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### **The War Crimes Paradox:**

*The effects of criminalizing state behavior in signaling resolve in war*

The international community and legal experts increasingly have taken aim at ending practices in war that disproportionately harm civilians. By criminalizing forms of violence that are tactically unjustified or lack proportionality, advocates of international law hope to discourage violence directed at noncombatants. Since the 19<sup>th</sup> century, states have acknowledged the illegality of targeting civilian populations with international law codifying this prohibition extensively.

International Humanitarian Law (IHL) continues to develop mechanisms for punishing violators of these principles. The London Charter defined the categories of crime for which political and military officials could be tried and established procedures for tribunals, including the famous Nuremberg Trials. The United Nations has subsequently established tribunals for specific conflicts. These include the International Criminal Tribunals for the former Yugoslavia and for Rwanda as well as the Special Court for Sierra Leone. Though a number of states have refused to sign or ratify the Rome Statute (including notably the United States and China), the International Criminal Court (ICC) provides a judicial forum for trying those suspected of committing war crimes without the establishment of conflict-specific tribunals. Charges have been brought against individuals ranging from sitting heads of state to low ranking soldiers. Recently, courts prosecuting war criminals have convened to hear cases against Charles Taylor—the former president of Liberia, Congolese militia leaders, Slobodan Milosevic—the 3<sup>rd</sup> president of the Federal Republic of Yugoslavia, as well as many generals and lower ranking soldiers participating in inter- and intrastate conflicts.

Despite this burgeoning legal regime, harming civilians remains popular amongst warring parties. While some war crimes result from a breakdown in military command and control, others stem from explicit state strategy. This paper focuses on war crimes carried out as a matter of national military policy during interstate conflict. Classic examples of war crimes originating as a result of top-level decision making include targeting civilians through aerial bombardment and the use of chemical weapons.

Military strategists theorize over ways to weaken the civilian will of enemy societies.<sup>1</sup> Various national militaries have enacted these theories into practice, specifically attacking civilians during conflict as a matter of policy. For example, aerial bombing campaigns, in which force is used indiscriminately, have been a common feature of modern warfare.<sup>2</sup> Such tactics were used in many conflicts by the United States, including during World War II<sup>3</sup>, the Korean War<sup>4</sup>, the Vietnam War<sup>5</sup>, and the war on terror<sup>6</sup>. Nor is the United States alone in their use. Germany used massive aerial bombardment during the WWII, most famously during the Blitz.

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<sup>1</sup> Giulio Douhet, *Command of the Air* (Tuscaloosa, AL: University of Alabama Press, 2009); “Mr Baldwin on Aerial Warfare – A Fear for the Future,” *The Times* (11 November 1932), 7; David Milne, “‘Our Equivalent of Guerrilla Warfare’: Walt Rostow and the Bombing of North Vietnam, 1961-1968,” *The Journal of Military History*, 71:1 (2007), 169-203.

<sup>2</sup> Aerial bombing campaigns are by no means the only way militaries punish civilian populations during war. In general, the indiscriminate use of force that disproportionately effects civilian populations is a form of civilian victimization.

<sup>3</sup> Tami Davis Biddle, *Rhetoric and Reality in Air Warfare: The Evolution of British and American Ideas about Strategic Bombing, 1914-1945*, (Princeton, NJ: Princeton University Press, 2002); Mark Selden, “A Forgotten Holocaust: US Bombing Strategy, the Destruction of Japanese Cities and the American Way of War from World War II to Iraq,” *Japan Focus* (May 2007), <http://www.japanfocus.org/-Mark-Selden/2414> (Accessed 05 December 2010).

<sup>4</sup> Sahr Conway-Lanz, *Collateral Damage: Americans, Noncombatant Immunity and Atrocity after World War II*, (New York: Routledge, 2006).

<sup>5</sup> Robert A. Pape, *Bombing to Win*, (Ithaca, NY: Cornell University Press, 1996), 174-210.

<sup>6</sup> Mary Ellen O’Connell, “Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009,” University of Notre Dame Law School Legal Studies Research Paper, No 09-43 (November 2009); “Fatally Flawed: Cluster Bombs and Their Used by the United States in Afghanistan,” *Human Rights Watch*, (December 2002), <http://www.hrw.org/reports/2002/us-arghanistan> (Accessed 05 December 2010); “Off Target: The Conduct of the War and Civilian Casualties in Iraq,” *Human Rights Watch*, (December 2003), <http://www.hrw.org/reports/2003/usa1203/> (Accessed 05 December 2010); Jane Mayer, “The Predator War,” *The New Yorker*, (26 October 2009), [http://www.newyorker.com/reporting/2009/10/26/091026fa\\_fact\\_mayer?printable=true](http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer?printable=true) (Accessed 05 December 2010).

German tactics also claimed 40,000 lives during its campaign against Rotterdam.<sup>7</sup> During the Second Sino-Japanese War, Japanese conducted incendiary attacks against Chongqing, killing at least 5,000 civilians.<sup>8</sup> The illegal use of chemical weapons has also been pervasive in some conflicts, including the Iran-Iraq War.

More recent conflicts have also witnessed civilian victimization. Russian forces heavily attacked Grozny using largely indiscriminate means during the First and Second Chechen Wars.<sup>9</sup> Air power featured prominently during the 2006 Lebanon War. Civilians suffered disproportionately during this conflict in part due to Israeli military tactics as well as due to the way Hamas positioned itself within civilian population centers. The Sudanese government participated in aerial attacks of villages even after the ICC issued indictments of several regime leaders.<sup>10</sup>

What explains the persistence of highly visible instances of civilian targeting after the imposition of an international legal regime designed to prevent civilian victimization? I argue that the criminalization of behavior in warfare may actually make such behavior an attractive signal during bargaining with imperfect information. Modeling a strategic interaction between two states, this paper provides a game theoretic explanation for civilian victimization. When negotiating parties lack information about their opponent's resolve, states may have an incentive to engage in costly behavior to credibly signal this privately held information. By increasing the costs of targeting civilians through establishing legal protections and sanctions within IHL, this

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<sup>7</sup> Mark Selden and Alvin Y. So (eds), *War and State Terrorism: the United States, Japan and the Asia-Pacific in the Long Twentieth Century*, (Oxford, UK: Rowman & Littlefield Publishers, 2004), 30.

<sup>8</sup> Ibid.

<sup>9</sup> Jason Lyall, "Does Indiscriminate Violence Incite Insurgent Attacks? Evidence from Chechnya," *Journal of Conflict Resolution*, 50:3 (2009), 331-362; Matthew Evangelista, *The Chechen Wars: Will Russia Go the Way of the Soviet Union?*, (Washington, DC: Brookings Institution, 2002), 167-169.

<sup>10</sup> "Statement by Ambassador Rice on South Darfur," *USUN Press Release*, (03 February 2009), <http://www.america.gov/st/texttrans-english/2009/February/20090203163342xjsnommis0.6653711.html> (Accessed 05 December 2010).

legal regime may actually make the use of war crimes a credible signal within wartime negotiations. Thus a paradox exists. While war crimes tribunals are designed to punish and dissuade states from victimizing civilians, such courts may actually allow highly resolved combatants to signal their type to opponents and thus these courts may actually make civilian targeting more attractive for some belligerents. This war crimes paradox helps explain why combatants continue to perpetrate crimes during warfare even as the legal regime designed to prevent these crimes develops more teeth.

