is consistent with prior observations about the dynamics of warring parties in the SS legal regime. I had argued that insurgent groups were the only entity that had an incentive to bargain for peace under SS. As illustrated in the case of Uganda, the cost of war is higher for the LRA relative to the government since the government has ICC backing, which also strengthens the government's position at the bargaining table. If warring parties do negotiate, it is unlikely that they will reach a mutually acceptable agreement and insurgents will have more of an incentive to fight.

Despite LRA weakness, it still poses a threat to civilians in Acholiland. As it tried to rebuild it incapacitated forces, abductions of civilians and violence intensified. Moreover, once the ICC unsealed the arrest warrants of five top leaders on October 2005, all efforts of peaceful negotiations under way in Juba (southern Sudan) were aborted. Chief negotiator Betty Bigombe recognized the futility of such efforts especially since "[f]ocusing on top leaders will deter them from surrendering and seeking amnesty, as several (including several hundreds of former

abductees) already have, undoing the great pains taken by the Acholi communities to assure the LRA that amnesty is credible"[226].[227]

4. Hybrid Legal Regimes: A Variant of the Horizontal Cooperation Models

In the past decade, a third type of legal regime emerged to adjudicate international crimes committed in the context of civil wars. Such regimes come about after hostilities have ended and there is some semblance of peace. Usually, the presiding government calls on the international community to assist it in bringing perpetrators of international crimes to justice in the following circumstances: 1) when the judicial system has been completely devastated by war and the state needs legal and financial assistance to rejuvenate it; and/or 2) when the government has an interest in ending "the cycle of impunity" by legitimately prosecuting their enemies.

Governments in this predicament envision the creation of the ad hoc tribunals such as those developed by the UNSC for the former Yugoslavia and Rwanda but with legal designs more attuned to respect state sovereignty and the nation's vision of justice. It follows then that the legal regime would be based on a relation similar to those found in the horizontal cooperation model but with legal design features that have country specific attributes. For instance, the legal regime would reflect a "mixed" or "hybrid" composition with the incorporation of international laws and national laws along with international and national prosecutors, judges, and lawyers in the practical design of the statutes creating such courts. The seat of hybrid regimes would be located on the territory where the atrocities took place as opposed to situations like the former

Yugoslavia and Rwanda where the ad hoc tribunals are located at The Hague and Arusha, Tanzania, respectively.

Similar to the other legal regime coming out of the horizontal cooperation model, namely the ICC, the legal basis for the establishment of the hybrid court is consensual-"their legal status, applicable law, composition and organizational structure had to be negotiated and agreed upon between the parties [state and the international drafters]".[228] Unlike the ICC, hybrid court legal regime designs vary across cases. Rather than states determining at the aggregate level how justice should be pursed in one single legal model, each country determines how justice is pursued in the negotiation process between individual states and diplomats and lawyers of the UN Secretariat. In other words, such negotiation processes do not lend themselves to the creation of a single UN court model, instead hybrid models are subject to the political biases of a specific government and the UN Secretariat, which lead to different legal choices on questions of jurisdiction, organizational structure, and composition of the hybrid tribunal.[229]

As of today, there have been four different types of hybrid courts (i.e. in Sierra Leone, East Timor, Kosovo, and Cambodia). These courts emerged in the aftermath of war and as such are designed with the intent to bring those most responsible for past war crimes to account. Since peace has already been achieved in these cases, the ultimate goal is that of justice. This thesis is primarily concerned with courts that emerge during ongoing conflict and the outcome of peace, as such examining the diversity of the mixed jurisdiction of the various hybrid courts is not in its purview.[230] It suffices to focus on one hybrid court and determine how certain design features reflect the ideas of both the state sovereignty and the human rights models. I will do so by comparing and contrasting it with the other types of legal regimes that have emerged, namely the ICTY and the ICC. Since it was the first hybrid model to have emerged after the creation of the

ICTY and the ICC and has made significant strides in achievement of justice with the prosecution of the former head of state of Liberia, Charles Taylor,[231] I consider the Special Court for Sierra Leone (hereinafter SCSL or the court).

4.1 Salient Features of the Hybrid Court for Sierra Leone

While the regimes coming from the human rights perspective were designed with extensive legal powers and jurisdictions to ensure that the global goal of prosecuting the most complicit perpetrators no matter what the costs locally, the court designed to address the atrocities in Sierra Leone paled in comparison. In attempting to focus purely on the internal dimensions of the war, drafters of the statute creating the SCSL, ironically neglected to consider several dimensions of the war and as a consequence of this oversight, the statute creating the SCSL was endowed with limited powers and jurisdictions. The myopic approach is due in part to state proclivities to refrain from allowing provisions in the statute that compromised sovereign integrity during the negotiation process coupled with the lack of political will on the part of the international drafters creating the court to deal with such matters at the international level.[232] At first glance, these two positions seem to be aligned; states are likely to accept the limitations imposed by the international drafters especially since designing a court model with provisions that address a more global concern is often antithetical to pure state sovereign concerns. But the laws that govern the internal dimension of conflicts are not as far reaching as those that are designed to address the international dimensions of a conflict, and as such the ability of the SCSL to apprehend and bring those perpetrators to account for some of the egregious atrocities that took place at the onset and during the conflict is limited.

4.1.1 The Role of the State

After a brutal and devastating civil war that crippled the judicial apparatus of Sierra Leone, the government of Sierra Leone requested the creation of an international court that would assist them in not only refurbishing the judicial system but would also try the individuals most responsible for violating international crimes during the civil war in Sierra Leone. In response, the Security Council created the SCSL in 2002.[233] The Statute creating the SCSL is a result of an agreement between the United Nations and the Government of Sierra Leone and is therefore a 'treaty-based *sui generis* court of mixed jurisdiction and composition'.

Unlike the vertical cooperation model, where the court has superior authority over the state, the SCSL does not have such standing since the court emerged as a result of a treaty based agreement. It does, however, have some remnants of regimes coming out of the vertical cooperation model in the provisions that maintain that the statute of the SCSL enjoys primacy over national courts. Moreover, the court can issue binding orders on the Government of Sierra Leone (see the Statute Article 8 and the Agreement Art.17). This means that national courts and other authorities are duty bound to cooperate with the SCSL to collect evidence, summon witnesses, and bring witnesses to the court.

Similar to the Rome Statue creating the ICC, however, there are no provisions specifying what recourse the SCSL has in the event that national authorities fail to cooperate. Like the ICC, the SCSL has no means of enforcing the obligations of cooperation. While it will agree to cooperate with the court in principle, the government will not agree to provisions that subject it to the authority of the court if it suggests compromising state sovereign prerogative.

4.1.2 Powers and Jurisdictions afforded to the SCSL

Other striking feature of the statute creating the SCSL is that it neglects the international dimension of the war in Sierra Leone. Unlike the war in the former Yugoslavia, which was classified as both internal and international armed conflict, the war in Sierra Leone was considered an internal armed conflict only. Despite evidence suggesting that the war commenced as an international war with the invasion of Liberian forces into Sierra Leone territory in 1991 (see the Truth and Reconciliation Report), the drafters of the statute decided to design the court so it could address only the internal dimension of the war.[234] Thus, some of the salient differences between the design features of the ICTY statute and the SCSL statute are: 1) limited temporal jurisdiction, 2) limited subject matter jurisdiction, and the 3) lack of UNSC Chapter VII powers.

In the statute creating the ICTY, the temporal jurisdiction of the tribunal marks, 1 January 1991, the day that is generally accepted that the war in the former Yugoslavia started. Instead, while it was generally accepted the war in Sierra Leone commenced in 1991, the selection date chosen for the SCSL is 30 November 1996.[235] At this point, the war in Sierra Leone was primarily internal with government forces in the throes of violent rebel insurrection carried out by the Revolutionary United Front (RUF). While there is evidence that international crimes including grave breaches were committed from 1991 to 1993, the SCSL cannot account for these crimes since its jurisdiction is restricted to events that took place after 1996.[236]

By limiting the temporal jurisdiction to account for the internal dimension of the war only, the drafters of the court consequently limited the subject matter jurisdiction of the statute creating the court. The court only has jurisdiction over the laws governing internal armed

conflict. Thus, the applicable laws are: crimes against humanity, Article 3 to the Geneva Conventions and Additional Protocol II, other serious violations of international humanitarian law, and certain crimes that fall under Sierra Leone law. This limitation is striking for both legal and political reasons. 1) Legally: the Rome Statute creating the ICC did attempt to go beyond the laws governing internal armed conflict when it included other war crimes as violations of internal armed conflict. The SCSL statute does not include other war crimes with the same extensive list of violations as the Rome Statute. Moreover, the grave breach provision, which upholds the principle of *aut dedere aut judicare,* obligates all states to prosecute international crimes by either prosecuting the accused or extraditing the accused to a concerned state, does not apply since such crimes can be committed only in international wars. 2) Politically: despite these legal limitations, the former President of Liberia was indicted, apprehended, prosecuted, found guilty, and was recently (30 May 2012) sentenced to fifty years in prison for 11 counts of adding and abetting war crimes in Sierra Leone.

Neglect of the international dimension of the war also led to the UNSC to decide not to provide the court with Chapter VII powers. While the situation in Sierra Leone constituted a threat to international peace and security in the region, the Security Council did not mention that in creating the SCSL it was 'acting under Chapter VII of the UN Charter' as it did in the resolution creating the ICTY. Because of this decision, member states of the UN are not obligated to cooperate with the SCSL. In other words, third states do not have to abide by any request of the SCSL such as arresting or surrendering indicted criminals.[237] To illustrate, after unsealing the indictment of Taylor, then sitting head of state of Liberia, on 7 March 2003, the indictment was publically announced on the 4 June 2003, while Taylor was at a meeting in Ghana. Ghanian authorities failed to act on the indictment and arrest Taylor. Taylor subsequently

resigned from office and was given asylum in Nigeria.[238] It was only after significant political pressure from the United States that Nigeria extradited Taylor to the SCSL on 29 March 2006. Thus, while justice was indeed served with the indictment, apprehension, and eventual prosecution of Charles Taylor, it was not due to the design of the hybrid court *per se*, which had clear stipulations that could have precluded Taylor's prosecution (lack of Chapter VII powers, limited temporal and subject matter jurisdiction). Instead, the apprehension and prosecution of Taylor occurred due to political pressure and assistance from third states (namely the United States and Nigeria).

4.2 Preliminary evaluation of hybrid legal regime's ability of achieving peace and justice

If we were to conceive of an ideological spectrum, where at one end we place the principle of state sovereignty and at the other end the principle of human rights/cosmopolitan rights, a hybrid model is a model that would fall somewhere in between these two principles. Recall from the previous section that the original intent of the International Criminal Court (ICC) was to reconcile the principle of SS and HR in one legal entity. Ideally, the design of this regime would give equal weight to both principles of HR and SS. Yet, as we have seen, the actual design of the Rome Statute creating the ICC shifted more toward the SS side of the spectrum.

In principle, one can design a hybrid model that is closer to HR or SS. This choice would have practical implications on how the court is legally designed; in other words, a hybrid model that is more in line with HR would have legal powers and jurisdictions more in line with international law rather than domestic law, and vice versa for hybrid regimes designed more in

line with the SS. The closer the hybrid model(s) is to HR the more the issues that were discussed above concerning the HR regimes ability of achieving peace and/or justice would apply. Similarly, the closer the hybrid model(s) is to SS, the more the observations made above about SS regimes ability to achieve peace and justice would apply.

With regards to country specific hybrid court models, where each hybrid model falls within the spectrum will depend on several factors such as, the interests of whoever is in power at the end of the conflict: the incumbent government, an interim government led by the United Nations (i.e. East Timor and Kosovo), or the insurgent group turned government; the strategic position of the state in question, or in other words, whether the state poses a threat to international peace and security; and, how the war ended: decisive victory or negotiated settlement, etc.

5. Domestic Tort Litigation (DTL) Regime

Applied to the international setting, the views of the DTL regime are in line with consequentialist concerns, which call for settling political accounts before dealing with concerns of justice. Scholars in this camp maintain that violations of international crimes should be prosecuted, but do not believe that international custom or convention impose on states a duty to prosecute individuals at the price of compromising national stability.[239] Since we are working under the rubric of the logic of consequences, none of the cooperation models governing state and international court relations apply here. In the DTL regime, the court is neither a "supra-state entity" nor an "instrument" used for states to secure their interests. The court is merely a device to resolve disputes between opposing parties. Thus, when bargaining during civil wars, both

parties have to have the ability to solicit the court in the event that they fail to agree. In Chapter III, we saw that in order for the DTL international legal regime to work, both the state and the insurgent group have to be regarded as equals under the law. This implies two things: 1) both the state and the insurgent group can call the court to intervene when either one or both commit international crimes and 2) if the court should intervene, both the state and the insurgent group will be prosecuted and penalized in a way which is commensurate to the crimes committed. Thus, in the DTL it is under the threat of court proceedings that settlements are concluded: parties agree to make concessions to each other because their interests are best served by avoiding the court. The main role of the court is that of determining the bargaining possibilities for the opposing rational parties, as parties would agree on any outcome which improves on the expected judgment rendered by the court.

The recognition that under the DTL the court's essential role is that of affecting the parties bargaining range suggests that courts could be designed in order to achieve "the best" possible bargaining range for the warring parties. For instance, if the desired outcome is the immediate cessation of hostilities, one would like to be in a situation where conflicting parties might find a mutually beneficial agreement. Since the existence of these agreements (points in the bargaining range) depends on the courts' design, one will choose a design (if any) that will change the parties incentives from fighting to negotiating for peace.

5.1The Modus Operandi of DTL

Usually, parties in a domestic civil dispute have the same legal rights. In particular they have the same right of calling for the intervention of the court. A necessary condition for the DTL model to be effective in the international setting is that the government and rebel group

would be granted symmetric status with respect to an international court. By virtue of this symmetry, the DTL model has the potential of addressing all the problems stemming from the asymmetries of the SS model.

5.2. Peace vs. Justice

Popular view holds that under the DTL peace is traded for justice, and this is usually seen as a drawback of the DTL.[240] I am now going to carefully examine this point by 1) considering what exactly happens when parties are given the opportunity to negotiate for peace and 2) evaluating whether the peace that is obtained comes at the expense of justice. When parties negotiate for peace, we have two possibilities: either they reach an agreement or they do not. If no agreement is reached there are, in turn, two possible scenarios under the DTL: 1) nobody wants to call the court or 2) somebody calls the court. In the first scenario, war continues, nobody is held accountable, and there is neither peace nor justice. This outcome is certainly problematic. Any serious attempt of extending the reach of the DTL to deal with the management of civil wars must incorporate features that avoid this scenario.

A straightforward solution to this problem would be to set a date and stipulate that an HR court will intervene if parties fail to negotiate for peace by that date. In fact, this provision generates *per se* an incentive for the parties to bargain and avoid the court's intervention. More generally, any system that generates incentives for parties to call the court after negotiations' failure will do (for instance, the first to call the court gets some form of clemency, etc.). In principle, these incentives can be carefully designed so as to ensure that the incentives to call the

court is powerful enough not to let the war continue indefinitely but weak enough not to undo the potential gains from bargaining.

In the second scenario, the court's intervention is avoided with the parties making concessions to one another. In this case, perpetrators are not given a "free ride," but instead, their "punishment" consists in transferring part of their wealth to the victims of their crimes.[241] By definition (since the parties have reached an agreement), this compensation is preferred by the victim to the perpetrators being punished by the court.

It is possible that the international community may not deem the compensation commensurate with the gravity of the crimes. This would simply mean, however, that the "preferences" of the international community differ from those of the party in question (which is "revealed" by the very fact that this party has accepted the deal). In fact, this is one of the distinguishing features of the DTL model, which--once in place--puts weight only on the preferences of the party's involved in a dispute, and not on those of third parties.

In sum, the real issue is not whether peace is traded for justice. It is really about which preferences, those of the victims or those of the international community should prevail. Once this choice is made, the type of court design and level of punishment rendered will follow as a consequence.

5.3. Justice and Peace

A criticism of the DTL regime comes from the idea of Akhavan (1995), who suggested that there is a complementary interrelationship between war crimes prosecution and the peace

process. In Akhavan's view, the chance of war tomorrow depends on today's level of accountability.[242] In other words, the less you prosecute perpetrators today the more the chance of war tomorrow increases. According to this view, some of the benefits of the DTL regime are temporary. By reducing/eliminating prosecutions, the DTL regimes would probably lead to ending the war sooner, but only at the price of a higher chance of a resurgence of war.

In my view, when correctly understood, Akhavan's observation is not really a criticism of DTL. Rather, it highlights an important relation between sanctions and chance of future hostilities,[243] which must always be taken into account in order to correctly determine the combatants' incentives and their bargaining possibilities. Due consideration of such a relation is necessary to determine the optimal regime as well as the optimal level of punishment. This view is perfectly in line with consequentialist concerns.

As a general matter, Akhavan's concern applies to any regime, and probably has more to do with the level and the type of punishment than with the regime itself. For instance, one could imagine a scenario where the HR regime is in place but the sanctions imposed on the perpetrators are insufficient to deter future hostilities. Paradoxically, in an admittedly ideal scenario, the DTL might be the regime that is less vulnerable to Akhavan's point. In fact, if we suppose that the parties in a conflict would correctly assess the relation between sanctions and probability of resurgence of hostilities, then the parties would incorporate this in their request/demands at the bargaining table. If an agreement is reached, the concessions from one party to another (which are the "punishments" in the DTL) would then account for Akhavan's concerns in a way that all parties deem satisfactory.

5.4. Fairness under the DTL

As we have seen, the punishment of a perpetrator in the DTL consists of the concessions it has to make to its victims. In the application of the DTL, one would like to ensure that the more culpable the perpetrator the more concessions it would be willing to make at the bargaining table. In order to guarantee that this is indeed the case, it is then necessary to ensure that the more culpable the party is "the lower" its' bargaining power. Recall that in the DTL, the main role of the court is that of determining the parties' bargaining range (by determining the parties' threat points), we can then conclude that this feature will be obtained by guaranteeing that the sanctions imposed by the court would be harsher the more heinous and numerous the crimes.

5.5 An Illustration of de facto DTL at work: Second Phase of war in the Former Yugoslavia

Earlier it was argued that with the creation of the ICTY, the logic of appropriateness prevailed. An international court was established to redress violations of international criminal law during the war in the former Yugoslavia by prosecuting those most responsible for perpetrating these crimes. While it was perceived that this approach would satisfy the goals of justice, practically, it hindered prospects of achieving any form of peace. As D'Amato observed, given the *modus operandi* of the ICTY, a peace agreement would ensue only if secret talks/deals were made on the side. As such, the US delegation did just that; by abrogating from the HR system and adopting a *de facto* DTL, it was able to create incentives for warring combatants to bargain.

Since the ICTY had indicted war criminals Karadzic and Mladic for war crimes, the US refused to bargain with them, bringing Milosevic to the forefront as primary negotiator. Milosevic insisted that the indicted men were necessary to make peace, and if excluded from the negotiations they would cause more havoc and continue to fight.[244] When the preliminary peace talks began, Milosevic secretly arranged for the American delegation, led by Ambassador Holbrooke, to meet with Mladic and Karadzic. According to Bass, on September 14, in Pale, Karadzic and Mladic signed an American paper pledging to end the siege of Sarajevo, and "[u]nbeknowest to the public, the Americans held one more meeting with Karadzic," in Belgrade.[245] There, Milosevic told the American team that Karadzic would be part of the negotiations. The American team agreed as long as Karadzic did not lead the Serbian delegation.

Aside from the secret talks to get the Bosnian Serbs to sign the cease-fire, the US had to make additional assurances to shield them from prosecution in order to entice them to sign the actual peace agreement. A month before the Dayton Peace talks (October 1995), the Pentagon and the "reluctant" State Department agreed that NATO's Implementation Force (IFOR),[246] which was to be deployed to implement the peace agreement, would not be responsible for arresting war criminals.[247] At the actual Dayton talks the Americans employed Pentagon language: "IFOR would not arrest war criminals, but it would have the authority to do so".[248] In other words, if IFOR troops happened to come upon war criminals during their peacekeeping effort, then it would arrest the criminals, but it would not actively search for the men on the Hague's list.[249] In practice, IFOR embarked upon a policy of avoidance.[250]

The war crimes issue was not allowed to even surface in the talks for fear that Milosevic would never accept it. Bosnian President Izetbegovic wanted and suggested that Bosnian Serbs be treated like defeated Nazi's with terms imposed upon them, some of which were the

following: 1) arresting and extraditing of war criminals, 2) imposing of automatic sanctions in case of noncompliance, and 3) vetting of war criminals from police, military, and office holders.[251] US Secretary of Defense, William Perry dissuaded Izetbegovic from pursuing this course. As a consequence, Bosnians were specifically told not to mention war criminals. Moreover, Britain and France did not want sanctions over war criminals.[252] Despite the fact that Bosnia had made significant military and territorial gains towards the end of the war during the October offensive and that it bore the brunt the war, none of the terms that it requested were granted. While the Dayton Accords did create a Bosnian state with internationally recognized borders, it was still divided in two parts: the Federation of Bosnia and the Republika Srpska; each with its own autonomy and army.[253] The Dayton Accords also included provisions with special arrangements for refugees and displaced persons (a particularly acute problem for the Bosnians). The only provision that partially met the Bosnian terms was the stipulation that denied war criminals the right to hold public office or engage in public life.

