The Strategic Use of International Criminal Tribunals

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1. Introduction

Since 1945, civil wars[1] have caused the death of more than 16.2 million people, five times more the toll of interstate wars.[2] The peace studies literature holds that military as well as informational asymmetries that are present in any war lead to more dire consequences in civil wars because of the nature of the actors involved. Rebel groups 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.[3] This military imbalance "compels rebels to resort to unconventional and unlawful means and methods of warfare as the only way to redress the military and economic imbalance they face."[4] This often forces the government to resort to unconventional and unlawful methods of warfare as well.[5] The recourse to unconventional methods of warfare exacerbates the problem of informational asymmetry. Engaging in direct battle often reveals information regarding the strength, capabilities, and resolve of each faction.[6] 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 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.

In the '90s, international criminal tribunals emerged as a consequence of civil wars and were designed to specifically redress the violence perpetrated against civilians during such wars. The intended goals of international criminal tribunals were to establish justice and to some extent peace by punishing those parties most responsible for violating international humanitarian and human rights law.[7] As we shall see, the design of these tribunals has been inspired by various legal and political views and, more often than not, has been the outcome of political compromises. In this paper, I explore the problem of designing an international criminal tribunal from a strategic point of view. Specifically, I examine whether or not an international criminal tribunal can provide warring parties with the right incentives to end violence and successfully negotiate for peace. This project can be viewed as an extension of an idea originally put forth by Anthony D'Amato during the Yugoslavian war (see below).[8]

The main idea is that an international criminal tribunal can be viewed as a devise which imposes costs and provides rewards for the warring parties. By doing so, it may alter the profitability of the various options available to warring parties and change the parties' choices. Thus, the problem of this paper becomes that of assessing whether or not there exists a feasible system of costs/rewards which would induce the desired outcome. A key idea is that the determination of which systems of costs/rewards are feasible depends, in an essential way, on the political and legal views underlying the institution of the international criminal tribunal.

Before getting into the details of the project, an observation is probably in order. The tribunal's punishing power, while important, is not necessarily the key factor. In particular, the

idea that the ability of deterring behavior is directly correlated to the tribunal's punishing power has tragically been proven wrong by the war in the former Yugoslavia (e.g. genocide in Srebrenica). Despite the efforts by the United Nations Security Council (UNSC), who imposed the International Criminal Tribunal for the former Yugoslavia (ICTY) and endowed it with Chapter VII powers,[9] the war kept going on in the most violent way.

1.1 D'Amato's proposal

From the perspective of this paper, a very instructive debate took place during the Yugoslavian war. International lawyer Anthony D'Amato cautioned the international community not to issue indictments for complicit leaders in tandem with ongoing peace talks. He 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*. The rationale for this model is that "exact justice" can be attained among individuals in conflicting situations without necessarily involving a court. This is so because the DTL model creates the right incentive for opposing parties to bargain for a mutually beneficial agreement in order to avoid that neither 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.

The novelty of D'Amato's proposal is that the DTL model be applied to the international management of civil wars. This is a far reaching extension of the classical DTL model for two reasons: (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 same: just like in civil matters, the court is not an actual threat, but only a potential threat. Practically, the parties' threat of calling the court determines the parties' "outside options" of the bargaining process, that is, what they would obtain if they did not settle among themselves.

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 below).[10] 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, 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, the right to petition an international court is a right that is not afforded to rebels under any circumstance. 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 sections.

1.2 The approach of this paper

This paper is devoted to exploring the validity of D'Amato's idea. More generally, the aim is to introduce 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.

Formally, I will describe civil wars as games. I will start off with the two main players, the rebels and the government. These players can either decide to fight -- either by using

conventional methods or unconventional methods -- or bargain for peace. As we shall see, additional actions may or may not be available depending on the legal regime in place. Payoffs are determined by the underlying structural conditions of the civil war.[11] A key observation is that the type of legal system in place affects the game being played because it affects the options available to the combatants as well as their payoffs. For a quick example of this, let us consider two scenarios, A and B, which differ because the rebels are recognized as an international legal subject in A but not in B. Thus, in scenario 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 in A, a player has an action ("call the court") which is not available in B. All the more, the presence of this action in A alters the players' incentives (with respect to scenario B) as follows: the value of the action "commit crimes" for the government is 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. While the determination of the actual outcomes will depend on the specifics of each situation, the observation is fully general: *different legal systems produce different incentives for parties to commit crimes, to bargain to avoid involvement of the court, and to bargain for a durable peace*. As a consequence, in many circumstances different legal systems will lead to different outcomes.