This paper proceeds in three parts. First, it positions war crimes within the bargaining-in-war literature as well as current scholarship on civilian victimization. Influenced by recent scholarship on the tactical inutility of barbarism, the paper then examines a model in which war crimes only function as a credible signal of resolve. This analysis is based on a best case scenario assumption that targeting civilian populations conveys no additional battlefield advantages to the perpetrator. Unfortunately, the model demonstrates that this best case scenario is actually anything but. Under certain situations in which IHL imposes low costs, a pooling equilibrium obtains in which no states use war crimes for signaling purposes. However, I contrast the pooling equilibrium model with a second situation in which international legalization efforts have made committing a war crime sufficiently costly such that resolved states now have an incentive to use them for signaling purposes. I conclude by examining the model's further implications for whether IHL can ever achieve its goal of protecting civilians.

**Bargaining-in-Warfare and Crimes in Warfare:**  
International Relations Theory on Strategic Civilian Victimization

International Relations theorists have attempted to explain the persistence of armed conflict by examining explanations for bargaining failure during the lead up to war. Likewise students of international law have tried to explain why states target civilians once they initiate a

conflict and whether the laws of war have any restraining effect on military action. This section outlines prominent explanations for both phenomena, drawing links between these divergent literatures.

Civilians are often not only incidental victims during a conflict, but may actually be specifically targeted. Two strands of scholarship address this issue. The first examines the determinants of civilian victimization. The second focuses on the development of international legal protections for civilians. Research on barbarism—the specific targeting of civilians as a strategy in warfare—attempts to explain the frequency of these tactics, why states resort to them, and whether they are effective. Barbarism is not a dominant feature of warfare, but nor is it uncommon. Academic estimates of the percent of conflicts in which noncombatants are specifically attacked as a strategy in warfare range from 20<sup>11</sup> to 33 percent<sup>12</sup>. Examining modern warfare techniques, Benini and Moulton argue that civilian casualties are systematically underreported so current estimates are likely underestimates.<sup>13</sup> These studies further indicate that systematic violation of noncombatant immunity is a feature of conflicts after the Nuremberg Trials established a precedent that those who victimize civilians might face legal consequences.<sup>14</sup>

The efficacy question looms large in discussions about harming civilians intentionally. Scholars remain divided in their answers. On the one hand, civilian victimization may entrench opposition<sup>15</sup> as well as make establishing a post-war peace more problematic<sup>16</sup>. Horowitz and

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<sup>11</sup> Ivan Arreguin-Toft, *How the Weak Win Wars*, (New York: Cambridge University Press, 2005).

<sup>12</sup> Alexander B. Downes, “Desperate Times, Desperate Measures: The Causes of Civilian Victimization in Warfare,” *International Security*, 30:4 (2006), 152-195.

<sup>13</sup> Aldo A. Benini and Lawrence H. Moulton, “Civilian Victims in an Asymmetric Conflict: Operation Enduring Freedom, Afghanistan,” *Journal of Peace Research*, 41:4 (2004), 403-422.

<sup>14</sup> Benjamin Valentino, et al. “‘Draining the Sea’: Mass Killing and Guerrilla Warfare,” *International Organization*, 58 (2004), 375-407.

<sup>15</sup> Pape, 326. This issue has also been examined within the sanctions literature, where again concessions appear rare. See Robert A. Paper, “Why Economic Sanctions Do Not Work,” *International Security*, 22:2 (1997), 90-136. It also has received significant attention within the counterinsurgency literature. See Jason Lyall and Isaiah Willson III, “Rage against the Machines: Explaining Outcomes in Counterinsurgency Wars,” *International Organization*, 63:1

Reiter find that strategic bombing is more effective when aimed at military rather than civilian instillations.<sup>17</sup> Toft questions the military efficacy of barbarism tactics, suggesting that they do not reduce the loss of life among military personnel of a state employing them.<sup>18</sup> Other scholars have noted that the persistence of such strategies is puzzling if they convey no advantages. Lyall examines the indiscriminate use of force by Russia in Chechnya and finds that it is correlated with lower levels of insurgent recruitment.<sup>19</sup> Merom avers that democracies disproportionately lose small wars due to their unwillingness to use military force against civilian populations.<sup>20</sup> Therefore, the tactical efficacy of harming civilians from a military perspective remains disputed.

This paper provides an alternative explanation for the utility of civilian victimization. Rather than being a tactic employed for battlefield gains, barbarism may convey information to opponents even if it provides no additional military advantages. It therefore has a function within interstate relations even if this utility is difficult to determine based on the criteria of military necessity. This builds off of Clausewitz observation that war “is politics by other means.”<sup>21</sup> Violating the laws of war is a symbolic and costly gesture employed by states attempting to dispel the fog of war by credibly signaling private information to their foe. To determine the utility of a tactic in war, scholars must not only examine battlefield results but also must consider the larger diplomatic context. In other words, International Relations theorists must bring politics

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(2009), 67-106; Mark Kramer, “The Perils of Counterinsurgency: Russia’s War in Chechnya,” *International Security*, 29:3 (2004/2005), 5-63; Stathis N. Kalyvas, “The Paradox of Terrorism in Civil War,” *The Journal of Ethics*, 8:1 (2004), 97-138.

<sup>16</sup> Hugo Slim, *Killing Civilians: Method, Madness, and Morality in War*, (New York, NY: Columbia University Press, 2008); Caleb Carr, *The Lessons of Terror: A History of Warfare against Civilians*, (New York, NY: Random House, 2002).

<sup>17</sup> Michael Horowitz and Dan Reiter, “When Does Aerial Bombing Work? Quantitative Empirical Tests, 1917-1999,” *The Journal of Conflict Resolution*, 45:2 (2001), 147-173.

<sup>18</sup> Ivan Arreguin-Toft, “The [F]utility of Barbarism: Assessing the Impact of Systematic Harm of Non-Combatants in War,” conference paper presented at the annual convention of the American Political Science Association, Philadelphia, PA (2003).

<sup>19</sup> Jason Lyall, “Does Indiscriminate Violence Incite Insurgent Attacks? Evidence from Chechnya,” *Journal of Conflict Resolution*, 53:3 (2009), 331-362.

<sup>20</sup> Gil Merom, *How Democracies Lose Small Wars*, (Cambridge, UK: Cambridge University Press, 2003).

<sup>21</sup> Carl von Clausewitz, *On War*, (Radford, VA: Wilder Publications, 2008), 17.

back into their determinations of tactical efficacy.

The question of efficacy has also been linked with determining the correlates of civilian victimization. For example, Downes argues that the type of conflict may shape whether barbarism tactics are employed. He finds that wars of attrition and wars for territorial conquest are more likely to place civilians in the crosshairs.<sup>22</sup> This analysis connects to the issue of effectiveness as targeting civilians in conquest attempts may produce military benefits like reducing the odds that a fifth column will develop within the conquered territory. However, Downes himself notes that civilian coercion produces few benefits in wars of attrition. Downes has also noted that civilian victimization tends to occur late in a conflict and suggests that this is a strategy of desperation and survival.