William and Scharf correctly observed about the Dayton Accords that "…the emphasis on a peace deal required the active undermining of the application of the norm of justice during the negotiations…"[254] The American delegation recognized that the presence of an HR based system such as the ICTY thwarted any possibility of attaining peace, and hence adopted a DTL like system, whereby parties would not be prosecuted if a peaceful agreement was reached. Later in Chapter V, I will provide a more detailed analysis of the mechanics of the DTL system.

"It is not our place to interfere. Have faith in their abilities to solve their problems on their own."

The Traveller

Star Trek: The Next Generation

Chapter 5

Optimal Court Design: A Comparative Analysis

In Chapter II, I formalized the war/bargaining game both in the static case and in the dynamic one. I also gave an example showing how a court can alter the strategic problem the combatants face. While admittedly rudimentary, the example successfully highlighted an important feature: a court may alter the profitability of negotiating relative to going to war. This observation calls for further investigation into the role a court may play in a conflict situation as well as for an examination of the effectiveness of different court designs. This study is the subject matter of the present chapter.

In Chapter III, I reviewed the different legal views of state sovereignty, human rights and cosmopolitan rights, and domestic tort litigation. In Chapter IV, I showed how these different views translated into different court designs and analyzed the role the court played in the civil wars of the former Yugoslavia, Uganda, and Sierra Leone. All of these developments come together in the present chapter. By using the war/bargaining game of Chapter II, I show how the different court designs of Chapter III and IV give rise to different strategic situations, hence games, faced by combatants. This provides the basis for a comparative analysis of the effectiveness of the various regimes. Specifically, one would proceed as follows. For given

structural conditions and combatants' beliefs, one would formalize the game corresponding to a given court design and determine the equilibrium outcomes of the game. Then one would compare the outcomes achievable under the various "permissible" designs, and determine in this way, the best design relative to the desired objective (i.e. achieving peace). I illustrate this procedure in detail in Section 4 of this chapter by means of a numerical example. I would like to stress, however, that the example in Section 4 does, in fact, much more than showcase the procedure of comparing, for given structural conditions and combatants beliefs, the effectiveness of different court designs. The numerical specifications have been chosen in line with the findings in the literature on civil wars, and the example is evidently "robust" (that is, small perturbations in the structural conditions and in the combatants' beliefs would produce "essentially the same" equilibrium). Thus, within the simplifications discussed in Chapter II, the example of Section 4 can be viewed as a description of a "typical" civil war. For this "typical" civil war, I explicitly compare the equilibrium outcomes under the regimes of Anarchy, Human Rights/Cosmopolitan Rights, and Domestic Tort Litigation (the analysis of State Sovereignty is implicitly contained in that of other regimes), and show that the Domestic Tort Litigation regime outperforms the other regimes in terms of its ability of leading the combatants to negotiate for peace. The example of Section 4 can be viewed as a result that lends formal support to the thesis put forward by D'Amato during the Yugoslavian war as discussed in Chapter IV (yet, as shown in Section 4.4 and further discussed in Section 4.5, D'Amato's argument does require some substantial modification).

This chapter unfolds as follows: I start off with a review of the formal model of civil wars in Section 1. Before I model the courts under different legal regimes, I briefly recap the features of the legal systems emanating from the principles of state sovereignty, human

rights/cosmopolitan rights, and the domestic tort litigation in Section 2. I list the assumptions for modeling in Section 3. In Section 4, I show how to compare different regimes. As I said above, I do so by using a numerical example, because I believe that this results in a clearer and more immediate explanation, but the procedure is fully general. I then comment on the reasons why the domestic tort litigation outperforms other regimes and, once more, tie this explanation to the literature on bargaining failure in civil wars.

1. Legal regimes and the war/bargaining problem

As we have seen in Chapter II, the problems combatants face at a given point in time can be schematically represented by means of the "big block" below.

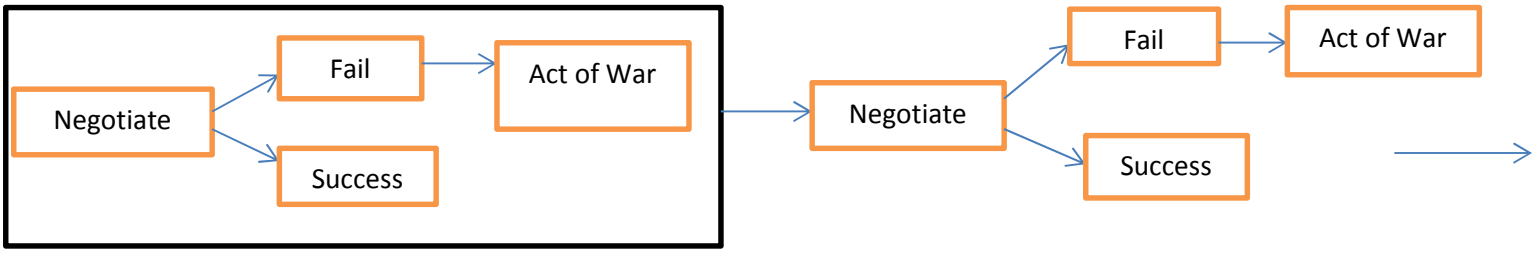

Figure 5.1
A "big block"

The full specification of the war/bargaining game, that is the one that factors in the temporal dimension of the problem, consists of repetition over time of the "big block", with the chain

coming to an end either when negotiations are successful or when one defeats the other. What happens at a given time in a "big block" affects the next "big block". That is, the acts that take place in each "big block", such as negotiation proposals, negotiation settlements, acts of war etc., involve transfers of resources, destruction of resources, information gathering and, hence, induces combatants to update their beliefs'. Thus, the underlying structural conditions as well as the players' beliefs change as we transition from one block to the next. Moreover, as observed in Chapter II, this transition may not be deterministic as the transition to the new big block may also depend on factors that are not under the players' control (players consider this occurrence a random event). In addition, there is asymmetric information both within each block and the transition to the future block. In principle, the complete analysis of the dynamic war/bargaining game would consist of two parts: (a) the determination of the outcomes of a "big block" as a function of the underlying structural conditions and players' beliefs; and (b) to the determination of the evolution over time of the structural conditions and beliefs. As noted in Chapter II, the full analysis of this dynamic game of incomplete information poses formidable challenges even under very strong assumptions, and is, at any rate, beyond the scope of this thesis.

As stated throughout the thesis, my goal is instead that of bringing to light an aspect that has been, surprisingly, neglected in the formal literature: the role of the legal regime in determining the problem faced by conflicting parties. The recognition of this role leads to an implication of utmost relevance: *legal regimes can be designed so as to generate the right incentives for conflicting parties to negotiate rather than go to war.* In the remainder of this chapter, I will show how this can be done. I will focus on a point in time (a "big block") and will show how, given certain structural conditions and beliefs, certain regimes might be able to generate the right incentives for parties to bargain while certain other regimes might fail to do so.

2. Conflict and courts in civil wars

In this section, I will briefly recap the main characteristic features of civil wars, legal regimes, and associated courts. I will also highlight the main assumptions under which my subsequent analysis will be performed. For a more extensive discussion on this topic, I refer the reader to Chapter II.

2.1 The basic game

The actors involved in a civil war are the government, G, and one or more rebel groups. For simplicity, I assume that there is only one of these groups and will denote it by R. G and R fight to seize control of the territory, resources, and assets of their country. The set of decisions available to G and R as well as the potential outcomes associated with these decisions are modeled as a game. It is convenient to think of such a game as being constituted by two interrelated parts, **W** and **B**, each a game in and of itself. The first part, ***W***, is a war game. The players in the game, ***W***, are G and R. The actions available to them correspond to the possible ways each player has of fighting the war. In general, one might have to consider a large number of actions. Practically, however, a course description of these options, "fighting conventionally" and "fighting unconventionally", would do for the present purposes. The payoffs associated with the players' choices are determined by the underlying structural conditions of the war.

The second part, ***B***, is the bargaining game. The players are still G and R and the actions available to them consist of possible proposals that they can make about the division of the pie. This represents the worth of the countries resources, territory, and assets G and R dispute over. It

is possible, and allowed in the model, that the two parties value the pie differently. The key observation is that the war game and the bargaining game are interrelated, that is the players' decision in one game depends on the possible outcomes in the "other" game. In fact, an important ingredient of the bargaining game $\boldsymbol{B}$ is the specification of what happens if the players fail to agree, that is the specification of the players' outside option. In actual situations, when G and R fail to agree at the negotiation table, one of the options available to them is to go to war. Formally, this corresponds to the players "exiting" the bargaining game and "entering" the war game. Thus, *the players outside options in the bargaining game* $\boldsymbol{B}$ *correspond to the players' expected outcomes in the war game* $\boldsymbol{W}$.

Both games, $\boldsymbol{W}$ and $\boldsymbol{B}$, are games with incomplete information. In game $\boldsymbol{W}$, each player has private information about its own military capabilities and resolve, and can make only an imperfect assessment about the other player's capabilities and resolve. It is possible that players entertain views that are at odds with each other. For instance, each player might believe that it is going to win the war.

In the bargaining game $\boldsymbol{B}$, there are two sources of private information. The first stems from each party having private information about its own assets and resolve. This matters in the bargaining process as it determines the concessions that each party has the potential to make. The second source of private information comes from the war game $\boldsymbol{W}$, as this game determines the players' outside options in game $\boldsymbol{B}$. Since $\boldsymbol{W}$ is itself a game with private information, it then follows that the outside options in game $\boldsymbol{B}$ are also private information. Just like above, this

produces the feature that the players' evaluation of their outside options might be at odds with each other and, in fact, their sum might even exceed the size of the pie (see Section 4).

Following the literature in Game Theory, I will model the players' private information by means of the notion of "type". Also, for the sake of clarity in analysis and exposition, I make the drastic simplification that each player can be of only one of two types: weak or strong. I will use the notation R_w, which means that the rebels are of a weak type, while R_s indicated the strong types (the notations G_w and G_s have similar meaning). The reader should think of these types as military types, that is, as a summary description of the players' military capability. Each player knows its own type, but in general, has only partial information about the other players' type. Following the literature on Bayesian games, this partial information is described by means of a probability on the other players' type (for instance, "R is weak and believes that G is weak with probability 0.4").

2.2 Courts under Different Legal Regimes

The key observation for modeling courts in civil wars is that the presence of a court alters, with respect to a situation of (international) anarchy, both the options available to warring parties as well as the potential outcomes that might obtain. *Formally, the introduction of a court appears as a device that alters both games **W** and **B**. It does so, by modifying both the actions available and the players' payoffs of those games.*

In particular, by altering the players' payoffs, a court may alter the relative profitability of the choice of negotiating versus the choice of going to war. Other constraints notwithstanding,

the introduction of a court may induce warring parties to bargain for peace. Practically, the courts ability to induce negotiations is limited by factors of various natures: political, historical, geographical, military, etc. In the case of civil wars, since the international community is typically more powerful than the state where the war is taking place, the factors of geographical or military nature are usually of second order concern. Thus, it makes sense to focus on factors of a political/ideological/ historical nature. The constraints emerging from these factors are encoded, *de jure* or *de facto*, in international treaties/statutes and in international law, and eventually produce different court designs. This is a crucial factor, whose importance was revealed in the cases studied in Chapter IV: that is, the court's ability to successfully induce negotiations depends significantly on its design. This observation makes a (formal) comparative study of alternative legal regimes and associated court designs all the more pressing. What makes this study possible is the following observation: starting with the games ***W*** and ***B*** under anarchy, the modifications produced by the court are different under different regimes. Thus, generally speaking *different legal systems produce different incentives for parties to commit crimes, to bargain to avoid the involvement of the court, and to bargain for a durable peace.*

2.2.1 Courts under State Sovereignty (SS)

Before modeling courts under different legal regimes, a brief recap of the main features of the different legal regimes is in order. In Chapter III, I looked at the principle of state sovereignty and saw how this concept became operational as a legal regime in Chapter IV. The main feature of a legal regime based on this principle is an asymmetry: under this regime, only the state has the right to call the court. Practically, this implies that the state will not call the court in the event that it violates the law and the rebels cannot call the court to hold the state accountable. Moreover, even in the event that a court is called upon to intervene, its ability to

prosecute would be highly dependent on the state's collaboration. This translates into the feature that when G does violate the law, the court is unlikely to prosecute G as was seen in the case of Uganda and the ICC in Chapter IV. This is yet another asymmetry associated with the SS regime: the court is likely to sanction the same violations committed by both G and R on different scales by showing more leniencies toward G (even impunity i.e. Uganda) than for R. Some of the potential drawbacks of this legal regime are easily inferred: 1) it may exacerbate the problem of committing humanitarian and human rights violations (G has no incentive to cease committing atrocities when the court has agreed to refrain from prosecuting it); 2) it may dramatically reduce the value of bargaining (G has no incentive to bargain with R when it can either get rid of R militarily, and/or in the event it cannot fight or defeat R directly, it can call the court to prosecute R if R committed crimes).

2.2.2 Courts under Human Rights/Cosmopolitan Rights (HR/CR)

In Chapter III, I studied the principles of human rights and cosmopolitan rights and saw how they became operational through the International Criminal Tribunal for the former Yugoslavia (ICTY) in Chapter IV. The main feature of a court based on the HR/CR principle is that the court can automatically intervene upon any infraction of the law. Neither party is needed to solicit the court. Moreover, once the court intervenes, all parties will be prosecuted if they have committed crimes. In this sense, there is symmetry between parties because both violations of R and G are sanctioned on the same scale. In other words, justice will be meted equally to both parties yet commensurate to the crimes committed.

In the cosmopolitan rights model, everybody, including civilians and individuals not directly involved in the war, can call the court to intervene. At the cost of a minimal

approximation, for all practical purposes, this can be considered the same as the court automatically intervening upon violations of the law, and as such the two regimes, HR/CR, can be modeled as one. The potential drawbacks of this regime are not as evident as those of SS and, in fact, half of the formal analysis in this chapter is devoted to unveiling them. As we shall see, this regime is largely ineffective in addressing those issues that, according to the literature on bargaining for peace during civil war, prevent parties from successful negotiation. Also, this regime might generate a rather perverse effect: as expected punishment (which might be very harsh and costly, i.e. Charles Taylor) might outweigh any potential gains from bargaining, "all-out war" may result as the only optimal option. We saw an instance of this in Chapter IV when studying the war in the former Yugoslavia. The leaders needed for negotiations, were the very leaders slated to be sanctioned by the court. The United States understood that parties would have no incentive to bargain for peace with prosecutions pending. Thus, it advocated an abrogation of the law to entice warring parties to the negotiating table.

2.2.3 Courts under the Domestic Tort Litigation (DTL)

A necessary condition for the DTL to be effective in the international setting is that G and R would be granted symmetric status with respect to an international court. In particular, G and R must have the same right to call the court, and if one party does call the court, all players including the one that called the court, will be punished if they have committed crimes. As we shall see, this regime has the potential of successfully addressing the drawbacks associated with other regimes. Firstly, and perhaps rather unexpectedly, we will see that this regime favors information transmission. That is, *information transmission is less costly under this regime than under other regimes.* Thus, this regime has the potential of reducing the "informational asymmetry" that the literature on bargaining for peace has identified as one of the main causes,

(possibly the most important), for bargaining failure. Secondly, this regime is capable of preserving all the potential gains from negotiation, thus keeping the value of bargaining relatively high. Finally, being inherently symmetric, this regime is not subject (unlike SS) to all those drawbacks stemming from the asymmetric treatment of the conflicting parties.

2.3 Court's design and the timing of its introduction

When analyzing the impact of different legal regimes, it is crucial to determine at what stage of the conflict a court is introduced. To see why this is important, let us consider a situation where a court is introduced only after international crimes have been committed. In such a scenario, the value of bargaining is higher for both parties under the DTL regime than it is under the HR/CR. This is so because under the DTL regime if players reach an agreement, then no court is called, and no sanction is imposed on the players for the crimes already committed. In contrast, under the HR/CR regime the players would be punished for the crimes committed independently of their willingness to bargain. It is possible, however, to envision scenarios where these conclusions about the relative performance of different regimes might be reversed; for instance, by considering a situation where a court is already in place before the onset of the war.

3. Modeling Civil Wars: Characterizing Assumptions

In this section, I am going to briefly review the set of empirical regularities identified by the literature on violence and bargaining for peace during civil war, as discussed in Chapter II. For

the purposes of this section, it is important to highlight and illustrate how these findings translate into formal assumptions about the games $\boldsymbol{W}$ and $\boldsymbol{B}$ above.

1) Rebels (R) are at a military disadvantage relative to government (G) forces and will, therefore, fight indirect, unconventional wars. Formally, this translates into the feature that (all other things being equal) R's payoffs for engaging in direct battle are lower than R's payoffs for resorting to indirect battle.[255]

2) Though G is at a military advantage, it is unlikely to engage in direct battle with R. As such, it will be unable to garner information on R strength, capabilities, and resolve.[256] Formally, this corresponds to the feature that G has only partial information about R's military capabilities. Moreover, G may obtain more information by engaging R in direct battle than by resorting to indirect methods of warfare.

3) G is more likely to resort to unlawful methods of warfare to defeat R[257] instead of negotiating with R. Formally, given its lack of information about R's military capabilities, G's expected payoff for fighting unconventionally is higher than both the payoffs achievable through conventional warfare and the payoff achievable from negotiating.

4) Both parties are unaware of each other's strength and resolve. They are likely to overestimate their own strength and underestimate that of their opponents.[258] Formally, the sum of the parties' outside options in the bargaining game exceeds (at least at the onset of the war; i.e., before additional information is gathered) the size of the pie.

I refer the reader back to Chapter II for a thorough discussion of these assumptions.

4. Relative Performance of different Regimes: A Comparative Analysis

I am now going to study the relative performance of the various regimes in terms of their ability to induce parties to negotiate for peace. Two features of my approach should be stressed once more. The first feature is that I consider the problem *at a given point in time* and ask whether or not there is a regime that might *induce parties to negotiate at that point.* The choice of focusing on a given point in time is motivated by two sets of factors: 1) As discussed in Chapter II, the study of a dynamic game poses formidable challenges even at the level of a simple example, and hence, it cannot be tackled in this thesis. More importantly, I did not want to mix the study of different court designs with the complications arising from the dynamic game. 2) To the best of my knowledge, this is the first research project that formalizes the notion of legal regimes in the context of civil wars and studies their relative performance. As a consequence, I thought it best to showcase the issues pertaining to the formalization of legal regimes in their clearest and most basic form.

Schematically, my analysis focuses on the study of a given "big block", as identified by the conflict's underlying structural conditions and the players' beliefs. Each legal regime determines a different "big block" as some of the structural properties of the corresponding games (actors, payoffs) depend on the regime. I will study the equilibrium outcomes of the games corresponding to each regime, and then will evaluate the different regimes by comparing these outcomes.

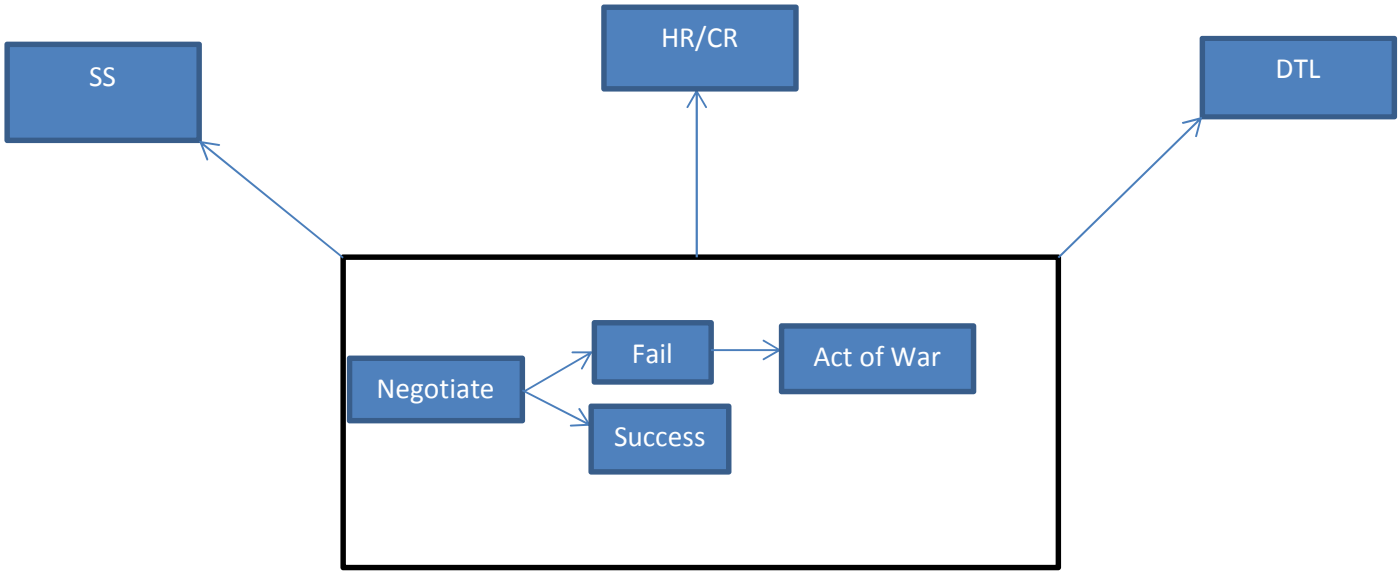

Figure 5.2
A "big block"
Its specifications depend on the regime in place.