The paper unfolds as follows. In Sections 2 to 4, I will examine extant legal regimes coming out of the principles of state sovereignty, human rights and cosmopolitan rights, and DTL, respectively. The main goal of these sections is to see how the specific design features of each of these regimes might exacerbate or mitigate combatants' incentives to fight or bargain for peace. In Section 5, I will provide some general considerations on the formal study of civil wars

as well as on the impact that different legal regimes might have on the outcomes of these wars. These considerations along with the findings of the literature on bargaining for peace (Section 6) allow me to identify a set of assumptions that describe civil wars as games. In Section 7, I provide an example of a civil-war game. This is a game with asymmetric information, which formalizes some of the problems devised by bargaining for peace literature. I then study the possible outcomes achievable in this war game under alternative legal regimes. The analysis supports D'Amato's thesis that, *under certain circumstances*, the DTL model may be the most efficient model for achieving both justice and peace during civil wars. Without any pretense of realism, the example is suggestive of the phenomena that took place during the war in the former Yugoslavia and that led D'Amato to foresee both the failure of negotiations (those that took place prior to Dayton Accord) and the fact that the International Criminal Tribunal for the former Yugoslavia (ICTY) would have exacerbated the conflict.

2. International criminal tribunals within the model of State Sovereignty (SS)

The traditional idea of state sovereignty is that it is states' prerogative to decide how to govern their territory and citizens without any outside interference. External entities such as an international criminal tribunal can get involved in a state's affairs only if that state calls for their intervention. Clearly, in situations of conflict between the state and a rebel group, the regime of SS produces an asymmetry as only the state has the right to call an international court. The implications that the principle of SS has on the potential effectiveness of instituting an international criminal tribunal are straightforward. In fact, the main consequence of this asymmetry is that the international court, when in place, becomes an "instrument" used by states

in order to secure their interest. Oversimplifying a bit, the state will not call the court in the event that it is the sole violator of the law and rebels cannot call the court to hold the state accountable. Thus, within the realm of SS, justice is one-sided and the duty to prosecute can be partially fulfilled at best. In fact, justice is likely to be fully rendered only in two circumstances: 1) when the state is not culpable but other parties are; or 2) when the state's interests are aligned with those of the international criminal tribunal, in which case it would willingly subject state officials to national or international prosecution. In all other cases, an international criminal tribunal would have its hands tied.

Similar considerations can be made about the ability of this regime to induce opposing parties to bargain for peace. Since the state is the only entity that can call the court, this regime generates a bias toward the government and makes insurgents more susceptible to prosecution than government forces. This is extremely problematic because the state 1) will have an incentive to commit crimes as part of their military strategy to fight off insurrection[12] 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 regime of SS increases the government's incentives to go to war. In sum, peace is unlikely to occur and the commission of international crimes is likely to increase.

2.1 Current interpretations of the principle of SS

Over the years, the concept of SS has evolved from the very strict interpretation outlined above to a more permissive stance, whereby external entities can interfere to a certain extent 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. A case in point is the International Criminal Court (ICC), which is governed by the Rome Statue.[13] The ICC was established in 1998 and entered into force on July 1, 2002 after ratification by sixty countries. It is the first permanent treaty based international criminal court whose main objective is to end impunity for the perpetrators of the most serious crimes that affect the international community.[14]

Even with the introduction of the ICC, it is still the state that determines how to achieve justice. In fact, while the ICC can attempt to intervene, the state is under no obligation of cooperating with the ICC. According to Article 87 (Rome Statute), 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 (2003) argues that there is no enforcement power to make states cooperate by way of acts or countermeasures put forth by the Assembly of States, nor by way of the Security Council stepping in and possibly imposing sanctions. He further questions why the Security Council should not act under Chapter VII powers especially when a states refusal to cooperate could amount to the threat to peace and security. Granted, the ICC does not exclude such possibilities, but it does not explicitly specify them in the statute.[15] The lack of countermeasures in the event that states fail to cooperate with the ICC is testimony to the state centric approach taken by the Rome Statute to deal with matters of international justice: it is the state's prerogative to decide whether or not to cooperate with the court. All the more, the principle of complementarity makes the ICC a subsidiary or complementary to national courts, with the priority in the exercise of jurisdiction given to national courts.[16]