However, Downes' inference is unsatisfying for several reasons. Downes ignores the use of civilian targeting in many asymmetric conflicts by the larger power for which state survival is not in question undermining the desperation hypothesis.<sup>23</sup> His emphasis on leaders choosing to victimize civilians because they fear state survival is further challenged by findings that state death is becoming a relic of a past era even though war crimes remain en vogue.<sup>24</sup> Nor is civilian victimization a tactic of last resort as Downes insists. For example, air coercion tactics were how NATO began operations within Kosovo. This implies that targeting civilians does not always occur as a ratcheting up of violence during a protracted conflict. However, the use of war crimes later in a conflict is consistent with this tactic being an element of in-conflict bargaining. The more protracted a conflict, the more demonstrative a signal a state may need to send to reveal

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<sup>22</sup> Downes, "Desperate Times, Desperate Measures," 190.

<sup>23</sup> For example, his analysis cannot explain NATO's decision to use air power during the Kosovo conflict as this was not a conquest attempt nor had it devolved into a war of attrition by the time this decision was made. See Ivo H. Daadler and Michael E. O'Hanlon, *Winning Ugly: NATO's War to Save Kosovo*, (Washington, DC: Brookings Institution Press, 2001).

<sup>24</sup> Tanisha M. Fazal, *State Death: The Politics and Geography of Conquest, Occupation, and Annexation*, (Princeton, NJ: Princeton University Press, 2007).

new information. The drama of extensively harming civilians reveals this information to both the opponent's leadership and populace.

Other correlates examined within this literature include the regime type of the perpetrating state. Regime type may play an important role in determining whether or not a state violates the laws of war by choosing not to observe the principle of noncombatant immunity. While Downes rejects the notion that democracies are less likely to victimize civilians,<sup>25</sup> other scholars have noted the restraining effects of democracy.<sup>26</sup> For example, Rummel finds that democracies are less likely to use barbarism tactics.<sup>27</sup> However, most evidence within studies of regime types suggests at most a very weak regime effect. A bargaining based model may thus help explain why these tactics are attractive to states regardless of their domestic form of governance. Information revelation is a mechanism common to both autocracies and democracies.

Other works examine not only a state's incentives to target civilians, but also their incentives to avoid such tactics. IHL may alter this incentive structure. In light of the continued use of force deemed off limits by this legal regime, this could reflect the inefficacy of international law. Realist legal theorists imply that international law has little binding power against states due to the anarchic structure of the international system.<sup>28</sup> They opine that law is epiphenomenal. If a state complies with a law, it is merely because the state would have taken

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<sup>25</sup> Alexander Downes, "Restrain or Propellant? Democracy and Civilian Fatalities in Interstate Wars," *Journal of Conflict Resolution*, 51:6 (2007), 872-904.

<sup>26</sup> Valentino, *et al.*; Toft, "[F]utility of Barbarism," 14.

<sup>27</sup> R. J. Rummel, "Democracy, Power, Genocide, and Mass Murder," *Journal of Conflict Resolution*, 39:1 (1995), 3-26.

<sup>28</sup> Jack Goldsmith and Eric Posner, "Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective," *Journal of Legal Studies*, 31 (2002); John Mearsheimer, "The False Promise of International Institutions," *International Security*, 19:3 (1995), 5-49.

the same action absent the legal codification.<sup>29</sup> The fact that states violate the laws of war as they apply to civilians in upwards of a third of cases seems to undermine Louis Henkin's observation that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."<sup>30</sup> However, if international law is a second order reflection of state interests, realist scholars are unable to explain why states expend effort drafting and going through lengthy ratification processes to form the documents of IHL. Nor are these scholars able to demonstrate why legal rhetoric remains important to states that violate international law.

This paper presents an explanation for why states expend effort drafting legal documents and shaping legal arguments while simultaneously violating the principles enshrined in IHL. The international community's development of IHL is consistent with establishing a screening device for resolve during wars. The model I outline suggest that states with higher resolve violate international law to signal this quality and that less resolved states will be unwilling to expend this cost. Thus, by imposing costs on violators, IHL helps states credibly reveal information about their type during a conflict. This thus explains why states work to establish a legal regime which some then choose to flout.

Statistical studies of compliance to the laws of war present a mixed picture. Morrow posits that mutual ratification of the laws of war increases the odds of compliance.<sup>31</sup> This suggests that reciprocity may be the foundation upon which covenants without swords are made into more than words. Morrow also finds evidence that democracies may sign on to treaties regulating conduct in war less cynically than other regime types. In contrast, Valentino, *et al.*

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<sup>29</sup> E.H. Carr, *The Twenty Years' Crisis, 1919-1939: An Introduction to the Study of International Relations*, 2<sup>nd</sup> ed. (New York, NY: Harper & Row, 1964); Jona Von Stein, "Do Treaties constrain or Screen? Selection Bias and Treaty Compliance," *American Political Science Review*, 99 (2005), 611-622; George Downs, *et al.*, "Is the Good News about Compliance Good News about Cooperation?" *International Organization*, 50 (1996), 379-406.

<sup>30</sup> Louis Henkin, *How Nations Behave: Law and Foreign Policy*, 2<sup>nd</sup> ed. (New York, NY: Columbia University Press, 1979), 47.

<sup>31</sup> James D. Morrow, "When Do States Follow the Laws of War?" *American Political Science Review*, 101:3 (2007), 559-572.

find little support that being a signatory to the Hague or Geneva Conventions results in states targeting civilians less frequently.<sup>32</sup> Their findings further question a regime effect. Instead, they suggest that civilian victimization stems from the belief of states that targeting war-related domestic production will result in their adversary surrendering earlier, thus cutting short long and costly conflicts. However, this finding is inconsistent with evidence that states which choose to victimize civilians do not only target war production centers. For example, the US Air Force continued bombing North Vietnam after a number of studies demonstrated the futility of such a campaign.<sup>33</sup> Statistical legal scholarship therefore presents a very uneven picture of the laws of war and their ability to protect civilians.

The reciprocity hypothesis implies that targeting civilians is part of a strategic interaction. Thus understanding a state's choice in this matter requires also understanding the decisions of that state's adversary and vice versa.<sup>34</sup> Nor is Morrow alone in this supposition. Toft argues that barbarism is a tactic employed by states in asymmetric conflict when faced with situations in which conventional military and counterinsurgency methods might fail. In particular, he notes that when the weaker party in these wars uses conventional tactics they are more easily routed by a strong state engaging in barbarism. However, this tactical strategic interaction process implicitly treats these conflicts as winner takes all affairs. Yet, conflicts with barbarism often end in negotiated settlement rather than sheer defeat. This implies that targeting civilians should be conceptualized as part of the bargaining process that occurs within war.

Since civilian victimization is a state strategy in warfare, it is logical to make this process

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<sup>32</sup> Benjamin Valentino, *et al.* "Covenants without the Sword: International Law and the Protection of Civilians in Times of War," *World Politics*, 58:3 (2006), 339-377.

<sup>33</sup> Toft, 6 references Stanley Karnow, *Vietnam: A History* (New York, NY: Viking Press, 1983), 509.