The second feature is that I illustrate my approach and findings by means of a numerical example. I have chosen to do so for the following reasons. As stated in the previous section, the findings of the literature on violence and bargaining for peace during civil war take the form of qualitative restrictions on the players' payoffs and beliefs in the games ***W*** and ***B*** appearing in the "big block". A study of the games ***W*** and ***B*** for arbitrary payoffs and beliefs satisfying those restrictions would certainly be possible, but, in my opinion, would not be particularly enlightening. In fact, it is easy to convince oneself that the restrictions identified in the list are sufficiently strong that any numerical example satisfying those restrictions can be considered a description of a "typical" civil war. Hence, directly casting the analysis in numerical form has

the advantage of delivering sharper results which are, at the same time, representative of the general situation.

Stated more formally, it is easily seen that the example that I present, besides satisfying the constraints identified by the literature, is *robust* to both perturbations in the payoffs and beliefs. The latter observation is especially important in view of the extreme assumptions which I make, again for the sake of delivering a clear result, on the players' beliefs. I should also point out that my example displays the additional assumption that "fighting unconventionally" is a dominant strategy under international anarchy. As already discussed in Chapter II, Section 2.1.2, while the assumption considerably simplifies the determination of the equilibrium, all of the conclusions obtained in this section would go through under the weaker assumption that fighting unconventionally is a dominant strategy only for R and that fighting unconventionally is a "best response" for G to R fighting unconventionally. In this form, the assumption is simply one of the regularities found in the literature and, thus, entails no loss in generality.

4.1 A Basic War/Bargaining game in the context of Civil War

This is a 2-player game. The players are G (the government) and R (the rebels). In the bargaining game $\boldsymbol{B}$, G and R bargain over a pie worth 100 in total. The actions available to each player in game $\boldsymbol{B}$ consist of the possible proposals of how to split the pie. If they fail to agree, then they will enter the war game $\boldsymbol{W}$. $\boldsymbol{W}$ is a game with incomplete information. Each player is of one of two possible types: Weak or Strong. That is, G has two possible types, $\{G_W, G_S\}$, and so does R, $\{R_W, R_S\}$. Each player has two possible actions in the war game: fight conventionally

(β_u) or fight unconventionally (α_c). I assume that international crimes are committed when fighting unconventionally. The players' payoffs are determined according to the tables below, where R is the column player and G the row player:

THE WAR GAME

R_W

G_W

	α_c	β_u
α_c	20,15	-10, 55
β_u	45, 0	30, 20

R_S

	α_c	β_u
α_c	0, 35	-40,75
β_u	20,20	5, 65

G_S

	α_c	β_u
α_c	60,0	10, 30
β_u	95, -20	80,15

	α_c	β_u
α_c	30,20	0,40
β_u	65,0	20,45

As mentioned above, the payoffs specifications encode the simplifying yet unnecessary assumption that fighting unconventionally is a dominant strategy for both players independently of the other player's type. To complete the description of the war game, one has to specify the players' actual types as well as their beliefs about the other player's type. I am going to assume that both players are strong, G= G_S and R= R_S. Moreover, I am going to assume that G thinks that R is weak with probability $y \in [0,1]$ and strong with probability 1-y, while R thinks that G is weak with probability $x \in [0,1]$ and that G is strong with the complementary probability 1-x. Practically one should think of both x and y, the probability that one player assigns to the other being weak, as being close to 1. The assumption that players are quite off the mark in assessing their opponent's strength is motivated by the literature's findings reported in Section 3 (Section 3, item 4)). As said above, the equilibrium outcomes of the war game constitute the outside options of the bargaining game, which is a also a game of incomplete information.

4.2 The basic game in a situation of anarchy

To begin, let us suppose that there is no court in the picture. According to the assumptions, if the players decide to go to war, G believes that it is in one of the two games in the bottom row of the table: precisely, in the lower left game with probability y and in the lower right game with probability 1-y. Moreover, G knows that in such a case, R would choose β_u (=fight unconventionally) since this is the dominant strategy for R. G would then best respond by choosing β_u (in fact, this is a dominant strategy for G as well). Hence, the expected value for G from going to war is given by

$$80y + (1 - y)20 = 20 + 60y$$

Since the pie is worth 100, it follows that the highest concession that G is willing to make at the bargaining table is

$$100 - (20+60y) = 80 - 60y$$

Practically, for y close to 1, one should think of this number as being approximately 20. Similarly if the parties decide to go to war, R would know that it is in one of the two games in the right column of the table (since R knows that it is strong). In either one of those games, both R and G are going to play β_u, which makes it easy to compute R's value from going to war. This value is

$$65x + (1 - x)45 = 45 + 20x$$

Hence, R is willing to bargain rather than go to war if it can get something greater than 45 + 20x (practically, one should think of this number as being close to 65 as we think of the probability x as being close to 1).

We conclude that for negotiations to take place it must be the case that R's minimal possible request has to be lower than G's highest possible concession, a condition that now reads as $45 + 20x \leq 80 - 60y$ or equivalently $y \leq \frac{7}{12} - \frac{1}{3}x$. The set of values of y and x for which the inequality is satisfied gives us those beliefs for which a bargaining range exists. These are represented in the shaded area in the diagram below

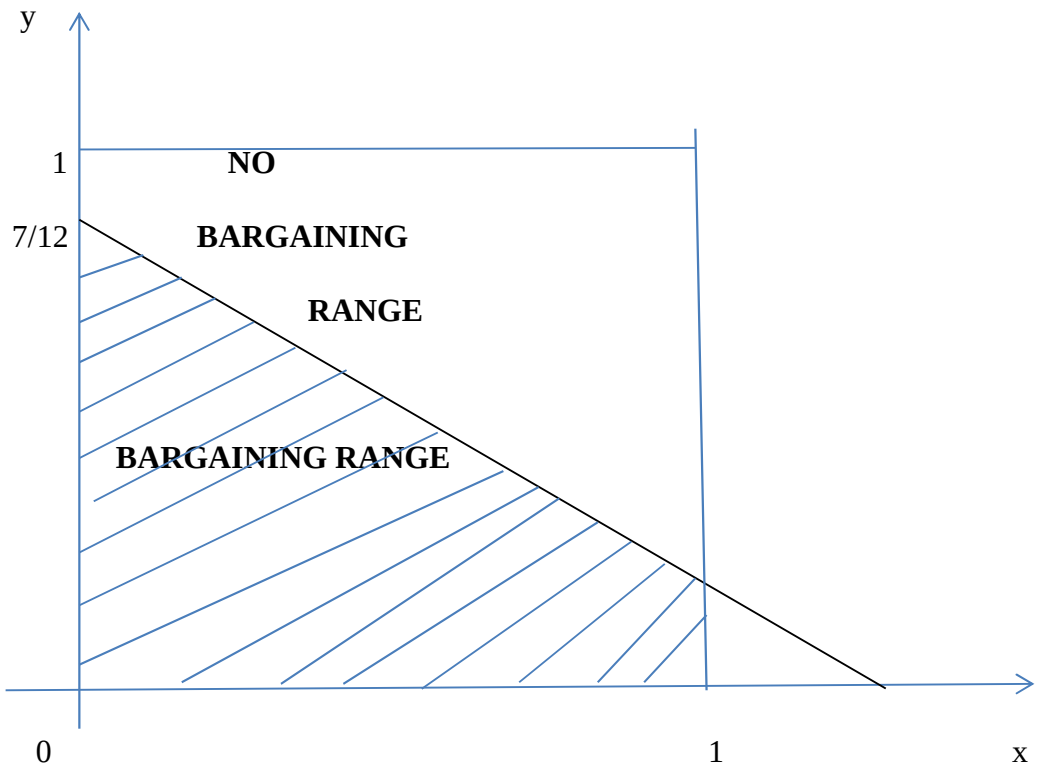

Figure 5.3
Bargaining Range

From the diagram, we also see that when x and y are relatively high (for instance both close to 1), which is in line with our assumptions, there is no bargaining range. We then conclude that when these beliefs fall in the range identified in the literature on bargaining for peace during civil war, then no bargaining is possible, and parties will choose to go to war in our game.

4.3 Introducing a temporal aspect

I am now going to enrich the description by introducing a temporal aspect. This is important because it not only enhances how realistic the model is but also allows me to account for an important phenomenon: *information transmission*. I already noted in Chapter II, that the recognition that conflicts occur over time implies that any concession or any act of war that realizes leads the parties to update their beliefs about each other's type. Needless to say, this process of updating information is of utmost importance since the presence of asymmetric information is one of the most prominent causes of bargaining failures pointed out in the literature.

From now on, I will endow R with a new action, which I label "strike," and the timing of the game should be thought of as follows. Let t_o be the date under consideration, that is the date at which our analysis begins. At this date, the underlying structural conditions and the players' beliefs are given and fully described by the war/bargaining game. At date t_o, we begin with a round of negotiations. If this is successful, we are done. If this is unsuccessful, R may decide to strike or not strike. After this decision, we move to the new date t_1. At t_1, we have two possibilities: either R did not strike at t_o, in which case the game at t_1 is the same as t_o; or R did strike in which case both payoffs in the game at t_1 and the players beliefs are different as a consequence of R's strike. The sequence of moves is schematically described in the figure below

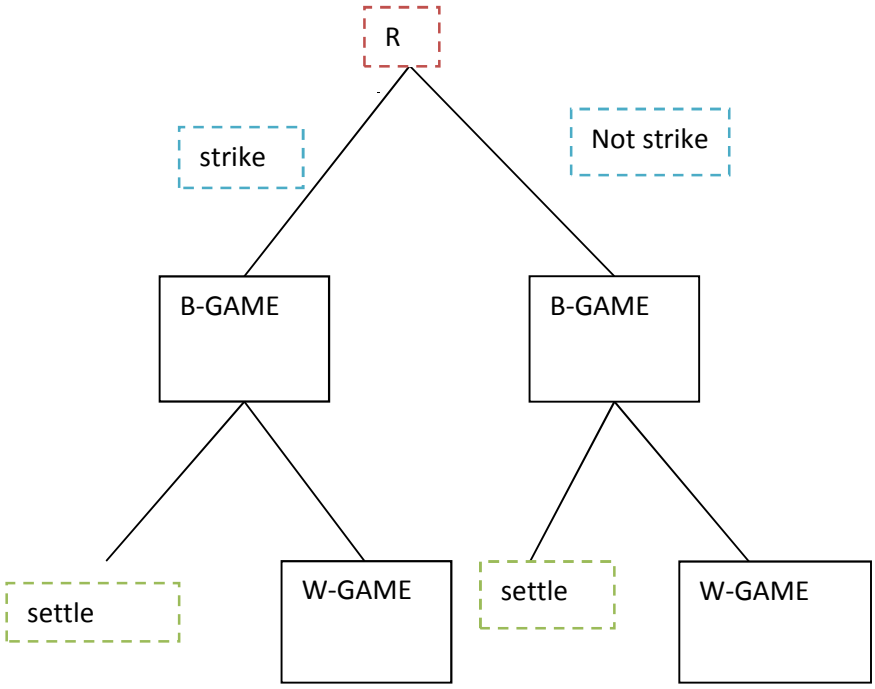

Figure 5.4
Game Tree

Again it is important to record that the games in the boxes on the left branch are different from the games in the box on the right branch because R's strike produces both a change in the payoffs and a change in the beliefs.

To complete the description of the game, I have to specify how R's strike changes the payoffs and the beliefs. With regard to the payoffs, I will keep things as simple as possible, and simply assume that R bears a cost of 10 if it strikes. For future reference, I do assume, however, that war crimes are committed during the strike. It would certainly be possible to embellish this

description by assuming that R's strike alters, for instance, the "size of the pie" by causing damage to G, but this would not change the substance of the analysis. More importantly, these embellishments might divert our attention away from what is more important: information transmission and how the players update their beliefs. I model this process as follows. Let S denote R's action "strike" and $\neg S$ the action "not strike". I assume that G has a *prior* probability over the set of pairs

$$\{(R_w,S), (R_w, \neg S), (R_s, S), (R_s, \neg S)\}$$

Thus,

$$P(R_w, S) = y_1$$

is the *prior* probability that G assigns to R being weak and deciding to strike. The probabilities $P(R_w, \neg S) = y_2$, $P(R_s,S) = y_3$ and $P(R_s, \neg S) = 1 - y_1 - y_2 - y_3$ have a similar meaning. Accordingly, the *prior* probability that G assigns to R being weak is given by

$$P(R_w) = P(R_w, S) + P(R_w, \neg S) = y_1 + y_2$$

By setting $y_1+y_2= y$, we obtain the probabilities specified in 4.2, and that analysis applies. After R decides to strike or to not strike, G updates his beliefs on R being weak or strong on the basis of this information. G does so by using Bayes rule. Precisely, G's *posterior* probabilities are given by

$$P(R_w|S) = \frac{y_1}{y_1+y_3}; \quad P(R_s|S) = \frac{y_3}{y_1+y_3}$$

and

$$P(R_w|\neg S) = \frac{y_2}{1-y_1-y_3}; P\ (R_s|\neg S) = \frac{1-y_1-y_2-y_3}{1-y_1-y_3}$$

Notice, that by choosing y_2 sufficiently close to 1, y_1 sufficiently close to 0 (possibly 0) and y_3 positive but sufficiently close to 0, we have the features that: (a) at the beginning (*prior* probability), G is "almost certain" that R is weak, in accordance with Section 4.2; (b) if R strikes, G becomes "certain" or "almost certain" that R is strong; finally, (c) if R does not strike, G is "almost certain" that R is weak (that the war/bargaining game in t_1 is essentially the same as the war/bargaining game in t_0). In what follows, I assume that y_1=0. Thus, if R strikes, G becomes certain that R is strong. In view of the previous discussion, this is "harmless" and simplifies the determination of the equilibria.

4.3.1 Pre-emptive Strike

The above description lends itself to a two-fold interpretation. One possibility is that our analysis is taking place at an arbitrary date t, which indicates that the war has been fought for several periods, or in other words, it is ongoing. In such a case, what I labeled "strike" should be interpreted as an ordinary act of war which, at that point in time, induces the revision of beliefs. Another interpretation is that our analysis is taking place before any act of war is committed. In such a case, what I labeled "strike" can be interpreted as a "pre-emptive strike". In the literature on bargaining and war, such a "strike" is usually interpreted a "costly signal,"[259] and I will give the same interpretation below. At any rate, the formal analysis of the two situations is exactly the same.

4.3.2 Equilibrium analysis for the game under anarchy

I assume that R incurs a cost of 10 for striking; everything else is unchanged. I also assume that war crimes are committed during the strike, but this will be significant only in the next section. The process of updating beliefs following R's choice to strike or not strike was described above. In order to examine the outcomes of this game, the first step is to determine whether or not R will strike.

A. If R does not strike, then G believes that R is weak with probability $\frac{y_2}{1-y_1-y_3}$ and that it is strong with the complementary probability. For high values of y_2 and x, the situation is exactly like that studied in section 4.2; there is no bargaining range, parties go to war, R gets 45 and G gets 20. Notice, however that the players expected payoffs are

$$\frac{y_2}{1-y_1-y_3}\,80 \;+\; \left(1-\frac{y_2}{1-y_1\;-y_3}\right)20 = 20 \;+ 60\frac{y_2}{1-y_1-y_3}$$

and

$$65x + (1-x)\,45 = 45 \;+ 20x$$

for G and R, respectively. For high values of y_2 and x, the numbers are close to 80 and 65, respectively.

B. If R does strike, then G changes its mind about R; now G knows that R is strong and is willing to concede up to 80. Any concession lower than 80 makes G better off than going to war. The minimal request that R (after having stuck) would make at the bargaining table is 45 +20x, where x is the probability that R assigns to G being weak. Since $x \leq 1$, we have

$$45 + 20x \leq 65 < 80$$

and we conclude that there is a bargaining range. Graphically, the set of admissible beliefs after R strikes consist of the segment [0,1] on the horizontal line because G is certain that R is strong (the probability y that R is weak is 0)

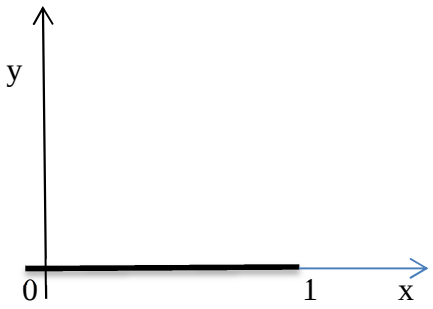

Figure 5.5
Admissible beliefs and bargaining range after R's strike

Any point in the segment represents beliefs for which bargaining is possible. In this situation, there are plenty of equilibria where the parties successfully bargain. To see this, notice that when R strikes, G is certainly willing to concede 55: G knows that R is strong; by going to war G would get at most 20 (hence, willing to concede up to 80). On its end, R is willing to agree to this concession. By striking first, and then rejecting G's offer and going to war, R can only get

$$-10 + 45 + 20x$$

which is always less than or equal to 55.

4.3.3 More on the equilibrium

Conditionally on R having struck, G is never willing to concede more than 55 because G knows that under no circumstance can R achieve more than this amount. The exact determination of all possible equilibrium concessions of G in the subgame determined by R's strike depends on the value of x, the probability that R assigns to G being weak. In fact, R is not willing to accept any concession lower than

$$45 + 20x - 10$$

As x varies in [0,1], this value varies in the interval [35,55]. Knowing x, however, is not sufficient to determine the equilibrium concession, except in the case were x =1. If x =1, the minimum that R is willing to accept is 55, which is also the maximum that G is willing to concede (in any best–response play). In such a case, we conclude that the sequence of moves (R strikes, G offers 55, R accepts) constitutes a Nash Equilibrium (NE) of this sequence. In all other cases, that is for x < 1, knowledge of x is not sufficient to determine the equilibrium. In fact, we should add assumptions on how players update their beliefs about each other's type following offers and counter-offers at the negotiation table. To see this, suppose for instance that x = 0, that is R thinks that G is strong. Thus, it would be profitable for R to accept any offer greater or equal to 35. Suppose, however, that R wants to play "hard ball" to induce G to make a higher concession. For instance, R might turn down an offer of 47 in order to convince G that it really thinks that G is weak, and therefore, it is not willing to accept anything below 55 (even if this is not true). In such a case, how would G react to R's behavior? Would G give in and make a higher offer or would G try to play "hard ball" itself?

While all of these scenarios are certainly interesting, they are only tangential to the main inquiry pursued here; their study is in the purview of Game Theory/Bargaining Theory. In this

analysis, the main point is that for all x's there is a Nash Equilibrium of the subgame determined by R's strike, where the parties agree to bargain rather than go to war. Be that as it may, the highest achievable value for R (independently of x) in the subgame determined by its choice of striking is 55. We conclude that R will certainly decide not to strike if the following condition is satisfied

$$45 + 20x \geq 55$$

that is

$$x \geq \frac{1}{2}$$

Since this is in line with the literature, we should focus on high values of x; we are going to assume that this condition is satisfied. We can summarize our findings by means of the following proposition.

Proposition 1: *In the equilibrium of the game under anarchy, R elects not to strike. Both parties decide to go to war and crimes are committed.*

In the remainder of the chapter, I am going to assume that x=1. This is in line with the empirical findings and has the virtue of greatly simplifying the determination of equilibria (i.e. the determination of the equilibria in the subgame above). To consider high values of x rather than x=1 would not lead to any substantial change but would result in a more cumbersome exposition.