This situation severely hinders the ICC's ability of rendering justice. Practically, the cooperation of the states is a necessary condition for the ICC to exercise its own jurisdiction effectively. Sometimes, this cooperation may come at the price of justice itself: the ICC 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. Branch (2007) observes that the Ugandan government was engaged in overt violence against civilians in Northern Uganda during Operation North in 1991-1992. Yet, the government solicited the ICC to prosecute the Lord's Resistance Army (LRA) for war crimes and crimes against humanity. The ICC responded by indicting five of the top commanders of the LRA only. According to Branch, "[the] Ugandan government has threatened several times to withdraw its referral to the court, implying that it will cease cooperation if its own military becomes subject to prosecution, which is a concern for the ICC, since the termination of Ugandan cooperation could effectively close down the investigation."[17] While the ICC acknowledged the crimes committed by the government, it claims that those of the LRA "are far more serious than the crimes of the [Ugandan People Defense Force] UPDF," thus prosecuting the LRA only.[18] In sum, even with the more relaxed interpretation of SS, international criminal tribunals are still an instrument used by states to pursue their own interest. As a consequence, except for the cases discussed at the beginning of Section 2, these courts will be ineffective in rendering full justice and inducing peace.

3. International criminal tribunals within the Human Rights/Cosmopolitan Rights (HR/CR) model

Two monumental events changed the face of state sovereignty in the eyes of international law: the human rights movement, which heralded the notion of crimes against humanity, and the prevalence of civil wars, which became the dominant type of warfare after WWII. With the notion of crimes against humanity,[19] 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; a principle that marks a dramatic rupture with the idea of state sovereignty. At first, this principle was mitigated by the proviso that, crimes against humanity could only be punished if committed in times of warfare. As the human rights movement gained momentum, this nexus requirement has disappeared. Nowadays, crimes against humanity are punishable without any reference to the circumstances under which they were committed. The idea of sovereignty can no longer justify state impregnability, as 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.

With the emergence of these principles, the idea of state sovereignty has been completely redefined. 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 either states or other actors violate human rights. The main idea underlying these changes 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. This is very much in line with the idea of global cosmopolitan rights, which stipulates that sovereignty

resides with individuals as well as states: if a government fails to protect its citizens, then others have an obligation to intervene.[20] Because of this, I will treat the human rights view and the cosmopolitan rights view simultaneously, when I will formalize these ideas.

The chief example of an international criminal tribunal designed according to the principles of HR/CR is the tribunal implemented in Yugoslavia (ICTY). Consistent with what is described above, one of the main features is the court's ability to automatically intervene upon any infraction of the law, without any solicitation by the state. To ensure that state perpetrators would be brought to justice, such legal regimes are endowed with the necessary legal powers and jurisdictions that serve to constrain any state from neither derogating from the duty to prosecute nor affecting the tribunal's ability of prosecuting culpable parties. Specifically, human rights/cosmopolitan rights regimes like 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.[21]

D'Amato noticed two potential drawbacks of these models. First, there is tension between pursuing peace and justice simultaneously. D'Amato observed that, under the legal powers and jurisdictions afforded by the human rights legal regime, if the leaders needed to negotiate a peace agreement are prosecuted, they will have no incentive to bargain for peace and will continue to fight. Second, if atrocities have already taken place, the punishment imposed under these regimes might outweigh all the potential gains achievable from bargaining. In such circumstances, "all out war" would be left as the only option. Thus, it appears that HR/CR regimes are more likely to ensure the goal of justice than that of peace.

4. International criminal tribunals within the Domestic Tort Litigation (DTL) model

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 that of human rights/cosmopolitan rights, the idea of the domestic tort litigation model would fall somewhere in between. The domestic tort litigation model shares with the model of state sovereignty the feature that international courts cannot intervene without the request of one of the parties directly involved in the conflict, but departs from it in that not only the state but all parties involved in the conflict are given the right to petition international courts.