<sup>34</sup> On the fallacy of analyzing strategic interactions through decision theoretic lens see George Tsebelis, "The Abuse of Probability in Political Analysis: The Robinson Crusoe Fallacy," *American Political Science Review*, 83:1 (1989), 77-91.

endogenous within models of interstate bargaining during warfare. The bargaining-in-warfare literature takes Schelling's intuition that violence is also a means of bargaining and formalizes it within game theoretic models of interstate war.<sup>35</sup> These rationalist accounts for war attempt to understand not only why states are unable to successfully negotiate to prevent the onset of a war<sup>36</sup>, but also how they continue to bargain once hostilities begin<sup>37</sup>. This literature aims to make the onset, duration, and conclusion of wars endogenous within one unified model.<sup>38</sup> However, this literature has often ignored the fact that how states fight might be as important as how long they fight in explaining settlement outcomes. This paper takes up this challenge and outlines how the decision to target noncombatants versus employing more conventional military tactics affects interstate negotiations during a conflict.

The rationalist literature on war asks why do states fight rather than first settle their disputes around mahogany tables. Fearon points to two explanations for why bargains do not forestall conflicts: the inability of states to credibly commit to their agreements as well as the perverse effects of asymmetric information.<sup>39</sup> Scholars extending his work have relied upon asymmetric information to explain why war exists. They assert that it is a costly signal that credibly reveals otherwise private information that states might have an incentive to distort. Asymmetric information can stem from two sources. Fearon, Wagner and Powell all

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<sup>35</sup> Thomas C. Schelling, *Arms and Influence*, (New Haven, CT: Yale University, 2008).

<sup>36</sup> James D. Fearon, "Rationalist Explanations for War," *International Organization*, 49:3 (Summer 1995), 379-414.

<sup>37</sup> R. Harrison Wagner, "Bargaining and War," *American Journal of Political Science*, (2000), 469-84; Robert Powell, "Bargaining and Learning While Fighting," *American Journal of Political Science*, 48:2 (2004), 344-364; Alistair Smith and Allan C. Stam, "Bargaining and the Nature of War," *Journal of Conflict Resolution*, 48:6 (2004), 783-813; Darren Filson and Suzanne Werner, "A Bargaining Model of War and Peace: Anticipating the Onset, Duration, and Outcome of War," *American Journal of Political Science*, 46:4 (2002), 819-838.

<sup>38</sup> Dan Reiter, "Exploring the Bargaining Model of War," *Perspectives on Politics*, 1:1 (2003), 27-43. See also Scot Wolford, Dan Reiter, and Clifford Carrubba, "Information, Commitment, and War," *Journal of Conflict Resolution*, (Forthcoming).

<sup>39</sup> Though Fearon's observation has been contested by some. Jonathan Kirshner, "Rationalist Explanations for War," *Security Studies*, 10:1 (Autumn 2000), 143-50. Private information may also only lead to war if it is correlated with other factors which make states impatient. See Bahar Leventoglu and Ahmer Tarar, "Does Private Information Lead to Delay or War in Crisis Bargaining?" *International Studies Quarterly*, 52 (2008), 533-553.

independently note that states have an incentive to keep secret their military's actual strengths and thus bargaining parties likely have imperfect information about their odds of winning should a dispute move from embassy meeting rooms to war theatres. Fearon and Wagner further note that states may be differently resolved in a dispute. War may thus allow states to signal their actual resolve in ways that are more effective than cheap talk. The analysis herein extends research on how belligerents signal their resolve to their adversary. It improves the current explanations by taking note of the fact that states employ varied tactics in warfare and that this may actually provide a credible source of information if some tactics are relatively more costly than others.

This section has outlined the state of the literature on civilian victimization, IHL's attempts to limit such behavior and international compliance regarding the laws of war, and the bargaining literature on warfare. It suggests that a model of a state's choice to engage in barbarism may explain certain puzzling empirical regularities. First, it may uncover why states exert effort to create international covenants which a sizeable percentage of signatories then abrogate. Second, it may help clarify why states continue to target civilians even while international law becomes more able to punish perpetrators of such war crimes. Next, it may elucidate why states engage in diverse tactics during combat, making the decision between conventional and barbarous tactics endogenous within a bargaining approach. Finally, it may provide a functionalist account for civilian victimization even though the military utility of such strategies remains contested by academics. I next turn to an account of war crimes as a signaling mechanism based on the widely held belief among scholars of civilian victimization that this tactic is ineffective.

## **Modeling Civilian Victimization under IHL**

This section outlines a model of the effects of criminalizing behavior in war. It presents a formal model where the strength of IHL, measured in the costs associated with committing a war crime, is a variable. Comparative statics are presented for when international law is relatively ineffective and when war crimes are very costly acts. Paradoxically, this model demonstrates that as IHL becomes more able to punish war criminals, resolved states might specifically use war crimes to signal their type.

In the model of IHL, a state can either have high or low resolve. This reflects that resolve is variable within conflicts and among actors. The same state may care more or less about a particular issue in dispute. Different issues have differing levels of saliency for a given actor, affecting a belligerent's resolve. Treating resolve as variable is also justified as it is a common assumption used within the bargaining literature of warfare. For example, Wagner and Fearon both discuss the role of state resolve in a conflict affecting bargaining outcomes.

Resolve is a relational concept. It is measured by comparing the resolve of one party to that of another. The model captures this comparative quality by assuming that there are two states, one of whom can take an action to signal its resolve and a second which can interpret this signal. The signaling state can either have resolve which is higher or lower than the interpreting state which is assumed to possess average resolve. This is a simplifying assumption which nonetheless captures the vast majority of interactions. The only case not considered within this game structure is when both belligerents feel that the issue in conflict is equally salient.

The model assumes that the resolve of the states on a particular issue is exogenously given. A move by nature represents this within the model. Therefore, I do not examine cases

where states can manipulate their own level of resolve. This may abstract some from reality.<sup>40</sup> For example democracies may be more effective in conflict because making public threats may generate audience costs which then force them to be more resolved in a conflict.<sup>41</sup> The role of audiences in tying elite's hands may also allow some non-democratic elites to manipulate their country's resolve during a dispute.<sup>42</sup> However, the choice to manipulate domestic publics is likely still a reflection of some base amount of resolve held by the state on a particular issue. More resolved states are more likely to engage in strategies which increase their audience costs than inherently less resolved states. This is because manipulating audiences and resolve entails risk. By generating audience costs, a state may get a better deal at the negotiating table. Alternatively, a country may forestall the possibility for compromise with its fellow disputants by collapsing the bargaining range. This action thus involves some danger of escalating disputes into conflict and would thus be courted by states more willing to be belligerents in the first place.

The model further assumes that the signaling state's resolve on a specific issue is private information held by that state. The second state thus does not know for sure whether it is dealing with a steadfast foe or an opponent with lesser resolution over the issue in dispute. The applicability of this assumption is somewhat conflict dependent. Most experts would rightly assume that if a conflict broke out between the United States and China over Taiwan that the United State would be correct to assume it was dealing with a highly resolved opponent.