4.4. Introducing a court

We are now going to study how the introduction of the court changes the results we have obtained thus far. The introduction of the court might allow players an additional action ("call the court") and potentially (depending on the legal regime and the players' actions) reduces the payoff that a player might achieve by using the action β_u (fight unconventionally) as well as the payoff that R can achieve by striking (as international crimes are committed by R when striking.). I am going to specify the costs that the court imposes on the players for committing international crimes as follows. The court imposes a penalty (=cost) of 40 on R for striking. It imposes an additional penalty of 10 on each party for using action β_u if this follows a strike from R. It imposes a penalty of 20 on each party for using action β_u if no strike from R takes place.[260] I stress that these are only *potential costs*. They become *actual costs* only when the court is allowed to intervene, which is going to depend on the legal regime in place. In order to complete the description of the game, I must specify which players have the options of calling the court, and when they have the option to do so. This varies with the legal regime in place.

ACTIONS	REBEL COSTS	GOVERNMENT COSTS
Striking	-40	0
Striking + Unconventional warfare	-50	-10
No Strike +Unconventional warfare	-20	-20

Figure 5.6

Costs imposed by a court for committing international crimes

4.4.1 The Domestic Tort Litigation Model (DTL): Equilibrium Analysis

In the domestic tort litigation model (DTL), the court can only intervene if one of the parties requests its intervention. Both players have the option of calling the court if international crimes have been committed. If one party calls the court, all players, including the one that called the court, will be punished if they have committed crimes. The main finding of this subsection is summarized in the following proposition:

Proposition 2: *Under the DTL, there exists a Nash Equilibrium of the war/bargaining game with the following features. R strikes and commits international crimes; G and R successfully negotiate; no party calls the court.*

In order to prove proposition 2, we have to consider several scenarios. The first step consists in determining whether or not 1) R strikes or 2) R does not strike. Next, if R strikes, we have to determine if (1a) G calls the court or (1b) G does not call the court. For each case, we will then have to determine whether or not one or both players decide to go to war. Finally, if in case (1b) players decide to settle, we will have to determine whether or not G would renege on the agreement, and call the court to intervene.

To begin, let us suppose that R does not strike. Then, as seen in Section 4.3, G updates its beliefs and thinks that R is weak with probability $\tilde{y} = \frac{y_2}{1-y_1-y_3}$ (recall, however, that we assume that $y_1 = 0$, that is R strikes G becomes certain that R is strong, thus R is weak with probability $\tilde{y} = \frac{y_2}{1-y_3}$). The analysis of the previous section applies, and G is willing to concede up to 80-60$\tilde{y}$. Practically, we should be thinking of $\tilde{y}$ as being close to 1 and, consequently, the maximum G is willing to concede as being close to 20. For what concerns R, recall that we have been supposing that x=1, that is R is sure that G is weak. Thus, the value for R of going to war is 65, if G does not call the court, while it is 45 if G does call the court (65 (expected value from war) – 20 (penalty imposed by the court)).

We conclude that the worst case scenario for R is that it would get 45 from war. It follows then that R would ask for at least 45 at the bargaining table, while G would want to give up at most 80-60$\tilde{y}$. The no bargaining condition is then

$$80 - 60\tilde{y} < 45$$

or equivalently,

$$\frac{7}{12} < \tilde{y}$$

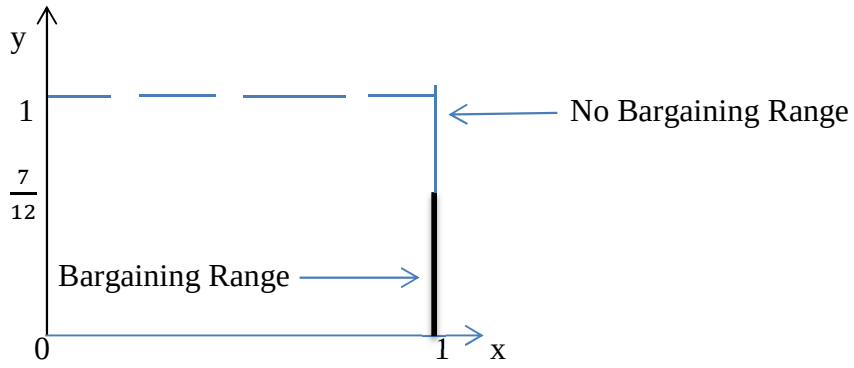

Figure 5.7
Admissible beliefs and bargaining range under the domestic tort litigation if R does not strike

Since we have been thinking of $\tilde{y}$ as being close to 1, we then conclude that no bargaining is possible and that both parties will go to war. In this scenario (i) nobody calls the court; (ii) R's expected payoff is 65, while it realized payoff is 45; (iii) G's expected payoff is $80\,\tilde{y} + 20(1-\tilde{y})$, (which, under our assumption is nearly 80), while its realized payoff is 20.

Next let us consider the scenario where R strikes. We want to find out whether or not G will choose to sit at the bargaining table. We are going to do so by comparing three payoffs for G: (i) the payoff that G achieves by not negotiating, not calling the court, and by going to war; (ii) the payoff that G achieves by not negotiating and calling the court; (iii) the payoff that G achieves by negotiating and not calling the court. Regarding the first payoff, we know that after R strikes, G updates its beliefs and becomes certain that R's strong. Thus, G's expected value from going to war is 20 (this payoff would go down to 10 if R calls the court, but this threat is not credible).

Next, suppose that G refuses to negotiate and instead calls the court. What is R going to do? If R does not do anything, R gets -50 (– 40 (penalty from the court) -10 (cost of strike)). If R goes to war, R expected payoff is 15 (65 expected gain from going war; x=1) -10 (cost of strike) – 40 (penalty from court)). So, obviously R would choose to go to war. In such a case, G will have to go to war, and G will get a payoff of 10 (20 (gain from war) -10 (penalty from court)). In sum, conditional on R having struck, the value for G of not negotiating and calling the court is 10.

Finally, let us examine G's decision of not calling the court and sitting at the bargaining table. The following observation is crucial: since, by striking, R has committed punishable crimes, *G can credibly threaten to call the court*. In this way, G can effectively lower R's demands at the bargaining table. Formally, this means that the value for R of leaving the negotiations (rejecting G's offer) is given by the payoffs achievable in the war game minus the penalty imposed by the court. Just like before, this value is 15 = 65-10-40. Thus, any offer greater than 15 that G makes to R would be acceptable. R, on its end, can threaten to go to war, and by doing so would lower G's payoff down to 20 (again, this payoff could go down to 10 if R calls the court, but this threat is not credible). Hence, any offer higher than 20 that R makes to G would be deemed acceptable. In sum, if G decides not to call the court and bargain, then there are possibilities of splitting the pie that are mutually beneficial for both parties.

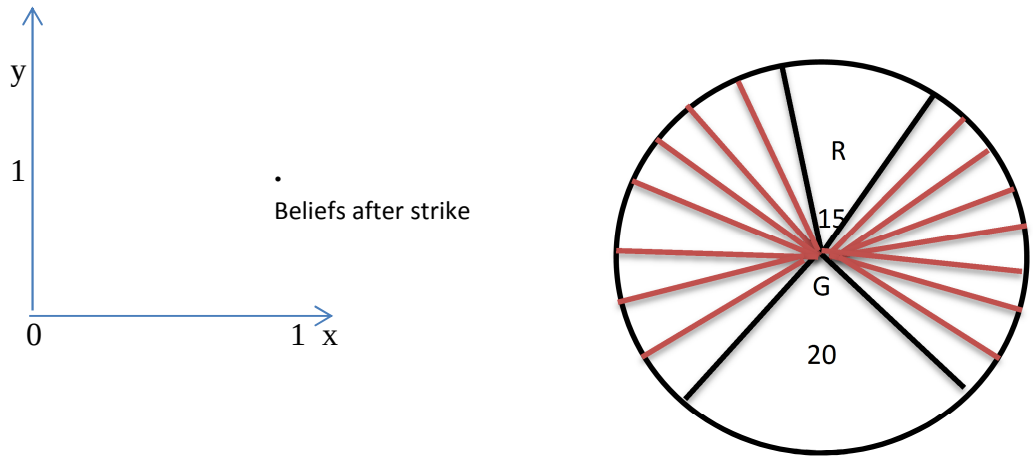

Figure 5.8
Beliefs and bargaining possibilities after R strikes

By negotiating and committing to not call the court, G can guarantee itself a payoff of at least 20, that is at least as high as the highest payoff produced by the two strategies we previously examined. In fact, G can achieve strictly more than 20. For instance, let us consider the division of the pie (proposed after R strikes), 25 for G and 75 for R. The total payoffs are as follows: R gets 65 (-10 (strike) + 75 (negotiations)) which is equal to 65, the maximum expected value of not striking pre-emptively and going to war, thus, R weakly prefers striking and making the deal of (75 for R, 25 for G) to not striking and going to war. G gets 25 which is more than 20, the value of not negotiating. The split is in fact an equilibrium outcome of the game. The strategy profile reported in the table below constitutes a Nash Equilibrium of the game which generates exactly this split.

	Rebels: Strategy A	Government: Strategy B
1	Strike	
2		Offer 75 to R
3	Accepts any offer $\geq$75; rejects any offer <75 and goes to war	
4		Does not call the court if R accepts; goes to war if R rejects
5	Does not call the court if G does not call the court; goes to war if G calls the court	

If R follows strategy A and G follows strategy B, then R gets 65 and G gets 25.

Claim: The pair of strategies (A,B) is a NE. In order to prove this claim, we have to show that given that G plays B, R cannot improve its payoff by playing a strategy different from A.

R could switch to 1) "not striking" or 2) "calling the court" or 3) "using a different bargaining strategy" or 4) all three. We have already noticed that the maximum expected payoff that R can achieve by "not striking" is 65 (whether R calls the court or not). Thus, R weakly prefers Strategy A to any strategy involving "not striking". Next, given that R strikes, by calling the court R would only lower its payoff. With respect to a different bargaining strategy, following an offer, R can adopt a threshold strategy or a non-threshold strategy. A threshold strategy is identified by a single number: any offer above this number is accepted and any offer below this number is rejected. Thus, the set of all possible offers is divided into two regions with any point in the acceptance region being bigger than any point in the rejection region.

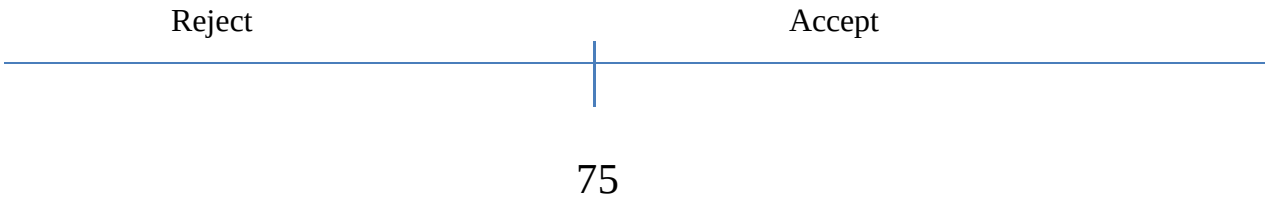

Figure 5.9
Example of a threshold strategy

In a non-threshold strategy, this is not true. We can find both a point in the rejection region that is higher than a point in the accept region and a point in the acceptance region that is higher than a point in the rejection region.

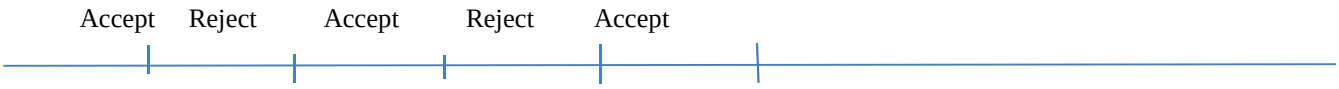

Figure 5.10
Example of a non-threshold strategy

We begin by observing that clearly a non-threshold strategy is always weakly dominated by a threshold strategy. From this it follows that if we find a non-threshold strategy that does better than Strategy A, then there exists a threshold strategy that does better than Strategy A. Next, let us consider a threshold strategy with a threshold lower than 75. If R deviates from the proposed strategy by switching to such a strategy, then R would still accept the offer of 75 that G offers it. Thus, R's payoff would not change from that of the proposed profile, and we conclude

that this type of deviation is not profitable. Let us consider, now, a threshold strategy that is higher than 75. If R deviates by switching to such a strategy, then R would reject the offer of 75 that G offers it. In such a case, G will go to war and so will R, and R will get 15 (65 (expected gain from war, x=1) – 10 (cost of strike) – 10 (penalty from court)), if the court is called, and 55 (65(expected gain from war, x=1) – 10 (cost of strike)), if the court is not called. Thus R will get 55 at best instead of 65 that it gets in the proposed profile. We conclude that this type of deviation is not profitable for either party and that Strategy A for R is a best response to G's Strategy B.

Next, let us examine G's situation. Clearly it is not profitable for G to offer R more than 75. If G offers less than 75, then R goes to war, and we have already seen that in such a case G would get at most 20 (whether a court is called or not). Thus, this deviation is not profitable. Next G could call the court after R accepts. But, in such a case R would go to war. As we know, G would make at most 20 (in fact 10, since G itself has called the court). Again this deviation is not profitable. We conclude that the proposed profile is a Nash Equilibrium. We stress that in this equilibrium, international crimes are committed during the strike, negotiations take place, and peace is reached without the involvement of the court. We will comment on this feature in Section 4.5.

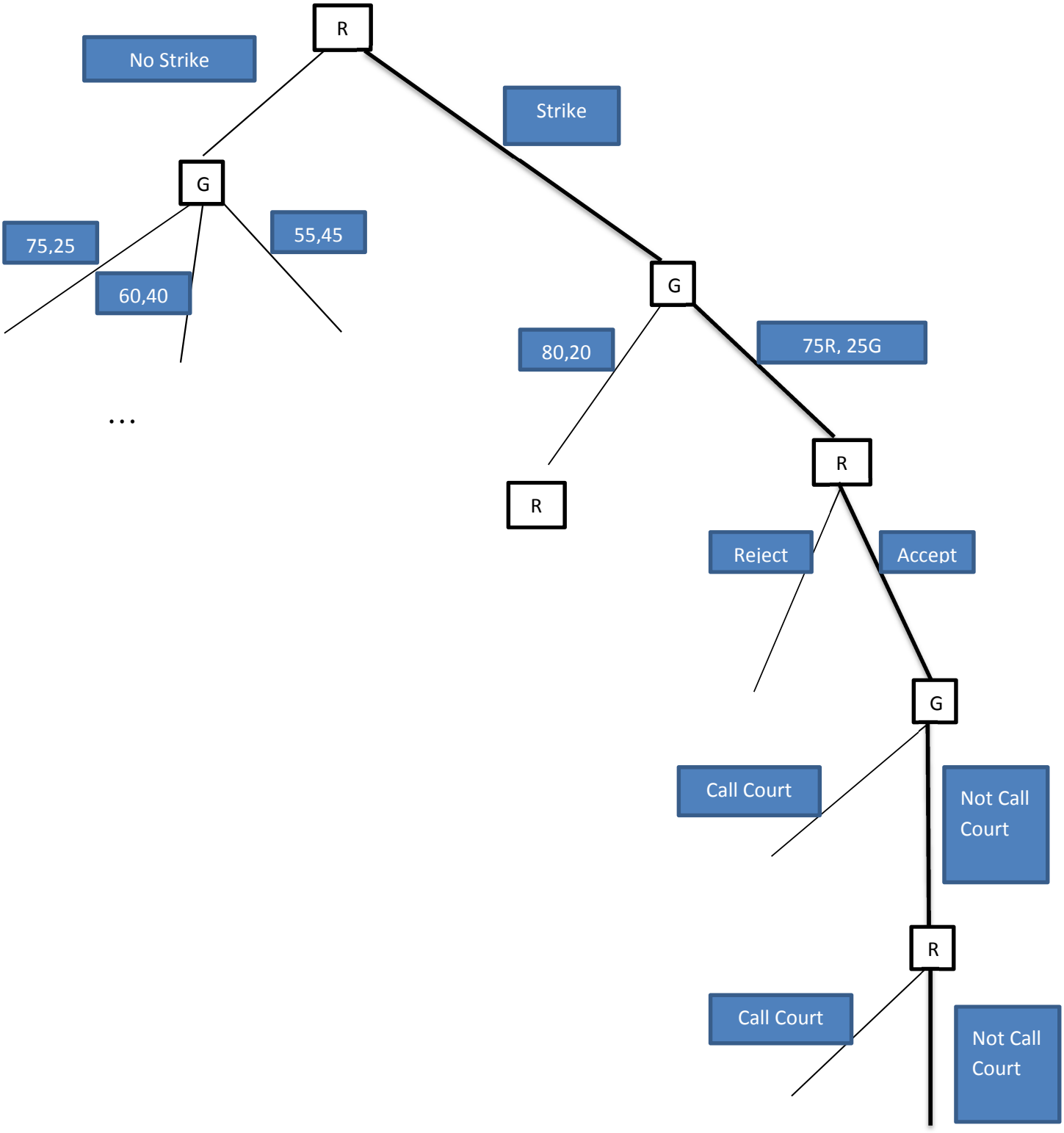

Figure 5.11
The equilibrium path

4.4.2 The Human Rights Model (HR)

In the HR model the court automatically intervenes when international crimes are committed. It does not need the authorization from any of the players involved in the war, and the players know that they will face prosecution even if they decide to negotiate for peace. The main finding of this subsection is contained in the following proposition.

Proposition 3: *Under the HR, there exists no Nash Equilibrium of the war/bargaining game where the parties successfully negotiate.*

In other words, the situation is dramatically different under HR: bargaining will never take place; parties always elect to go to war and crimes are always committed (and of course, the court will intervene).

In order to prove Proposition 3, just like before, we begin by determining whether or not R strikes in the equilibrium of the game. If R does not strike, the situation is the same as in the DTL model with the only difference that now the court will definitely impose a penalty of -20 on both for going to war. R's expected value for going to war is 45 = 65 (from war; x=1) – 20 (court penalty), (while it's realized value would be, in fact, 25). G's expected value from going to war is $80\tilde{y} + (1- \tilde{y})\ 20 – 20=60\ \tilde{y}$. The no bargaining condition is

$$100 - 60\ \tilde{y} < 45$$

or equivalently

$$\frac{11}{12} < \tilde{y}$$

Again, for $\tilde{y}$ sufficiently close to 1, no bargaining will take place, and both will elect to go to war.

If R strikes, there are two possibilities: G may or may not go to war. If G goes to war, then R's expected value (x=1) is 15 (-10 (cost of strike) + 65 (from war) – 40 (court penalty)) and G gets 10 (20 (from war) – 10 (court penalty)). If instead G decides to negotiate, then the highest concession that G is willing to make at the bargaining table would be 90 (since by going to war G would get 10). Hence, if R strikes, then it can get at most 90 from bargaining. Thus, in the best case scenario, R will end up with a payoff of 40 (-10 (strike) + 90 (negotiation) - 40 (court penalty)). We see, then, that for R the value of not striking and going to war (which is 45, as seen above) is higher than the value of striking (which is at most 40). In sum, under the HR model, *in any Nash Equilibrium of the game R does not strike, no information is transmitted, there is no bargaining range (no room for negotiation), both parties go to war and international crimes are committed by both parties.*

4.5 Information transmission under alternative regimes: Reshaping D'Amato's thesis

We have seen that the equilibrium outcomes of the war/bargaining game may be dramatically different under different regimes: under our assumptions, peace obtains under the DTL but may not be achieved under HR. Anthony D'Amato (Chapter IV, Section 5) foresaw this possibility when dealing with the Yugoslavian war, and attributed it to the feature that the HR

system erases the potential gains from bargaining. While D'Amato's insight is remarkable, his explanation is incomplete. As we shall see, it somehow confuses an effect (the lack of bargaining possibilities) with its cause.

The key for understanding why and how the DTL may outperform the HR system is *information transmission*. To see this, we need to go back to the basics and precisely to the findings of the literature on bargaining for peace during civil wars. According to that literature, one of the main causes of bargaining failure in civil wars is the asymmetry in the parties' information and the consequent incorrect assessment of the terms achievable from war. The DTL system operates successfully in mitigating this problem and this is precisely what leads the parties to bargain successfully. The details of how this mechanism works become clear when we re-trace the steps of our formal analysis.

Under both regimes, the parties start out with the same incorrect beliefs about each other's strength and resolve. As a consequence, they incorrectly evaluate the potential gains from war, which results in a lack of a bargaining range. Following this situation, what happens under the DTL is that one party (R) strikes. Whatever the intent of this party, the "strike" is *de facto* a (costly) signal that this party sends to the other. The other party, then uses this signal to revise its beliefs about the opponent's strength and resolve, and by doing so can better assess the potential gains or losses from war. In turn, this results into a willingness of making concessions at the bargaining table, which leads to the emergence of a bargaining range. In sum, peace is achievable under the DTL because information is transmitted, beliefs are revised and, as a consequence, bargaining possibilities are unveiled. Why does this fail to occur under the HR system?