Customarily, the domestic tort litigation model pertains to the sphere of domestic law, and its application to the sphere of international law constitutes a big novelty. In order to appreciate its potential, it will be convenient to reverse the usual approach to the problem of civil wars. During civil struggles, the main goal is to either prevent the onset of armed conflict or to put an end to it if it is already ongoing. Ideally, one would like that the opposing parties settle their disputes at the bargaining table rather than on the battlefield. Usually, this is pursued by trying to provide the opposing parties with the right incentives to bargain. This is done, however, *within a given institutional context*. Extending the principles of the DTL model to the international management of civil wars flips the terms of this approach: given the goal of achieving peace, one wants to create an institutional environment that would lead opposing parties to bargain rather than go to war.

D'Amato observed that this motive is the essence of the DTL model in domestic disputes. Under DTL, an injured party claims redress for injuries caused by another person. 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."[22] The dispute can be settled by means of negotiations, rather than by means of a legal action. The salient features of this system are that: (1) The terms of the law of negligence determine the parties' bargaining opportunities by determining what they would get if they did not settle; (2) The potential enforcement by a court of the law of negligence creates the incentives for the parties to bargain; and (3) The court is an external entity with respect to the opposing parties, a set-up guaranteeing that the court would serve the purpose of the law rather than the interests of any of the parties. The last feature, in particular, has an important implication: if the DTL has to be extended to the management of civil war, then *a court has to be managed by the international community* in order to guarantee its impartiality with respect to the opposing parties.

D'Amato looks specifically at the domestic tort litigation procedure and at the law of negligence for guidance in applying these ideas to the management of civil wars. The feature that a court cannot intervene unless solicited by one of the parties involved provides the structure for negotiations: 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.[23] Cases are settled by means of compromise rather than adjudication because the interests of both parties are best served by avoiding the court. Genn (1987) argues that the act of compromise is an efficient solution to the stark difficulties, uncertainties and cost of protracted court proceedings in domestic litigation.[24] 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 'punishment' for negligent parties in the award of damages. This feature might lead some to claim that a system based on these principles might not serve the purpose of deterring future unlawful actions, a concern which is instead of primary importance in contemporary criminal law. On this issue, we refer to Genn (1987), who argues against this view by showing that both deterrence and retribution are important and legitimate functions of the law of negligence.[25] D'Amato's proposal follows the same logic as it explicitly 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. Since patricians had sufficient assets to be able to pay full compensation, the prospect of losing their assets 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.[26] But, as D'Amato explains, these shortcomings are likely to disappear when these principles are applied to the international management of civil wars. In such settings, typically all parties 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.[27] Either way military and political leaders should be deterred from causing injury for fear of future unfavorable ramifications.

The effective transposition of the domestic tort litigation principles to civil wars requires that the same rights would be afforded to all warring parties. In particular, both states and insurgent groups should have the same rights. This implies two things: 1) both state and 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 commensurate to the crimes committed.

By its very construction, the DTL model is symmetric. As such, it has the potential of addressing all of the problems stemming from the asymmetries of the state sovereignty model discussed above. Moreover, by its very design, the DTL aims at creating an environment that enhances the parties’ ability to settle their disputes at the bargaining table. The exact quantification of this feature depends on the details of the model’s implementation; precisely, on the exact quantification of the penalties that the court can impose and on the court’s ability to carry out punishments. In Section 7, we will see that, *under certain circumstances*, the DTL model is likely to outperform the HR/CR model. This occurs when the penalties imposed on the HR/CR model excessively reduce the potential gains from negotiations, thus making war relatively more appealing than settling at the bargaining table.

5. General considerations on the formal study of different regimes

In this section, I am going to describe how to undertake the formal study of civil wars as well as the impact that different legal regimes might have on the outcomes of these wars. I will limit myself to general considerations, and refer the reader to Blake-Amarante (2011) for examples and further details.[28]

5.1 A formal model for civil wars

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. 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 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 coarse description of these options (fighting without committing crimes against humanity, fighting by committing crimes against humanity, etc.) would do. The payoffs associated with the players' choices are determined by the underlying structural conditions of the war.

The second part, B, is a *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 assets G and R dispute over. It

is possible, and allowed in the model, that the two parties value the pie differently (see subsection 5.2).