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<sup>40</sup> Behavioral economics research looking at the effects of effort-justification suggest that as people expend cost on activity they are more likely to become more committed to that activity in order to justify their costs. This suggests that fighting or engaging in some other costly activity might actually increase the resolve of both parties. However, this likely affects both states and therefore should not undermine the overall findings. See E. Aronson and J Mills, "The Effect of Severity of Initiation on Liking for a Group," *Journal of Abnormal and Social Psychology*, 59 (1959), 177-181.

<sup>41</sup> James Fearon, "Domestic Political Audiences and the Escalation of International Disputes," *American Political Science Review*, 88:3 (1994), 577-592; Michael Tomz, "Domestic Audience Costs in International Relations: An Experimental Approach," *International Organization*, 61:4 (2007), 821-840.

<sup>42</sup> Jessica L. Weeks, "Autocratic Audience Costs: Regime Type and Signaling Resolve," *International Organization*, 62:1 (2008), 35-64.

However, it is reasonable to believe that in the vast majority of conflicts states have at best ambiguous information about their opponent's resolve. Clausewitz famously commented on the ambiguity of information inherent to all war, writing, "Lastly, the great uncertainty of all data in war is a peculiar difficulty, because all action must, to a certain extent, be planned in a mere twilight, which in addition not unfrequently—like the effect of a fog or moonshine—gives things exaggerated dimensions and an unnatural appearance."<sup>43</sup> Moreover, private information over resolve was a prominent feature of both world wars. The British sent unclear diplomatic messages during the lead up to World War I resulting in Germany questioning Britain's commitment to the lowlands, making the Schlieffen plan appear more attractive.<sup>44</sup> Historians also note that when deciding to invade Poland, Hitler believed that France and Britain would concede as they had during the Czech Crisis.<sup>45</sup> Instead, this episode began World War II. It therefore follows that the model treats the resolution of the first state as unknown to the second state.

The model further presupposes that there are benefits to being perceived as having more relative resolve during bargaining. Resolve and expected bargaining outcomes are often treated as correlated. More highly resolved states should expect to receive more of a bargained over good than relatively less committed parties. This stems from the fact that resolve relates to bargaining reservations. In other words, states with higher resolve are also likely to have reservation points such that they are willing to concede less and demand more in negotiations.

This view is consistent with treatment in the bargaining literature both during crises and the lead

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<sup>43</sup> Clausewitz, 104.

<sup>44</sup> Michael R. Gordon, "Domestic Conflict and the Origins of the First World War: The British and the German Cases," *The Journal of Modern History*, 46:2 (1974), 191-226.

<sup>45</sup> A.J.P. Taylor, *The Origins of the Second World War*, (New York, NY: Simon & Schuster, 2005), 219-220. See Norrin Ripsman and Jacks S. Levy, "Wishful Thinking or Buying Time? The Logic of Appeasement in the 1930s," *International Security*, 33:2 (2008), 148-181 for a discussion of how Britain viewed appeasement not as a war avoidance strategy but as a war preparation strategy.

up to war.

Regardless of type, high and low resolve states both have an incentive to appear as highly resolved.<sup>46</sup> The fact that asymmetric information exists over type produces incentives for low resolved states to bluff if they can pull it off. A state's bargaining partner is thus suspicious when the first state makes claims of being highly interested in a disputed issue. Therefore, assertions of high resolve must be accompanied with a credible signal to be believable. Credible signals require some form of costly action that is not available to the unresolved type of state. A bargaining partner is unlikely to find claims of high resolve sufficiently believable as these merely represent cheap talk due to a state's incentive to distort their quality.<sup>47</sup>

The final assumption the model is that states incur different costs for sending a cost signal. Specifically, more resolved states should suffer relatively fewer costs associated with their signal. This signal should be comparatively more burdensome on states lacking determination in a dispute. The costs of fighting dirty stem from three potential sources. There are the sunk costs from engaging in military operations that harm civilians. These include fueling the planes and providing the ordnance, for example. Then there are the *ex post* costs that can be legally applied. IHL and judicial proceedings represent this later type. Finally, there are political costs that domestic societies place on violators of international law. IHL may be directly related to domestic political costs as it provides a forum to publicize and politicize wrongdoing during warfare. The costs of ugly warfare are thus an interesting hybrid of tying one's hands and upfront

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<sup>46</sup> See Branislav Slantchev, "Feigning Weakness," *International Organization*, 64:3 (2010), 357-388 for a discussion of cases where the stronger party might not have an incentive to represent itself as such. This analysis could equally be applied to cases of resolve as well. However, I assume that my model occurs after war has already been initiated and thus under Slantchev's model, the stronger state then has an incentive to be seen fully as such.

<sup>47</sup> For models where "cheap talk" can prevent war see Anne E. Sartori, "The Might of the Pen: A Reputational Theory of Communication in International Disputes," *International Organization*, 56:1 (2002), 121-149; Kristopher W. Ramsay, "'Cheap Talk' Diplomacy, Voluntary Negotiations, and Variable Bargaining Power," *International Studies Quarterly* (Forthcoming).

sinking of costs.<sup>48</sup>

States that are more resolved likely suffer less from these judicial and political costs. First, resolved societies are less likely to hold their leaders and officials responsible for war crimes and thus the domestic audience costs are lower. For example, following the war crimes tribunals at the close of World War II, a movement developed within Japan to reduce sentences and parole convicted violators of the laws of war. In Japan, this parole-for-war-crime movement was a populist reaction against the Tokyo Trials and consisted of 10 million members.<sup>49</sup> Once war criminals were paroled, Japan was also willing to politically rehabilitate offenders. While some societies have suffered war criminals amongst their midst, not all societies have supported the actions of their violators. For example, war responsibility has been handled dramatically different in Germany. While the Japanese have developed history curricula which whitewashes the atrocities committed under imperial order<sup>50</sup>, Germany has memorialized its actions during the war, creating a historical memory of responsibility. For instance, Holocaust denial is a criminal offence in Germany. This divergent handling suggests that different states will exact different costs from those who victimize civilians during wartime.

Nor are differential costs merely a reflection of national and cultural differences. Different conflicts fought by the same state can generate very divergent political reactions to civilian victimization. These differences further map on to levels of resolve. A classic example is the contrasting civilian interpretations of U.S. tactics during World War II and Vietnam. Despite the fact that dropping devastating incendiary devices and napalm is functionally equivalent,

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<sup>48</sup> James D. Fearon, "Signaling Foreign Policy Interests: Tying Hands versus Sinking Costs," *Journal of Conflict Resolution*, 41:1 (1997), 68-90.

<sup>49</sup> Awaya Kentaro, "The Tokyo Tribunal, War Responsibility and the Japanese People," *JapanFocus*, <http://www.japanfocus.org/-Awaya-Kentaro/2061> (Accessed 10 December 2010).