Under the HR system, when a party strikes it will be punished by the court. Effectively the punishment works as an additional cost imposed on the act of sending a signal. As in the analysis above, it may be the case that the punishment makes the signal so costly that it is not worth sending. Even if the signal were to generate the most favorable bargaining possibilities for the party sending it, those potential gains are outweighed by the cost imposed by the court. Thus, signals are not sent, beliefs are not revised in the right direction, the incorrect assessments of parties' strength stand, and, consequently, the existence of bargaining possibilities is not perceived.

4.6 Revisiting and Reinterpreting the Yugoslavian War: The Blake-Amarante Effect

In Chapter IV section 2.2.1, I claimed that D'Amato's predictions did come to pass; that is, for any peace negotiation to ensue, UN officials (in this case the US) had to abrogate from the HR system because it failed to create incentives for parties to negotiate for peace with prosecutions pending. In the previous section (4.5), I argued that while D'Amato's insight is indeed remarkable, he somehow confuses the effect (the lack of bargaining possibilities) with its cause (HR system's ability to preclude information transmission). In this section, I will complete D'Amato's explanation and argue that a *de facto* DTL was in operation during the second phase of the war in Yugoslavia, when the US (who acted as an enforcer) intervened to form an alliance between the Croats and the Bosnians in 1994. We see that the formation of the alliance and the strike where the Croats and Muslims retook Krajina and twenty percent of Bosnia[261] can be thought of as an illustration of the Blake-Amarante effect: with the US in the picture acting as a *de facto* DTL court as opposed to an HR court, a signal of the opponents strength was sent to the

Serbs, the Serbs were forced to change their beliefs and recognized that they were in a militarily weak position, and hence they were willing to negotiate for peace.

In 1994, the US actively intervened and used force to open up a bargaining space during the war in the former Yugoslavia. It did so by 1) convincing the Croats to agree to allow the Bosnians to be fully armed; 2) drawing up a peace agreement between the Croats and Bosnians; and 3) creating the Croat- Muslim Federation.[262] The US not only created the Federation but also provided it with equipment and Bosnian and Croat troops were trained by "an American military consulting firm comprised primarily of retired American military officers".[263]

As illustrated in Chapter IV, all attempts at peace settlement during the first phase of war (prior to the Croat-Muslim Federation) failed miserably due to Serb military strength, recalcitrance and noncooperation, and impending prosecutions from the ICTY (See Chapter IV case study of Yugoslavia). At the second phase of the war, the alliance proved to be a catalyst for peace for two reasons. First, it led to the end of hostilities between the Croats and Bosnians. Second, it created a stronger military opponent against the Serbs. It is important to note that while the alliance was created to oppose the Serbs, it was not created to decisively overcome them, but instead was created to get them to the bargaining table. Lord Owen writes that President Tudjman of Croatia acknowledged that the alliance was not directed against the Serbs, but was for peace.[264]

The Croation-Muslim alliance launched "Operation-Storm" on 4 August 1995. According to William and Scharf: "The combined Croatian/Bosnian military action met with significant success in that it cleared Serbian forces from the Krajina region and threatened the remaining Serbian forces in Eastern Slavonia…The advance also cleared Serbian forces from much of western Bosnia, rolling them back to Banja Luka. It is believed if the offensive continued, the

Croatian and Bosnians may well have been able to defeat the Serbian forces and thereby reunify Bosnia…the US forced the Croatians and Bosnians to bring their offensive to a halt on 12 October 1995".[265] After the Croat-Muslim counter offensive and NATO air bombing, the Serbs agreed to a number of conditions that they had failed to agree to during the first phase of war. The conditions entailed: "removing heavy weapons from the 'weapons exclusion zone' around Sarajevo, refraining from attacking UN-declared safe areas, and granting full freedom of movement to UN personnel, including free use of Sarjevo's airport".[266] More importantly, the Serbs were ready to negotiate for peace.

It is interesting to note that atrocities were committed against Croat-Serbs during the offensive. Human Rights Watch reports that 116 civilians were killed during the offensive and 200,000 were displaced.[267] According to an article, "No Verdicts in Croatia Over Operation Storm," issued by Balkan Transitional Justice 28 November 2012, "Croatian NGOs have noted several times that no one has yet been convicted in Croatia for war crimes connected to Operation Storm. It is widely accepted that there was a policy of impunity concerning war crimes committed during Operation Storm".[268] This suggests that the United States may have convinced the Croats and Bosnians to unite under the condition that they would not be prosecuted for crimes committed during the offensive, in order to open up a bargaining space. Again, we see the DTL at work here, with the US as the enforcer: the US backed strike allowed a signal to be sent that would have been too costly to send under the HR, a bargaining space did indeed open up after Operation Storm, (Dayton negotiations commenced in November 1995), and after almost twenty years since the strike, combatants have not been tried for war crimes during the strike!

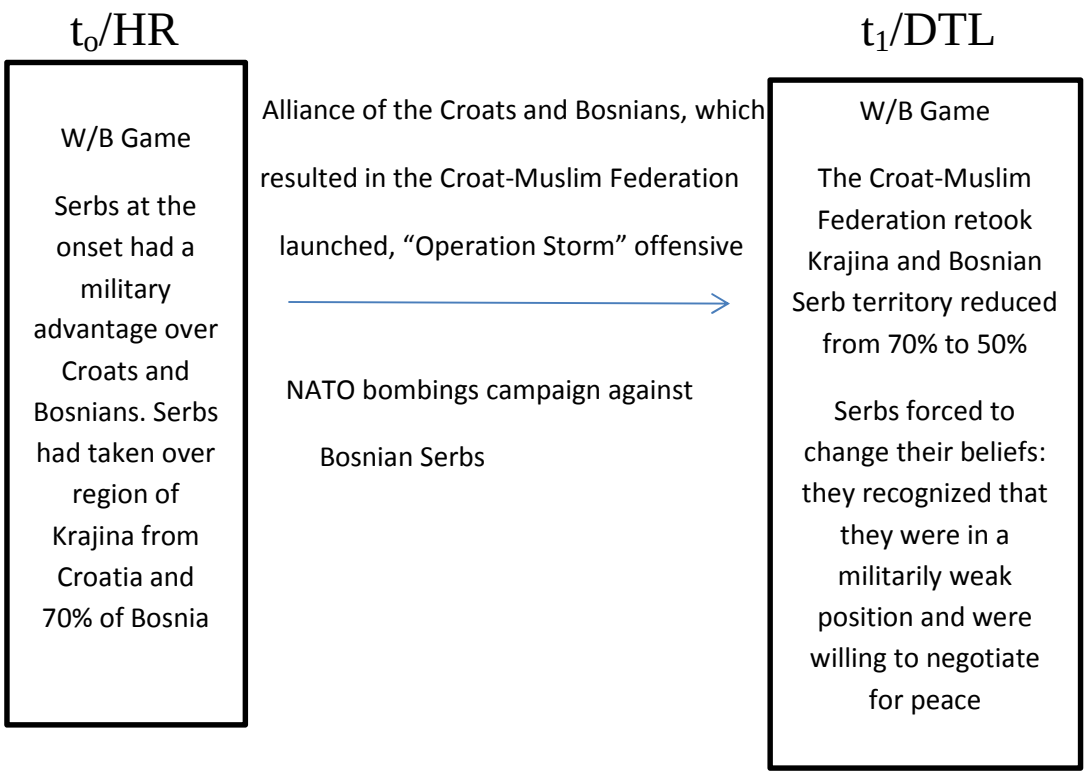

Figure 5.12
Illustration of Information Transmission

Chapter 6

Conclusions and Future Research

On March 14, 2012, the International Criminal Court rendered a guilty verdict to Thomas Lubanga, an African warlord from the Democratic Republic of Congo (DRC), for crimes against humanity during the civil war in the DRC. On April 26, 2012, the Special Court for Sierra Leone prosecuted the former head of state of Liberia, Charles Taylor, for war crimes perpetrated during civil war in Sierra Leone. International criminal tribunals have become a new force to be dealt with; warlords and, in particular, heads of state are no longer spared or protected by international law for violating international humanitarian law and human rights law.

Shortly after Lubanga's sentence, Ian Paisley, a member of the British Parliament from Northern Ireland and former peace negotiator during the Northern Ireland peace process, wrote a telling article in the New York Times.[269] While lauding the achievements of international justice by the ICC, he also criticized it for its inability to be an instrument for delivering peace as it was originally designed to do. In fact, despite the indictment, apprehension, and prosecution of Lubanga, the DRC is still in the midst of civil war. Paisley observed that had the ICC existed during the Northern Ireland peace process or when the South African Truth and Reconciliation Commission began its work, not only the ICC would have been called to intervene and prosecute those accused of violence but also would have driven old enemies further apart and stifled any possibility of achieving peace. This observation speaks to the general problem of my research: Can peace and justice be attained simultaneously; and more specifically, how can we design international criminal tribunals to create incentives for warring combatants to negotiate for peace during civil wars?

I tackled this problem by starting from the basic question: Why do negotiations fail during civil wars? The literature on peace and security studies has identified several causes for this failure: asymmetric information, problem of credible commitment, and issue indivisibility. From this, I could then re-formulate my question by asking how to design a court that could mitigate/remove the causes of bargaining failure.

In my thesis, I started off by formalizing the situation of conflict: this consists of two interdependent games, a War Game and a Bargaining Game, whose specifications incorporate the distinguishing features of civil wars: the nature of the actors involved, the way they fight, the type of government, the strength of the rebel group, the international constraints, etc. A novelty of my approach consists of the observation that the full specification of these games (i.e., action available, payoffs, etc.) depends on the legal regime in place. By studying how the War/Bargaining game varies with the legal regime in place, I could then compare the different regimes with respect to their ability of achieving the goals of peace and/or justice. I applied these ideas to compare the relative performance of international criminal tribunals designed according to the principles of state sovereignty, human/cosmopolitan rights, and domestic tort litigation. I obtained a novel result: a careful choice of the legal regime might substantially reduce the problems associated with the presence of asymmetric information in civil wars.

To my knowledge, the first to notice, in a specific case, that the choice of the legal regime might provide combatants with the right incentives to bargain for peace was international lawyer Anthony D'Amato (1994) during the civil war in the former Yugoslavia.[270] When it was decided that the International Criminal Tribunal for the former Yugoslavia (ICTY) would be created and would issue indictments for complicit leaders in tandem with peace talks, D'Amato (1994) claimed not only that this would have been ineffective, but also that it would have exacerbated

the existing problems. D' Amato recognized that the design of the ICTY, based as it was on the principles of human rights (HR), would have created an incentive problem as it did not provide incentives (even with the threat of punishment) for warring parties to cease hostilities. Practically, once leaders had been indicted, it was more profitable for those leaders to take their chances and keep fighting rather than agreeing to cease hostilities and subject themselves to punishment. Thus, D'Amato proposed to adopt a model based on principles of the domestic tort litigation (DTL), which is based on the notion that "exact justice" can be attained among individuals in conflicting situations without necessarily involving a court. Practically, if conflicting parties settle, courts would not intervene. Culpable parties would not be prosecuted once they settle. My thesis provides formal support to D'Amato's idea, even though D'Amato's argument has to be modified. The HR system fails not only because it erases potential gains from bargaining as D'Amato claimed, but mainly because it makes information transmission too costly. In contrast, the DTL system allows parties to transmit information to each other in a way that is not too costly. In turn, this allows parties to correct their beliefs and unveil bargaining possibilities that had been undetected before the signaling took place.

My thesis can be viewed as providing a formal setting where the performance of alternative legal regimes – such as the State Sovereignty (SS) model, the Human Rights (HR) model, the Cosmopolitan Rights (CR) model and the DTL model -- could be evaluated on the basis of their ability to alter combatants' incentives from fighting to bargaining for peace. It does so by unveiling the formal link between the factors leading to bargaining failure and the legal/institutional regime in place. In this thesis, I have focused on a model that is both static and basic. I have done so in order to isolate the main novelties of my approach. Nonetheless, the ideas presented and the procedures employed are fully general. As such, they are suitable for

substantial extensions; each of these extensions constitutes an avenue for future research. In what follows, I will list the ones that I intend to pursue in the near future.

1. Multiple Players and the Public Interest Variant

In this thesis, I have focused on cases where there are only two warring parties. One possible extension of the model consists in considering three or more parties. This extension not only increases the realism of the model, for in actuality there may be more than one rebel group, but also poses new questions and allows for new possibilities. This is especially true when the civilian population is introduced as a (third) player in the War/Bargaining game utilized in this thesis.[271]

We have seen that the DTL model may create incentives for parties not only to bargain for peace but also to create self-enforcing peace agreements. The main issue that appears when considering three or more players is that two parties may settle at the expense of a third one (for instance, the civilian population). In this case, one would have to answer the question: what happens if some but not all parties settle with one another? Here, the possibility of designing entirely novel regimes, such as an intermediate regime between the models of DTL and of HR, appears.

To see this, let us suppose that there are three players, A, B, and C; each player commits international crimes, and players A and B settle among themselves and agree not to call the court. Suppose also that player C does not agree with either A or B. If one wants to pursue an

extension of the DTL model, one has to consider what would happen in this situation. Among the conceivable designs, we could have:

1. A design leaning toward the HR model, where player C calls the court and the court punishes everybody (This is not entirely an HR model because if C does not call the court, the court cannot intervene).
2. A design leaning toward the DTL model, where the court cannot punish A and B for the crimes that they have committed against each other (since they settled) but only for crimes that they committed against C (and C for crimes committed against A and B).
3. Intermediate between points 1 and 2: the court would still punish A and B for all the crimes (including the ones against each other) but apply a "discount," or in other words show clemency toward A and B since they have settled *inter se*. Clemency may be granted to A and B by way of imposing a pecuniary sanction against them. An interesting issue would be how to use these proceedings. Among the various possibilities:
    a. Compensate victims
    b. Contribute to an "international victim's fund," where the proceedings could be used to benefit others not necessarily involved in the conflict at hand (for instance, victims of different conflicts).

A case of special interest obtains when one of the players is the civilian population. The role of this player as well as its rights and potential outcomes depend heavily on the legal regime in place. In many regimes, the delicate problem of representation may emerge. For instance, the United Nations Security Council (UNSC) or the Chief Prosecutor of the International Criminal Court could represent the civilian population but the international public interest and the civilian interest may not be aligned. The case of Uganda provides an example of this misalignment.

There, segments of the civilian population voiced a desire for the end of violence at the expense of justice, but international law dictated that the crimes inflicted on civilians be redressed. Adam Branch captures these sentiments well when he wrote of the ICC intervention in Ugandan civil war and said, "With nearly the entire rural population of Acholiland displaced into internment camps, many of them starving to death, the question of what justice means is secondary to, and in fact irrelevant in the face of, the overwhelming need for the war to end and for the Acholi to go home. To talk about justice as being realized through the capture of five men and to spend millions of dollars and a massive international effort on capturing them in the midst of a humanitarian disaster of this scale, especially when there is no guarantee that they will be captured or that their capture will bring peace, is myopic and morally indefensible."[272] In such a case, does the Chief Prosecutor of the ICC or the UNSC duty to prosecute such crimes override the rights/desires of the civilians? Following these observations, one should probably distinguish the case where the interests of the Chief Prosecutor or UNSC are aligned with the civilian population from those where the interests are at odds. Most likely, the outcomes would be very different.

2. Time and Dynamics: Dynamic Jurisdiction

Given any specification of the structural conditions of the war, my thesis provides a setting which, in principle, allows one to determine the optimal design of the criminal tribunal. By optimal design of international criminal tribunals, I mean that the design will create incentives for combatants to bargain for peace and/or stop ongoing violence or prevent violence. Recent literature has identified "timing" as a factor that plays a crucial role in civil wars. This is so

because the asymmetry in the information is different at different stages of the conflict. For instance, the players' relative strength may be more difficult to assess at the onset of war than toward the end of war. This suggests that the optimal design of the court depends on the stage of the war. In general, the relation between the stage of the war and the court's optimal design is ambiguous as it is possible to conceive of situations where, while the asymmetry in the information is reduced, it is not possible to create incentives for parties to bargain for peace. An example of this sort is given by Morelli, Estaban, and Rohner who find that the length of a conflict increases polarization and as such smaller groups are more likely to lose and are more susceptible to being eliminated by groups with more consolidated power i.e. government.[273] In situations like this, the conditions for the rebels to achieve legal status are usually not met (see Chapter III, Section 3.4) and the HR regime may be the only solution for creating incentives for the government to negotiate with the rebels and prevent mass killing.

While the extension of my model to a dynamic setting poses formidable theoretical problems (mainly in the dimension of determining equilibrium outcomes), this extension is likely to deliver new and important insights. The conceptual part of this extension is not difficult, and, in fact, I sketched the full dynamic model in Chapter II. When doing so, I introduced the idea of dynamic jurisdiction, which certainly deserves a thorough inquiry. In a nutshell, the idea of dynamic jurisdiction hinges upon the recognition that time might be necessary for the desired changes to take place, and tries to incorporate this observation in the determination of the optimal regime. Notice that this might imply that the optimal regime may vary with the stage and/or the parameters of the war/bargaining game as it is illustrated by the example below. Some caution is needed, nonetheless. At each stage, the war/bargaining game contains characteristics that are unobservable by the international community, i.e. the warring parties' beliefs. Hence, the

dependence of the optimal regime on the stage of the game must be expressed either in terms of the game's estimates available to the international community or in terms of characteristics that are observable. In practice, this might be simpler than what it sounds.

More specifically, we can consider the war/bargaining game at a given point in time and envision two alternative regimes: the HR and a hybrid DTL/HR. The latter regime works as follows: it is similar to the usual DTL but stipulates that if the amount of crimes committed from t_o onward reaches a certain level (measured in some way), then a court will automatically intervene. When the war/bargaining game fits the specifications of Chapter V, our previous analysis allows us to conclude that the HR regime would lead to war. In contrast, by analogy with our analysis in Chapter V, we can imagine that the game under the hybrid DTL/HR model would allow players to engage in subsequent periods in strikes/counterstrikes, or skirmishes, that could potentially continue until the threshold set by the regime is reached. We can think of these skirmishes as costly signals. It is conceivable that after a certain time these skirmishes will convey a sufficient amount of information, and on the basis of this information, parties will settle before the threshold is reached. Notice that in this example the jurisdiction is a function of the stage game through the observable "level of crimes committed". In fact, we should be thinking of the proposed hybrid DTL/HR regime not as a single regime but rather as a family of DTL/HR regimes parametrized by the threshold "level of crimes" (that is, each level of crimes determines exactly one such a regime by stipulating that the HR system applies if that level is reached and the regime is otherwise DTL; conversely, each hybrid DTL/HR is uniquely associated to exactly one threshold). When thought of in this way, the threshold (hence, the regime) becomes an object of choice by the international community, which would then be optimally determined. A system like this would have the virtue of clearly expressing the trade-off between the necessity of

favoring information transmission for the purpose of successful negotiations and the commission of crimes.

3. Credibility

Throughout the thesis, I have assumed that international courts can impose significant costs on combatants and that the court's threats of doing so are always credible.[274] While international courts have made significant strides in certain cases,[275] historical experience shows that these assumptions cannot always be maintained. The problem of credibility of threats is certainly a difficult one[276], and my thesis does not solve it. I believe, however, that my project can contribute to this area in at least two respects. My thesis has produced statements of the sort "threats are effective in leading to peace in a certain regime, say DTL, and not effective in another regime, say HR". In this way, one contributes also to the credibility problem by narrowing down the class of threats that one has to consider in each regime. Once a regime is fixed, and one knows that a certain threat will not be effective; there is no reason of inquiring into its credibility.

The idea expressed in this thesis may contribute to the credibility problem in another dimension as well. In fact, just like different institutional/legal regimes may have a different impact on the problem of asymmetric information, the same may be true for the credibility problem. For a simple example, one could envision a situation where, in a regime of state sovereignty, a certain threat to punish the government requires the collaboration of the government itself. Clearly, such a threat will not be credible. The point here is that the very

determination of which threats are credible may depend on the legal regime in place, and the study could, in principle, be pursued in the same spirit as the one presented in this thesis. More generally, toward this determination, one should consider not only the legal regime but also the type of government in place and their objectives (i.e. may want to join political and economic institutions like the European Union), the strategic position of the state in question (i.e. whether the state poses a threat to international peace and security), and the type and number of rebel group(s) in the war.[277]

4. Miscellaneous Extensions

There are a number of extensions that I intend to pursue that require further investigation into what I label "the underlying structural conditions of war". As remarked several times, a number of relevant factors are collected under this heading. A notable one is the type of government in place at the time of war (i.e. bureaucratically weak or strong, democratic or non-democratic), and how this type effects the outcomes. Furthermore, the recognition that in a dynamic setting the type of government may change as a consequence of the war and/or the intervention of the international community makes the prospects of such a study all the more interesting.