The key observation is that the war game W and the bargaining game B are interrelated, that is the players' decisions in one game depend on the possible outcomes in the "other" game. In fact, an important ingredient of the bargaining game 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* B *correspond to the players' expected outcomes in the war game* W.

5.2 Asymmetries in the information

Both games, W and B, are games with incomplete information. In game 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 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 the each party has the potential to make. The second source of private information comes from the war game W, as this game determines

the players' outside options in game B. Since W is itself a game with private information, it then follows that the outside options in game 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 7, for an example).

5.3 Modeling 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 the warring parties as well as the potential outcomes that might obtain. *Formally, the introduction of a court appears as a devise that alters both games* W *and* B. It does so, by modifying both the actions available and the players' payoffs of those games. Moreover, the modification to the games W and B produced by a court are different under different legal regimes. It is precisely this feature that renders possible a comparison of the various regimes.

To get an idea of how this works, let us begin by observing that a court can be seen as a mechanism that sanctions the players in game W for the use of certain actions. For instance, a court may impose a cost for playing the action "fight by committing crimes against humanity". By doing so, the court alters the payoffs achievable in game W. The important point here is not that the court changes the players' payoffs *per se* 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 W. By virtue of what was said above, this is tantamount to altering the

players' outside options in the bargaining game B. That is, *the ability of imposing costs on certain actions in game* W *ultimately translates into the ability of altering the relative profitability of bargaining with respect to going to war*.

Notice that different legal regimes might have different impact on the games W and B. The easiest way to see this is to consider the action "call the court to intervene". This action is not available to any of the players in a situation of international anarchy (i.e., no court in the picture), is available only to one player (G) under the regime of SS, to both players under the DTL regime, can be activated independently of the players' will under the HR/CR regime.

5.4 Timing

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 crimes against humanity 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.

6. A set of reasonable assumptions for modeling civil wars

In this section, I am going to list a set of empirical regularities identified in the literature on bargaining for peace during civil war. Each finding has a formal counterpart in the form of an assumption made on the games W and B discussed 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.[29]

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.[30] 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[31] 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.[32] 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.

7. An example of the Relative Performance of different Regimes

In this section, I am going to outline an example of a War/Bargaining game, and analyze the relative performance of different legal regimes. Without any pretense of being descriptive, the example is suggestive of the phenomena that took place during the war in Yugoslavia,[33] which led D'Amato to foresee both the failure of the negotiations and the fact that the court would have exacerbated the conflict under the HR/CR legal regime.

7.1 A Basic War/Bargaining game

This is a 2-player game. The players are G (the government) and R (the rebels). In the bargaining game B, G and R bargain over a pie worth 100 in total. The actions available to each player in game B consist of the possible proposals of how to split the pie. If they fail to agree, then they will enter the war game W. 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 (C) or fight unconventionally (U). I assume that war 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		R_S
G_W			
G_S			

G_W

	C	U
C	20,15	-10, 55
U	45, 0	30, 20

R_S

	C	U
C	0, 35	-40,75
U	20,20	5, 45

G_S

	C	U
C	60,0	10, 30
U	95, -20	80,15

R_S

	C	U
C	30,20	0,40
U	65,0	20,65

For the purpose of the example, I have assumed 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 1) and that R thinks that G is weak with probability $x\epsilon(0,1)$ and that G is strong with the complementary probability 1-x. One might assume that the probability x, the probability that R assigns to G being weak, is close to 1. The assumption that G is absolutely certain that R is weak (while R is, in fact, strong) is only a simplifying assumption, and the analysis below would be essentially the same if one assumes that G puts a big weight on the hypothesis that R is weak. 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 6 (Section 6, item 4)). As said above, the equilibrium outcomes of the war game constitute the outside options of the bargaining game, which is a game of incomplete information as well.