<sup>50</sup> Martin Fackler, "60 Years After Its Defeat, Japan Still Struggles with Responsibility," *New York Times*, (15 August 2005), <http://www.nytimes.com/2005/08/14/world/asia/14iht-VJ-Japan.html> (Accessed 10 December 2010).

discussions of war time atrocities within the United States predominantly focus on U.S. operations within Vietnam. Domestic discussions of the Vietnam War have also focused on ambivalence towards the conflict as not reflecting core U.S. national interest. In contrast, World War II has been treated as a relatively a necessary and just war. The history of congressional investigations of both wars illuminates this sharp contrast. The Truman Committee and its successor the Senate War Investigating Committee confined their inquiry to how the government could save money on the war effort, examining wartime appropriations like the Spruce Goose but not the overall aim and conduct of the conflict. The Fulbright Hearings instead included testimony from John Kerry about allegations of US war crimes made by veterans against the war. The differences suggest that when a society views a particular conflict as necessary, it is more willing to adopt a *c'est la guerre* view and less willing to criticize civilian victimization. When the same state is less resolved, criticism of the conflict and tactics therein multiply.

Judicial costs for resolved and unresolved states are also likely variant, with resolved states paying relatively less. States place different amounts of emphasis on crafting legal defenses for their actions during warfare. It may be that more resolved states are more able to produce these justifications than other types of states. For example, the Bush Administration torture memos, though extremely dubious, may represent the efforts of a resolved state to explain away its actions lessening the legal costs it might face. However, these actions do not make barbarism a costless course of action as the domestic uproar surrounding water boarding demonstrates. These actions therefore demonstrate that resolved states will still face some cost for their actions, but that they may be able to develop strategies that relatively lessen these costs when compared to unresolved states.

The model presented therefore build off simple costly signaling models. I assume there

are two states. The first state has private information over its resolve which it can attempt to convey to the second state. I argue that war crimes are a costly signal states may use once war has already begun. Thus, choosing to fight dirty or not may be a reflection of resolution type under certain conditions explored in the model. The costs of violating the laws of war are differential depending on the type of state. The second state does not witness what type of state it is dealing with, but can make inferences based on the actions of the first state, including their record for war crimes. I assume that war crimes always possess some positive cost for those who commit them based on scholarly examination of the efficacy of civilian victimization. When IHL has not highly criminalized this behavior, this cost might be relatively low but launching military missions still imposes some expense. The strength of IHL has been changing, however. This paper thus examines cases where IHL imposes additional burdens beyond mere operational costs on war criminal states. I now turn to constructing a formal model based on the previously elucidated assumptions.

### **The Model**

There are two actors, State 1 and State 2. Furthermore, State 1 can exhibit differential resolve. A proportion  $p$  of State 1s is resolved, while the remaining  $1 - p$  is unresolved. Throughout the paper, the superscripts  $R$  and  $U$  will correspond to the resolved and unresolved types of State 1 respectively. The percentage of resolved and unresolved states within the game is exogenously determined by nature and common knowledge.

State 1 can choose whether or not to commit a war crime. There are costs associated with victimizing civilians. Let  $D^t$  represent the costs of fighting dirty, where  $t = R, U$ . Also,  $D(M, J, P)$ , where  $M$  is the costs associated with launching military operations against noncombatants and  $J$  is the costs imposed by IHL.  $P$  represents the domestic political costs and

$P \propto J$ . Since military operations always involve some cost, if a state chooses to engage in war crimes  $D > 0$ . This is true even if domestic political and judicial costs do not exist. The model represents a strengthening of IHL by increasing  $J$ . Therefore, as IHL becomes stronger, the costs of fighting dirty will proportionally increase. If a state does not violate international law, then  $D = 0$ . By assumption,  $D^R < D^U$ .

States generally negotiate and fight over the distribution of some good, whether it be territory, prestige, or some other diplomatic or tangible quality states compete over. Since states are bargaining over the division of this one good, I represent this by a pie equal to 1. State 2 then has a choice of whether to offer State 1 more or less generous terms. Let  $\theta$  represent this offer where  $\theta = High\ or\ Low$  and  $0 \leq \theta \leq 1$ . This means that if State 1 were to accept an offer, it would receive  $\theta$  and State 2 would get  $1 - \theta$ . I assume that a high offer is more than a low offer and use H and L to denote each type respectively:  $\theta^H > \theta^L$ .

Next assume State 1 has a final move. It can accept or reject the offer made by State 2. If it accepts the offer, relative payoffs are determined by the size of the offer. If an offer is rejected, the belligerents continue to fight. For simplicity's sake, I employ a take-it-or-leave-it game where rejection results in the states fighting to the bitter end. War thus becomes a costly lottery. Assume that State 1 wins the war with probability  $q^t$  and State 2 wins with probability  $1 - q^t$ , where  $t = R, U$ . I further assume that resolved states are more likely to win relative to the unresolved counterparts as war effort is a widely acknowledged function of state resolution.<sup>51</sup> Therefore,  $q^R > q^U$ . Because war wastes resources in the division of a good, I represent this by a cost function,  $C$ . If a state wins, it receives  $1 - C$  as a payoff. Alternatively, if it loses, the state

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<sup>51</sup> See for example Merom (2003). This was a common explanation for why the United States lost in Vietnam and withdrew from Somalia. Alternatively, literature explaining democratic victory in warfare still suggests that democracies win most wars they start against autocracies due to resolve. Dan Reiter and Allan C. Stam, *Democracies at War*, (Princeton, NJ: Princeton University Press, 2002).

receives a payoff of 0.

Let a player function  $P(\emptyset)=\text{Nature}$ ,  $P(t)=\text{State 1}$ ,  $P(t, \text{War Crime})=P(t, \text{No War Crime})=\text{State 2}$ ,  $P(t, \text{War Crimes}, \theta)=P(t, \text{No War Crimes}, \theta)=\text{State 1}$  determine the order of moves within the interaction. I define the utility of player  $i$  by the Bernoulli payoff function  $U_i^t$ . I assume that players are rational actors with well-ordered von Neumann and Morgenstern preferences. This suggests that their preferences are complete, transitive, and that irrelevant alternatives have no bearing on the ordering as well as the players prefer a lottery with a higher expected payoff to a lottery with a lower expected payoff. The following represent player 1's utilities reflecting specific terminal histories of the game:  $U_1^t(t, \text{War Crime}, \theta, \text{Accept}) = \theta - D^t$ ,  $U_1^t(t, \text{No War Crime}, \theta, \text{Accept}) = \theta$ ,  $U_1^t(t, \text{War Crime}, \theta, \text{Reject}) = ((q^t)(1 - C) + (1 - q^t)(0)) - D^t$ , and  $U_1^t(t, \text{No War Crime}, \theta, \text{Reject}) = (q^t)(1 - C) + (1 - q^t)(0)$ .

State 2's utilities reflect whether it was able to successfully forestall conflict and whether it did so as cheaply as possible. Given specific terminal histories of the game, State 2 gets the following payoffs:  $U_2(t, \text{War Crime}, \theta, \text{Accept}) = U_2(t, \text{No War Crime}, \theta, \text{Accept})1 - \theta$  and  $U_2(t, \text{War Crime}, \theta, \text{Reject}) = U_2(t, \text{No War Crime}, \theta, \text{Reject}) = (q^t)(0) + (1 - q^t)(1 - C)$ .