Notes for Chapter I

[1] James Fearon and David Laitin, "Ethnicity, Insurgency, and Civil war," *American Political Science Review* 1 (2003): 75

[2] I employ the definitions of Fearon and Laitin, who describe civil wars as "[conflicts that] involve fighting between agents of (or claimants to) a state and organized, non-state groups who sought either to take control of a government, to take power in a region or to use violence to change government policy," and Kalyvas, who qualifies this definition when he states that civil war is the inherent "violent physical division of the sovereign entity into rival armed camps…" For the purposes of this thesis civil wars are broadly defined and encompass situations that 1) involve at least two contesting parties, a government and non-state actors, and 2) occur with the breakdown of the monopoly of violence. Like Kalyvas, I do not consider violence that leaves a sovereign state intact as a civil war. Fearon and Laitin, "Ethnicity, Insurgency, and Civil war," 76. Stathis Kalyvas, *The Logic of Violence in Civil War* (New York: Cambridge University Press, 2006), 18-19.

[3] James Fearon and David Laitin, "Ethnicity, Insurgency, and Civil war," 75.

[4] Macartan Humphreys and Jeremy Weinstein, "Handling and Manhandling Civilians in Civil War," *American Political Science Review* 100 (2006):429-447; M. Cherif Bassiouni, "The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors," *The Journal of Criminal Law and Criminology* 98 (2008): 711-810.

[5] Dan Reiter, "Exploring the bargaining model of war," *Perspectives on Politics* 1(2003): 30.

[6] William Zartman, ed., *Elusive Peace: Negotiating an End to Civil Wars* (Washington, DC: Brookings institute, 1995) and Barbara Walter, "Bargaining Failures and Civil Wars," *Annual Review of Political Science* 12(2009):243-61.

[7] Bassiouni, "The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors," 715.

[8] Benjamin Valentino et al., " 'Draining the Sea': Mass Killing and Guerrilla Warfare," *International Organization* 58 (2004): 384.

[9] Benjamin Valentino et al., " 'Draining the Sea': Mass Killing and Guerrilla Warfare,"375-407.

[10] Harrison Wagner, "Bargaining and War," *American Journal of Political Science* 3(2000):469-84; Darren Filson and Suzanne Werner, "A Bargaining Model for War and Peace: Anticipating the Onset, Duration, and Outcome of War," *American Journal of Political Science* 46(4) (2002):819-38**;** Alastair Smith and Allan Stam, "Bargaining and the Nature of War," *Journal of Conflict Resolution* 6(2004): 783-813.

[11] By international community, I'm referring mainly to the United Nations Security Council (UNSC). But the definition may also encompass other international organizations like the European Union (EU) and/or regional organizations like North Atlantic Treaty Organization (NATO), etc.

[12] However, for the first time ever, retroactive laws were adopted when the IMT at Nuremberg was given jurisdiction over crimes against humanity, which cover laws of how states treat their citizens as a result of German persecution of Jews in Germany (see Chapter III).

[13] The ICC prosecuted DRC warlord Thomas Lubanga for war crimes of enlisting and conscripting children under the age of 15, on 14 March 2012. It was the first verdict issued by the ICC since its inception in 2002. Simons, Marlise. ``Congolese Warlord Convicted, in First for International Court.`` *New York Times,* March 14, 2012. Accessed March 22, 2013. http://www.nytimes.com/2012/03/15/world/africa/congo-thomas-lubanga-convicted-war-crimes-child-soldiers.html?_r=0

[14] For more information on the array of international criminal tribunals see Chapter IV.

[15] Daphna Shraga, "The Second Generation UN-Based Tribunals: A Diversity of Mixed Jurisdictions," in *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia,* ed. Cesare P. R. Romano, Andre Nollkaemper, and Jann K. Kleffner, 15-38. (New York: Oxford University Press, 2004), 16.

[16] To do this, I assume that international courts can impose significant costs on combatants and the court's threat of doing so is always credible.

[17] The literature also identifies two other factors that lead to bargaining failure: commitment problem and issue indivisibility. See in general James Fearon. "Rationalist Explanations for War," *International Organization* 49 (1995):

379-414; Barbara Walter, *Committing to Peace: The Successful Settlement of Civil Wars.* (Princeton, NJ: Princeton University Press, 2002); Barbara Walter, "Bargaining Failures and Civil Wars," *Annual Review of Political Science* 12 (2009):243-261; Robert Powell, "War as a Commitment Problem," *International Organization* 60(2006): 169-203 See Chapter II within for a more thorough discussion.

[18] See Anthony D'Amato, "Peace vs. Accountability in Bosnia," *American Journal of International Law* 88(1995):500-506.

[19] Many legal scholars were appalled and dismayed by D'Amato's suggestion claiming that it was a smack in the face of justice. In their view peace would come at the cost of justice. Paust, for example, argues that D'Amato does not consider justice as a means to achieving long-term peace. Ferencz argues that D'Amato's proposal betrays victims of war crimes because it does not punish perpetrators nor does it deter future perpetrators. Other critics object to the proposal because it goes against the notion that there is an absolute duty to prosecute war criminals under international law. None of the scholars who opposed D'Amato's proposal explain how exactly justice leads to peace, but neither does D'Amato provide a clear exposition of how justice does not lead to peace. *See* J. Paust, "Correspondence," *American Journal of International Law* 88(1994):715-717; B. Ferencz, "Correspondence," *American Journal of International Law* 88(1994):717-718; Payam Akhavan, "Correspondence," *American Journal of International Law* 89(1995):92-93; Anthony D'Amato, "Correspondence," *American Journal of International Law* 89 (1995): 94-95.

[20] If they fail to settle inter se, they can either continue to fight, or one party can call the court to intervene. If both parties are culpable, then both parties will be prosecuted (including the one that called the court to intervene).

[21] Adam Branch, "Uganda's Civil War and the Politics of ICC Intervention," *Ethics and International Affairs* 21.2(2007): 179-198. It is important to note that the ICC Prosecutor's statements concerning the decision to proceed against the LRA rather than the government emphasized the relative gravity of the crimes committed by the LRA. I thank Professor Damrosch for emphasizing this point.

[22] By underlying structural conditions of a civil war, I mean, the characteristic features of a civil war and the types of players. These include a wide range of factors such as (1)type of civil war: religious, ethnic, nationalist, war of greed, war for control; (2)type of government: nascent democracy, oligarchy, monarchy, financially and bureaucratically weak or strong; (3)military capability of each player: weak, strong, fight using conventional or unconventional weapons, insurgency or rural guerrilla warfare; (4) timing of war: onset, during, aftermath;(5) territory: mountainous, rough terrain; (6)poverty level large populations support base etc.) For more characteristics of civil wars s*ee* Fearon and Laitin, "Ethnic, Insurgency, and Civil War,"75-90.

[23] Although war crimes were committed during the strike, to date "no one has yet been convicted in Croatia for war crimes connected to Operation Storm. It is widely accepted that there was a policy of impunity concerning war crimes committed during Operation Storm." See http://www.balkaninsight.com/en/article/the-storm-27-war-crime-cases-no-verdict [accessed 14 February 2013] Also see http://www.balkaninsight.com/en/balkan-transitional-justice/about-the-project [accessed 20 February 2013] "The ***Balkan Transitional Justice*** initiative is a regional initiative funded by the European Commission, the Federal Department of Foreign Affairs of Switzerland and the British Foreign and Commonwealth Office FCO that aims to improve the general public's understanding of transitional justice issues in former Yugoslav countries (Bosnia and Herzegovina, Croatia, Kosovo, Macedonia, Montenegro and Serbia)." Also see the recent acquittal of two Croatian Generals on appeal for crimes committed during Operations Storm attack. See Rachel Irwin, "Croatian General Acquitted on Appeal," *Report News- International Justice-ICTY*, November 16, 2012, accessed March 15, 2013, http://iwpr.net/report-news/croatian-general-acquitted-appeal.

Notes for Chapter II

[24] Violence in this context means "the deliberate infliction of harm on people." Kalyvas mainly focuses on violence against non-combatants and civilians, See Kalyvas, *Logic of Violence,* 19.
[25] Stathis Kalyvas,"Warfare in Civil Wars," in *Rethinking the Nature of War,* ed. I. Duyvesteyn, J. Angstrom. (Abingdon: Frank Cass, 2005), 94.
[26] Humphreys and Weinstein, "Handling and Manhandling Civilians," 429.
[27] See for instance, Kalyvas, "Warfare in Civil Wars," 91; Bassiouini, "The New Wars," 714; and Lisa Hultman, "Battle Losses and Rebel Violence: Raising the Costs for Fighting," *Terrorism and Political Violence* 19 (2007): 208.
[28] It is argued that engaging in direct battle often reveals information regarding the strength, capabilities, and resolve of each faction. See in general See Wagner, "Bargaining and War,"469-484; Filson and Werner, "A Bargaining Model for War and Peace," 819-838.
[29] Kalyvas, "Warfare in Civil Wars," 90.
[30] Conventional civil wars, where rebel military strength outstrips that of the state, are considered "military coups" rather than "civil wars". See Stathis Kalyvas and Laia Balcells, "International System and Technologies of Rebellion: How the End of the Cold War Shaped Internal Conflict," *American Political Science Review* 104 (2010): 418.
[31] Valentino et al., "Draining the Sea,"384.
[32] Kalyvas, "Warfare in Civil Wars," 91.
[33] Fearon and Laitin, "Ethnicity, Insurgency, and Civil war," 75-76.
[34]Kalyvas, "Warfare in Civil Wars," 95.
[35] Hultman, "Battle Losses and Rebel Violence," 206.
[36] Hultman, "Battle Losses and Rebel Violence," 210.
[37] Hultman, "Battle Losses and Rebel Violence," 206.
[38] Some of the concessions that were granted to the RUF were the following: the rebel leader, Foday Sankoh, became the vice-president of the Republic of Sierra Leone, he controlled the diamond rich areas of the county, and his rebel group, the RUF, became a political party. Moreover, Article IX of the Lomé Peace Agreement between the RUF and the Government of Sierra Leone, granted full amnesty and pardon to the participants in the conflict. The document was still signed by all the parties despite a provision that was called the "moral guarantor," which was attached to the agreement. This provision held that the United Nations (UN) would not recognize the amnesty for serious crimes. In 2002, the Government of Sierra Leone along with the UN used this provision to justify the creation of the Special Court for Sierra Leone. The amnesty provisions in the Lomé Agreement were automatically nullified.
[39] Morelli M, Estaban J, Rohner D. Strategic Mass Killing. Unpublished Paper, (2012).
[40] Morelli M, et al. Strategic Mass Killing, 4; and Scott Straus, "Rwanda and Darfur: A Comparative Analysis," *Genocide Studies and Prevention* 1(2006): 43.
[41] See in general Donald Wittman, "How a War Ends: A Rational Model Approach," *Journal of Conflict Resolution*, 23 (1979): 743-63; and Reiter, "Exploring the bargaining model of war," 30
[42] See in general Harrison Wagner, "Bargaining and War," *American Journal of Political Science* 3(2000):469-84; Darren Filson and Suzanne Werner, "A Bargaining Model for War and Peace: Anticipating the Onset, Duration, and Outcome of War," *American Journal of Political Science* 46(4) (2002):819-38
[43] Wittman, "How a War Ends: A Rational Model Approach," 743-63.
[44] See in general Wagner, "Bargaining and War;" Reiter, "Exploring the bargaining model of war;" Hultman, "Battle Loses and Rebel Violence;" and Suzanne Werner and Amy Yuen, "Making and Keeping Peace," *International Organization* 59(2005): 261-292.

[45] I adopt a model of civil war similar to the war model structured by Harrison Wagner (2000). Though he presents a model based on interstate wars, the underlying theoretical idea is the same for intrastate wars (civil wars): war is part of the bargaining process and not an alternative of it. In fact, like Wagner's model, an important feature of the bargaining process is the specification of what happens when players fail to agree. He calls this the disagreement outcome (equivalent to what I call the outside option) which sets the bargaining range. Also see Thomas Schelling, *The Strategy of Conflict*, (Cambridge: Harvard University Press, 1960), who is credited for being the first modern social scientist to discuss war in terms of being part of a bargaining situation (Reiter 2003: 28).
[46] Kalyvas and Balcells, "International System and Technologies of Rebellion," 419.
[47] Reiter, "Exploring the bargaining model of war," 30.
[48] Kalyvas, "Warfare in Civil Wars," 91.
[49] Valentino et al, "Draining the Sea," 383-84.
[50] Reiter, "Exploring the bargaining model of war," 30; Valentino et al, "Draining the Sea," 384
[51] Usually, incidents of violations of international humanitarian or human rights law while fighting conventionally are due in part to unintentional, collateral damage rather than intentional, willful commission of such crimes.
[52] For more on the specific characteristics of civil wars and what the underlying structural conditions that lead groups to engage in civil wars see Fearon and David Laitin, "Ethnicity, Insurgency, and Civil war,"75-90; Paul Collier and Anke Hoeffler, *Greed and Grievances in Civil War* (Oxford Economic Paper: 2004); Paul Collier, Anke Hoeffler, and Dominic Rohner, *Beyond Greed and Grievance: Feasibility and Civil War.* (Unpublished paper, World Bank, August 7 2006 version 2006) ; Christopher Blattman and Edward Miguel, "Civil War," *Journal of Economic Literature* 48 (2010):3-57.
[53] Valentino et al, "Draining the Sea," 376-77.
[54] See James Fearon, "Rationalist Explanations for War," 379-414.
[55] Geoffrey Blainey, *The Causes of War*, (New York: Free Press, 1973).
[56] James Morrow, "Capabilities, Uncertainties, and Resolve: A Limited Information Model of Crisis Bargaining," *American Journal of Political Science* 33(1989): 941-972.
[57] Alastair Smith and Allan Stam, "Bargaining and the Nature of War," *Journal of Conflict Resolution*, 48(2004): 783-813.
[58] James Fearon, "Why do some Civil Wars Last So Much Longer than Others?," *Journal of Peace Research* 3(2004):275-301.
[59] Walter, "Bargaining Failures and Civil Wars," 255.
[60] See in general, Barbara Walter, "The Critical Barrier to Civil War Settlement," *International Organization* 51(1997): 335-64; Barbara Walter, *Committing to Peace: The Successful Settlement of Civil Wars,* (Princeton, NJ: Princeton University Press, 2002); Michael Doyle and Nicholas Sambanis, "International Peacebuilding: A Theoretical Approach and Quantitative Analysis," *American Political Science Review*, 94 (2002): 779-801; Michael Doyle and Nicholas Sambanis, *Making War and Building Peace: U.N. Peace Operations,* (Princeton, NJ: Princeton University Press, 2006); Virginia Page Fortna, "Does Peacekeeping keep peace? International intervention and the duration of peace after Civil War," *International Studies Quarterly* 48 (2004): 269-92; Virginia Page Fortna, *Does Peacekeeping Work? Shaping Belligerents' Choices after Civil War.* (Princeton, NJ: Princeton University Press, 2008); and Caroline Hartzell and Matthew Hoodie, "Institutionalizing Peace: Power sharing and Postcivil War Conflict Management," *American Journal of Political Science* 2 (2003):318-32. This thesis is exclusively concerned with a court; in particular those modeled according to the principles of the DTL as a third party enforcer. As the reader will see in Chapter V, one of the potential outcomes of the DTL model is that the warring combatants decide for themselves how they will make and maintain peace. Fortna claims that "…it is easy to lose track of the fundamental fact that it is the belligerents themselves who ultimately make decisions about maintaining the peace or resuming the fight. Only by considering the perspective of the peacekept [government and rebel group(s)], their incentives, the information available to them, and their decision making—can we understand whether and how peacekeekping makes a difference," (Fortna, *Does Peacekeeping Work?*, 3). She further shows that peacekeepers actually keep the peace because they can " reduce the likelihood of aggression by raising the cost of war or the benefits for the peacekept [G and R]; (2) they disrupt spirals of fear and security dilemmas by reducing belligerents' uncertainty about each other's actions and intentions; (3) they prevent actions from occurring or

control them so that they do not escalate to war; or (4) they can deter or prevent one side from reneging on a political deal and the other from power" (Fortna, *Does Peacekeeping Work?*,86).

By using the court as a "chip," warring combatants operating under the DTL have an incentive to avoid its intervention. In this way, the threat of court intervention should to reduce the likelihood of aggression by raising the cost of war. If one calls the court to intervene, additional costs are likely to be imposed on the warring combatants for going to war. Parties, therefore, have an incentive to reveal information and send the relevant signals to make appropriate concessions to each other so as to avoid that the other party call the court to intervene. Accidents are unlikely to occur; parties should exercise caution so as not to give the other party any cause to call the court. As we will see in the formal analysis in Chapter V, G will not renege on the agreement because by doing so, it will cause both itself and the rebel group to be worse off.

While the DTL model complements the finding of the favorable effects of third party enforcement in mitigating information asymmetry and credible commitment concerns, it differs in that it is only a *potential enforcer* but does *not* necessarily intervene to enforce the agreement. It is precisely for this reason that the DTL as a court model may prove to be the most efficient form of third party enforcement, for it puts the onus of obtaining and maintaining peace on the combatants ("peacekept"!) themselves. Hence, this thesis provides a potential solution to a lingering problem in the field: "How can combatants find creative ways to self-enforce their own peace agreements?" (Walter, "Bargaining Failures and Civil War," 258).

[61] Scholars in the field identify a third reason for bargaining failure: issue indivisibility. There are, however, many possible solutions to the issue indivisibility problem like issue linkage or side payments (Fearon, "Rationalist Explanations for War," 390). Powell subsumes the problem of issue indivisibility under the problem of commitment, See Robert Powell, "War as a Commitment Problem," *International Organization*, 60 (2006): 169-203.

[62] See Henk Goemans, *War and Punishment: The Causes of War Termination and the First World War*, (Princeton, NJ: Princeton University Press, 2000).

[63] I thank Professor Massimo Morelli for suggesting this extension.

[64] See Amnesty International Report. This report covers the period January to December 2002. Accessed July 28, 2012. http://www.africanreview.org/forum/docs/ai/uganda.pdf

Notes for Chapter III

[65] For discussion on legal status see Antonio Cassesse, *International Law*, (New York: Oxford University Press, 2001), 47.
[66] Janina Dacyl, "Sovereignty versus Human Rights: From Past Discourses to Contemporary Diliemmas," *Journal of Refugee Studies*, 9 (1996): 136-37.
[67] Dacyl, "Sovereignty versus Human Rights," 137.
[68] Stephen Krasner, "Compromising Westphalia," *International Security*, 20(1995-1996): 115-116.
[69] Dacyl, "Sovereignty versus Human Rights," 138.
[70] UN Charter Chapter VII.
[71] Cassese, *International Law,* 98.
[72] Such measures include resolutions calling for intervention by international organizations like the United Nations Security Council (UNSC) or direct third state intervention authorized by the UN.

[73] See in general, Krasner, "Compromising Westphailia,"115-151; and Stephen Krasner, "Sovereignty and Intervention," in *Beyond Westphalia? State Sovereignty and International Intervention*, ed. Gene Lyons and Michael Mastanduno. (Baltimore: Johns Hopkins University Press, 1995), 228-249; Stephen Krasner, *Sovereignty: Organized Hypocrisy,* (Princeton, NJ: Princeton University Press, 1999).
[74] See, Lori Damrosch, "Introduction," in *Enforcing Restraint: Collective Intervention in Internal Conflicts,* ed. Lori Damrosch (New York: Council of Foreign Relations Press, 1993), 10-14.
[75] Cassese, *International Law,* 47.
[76] Cassese, *International Law,* 47.
[77] Cassese, *International Law,*69.
[78] Cassese, *International Law,* 67.
[79] Cassese, *International Law,* 67.
[80] Cassese, *International Law,* 67. See also Moir, who states, "…when insurgents were extended recognition as a belligerent party…[t]his amounted to a declaration by the recognizing party that the conflict had attained such a sustained level that both sides were entitled to be treated in the same way as belligerents in an international armed conflict, and could be granted either by the parent government or by some third State," Lindsay Moir, *The Law of Internal Armed Conflict* , (Cambridge, UK: Cambridge University Press, 2002):5.
[81] Cassese, *International Law,* 68.
[82] Cassese, *International Law,* 68.
[83] See Oona Hathaway, "International Delegation and State Sovereignty," *Journal of Contemporary Problems*, 71 (2008): 115-150.
[84] Kenneth Waltz, *Theory of International Politics,* (Boston: Addison-Wesley, 1979), 96.
[85] Cassese, *International Law,* 78.

[87] Cassese, *International Law,* 83.
[88] See in general Diane Orentlicher,"Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime," *Yale Journal of Law* , 100 (1991): 2537-2615; Michael Reisman, "Sovereignty and Human Right in Contemporary International Law," *American Journal of International Law* 84(1990): 866-876.
[89]Several definitions of crimes against humanity have been proposed. Common elements are: 1) "refer to specific acts of violence against persons irrespective of whether these acts are committed in time of war or in time of peace 2) acts must be the product of persecution against an identifiable group of persons irrespective of the make-

up of that group or the purpose of the persecution such a policy can be manifested by the "widespread or systematic" conduct of the perpetrators, which results in the commission of the specific crimes contained in the definition". M. Cherif Bassiouni, "Crimes against humanity*",* in *Crimes of War,* ed. Roy Gutman and David Rieff (New York: W.W. Norton Company Inc. 1999), 107.