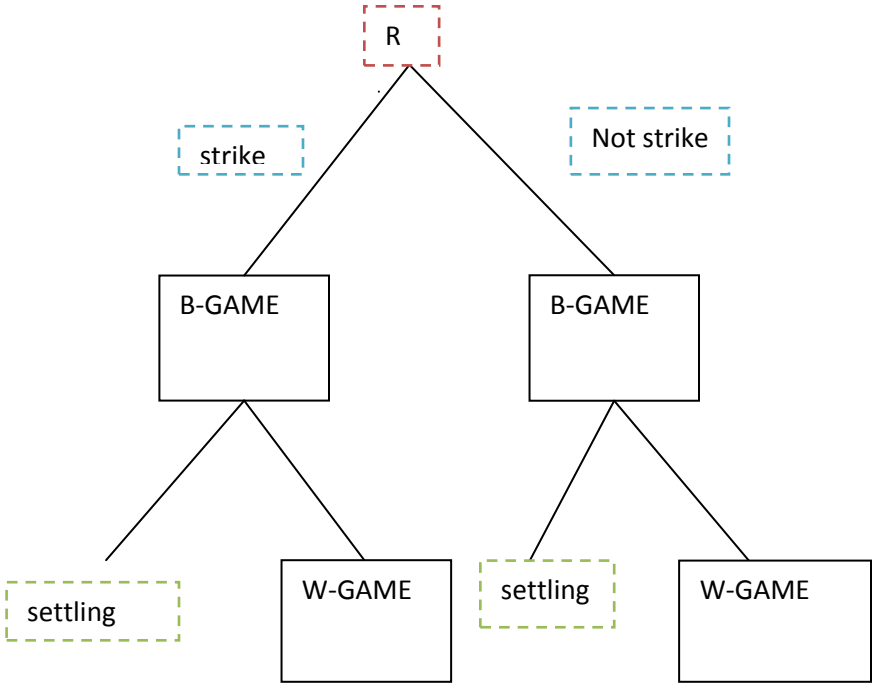
7.2 The basic game in a situation of anarchy

To begin, let us suppose that there is no court in the picture. Then, at the bargaining table G is willing to offer at most 20 to R (because from G's viewpoint the value of going to war – i.e., G's outside option in the bargaining game – is 80) while R is not willing to accept anything less than 65 (R's value of going to war). Thus, no bargaining is possible, and both parties will decide to go to war.

7.3 Enriching the basic game: a preemptive strike

Now, we are going to enrich the previous description by allowing player R an additional action: R can strike before the negotiations begin. We assume that the cost of this action for R is

10. If R does strike, this would convince G that R is strong, that is, by striking R would reveal its true type. I assume that crimes are committed by R when striking. The timing of the game is summarized in the diagram below.



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 everything is just like before (because G still perceives R as weak): the parties will go to war, and R will get 65.

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

minimum request that R (after having struck) would make at the bargaining table is 65 because R can get that much by going to war. Thus, there is room for negotiation since the minimal request is 65 and the highest possible concession is 80.

Suppose, for instance, that G offers 79. In such a case, the parties are going to settle: in fact, R would get 55 by rejecting the offer (65 (gain from war - 10 (cost of strike)), while R would get 69 by accepting the offer (79 (gain from negotiations) - 10 (cost of strike)). We conclude that the scenario (R strikes, G offers 79, R accepts) is an equilibrium outcome of the game. In such a scenario, war crimes are committed by R when R strikes, but the parties settle for a mutually beneficial agreement thereafter.

7.4. Introducing a court

Now a court comes into the picture. 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 U (unconventional fight) as well as the payoff that R can achieve by striking (as war crimes are committed by R when striking.). The costs that the court imposes on the players for committing war crimes are 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 U if this follows a strike from R. It imposes a penalty of 20 on each party for using action U if no strike from R takes place.[34] 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.[35]

7.4.1 The Domestic Tort Litigation Model

The domestic tort model requires that the court can only intervene if one of the parties requests its intervention. Both players have the option of calling the court if war 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. In order to examine the outcomes of this game, we have to consider several new scenarios.

First, we have to determine if (1) R strikes or (2) R does not strike. If R strikes, we have to determine if (1a) G calls the court or (1b) G does not call the court. In each of these cases, we will have to determine whether or not one or both players will 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 (credible commitment problem).

Let us suppose that R does not strike. Then, G thinks that R is weak and is willing to concede up to 20. R thinks that by going to war it would get 65 if G does not call the court and 45 if G calls the court. The worst case scenario for R is that it would get 45 from war. It follows then that R asks for at least 45 at the bargaining table while G wants to give up at most 20. Hence, no bargaining is possible, and both players will go to war. Notice that, in this scenario, nobody would call the court, R will get 65 and G will get 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; and (iii) the payoff that G achieves by negotiating and not calling the court. We already know that the first payoff 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 gets 5 (65 (gain from going war) -10 (cost of strike) – 50 (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, conditionally on R having struck, the value for G of not negotiating and calling the court is 10.