Finally, I assume an information asymmetry exists between the states. State 1 knows its type as well as the type of State 2 while State 2 only knows its own type. This is a simplifying assumption because in many instances parties will know their own type only. Let  $I_i$  represent player  $i$ 's information partition. Since State 1 knows its own type it follows that  $I_1 = (\{\text{Resolved}\}, \{\text{Unresolved}\}, \{\text{Resolved, War Crimes}, \theta\}, \{\text{Unresolved, War Crimes}, \theta\}, \{\text{Resolved, No War Crimes}, \theta\}, \{\text{Unresolved, No War Crimes}, \theta\})$ . Player 2 having less information has the following partition:  $I_2 = (\{t, \text{War Crimes}\}, \{t, \text{No War Crimes}\})$ . Figure 1

diagrammatically represents this interaction. It highlights a model of war crimes in which they might be used as a signaling mechanism between states currently embroiled in warfare.

Since the model includes a variety of parameters, there exist multiple equilibria. For example, there are cases where war would never be prolonged, where war carries on to the bitter end represented by the destruction of the losing belligerent, and where some types of states prefer continued war over some types which prefer accepting a lousy settlement but ending the violence. I focus on this last more interesting case where the type of State 1 has a dramatic effect on propensity for conflict and its duration. Specifically, I examine the case where resolved states are willing to only to accept a higher offer, but unresolved states always prefer to avoid more fighting. This condition obtains when the following inequalities are true:

$$\text{Condition 1: } \theta^H - D^R \geq ((q^R)(1 - C) + (1 - q^R)(0)) - D^R \geq \theta^L - D^R$$

$$\text{Condition 2: } \theta^H - D^U \geq \theta^L - D^U \geq ((q^U)(1 - c) + (1 - q^U)(0)) - D^U$$

These conditions shape the outcome in the same way for cases where State 1 does not commit a war crime. This can be seen by adding the relevant  $D^t$  to all sides of the inequality.

### **Case 1:**

#### **Clean Wars with a Non-Credible but still Costly Signal**

These conditions also shape the Nash Equilibrium. I first examine the equilibrium outcome where there is not a credible signal that more resolved states can employ which unresolved states are deterred from using. To find it, I first consider the behavior of State 1. If State 1 is resolved, it has two available strategies under condition 1 where this condition essentially argues that State 1 has a reservation price equal to  $\theta^H - D^R$ . It can optimally accept all offers  $\theta$  such that  $\theta \geq \theta^H - D^R$ . and continue down the war path when  $\theta < \theta^H - D^R$ . Alternatively, State 1 can accept all  $\theta > \theta^H - D^R$ . and reject those such that  $\theta \leq \theta^H - D^R$ . I only consider the strategy in which State 1 chooses to accept when it receives an offer at which it

is indifferent between accepting and fighting in order to use the Nash equilibrium solution concept.

Next, I turn to the strategies of an unresolved state. Under condition 2, an unresolved state 1 is always better off accepting an offer from state 2 than going to war. Unresolved state 1s also have two available strategies. This type of state 1 can accept all offers  $\theta \geq \theta^L - D^U$  and reject all offers where  $\theta < \theta^L - D^U$ . Instead, they can accept all offers when  $\theta > \theta^L - D^U$  and reject the cases where  $\theta \leq \theta^L - D^U$ . Again, attention is paid to the first case as it allows for an equilibrium outcome.

For a signal to credibly separate different types of actors, two conditions must be true. The signal must be differentially costly for the different types. This means that it must be easier for one of them to produce relative to the other. Additionally, the signal must be too costly for one of the types to employ. If both of these hold, a separating equilibrium obtains. However, if they are not both present, a pooling equilibrium exists. This section considers the case where employing war crimes does not allow resolved states to distinguish themselves from their unresolved counterparts. This occurs when the following *Legitimate War Constraint* holds:

$$\textit{Legitimate War Constraint: } \theta^H - \theta^L \geq D^U > D^R$$

When this conditions exists, the cost of a war crimes signal is too low to potentially deter unresolved states from using it.

However, under this case, neither resolved nor unresolved states would commit war crimes. Why? State 2 knows that if it sees a war crime, this does not credibly signal the type of State 1 it is interacting with. Therefore, State 2 will not use this information to shape its decision about what type off offer to provide to the other bargaining party. Instead, it assumes that State 1 is resolved with probability  $p$  and unresolved with probability  $1-p$  regardless of whether a war

crime occurs. State 2 therefore offers the other belligerent  $\theta^M = (p)(\theta^H) + (1 - p)(\theta^L)$  whether or not it observes war crimes. This occurs because State 2 in equilibrium must hold consistent beliefs and a belief that war crimes credibly convey information is inconsistent in this case. Since war crimes are not costless actions and since they do not affect the second state's actions whatsoever, the first state never has an incentive to employ them in equilibrium.

State 2's offer of  $\theta^M$  has the following characteristics:  $\theta^H \geq \theta^M \geq \theta^L$ . State 2 has no incentive to deviate from  $\theta^M$  when the following is true:  $1 - \theta^L \geq (q^R)(0) + (1 - q^R)(1 - C) \geq 1 - \theta^H$ . When these are both true in the non-credible signal case, the Nash equilibrium results in neither type of State 1 committing a war crime. State 2 then offers a middling offer which is rejected by resolved states and accepted by unresolved. This suggests that states will still war, but that these wars will be fought between soldiers on the battlefield and that these soldiers will not purposefully harm civilians. Next, I turn to the case where victimizing civilians produces a separating equilibrium and wars without limits against targeting noncombatants.

**Case 2:**  
Dirty Wars with a Credible Signal

Disproportionately barbarous wars result when a separating equilibrium can be attained. In this equilibrium, resolved states have an incentive to reveal their type by committing war crimes while unresolved states accept receiving a lower offer and have no incentive to commit war crimes even if the use of war crimes always results in a state being offered the highest offer. This occurs when the following condition is true:

$$\text{Criminal War Constraint: } D^U \geq \theta^H - \theta^L > D^R$$

This condition could be termed a *Criminal War Constraint*, and it indicates that the cost of fighting dirty for unresolved states is so high that they have no incentive to “bluff” about their type by targeting undefended civilians. This implies that the cost imposed by IHL has a dramatic

affect on state actions in war. If IHL is relatively non-credible, war crimes will be unlikely.

However, as IHL rises the costs for violating the norms of noncombatant immunity civilians may actually become more victimized.

Finding the Nash equilibrium is similar to the steps used in the first case. Again, let State 1 employ the following strategy: it accepts all  $\theta \geq \theta^H$  and rejects all  $\theta < \theta^H$  when resolved. When unresolved, it accepts all offers such that  $\theta \geq \theta^L$  and rejects the cases where  $\theta < \theta^L$ . Again, this ignores the secondary strategies which are incompatible with Nash equilibrium analysis.

Since State 2 recognizes that war crimes are a credible signal, it will believe that when it sees a war crime it is dealing with a resolved state. When it does not witness a war crime, it will assume that its bargaining partner is unresolved. This is a logical belief to hold since condition 4 indicates that unresolved states have no incentive to commit war crimes even if doing so means they will be offered the high amount. State 2 has no incentive to deviate from the strategy consistent with this belief. For example, if it offers states that commit no war crimes a high offer, it will be worse off since these states would have accepted a smaller amount. If it offers states that commit a war crime a low ball offer, it will result in war since these states have a high reservation price. This is a worse outcome for State 2 provided State 2 is best off when it wants to avoid war with the resolved type of state.