[90] See Gary Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*, (Princeton NJ: Princeton University Press 2000),116.

[91] Diane Orentlicher, "Genocide and Crimes against Humanity: The Legal Regime"*,* in *Human Rights,* ed. Louis Henkin et. al., (New York: Foundation Press 1999), 611.

[92] T.H. King, "The Legacy of Nuremberg," *Case Western Reserve Journal of International Law,* 35 (2002): 335.

[93] Orentlicher, *Genocide and Crimes against Humanity,* 612.

[94] Orentlicher, *Settling Accounts,* 2593.

[95] List of crimes have expanded since the Nuremberg trial to include rape and torture. The ICC also includes crimes of enforced disappearances of persons and apartheid.

[96] One could make the case that these ideas have also become operative with the institution of the International Criminal Court (ICC) as a complementary regime. This mechanism works as follows: in matters of state sovereignty concerns, each state conducts its own investigation and prosecution. The ICC does not intervene unless the state is "unwilling" or "genuinely unable" to prosecute the case. However, the ICC has automatic jurisdiction in cases of genocide and crimes against humanity. Because the ICC is a complementary regime, I study the ICC under the heading of state sovereignty regime in Chapter IV. The ICC, however, has some features of a human rights regime because it subscribes to the principle of universal jurisdiction, which enables it to automatically intervene, without necessarily securing state consent, in matters of war crimes, genocide, and crimes against humanity.

[97] Louis Henkin, "The Age of Rights," in *Human Rights,* ed. Louis Henkin et. al., (New York: Foundation Press 1999), 278.

[98] Henkin, "The Age of Rights," 279.

[99] Louis Henkin, *"*The International Bill of Rights: The Covenant on Civil and Political Rights"*, in Human Rights* ed. Louis Henkin et. al., (New York: Foundation Press 1999), 303.

[100] "In 1950, the International Law Commission declared crimes against humanity to be unrelated to war crimes, they became a separate category of international crimes, applicable in times of war and peace," Bassiouini, "The New Wars," 726.

[101] See in general "The Responsibility to Protect," Report of the International Commission on Intervention and State Sovereignty (Ottawa: International Development Research Center, 2001).

[102]Jack Donnelly, "State Sovereignty and International Intervention: The Case of Human Rights," in *Beyond Westphalia? State Sovereignty and International Intervention*, ed. Gene Lyons and Michael Mastanduno. (Baltimore: Johns Hopkins University Press, 1995), 121.

[103] See in general Anne-Marie Slaughter and William Burke-White, "An International Constitutional Moment," *Harvard Journal of International Law* 43(2002):1-21.

[104] Reisman, "Sovereignty and Human Rights in Contemporary International Law," 872.

[105] Reisman, "Sovereignty and Human Rights in Contemporary International Law,"870.

[106] "The Responsibility to Protect," Report of the International Commission on Intervention and State Sovereignty, 12

[107] "The Responsibility to Protect," Report of the International Commission on Intervention and State Sovereignty See Chapter 6, "The Question of Authority".

[108] Also see Jean Cohen.2004. "Whose Sovereignty: Empire versus International Law," *Ethics and International Affairs* 18(3): 1-24

[109] Reisman, "Sovereignty and Human Rights in Contemporary International Law," 870.

[110] Cassese, *International Law,* 79-80.

[111] The laws I'm specifically referring to are international humanitarian law and international human rights law. According to Cassese (2003), "International humanitarian law (which traditionally regulates warfare between states), and international human rights law (which regulates what states may do to their own citizens and, more generally to individuals under their control), are in essence two distinct bodies of law, each arising from separate concerns and considerations. The former is rooted in the notion of *reciprocity*…as it is simple self-interest for a

state to ensure that its soldiers are treated well in exchange for treating enemy soldiers well and that its civilians are spared the horrors of war. The latter is more geared to *community concerns*, as it pertains to protecting human beings per se regardless of their national or other allegiance. From this perspective, laws governing internal conflict are more akin to crimes against humanity than to war crimes, as the protections in, for example, Common Article 3 stem from human rights concerns for the individual rather than self-interest concerns of states to have reciprocal laws governing warfare. (The question of reciprocity does not arise in an internal conflict)." Antonio Cassese, *International Criminal Law* (New York: Oxford University Press, 2003), 65. Be that as it may, the first tribunal set up for the crimes committed during the war in the former Yugoslavia encompassed both international humanitarian and human rights law as the war was considered a civil war with international dimensions. See in general Tadic Appeal on Jurisdiction at paragraph 119.

[112] Cassese, *International Law,* 82.
[113] Cassese, *International Law,* 83.
[114] Cassese, *International Law,* 83. This is not true in the European Convention on Human Rights, where states accept this limitation.
[115] See in general Thomas Risse et al. *The Power of Human Rights: International Norms and Domestic Change,* (Cambridge, UK: Cambridge University Press, 1999).
[116] We can explore the possibility of granting insurgents legal status by adhering to Cassese's (2001) adoption of the traditional viewpoint of the doctrine of recognition of belligerency as a possible legal foundation. The doctrine identifies two requirements under international law granting international subject status during internal armed conflict. According to this view 1) civil commotion needs to reach a certain degree of intensity and duration; and 2) insurgents need to control a large part of the territory under conflict. Thus, in a civil war, if these two conditions are met, then insurgents can gain international legal status which means that they are afforded the same rights and obligations as lawful combatants. See Cassese, *International law*, 67.
[117] Hazel Genn, *Hard Bargaining: Out of Court Settlement in Personal Injury Actions.* New York: Oxford University Press, 1987), 3.
[118]IGenn, *Hard Bargaining,* 11
[119] Genn, *Hard Bargaining,* 11
[120] Genn, *Hard Bargaining,* 3
[121] D'Amato, "Peace vs. Accountability," 505
[122] D'Amato, "Peace vs. Accountability,"504
[123]Willian Schabas, "Punishment of Non-State Actors in Non-International Armed Conflict" *Fordham International Law Journal*, 26 (2003), 914.
[124] In purely internal armed conflict, domestic law is usually deemed applicable; however, according to international lawyer, Cherif Bassiouni, "International and domestic law do not always converge with respect to the laws and custom of war. The national laws of almost all countries address the regulation of armed conflicts as part of their internal military law, reflecting the obligations of international law. In addition, national military laws contain other provisions concerned with the way their military are expected to function. But IHL as codified in these laws is seldom reflected in national criminal laws applicable to those who are not part of the armed forces" Bassiouini, "The New Wars," 721.
[125] Schabas, "Punishment of Non-State Actors, " 915.
[126] Schabas, "Punishment of Non-State Actors, " 916.
[127] Schabas, "Punishment of Non-State Actors, " 916.
[128] Schabas, "Punishment of Non-State Actors, " 917.
[129] Schabas, "Punishment of Non-State Actors, " 917-18.
[130] Schabas, "Punishment of Non-State Actors, " 918. Schabas cites The Appeals Chamber ICTY 1995 landmark ruling which established that violations of the laws or customs of war could be committed in non-international as well as international conflicts and the Rome Statute has subject-matter jurisdiction over war crimes committed in non-international as well as international armed conflict (Article 8).
[131] Cassese, *International Law*, 68.
[132] Moir, *The Law of Internal Armed Conflict*, 10.

[133] Moir, *The Law of Internal Armed Conflict* , 41.

[134] Bassiouni maintains that "…these non-state actors who are de facto, but not de jure combatants in such conflicts, and who are therefore deemed criminals under the national laws of the state where the conflicts occur, have no specific protection under IHL, other than vague and general exhortations contained in Common Article 3 and Protocol II. In short, non-state actors fight 'in a twilight zone between lawful combatancy and common criminality' '' Bassiouini, "The New Wars," 725.

[135] For example, in Congo, General Laurent Nkunda, the leader of the Tustsi-dominated rebel group known by the French abbreviation CNDP is considering handing Jean Bosco Ntaganda, the group's chief of staff, over to the ICC who has indicted Ntaganda for war crimes. See Lydia Polgreen, "Rebel Force in Congo shows signs of Division,"*The New York Times*, January 11, 2009. http://www.nytimes.com/2009/01/12/world/africa/12nkunda.html?ref=laurentnkunda&_r=0

[136] This possibility is not too farfetched to conceive. As will be seen in Chapter IV, while the International Criminal Court (ICC) subscribes to the principle of complementarity, which gives primacy to domestic courts, the Chief Prosecutor of the ICC has the right to automatically intervene in the affairs of the state and indict, apprehend, and prosecute perpetrators (See Article 13(c) and Article 15 of the Rome Statute).

[137] As far as I know, the right of belligerents, which is afforded to insurgents upon recognition of the armed conflict as one of belligerency, does not say anything specifically about the rights of combatants to call an international court to intervene. (The benefits accrued by insurgents once they obtained recognition were the following: "…gained recognized status, and the opportunity to employ commissioned cruises at sea, and to exert all powers known to maritime warfare with the sanction of foreign nationals. They [could] obtain abroad loans, military and naval material and enlist men, as against everything but neutrality laws, their flag and commissions [were] acknowledged, their revenue laws…respected, and they acquire[d] a quasi-political recognition," Moir, *The Law of Internal Armed Conflict* ,8. This is the only legal stipulation; however, that puts all belligerents on an almost equal level playing field during internal armed conflict. In order for the DTL to work in the internal armed conflict context, warring parties need to be equal.

Notes for Chapter IV

[138] See in general, James March and Johan Olsen, *Rediscovering Institutions,* (New York: Free Press 1989); James March and Johan Olsen, "The Institutional Dynamics of International Political Orders," *International Organization*, 52(1998): 943-969; Stephen Krasner, *Sovereignty: Organized Hypocrisy,* (Princeton, NJ: Princeton University Press, 1999).
[139] See in general, Anthony D'Amato, "Peace vs. Accountability in Bosnia," *American Journal of International Law* 88(1995):500-506; Jack Snyder and Leslie Vinjamuri, "Trial and Error: Principles and Pragmatism in strategies of International Justice," *International Security,* 28.3(2003/04): 5-44; Carlos Nino, "The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina," *The Yale Law Journal*, 100 (1991): 2619-2640.
[140] See in general, J. Paust, "Correspondence," *American Journal of International Law* 88(1994):715-717; B. Ferencz, "Correspondence," *American Journal of International Law* 88(1994):717-718; Payam Akhavan, "Correspondence," *American Journal of International Law* 89(1995):92-93; Diane Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime," *Yale Journal of Law* , 100 (1991): 2537-2615
[141] Paust, "Correspondence,"716; Orentlicher, "Settling Accounts," 2551.
[142] Akhavan, "Correspondence," 92
[143] Akhavan, "Correspondence," 92.
[144]Nino, "The Duty to Prosecute Past Abuses of Human Rights," 2627; Jose Alvarez, "Crimes of State/Crimes of Hate: Lessons from Rwanda," *The Yale Journal of International Law* 24(1999), 459. Also see Paul Van Zyl, "Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission, *Journal of International Affairs,* 52 (1999): 647-667 ; Miriam Aukerman, "Extraordinary Evil, Ordinary Crimes: A Framework for Understanding Transitional Justice," *Harvard Human Rights Journal*, 39(2002): 39-97; Mark Osiel, *Mass Atrocity, Collective Memory, and the Law,* (New Brunswick, NJ: Transaction Publishers, 1997).
[145] Cherif Bassiouni, "Searching for Peace and Achieving Justice: The Need for Accountability," *Law and Contemporary Problems,* 59(1996): 23.
[146] Almost all tribunals, save the International Criminal Tribunal for the former Yugoslavia and those cases currently under the jurisdiction of the International Criminal Court i.e. Uganda, Sudan, and Democratic Republic of Congo, were created in the aftermath of war, in other words when peace was already achieved (i.e. the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, the Kosovo court system established under the auspices of the United Nations Interim Administration Mission in Kosovo, United Nations Serious Crimes Unit under the United Nations Transitional Administration in East Timor, the Extraordinary Chambers in the Courts of Cambodia, and more recently the Special Tribunal for Lebanon).
[147] I study Yugoslavia and Uganda because they represent cases where the court intervened during an ongoing war; cases where peace has yet to be achieved. Even though peace has been achieved in the case of Sierra Leone, I look at the hybrid court created for Sierra Leone to compare and contrast it from the Yugoslavia court design and the International Criminal Court design, and to highlight novel features of a tribunal based on a mixed design.
[148] Antonio Cassese, *International Criminal Law,* (New York: Oxford University Press, 2003), 356.
[149] It is generally accepted that the ICTR is a boilerplate of the ICTY. The only difference between the statutes creating each tribunal is the subject matter jurisdiction. The ICTR is designed to address mainly the crime of genocide and applicable laws are those related to civil wars only.
[150] The Statute creating the ICTY not only incorporates (as Article 5) Article 6c (crimes against humanity) of the Charter creating Nuremberg, but also extends considerably the Article's range of application. Some of the progressive changes incorporated in Article 5 are the inclusions of rape and torture, which are now listed as specific types of crimes constituting a crime against humanity. Another important change is the removal of the nexus to war. Crimes against humanity can be committed in times of peace as well as war. Most relevant to our concerns, crimes against humanity can be prosecuted in both international armed conflict and non-international armed conflict. *See,* M. Cherif Bassiouni and Peter Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, (Irvington-on Hudson: Transnational Publishers, Inc. 1996), 538, 546. Additionally, other goals inspired by Nuremberg and "brought by and on behalf of the international community would: threaten those in

positions of power to deter further violence; make possible atonement for the perpetrators and honor the dead; provide a mechanism to enable victims and their families to receive needed psychological relief, identify remains, restore lost property, and otherwise help heal wounds; channel victims' thirst for revenge toward peaceful dispute settlement; affirm the Nuremberg Principles at the international level while restoring faith in the rule of law generally; tell the truth of what occurred, thereby preserving an accurate historical account of barbarism that would help prevent its recurrence; and perhaps most important, restore the lost civility of torn societies to achieve national reconciliation" Jose Alvarez, "Rush to Closure: Lessons of the Tadić Judgment," *Michigan Law Review* 96(1998), 2031-2032.

[151] Andrew Rosen, "D'Amato's Equilibrium: Game Theory and a Re-evaluation of the Duty to Prosecute under International Law," *New York Journal of International law* 34(2004), 93. For thorough descriptions of the war in the former Yugoslavia, see in general Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*, and Paul Williams and Michael Scharf, *Peace with Justice? War Crimes accountability in the Former Yugoslavia,* (Boston: Rowan and Littlefield Publishers, Inc. 2002).

[152] Rosen, "D'Amato's Equilibrium," 93.

[153] Bass, *Stay the Hand of Vengeance,* 213.

[154] Rosen, "D'Amato's Equilibrium," 96.

[155] Rosen, "D'Amato's Equilibrium," 97.

[156] Rosen, "D'Amato's Equilibrium," 97-98.

[157] Bass, *Stay the Hand of Vengeance,* 229.

[158] William and Scharf, *Peace with Justice?* 97.

[159] William and Scharf, *Peace with Justice?* 97.

[160] S.C. Resolution 808, U.N. SCOR, 48th Session, 3175th meeting, U.N. Doc. S/RES/808 (1993).

[161] The first perpetrator to stand trial at the tribunal, Dusan Tadić, was arrested by German police in Munich. See Bass, *Stay the Hand of Vengeance,* 207.

[162] Cassese, *International Criminal Law,* 357.

[163] The international court has jurisdiction in most cases despite arguments that a state may claim national, passive, territorial or universal jurisdiction.

[164] Cassese, *International Criminal Law,* 357.

[165] Cassese, *International Criminal Law,* 54.

[166] Moir, *The Law of Internal Armed Conflict*, 136.

[167] Moir, *The Law of Internal Armed Conflict*, 137 quoting from Tadić Jurisdiction paragraph 97

[168] Prior to this ruling, the provision 'grave breach' only applied to situations of international armed conflict. The grave breach provision include willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.(see Articles 50, 51,130, 147 of the First, Second, Third, and Fourth Geneva Conventions, respectively. Also see Article 85 of the First Additional Protocol and Article 8(2) (a) of the Rome Statute. See Cassese, *International Criminal Law, 55-56.*

[169] Cassese, *International Criminal Law,* 55.

[170] Cassese, *International Criminal Law,* 349.

[171] International tribunals defer cases to national courts only when they are overloaded and when national courts prove to be more efficient and less prone to bias. Cassese, *International Criminal Law* 351.

[172] Slobodan Milosevic was indicted for war crimes in the midst of the war in Kosovo in May 1999. In 2001, the Serbian authorities arrested him and later transferred him to the ICTY. He died in custody in March 2006. See Carlotta Gall, "Belgrade Begins Process of Sending Milosevic to The Hague", *The New York Times*, June 26, 2001, accessed November 16, 2012. http://www.nytimes.com/2001/06/26/world/belgrade-begins-process-of-sending-milosevic-to-the-hague.html. Thirteen years after his indictment, Radovan Karadzic was arrested in July 2008 and is currently on trial at The Hague. See Dan Bilefsky and Marlise Simons, Bosnian Serb under arrest in war crimes, N.Y. Times July 22, 2008 at http://www.nytimes.com/2008/07/22/world/europe/22iht-22serb.14673866.html?pagewanted=all. Ratko Mladic was arrested in May 2011, fifteen years after his indictment, and is currently on trial at The Hague. See Christopher Castle, Mladic Arrest Opens Door to Serbia's Long-Sought

European Union Membership, N. Y. Times May 26, 2011 at http://www.nytimes.com/2011/05/27/world/europe/27union.html?_r=1.

[173] D'Amato, "Peace vs. Accountability in Bosnia," 500.

[174] D'Amato, "Peace vs. Accountability in Bosnia," 500.

[175]William and Scharf, *Peace with Justice?* 103-104.

[176] Bass, *Stay the Hand of Vengeance,* 231.

[177] William and Scharf, *Peace with Justice?*, 156.

[178] William and Scharf note that "…Milosevic's identification of any meaningful language on war crimes as a deal breaker led to an essentially symbolic reference to the obligation to cooperate with the Yugoslav Tribunal… these provisions…constituted the barest minimum that could be included given the level of atrocities committed in Bosian," 162.

[179] See Rome Statute of the International Criminal Court at http://untreaty.un.org/cod/icc/index.html

[180] On some occasions, however, the ideas underlying the foundation of the ICC have been stretched more in the direction of HR. For instance, the ICC can indict individuals from states that are not party to the Rome Statute as it did in the case of Sudan, when in July 2008; it indicted President Omar Hassan al-Bashir for genocide and crimes against humanity. Yet, without the said state cooperation or that of other states, the ICC has been unable to apprehend President al-Bashir.

[181] The current case of Libya is an exception to this claim as the Security Council referred the case of Libya to the ICC in response to pleas from rebels against the incumbent government. I thank Professor Damrosch for bringing this fact to my attention.

[182] Cassese, *International Criminal Law*, 358.

[183] Cassese, *International Criminal Law*, 360.

[184] Cassese, *International Criminal Law*, 358.

[185] Cassese, *International Criminal Law*, 360-61.Similarly, the United States unsigned the Rome Statute in 2002 and commenced to sign bilateral immunity agreements with various countries (as per Art. 98(2)). This move serves to exempt US civilian and military personnel from ICC jurisdiction.

[186]Benjamin Valentino, Paul Huth, and Sarah Croco, "Covenants Without the Sword International Law and the Protection of Civilians in Times of War," *World Politics*, 58(2006): 339-377.

[187] Cassese, *International Criminal Law*, 351.

[188] Cassese, *International Criminal Law*, 353.

[189] This was true in both the cases of Rwanda and Sierra Leone.

[190] *See* Tadic Appeal on Jurisdiction at paragraph 119. *See also* Moir, *The Law of Internal Armed Conflict,* 166.

[191] Cassese, *International Criminal Law*, 61.

[192] Additional Protocol II states that a high level of intensity, duration, and control over territory must be exhibited before any regulatory procedure can be invoked.

[193] Cassese, *International Criminal Law*, 61-62.

[194] Cassese, *International Criminal Law*, 62.

[195] Recall, Valentino et al, "Draining the Sea," argue that governments commit atrocities as part of calculated military strategy.

[196] Even though legally insurgents can't call the court, once the court intervenes upon state solicitation or the ICC prosecutor's initiatives, it is not far-fetched to consider the possibility that the ICC may in fact cooperate with an insurgent group especially if there is more than one insurgent group.

[197] See in general, Katherine Southwick, "Investigating War in Northern Uganda: Dilemmas for the International Criminal Court, *"Yale Journal of International Affairs* (Summer/Fall 2005): 105-119; available at www.yale.edu/yjia/articles/Vol_1_Iss_1_Summer 2005/SouthwickFinal.pdf; Adam Branch, "Uganda's Civil War and the Politics of ICC Intervention," *Ethics and International Affairs* 21.2(2007): 179-198; Mahnoush Arsanjani and Michael Reisman, "The Law-in-Action of the International Criminal Court," *American Journal of International Law*, 99(2005): 385-403; Payam Akhavan, "The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court," *American Journal of International Law*, 99(2005): 403-421.

[198] Arsanjani and Reisman, "The Law-in-Action," 392.

[199] Branch, "Uganda's Civil War," 180.

[200] Branch, "Uganda's Civil War," 180.
[201] According to Katherine Southwick, "Since the mid-1990s, the rebels have maintained bases in southern Sudan and received military support from the Sudanese government. Sudan's assistance to the LRA was in part a response to the Ugandan government's long-standing support of the Sudan People's Liberation Movement (SPLM), a rebel group in southern Sudan that had fought the Sudanese government for twenty-one years," Southwick, "Investigating War in Northern Uganda," 111.
[202] Branch, "Uganda's Civil War," 181.
[203] Branch, "Uganda's Civil War," 181.
[204] Branch, "Uganda's Civil War," 181.
[205] Arsanjani and Reisman, "The Law-in-Action," 392.
[206] Akhavan, "The Lord's Resistance Army Case," 409.
[207] Southwick, "Investigating War in Northern Uganda," 109. Apparently Museveni opposed the Amnesty Act passed by the Ugandan parliament in 2000.
[208] See Amnesty International Report 2003. This report covers the period January to December 2002. Accessed July 28, 2012. Available at http://www.africanreview.org/forum/docs/ai/uganda.pdf
[209] See Amnesty International Report 2003.
[210] Akhavan, "The Lord's Resistance Army Case," 409.
[211] Akhavan, "The Lord's Resistance Army Case," 409.
[212] Akhavan, "The Lord's Resistance Army Case," 418.

[213] Akhavan, "The Lord's Resistance Army Case," 418.
[214] See Sverker Finnström, "No-peace-no-war in Uganda," *News From the Nordic Africa Insitutute 1*(January 2005), 11, Accessed July 29, 2012. Available at www.nai.uu.se/publications/news/documents/news1_2005.pdf.
[215] Branch, "Uganda's Civil War," 181-182.
[216] ICC, "Statement by the Chief Prosecutor on the Uganda Arrest Warrants," The Hague, October 14, 2005, 2, Accessed July 29, 2012. Available at http://www.icc-cpi.int/NR/rdonlyres/3255817D-FD00-4072-9F58-FDB869F9B7CF/143834/LMO_20051014_English1.pdf
[217] Arsanjani and Reisman, "The Law-in-Action," 394.
[218] Arsanjani and Reisman, "The Law-in-Action," 394.
[219] Arsanjani and Reisman, "The Law-in-Action," 393.
[220] Government of Uganda, "Referral of the Situation concerning the Lord's Resistance Army," Kampala, December 2003, para 6.
[221] Branch, "Uganda's Civil War," 188.
[222] ICC, "Statement by the Chief Prosecutor on the Uganda Arrest Warrants," The Hague, October 14, 2005, 1, accessed July 29, 2012. Available at http://www.icc-cpi.int/NR/rdonlyres/3255817D-FD00-4072-9F58-FDB869F9B7CF/143834/LMO_20051014_English1.pdf
[223] Branch, "Uganda's Civil War," 191.
[224] Akhavan, "The Lord's Resistance Army Case," 417.
[225] Akhavan, "The Lord's Resistance Army Case," 417.
[226] Southwick, "Investigating War in Northern Uganda," 112.
[227] A potential counter argument to these claims about the ICC can arise from the ICC indictment of President al-Bashir of Sudan in mid-July 2008. This was the first time the ICC indicted a sitting head of state for crimes against humanity, war crimes, and genocide committed in Darfur. The motivation of the ICC was to induce the reluctant government of Sudan to collaborate with the ICC in apprehending government backed perpetrators of crimes against humanity, war crimes, and genocide in Darfur. The only goal the ICC has accomplished by this move is stifling the peace talks and causing upheaval among third states, who view this as a blatant infringement on state sovereignty. Hence, this case cannot be perceived as a counter argument to the claims made above (ICC intervention in Uganda) but rather a confirmation of it. Given the legal designs of the ICC the threat of indicting President al-Bashir is not credible because (a) it lacks the said states cooperation and (b) it lacks third state support. Because the indictment was made in the midst of peace talks in Darfur, to avoid the derailing of peace talks, the United Nations may be forced to invoke a suspension of the indictment under Chapter XVI. Hence, the

case of Sudan serves only to diminish the credibility of the ICC as an institution that is an instrument to peace and/or justice in ongoing conflicts. *See* Jacqueline Geis and Alex Mundt, "When to Indict? The impact of timing of international criminal indictments on peace processes and humanitarian action," The Brookings Institute-University of Bern Project on Internal Displacement, accessed January 8, 2012 at http://www.brookings.edu/~/media/research/files/papers/2009/4/peace%20and%20justice%20geis/04_peace_and_justice_geis

[228] Shraga, "The Second Generation UN-Based Tribunals,"16.

[229] Shraga, "The Second Generation UN-Based Tribunals,"16.

[230] For more information on the "hybrid courts," see in general, Cesare P.R. Romano, André Nollkaemper, and Jann Kleffner ed. *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia*, (New York: Oxford University Press, 2004); Michael Doyle, *UN Peacekeeping in Cambodia: UNTAC's Civil Mandate*, (London: Lynne Rienner Publishers, 1995); Suzanne Katzenstein, "Hybrid Tribunals: Searching for Justice in East Timor," *Harvard Human Rights Journal*, 16(2003): 246-78; Laura Dickenson, "The Relationship between Hybrid Courts and International Courts: the case of Kosovo', *New England Law Review*, 37(2003): 1059.

[231] On 7 March 2003, Chief Prosecutor of the Special Court for Sierra Leone, David Crane, issued an indictment for then president of Liberia, Charles Taylor. The Special Court accused Taylor of committing crimes against humanity with the intent 'to obtain access to the mineral wealth of the Republic of Sierra Leone, in particular the diamond wealth of Sierra Leone, and to destabilize the state. [He] provided financial support, military training, personal arms, ammunition and other support and encouragement' to rebel factions throughout the armed conflict in Sierra Leone. "The counts variously accuse him of responsibility for 'terrorizing the civilian population and ordering collective punishment,' sexual and physical violence against civilians, use of child soldiers, abductions and forced labour, widespread looting and burning of civilian property, and attacks on the abduction of UNAMSIL peacekeepers and humanitarian assistance workers." See *Case No. SCSL-2003-01-1(3014-3939) Special Court for Sierra Leone,* accessed October 15, 2012, at http://www.sc-sl.org/.

[232] The United Nations did not want to create tribunals as extensive and expensive as the ICTY and ICTR. (See Antonio Cassese, "The Role of Internationalized Courts and Tribunals in the fight Against International Criminality," in *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia,* ed. Cesare P.R. Romano et al. (New York: Oxford University Press, 2004): 3-13.

[233] S.C. Res. 1315, U.N. Doc. S/RES/1315 (August 14, 2000), accessed October, 15 2012, at http://www.ictj.org/static/Africa/SierraLeone/sres.1315.2000.eng.pdf

[234] From 1989-1991, Liberia was a failed state ran by several warlords with control over various parts of the country. Among the numerous warlords, the National Patriotic Front of Liberia (NPFL), led by Charles Taylor, had the upper hand controlling ninety percent of Liberia. The NPFL was recognized by the Economic Community of West African States Monitoring Group (ECOMOG) and the United States as one of the most disruptive forces on the territory of Liberia. In fact, ECOMOG emerged as a result of the conflict in Liberia and was called to establish a ceasefire agreement between the warring factions. (*See* Mitikiche Maxwell Khobe, "The Evolution and Conduct of ECOMOG Operations in West Africa," in Mark Malan. ed. Boundaries of Peace Support Operations : The African Dimension (Monologue 44, February 2000) accessed October 17, 2012 at http://www.iss.co.za/Pubs/Monographs/No44/Contents.html.)

As Taylor approached full control over the territory of Liberia, ECOMOG's peace efforts significantly hindered his plans. Sierra Leone was heavily involved in the peace efforts at the time and stationed ECOMOG forces on its territory. Because of Sierra Leone's intervention in thwarting his efforts to completely control Liberia, Taylor swore in an interview with BBC Focus on Africa that Sierra Leone would 'taste the bitterness of war.' (*See* BBC *Focus on* Africa; BBC Africa Service; "Interview with rebel leader Charles Taylor of the National Patriotic Front of Liberia (NPFL);" broadcast on 01 and 01 November 1990) Consequently, Sierra Leonean inhabitants of the areas controlled by the NPFL were targeted, detained, and often indiscriminately killed in detention.

At this time, political tensions were rising in Sierra Leone as the country strode towards democracy. Foday Sankoh, a former Sierra Leone Army (SLA) photographer then turn NPFL commando, solicited the assistance of Taylor to form a contingent of insurgents to attack Sierra Leone for the purposes of overthrowing the one party government. Taylor provided Sankoh with those Sierra Leoneans imprisoned throughout Liberia to form this army along with NPFL commandos and with a supply of arms. These Sierra Leonean detainees were forced into joining

the Revolutionary United Front (RUF), led by Foday Sankoh, and ended up being trained by NPFL commandos in various camps throughout Liberia. Of the armed forces that attacked Sierra Leone in 1991, four fifths of those forces were Liberian. At first the military objectives of both Sankoh and Taylor were the same. They aimed to capture the diamond rich border areas of Sierra Leone, overthrow the Government of Sierra Leone and install democracy. Later developments proved that neither Sankoh nor Taylor adhered to the objective of installing democracy; instead, they intended to overthrow the government and install Sankoh in order to gain full control over the diamond rich territories. They would then use this control as a means to fuel their movements and fill their pockets. In December 1990, the Banjul Agreement partitioned the Interim Government of National Unity with representatives from all factions of Liberia. Taylor and his NPFL force became part of the interim government sharing power with two other factions, the Armed Forces of Liberia, and the Independent Patriotic Front of Liberia. Three months later his side of the Interim Government of Liberia attacked Sierra Leone. *See* The Truth and Reconciliation Commission of Sierra Leone Report, Chapter 3A (2004) *See* An International Review of Peace Initiatives Accord, Liberia Chronology, accessed October 17, 2012, at http://www.c-r.org/accord/lib/accord1/chronol.stml.

[235] In the *Report of the Secretary General on the establishment of a Special Court for Sierra Leone*, the Secretary General acknowledged that it is generally accepted that the war in Sierra Leone began in 1991, but chose to focus on the date 30 November 1996 as it marked the first comprehensive Peace Agreement between the Government of Sierra Leone and the RUF. The Secretary General asserted that this date "…would have the benefit of putting the Sierra Leone conflict in perspective without unnecessarily extending the temporal jurisdiction of the Special Court. It would also ensure that the most serious crimes committed by all parties and armed groups would be encompassed within its jurisdiction." (See the *Report of the Secretary General on the establishment of the Special Court for Sierra Leone*, delivered to the Security Council, U.N. Doc. S/2000/915 (October 4, 2000) at paragraph 25 and 27). Moreover, the Secretary General felt the need to set the temporal jurisdiction at a later date so as not to overburden the Prosecutor and overload the Court (See Report of the Secretary General at paragraph 26).

[236] *See* The Truth and Reconciliation Commission of Sierra Leone Report, Chapter 3A (2004)

[237] In his Report, the Secretary-General points out that the Special Court only has primacy over national courts of Sierra Leone and does not extend to the courts of third States. He continues to say, "Lacking the power to assert its primacy over national courts in third States in connection with the crimes committed in Sierra Leone, it also lacks the power to request the surrender of an accused from any third State and to induce the compliance of its authorities with any such request". To deter crimes, the Secretary-General recommended that the Security Council vest the SCSL with Chapter VII powers for the purpose of requesting the surrender of an accused outside the Courts jurisdiction (See the *Report of the Secretary General* at paragraph 10).

[238] *See* The Special Court for Sierra Leone. The Prosecutor vs. Charles Ghankay Taylor, accessed October 19, 2012, at http://www.sc-sl.org/CASES/ProsecutorvsCharlesTaylor/tabid/107/Default.aspx

[239] D'Amato, "Correspondence," 95.

[240] Recall the debate that ensued after D'Amato's proposal. Many legal scholars were appalled and dismayed by D'Amato's suggestion claiming that it was a smack in the face of justice. In their view peace would come at the cost of justice. Paust, for example, argues that D'Amato does not consider justice as a means to achieving long-term peace. Ferencz argues that D'Amato's proposal betrays victims of war crimes because it does not punish perpetrators nor does it deter future perpetrators. Other critics object to the proposal because it goes against the notion that there is an absolute duty to prosecute war criminals under international law. None of the scholars who opposed D'Amato's proposal explain how exactly justice leads to peace, but neither does D'Amato provide a clear exposition of how justice does not lead to peace. *See* J. Paust, "Correspondence," *American Journal of International Law* 88(1994):715-717; B. Ferencz, "Correspondence," *American Journal of International Law* 88(1994):717-718; Payam Akhavan, "Correspondence," *American Journal of International Law* 89(1995):92-93; Anthony D'Amato, "Correspondence," *American Journal of International Law* 89 (1995): 94-95.

[241] D'Amato, "Peace vs. Accountability in Bosnia," 504.

[242] Akhavan, "Correspondence," 92.

[243] The relation between the level of prosecution today and chance of war tomorrow could, in some instances, go in the opposite direction; that is, the chance of war tomorrow could be higher, the higher the level of prosecution today. The war in the former Yugoslavia is a case in point. In the immediate aftermath of the first indictments of

Mladic and Karadzic by the ICTY, the two indictees captured Zepa, carried out the genocide of Srebrenica, and shelled Sarajevo.

[244] Bass, *Stay the Hand of Vengeance,* 233. According to Bass, "Marginalizing Karadzic and Mladic might help peacemaking efforts"(229). He quotes a staffer of Goldstone, who made the following observation: 'You have two options…A, you can indict Milosevic and be shut down. B, or you can do low-level [indictments] and do a few trials, like Mladic and Karadzic' (229).

[245] Bass, *Stay the Hand of Vengeance,* 235.

[246] UNSC Resolution 1031 (1995) on implementation of the Peace Agreement for BiH and transfer of authority from UN Protection Force to the multinational Implementation Force (IFOR) 15/12/1995 adopted at Security Council 3607th meeting. According to William and Scharf, "In Resolution 1013, the Security Council reaffirmed the obligation of all states to cooperate with the Yugoslav Tribunal and 'recognized' that IFOR was permitted to use all necessary force to ensure compliance with the military annex, but it did not explicitly authorize IFOR to use force to ensure cooperation with the Tribunal or to apprehend indicted war criminals" William and Scharf, *Peace with Justice?,*167.

[247] Bass, *Stay the Hand of Vengeance,* 240.

[248] Bass, *Stay the Hand of Vengeance,* 241.

[249] Bass, *Stay the Hand of Vengeance,* 248.

[250]Bass quotes Human Rights Watch, that said, "[I]t is increasingly evident that IFOR soldiers are making every effort not to 'encounter' the two most notorious of indicted persons, [Karadzic and Mladic]," Bass, *Stay the Hand of Vengeance,* 252.

[251]Rosen, "D'Amato's Equilibrium," 241.

[252] Rosen, "D'Amato's Equilibrium," 242.

[253] Rosen, "D'Amato's Equilibrium," 129.

[254] William and Scharf, *Peace with Justice?* 162.

Notes for Chapter V

[255] See in general William Zartman, ed., *Elusive Peace: Negotiating an End to Civil Wars* (Washington, DC: Brookings institute, 1995); Barbara Walter, "The Critical Barrier To Civil War Settlement," *International Organization* 51(3)(1997):335-64; Barbara Walter, "Bargaining Failures and Civil Wars," *Annual Review of Political Science* 12(2009):243-61; Cherif Bassiouni, "Criminal Law: The New Wars and the Crisis of Compliance with the law of armed conflict by Non-state Actors," *The Journal of criminal Law and Criminology* 98(3)(2008):712-810.
[256] See Filson and Werner, "A Bargaining Model for War and Peace," 819-38.
[257] See Valentino et al., "Draining the Sea," 375-407.
[258] See in general Geoffrey Blainey, *The Causes of War* (New York: Free Press, 1973); James Fearon, "Rationalist Explanations for War," *International Organization* 49(1995):379-414.
[259] See Fearon 1994,1995; Reiter 2005
[260] In other words, if R strikes and nobody goes to war, then R pays a penalty of 40 if the court is allowed to intervene. If R strikes and both players go to war, then R pays 50 (as it is seen as the aggressor) and G pays 10. If R does not strike and both players go to war, then they both pay 20. See the chart below.
[261] Rosen, "D'Amato's Equilibrium,"103.
[262] Rosen, "D'Amato's Equilibrium,"97.
[263] William and Scharf, *Peace with Justice?* 156.
[264] David Owen, *A Balkan Odyssey*, (New York: Harcourt Brace and Company, 1995), 288.
[265] William and Scharf, *Peace with Justice?* 156.
[266] William and Scharf, *Peace with Justice?* 156.
[267] Human Rights Watch, *Impunity for Abuses Committed During "Operation Storm" and the Denial of the Right of Refugees to Return to the krajina,* 1 August 1996, D813, accessed February 14, 2013, available at: http://www.unhcr.org/refworld/docid/3ae6a7d70.html . The article, Boris Pavelic, "No Verdicts in Croatia over Operation Storm,"*Balkan Transitional Justice*, November 28, 2012, accessed February 14,2013, continues to say that, " It was one of the reasons why the International criminal court for former Yugoslavia, ICTY, indicted Ante Gotovina, Ivan Cermak and Mladen Markac, who were later acquitted."
[268] See http://www.balkaninsight.com/en/article/the-storm-27-war-crime-cases-no-verdict [accessed 14 February 2013] Also see http://www.balkaninsight.com/en/balkan-transitional-justice/about-the-project [accessed 20 February 2013] "The ***Balkan Transitional Justice*** initiative is a regional initiative funded by the European Commission, the Federal Department of Foreign Affairs of Switzerland and the British Foreign and Commonwealth Office FCO that aims to improve the general public's understanding of transitional justice issues in former Yugoslav countries (Bosnia and Herzegovina, Croatia, Kosovo, Macedonia, Montenegro and Serbia)."

Notes for Chapter VI

[269] Ian Paisley, "Peace Must Not Be the Victim of International Justice," *New York Times*, March 16, 2012.
[270] Anthony D'Amato, "Peace vs. Accountability in Bosnia," *American Journal of International Law* 88(1995):500-506.
[271] I thank Professor Jack Snyder for this suggestion.
[272] Branch, "Uganda's Civil War," 197.
[273] Morelli et al., Strategic Mass Killing, Unpublished Paper, 24.
[274] Recall that this thesis takes credibility/enforcement issues as a given. I do not directly speak to how to strengthen enforcement capabilities of legal institutions or make their threats more credible. In order to study how regimes can be designed to alter the incentives of warring combatants in the civil war context to bargain for peace, I had to assume the court had necessary enforcement capabilities to make their threats credible. For more on strengthening courts enforcement capabilities see Michael Gilligan, "Is Enforcement Necessary for Effectiveness? A Model of the International Criminal Regime, "*International Organization.* 60 (2006), 935-67.
[275] The apprehension of state leaders such as Liberian president, Charles Taylor for the Special Court for Sierra Leone, the late Serb president Slobodan Milosevic and Bosnian Serb Radovan Karadzic for the ICTY, by their respective domestic forces, we can claim that the domestic forces and national judiciaries have become the new agents of a larger international system, thus increasing the likelihood of apprehension and prosecution by the international courts. With the domestic forces acting on behalf of international courts, it strengthens enforcement capabilities of international courts, and as such, makes their threats more credible.
[276] See in general, Thomas Schelling, *The Strategy of Conflict,* (Cambridge: Harvard University Press, 1960); Thomas Schelling, *Arms and Influence,* (New Haven: Yale University Press, 1966); James Fearon, "Threats to Use Force: Costly Signals and Bargaining in International Crises" (PhD diss., University of California, Berkeley, 1992); Anne Sartori, *Deterrence by Diplomacy,* (Princeton, NJ: Princeton University Press, 2005).
[277] It is possible that rebel groups may act as agents for international courts. For instance, in Congo, General Laurent Nkunda, the leader of the Tutsi-dominated rebel group known by the French abbreviation CNDP considered handing Jean Bosco Ntaganda, the group's chief of staff, over to the ICC who has indicted Ntaganda for war crimes. See See Lydia Polgreen, "Rebel Force in Congo shows signs of Division,"*The New York Times*, January 11, 2009.

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