Finally, State 1s which are resolved will commit war crimes while unresolved states will not. Even if paper tigers do harm the civilian population of its enemy, they will receive a lower payoff than accepting a pittance of an offer based on their incentives. Thus, the equilibrium obtains where wars become more barbaric when the cost of committing a war crime is sufficiently large to foster self-induced revelation of type by State 1.

## **Conclusion**

Why are these results paradoxical for IHL? Since the costs of fighting dirty are a function of the strength of IHL, as IHL becomes stronger, using war crimes as a signal becomes more credible. The development of the ICC and the slow establishment of the norm of trying those who violate the standards of just warfare may push the cost of committing a war crime above the pooling equilibrium cutoff point noted above. This suggests that even if committing a war crime has no other military strategic advantage, it might still be useful when states have hidden qualities they would like to signal to another. Therefore, the best case scenario where war crimes are not productive military tactics still implies that there are functional explanations for these violations. This may explain why the research on the efficacy of targeting civilians appears irreconcilable. While some authors have argued that war crimes are useful, others suggest that these tactics backfire. The answer may in fact be both are true. War crimes may be useful as a signal of information in political discourse but not a tactical asset to soldiers.

What else does this model imply about the character of war? The high cost equilibrium outcome suggests that when a large and demonstrative war crime occurs the war should come relatively quickly to an end with the criminal state receiving a better outcome than it would have absent this violation. Under this interpretation, the quick Japanese surrender after the bombing of Hiroshima and Nagasaki can easily be understood even if the Japanese had not feared further bombings. Therefore, war crimes may be especially likely just prior to the termination of protracted wars. This is because protracted wars are especially likely to need a new method for revealing information to successfully conclude a signaling process.

This model presents a depressing finding for IHL. It suggests that this institution may actual result in more war crimes being committed under certain circumstances. Thus, a paradox exists. As IHL increases the costs associated with barbarism, during a period of its development

it may actual produce more barbaric treatment towards civilians. The model demonstrates when war crimes are low cost but not costless they are not credible signals and thus neither resolved nor unresolved states should use them. However, when the cost becomes sufficiently high that it is in the interest for resolved states to signal their determination and less resolved states to accept a low offer without attempting to bluff about their type, targeting noncombatants becomes an equilibrium choice for resolved actors.

While gloomy, the question remains: do these results suggest that IHL will always produce more barbarism? Interestingly, within the model, hope exists for a second pooling equilibrium in which no war crimes will occur as IHL becomes even stronger. If the cost of committing war crimes meets the following constraint, which I term a *Just War Constraint*, then resolved states will be better off accepting a lower offer and not committing war crimes than committing war crimes and receiving a higher offer:

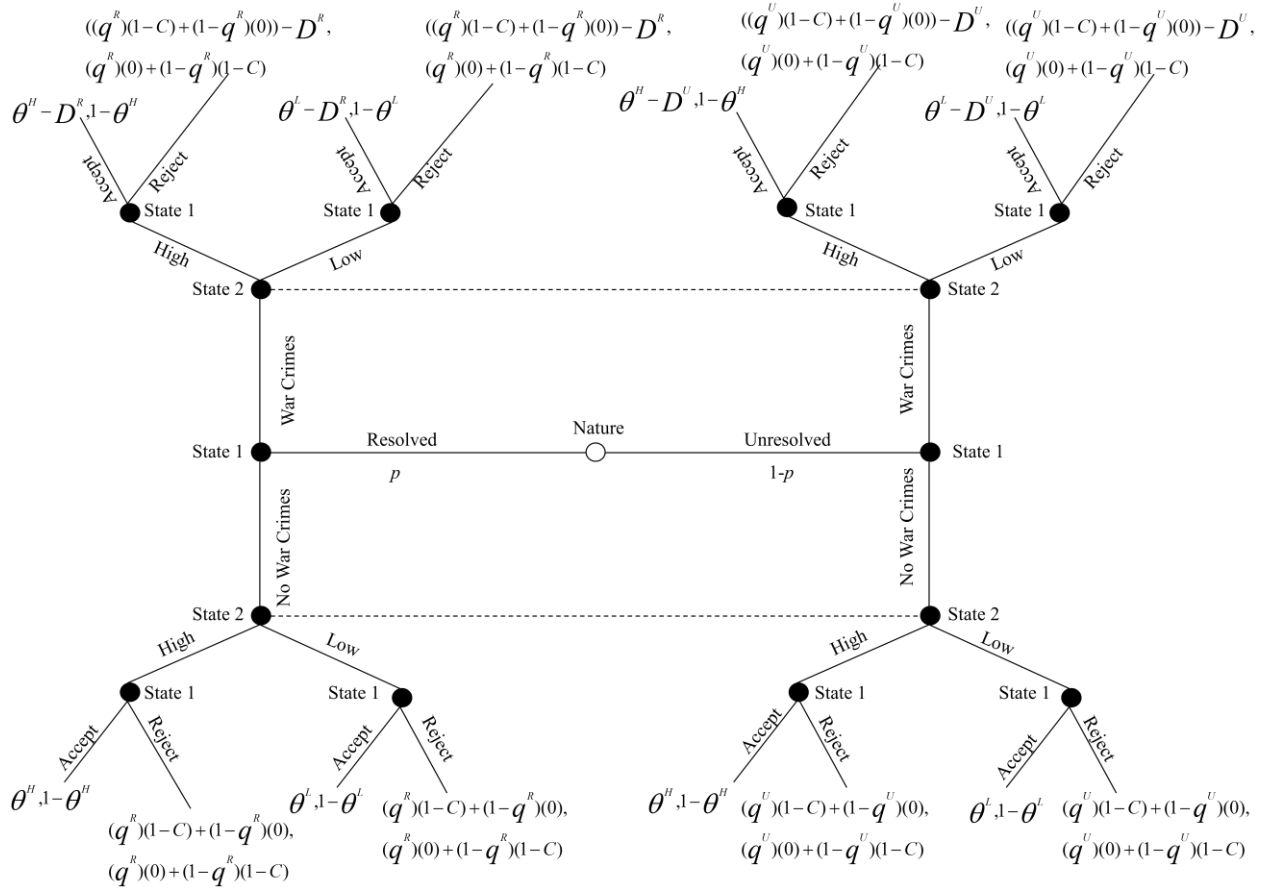
$$\text{Just War Constraint: } D^R \geq \theta^H - \theta^L$$

Since  $D^R < D^U$ , less determined states still have no interest in using war crimes as a signaling device.

The war crimes paradox is potentially a transitional problem provided that IHL can eventually impose costs sufficient to surpass this Just War Constraint. In that event, wars may become more consistently humane. However, IHL to date does not appear strong enough to achieve this result as civilians continue to be purposely victimized in many conflicts. Though this paper has presented a cynical result, supporters of the principles enshrined within IHL should continue to attempt to strengthen this regime. If IHL can be made sufficiently strong, it may be able to move out of a developmental phase where results that are contrary to its intentions emerge.

## Appendix of Figures

Figure 1: IHL as a Signal



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