Now, let us examine G's decision of not calling the court and sitting at the bargaining table. Since, R strikes, G knows that the value for R of going to war is 5 (G can credibly threaten to call the court). Thus, any offer greater than 5 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.

For instance, let us consider the division of the pie (proposed after R strikes), 21 for G and 79 for R. The total payoffs are as follows: R gets 69 (-10 (strike) + 79 (negotiations)) which is more than 65 (value or not striking preemptively but going to war). Thus, R prefers striking and making the deal of (79 for R, 21 for G) to not striking and going to war. G gets 21 which is more than 20, the value of not negotiating. Summing up, we have found an (Nash, also subgame

perfect) equilibrium of the game where R strikes and the players settle for the division (79 for R, 21 for G).

Finally, we want to determine whether or not G will have an incentive to renege on the agreement. If G reneges on the agreement, it is reasonable to assume that the splitting does not take place. Now R can do nothing at all or go to war. It is not profitable for R to do nothing (as the value for R would be -50), so R goes to war and ends up with 5. So G makes R worse off. However, G makes itself worse off, because G's payoff from war is 20 instead of 21. We can conclude that G would not renege on the agreement. Notice that in this equilibrium, war crimes are committed (during the preemptive strike), negotiations take place, and peace is reached without the involvement of the court.

7.4.2 The Human Rights Model

In the HR model the court automatically intervenes when war 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. We are now going to determine the equilibrium outcomes that obtain in the War/Bargaining game when the legal regime in place is the HR model.

We begin by determining whether or not R strikes in an (subgame perfect Nash) equilibrium. 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. In the end, R gets 45 (65 (from war) - 20(court penalty)) and G gets 0 (20 (from war) – 20 (court penalty)). If R strikes, there are two possibilities: G may or may not go to war. If G goes to war, then R gets 5 (-10 (cost of strike) + 65 (from war) – 50 (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 (subgame perfect 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 war crimes are committed by both parties.

7.5 Comments

The example shows that, in certain circumstances, the domestic tort litigation model outperforms the human rights model. War does not take place with the DTL model, while it does occur with the HR model. The reason is that the penalties imposed by the HR model reduce dramatically the potential gains from negotiations making war relatively more appealing. Under the HR regime, the penalty for striking is imposed on R independently of any considerations of the players' willingness to negotiate with each other. This makes the action, "preemptive strike," less profitable for R than other options. In this way, no information is transmitted to G and parties' evaluate their bargaining possibilities with little to no information. The result is that there are no mutually acceptable bargaining possibilities and parties decide to go to war. Notice that these features – lack of information, incorrect assessment of the parties' expected payoffs from war and lack of bargaining range – are precisely the main issues identified by the

bargaining for peace literature. In the example, the DTL model outperforms the HR model exactly by remedying, or at least by mitigating, these problems.

[1] I employ the definitions of Fearon and Laitin (2003), 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 (p.76)." Kalyvas (2006) 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 paper 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. Violence that leaves a sovereign state intact is not considered a civil war (Kalyvas 2006). James Fearon and David Laitin, "Ethnicity, Insurgency, and Civil war," *American Political Science Review* 1 (2003):75-90. Stathis Kalyvas, *The Logic of Violence in Civil War* (New York: Cambridge University Press, 2006), 18-19.

[2] Kalyvas, *Logic of Violence,* 19.

[3] See 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.

[4] 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, at 715.

[5] Benjamin Valentino et al., "Draining the Sea: Mass Killing and Guerrilla Warfare," *International Organization* 58(2004):375-407.

[6] See 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.

[7] 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.

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

[9] This requires the cooperation of all states. Putting politics aside, if we look solely at the design of the statute creating the International Criminal Tribunal for Yugoslavia, we can see that it is endowed with the necessary legal powers and jurisdictions to ensure the apprehension and prosecution of war criminals. See Candace Blake-Amarante, "Justice vs. Peace: D'Amato's Code to Efficient Court Design" (PhD diss., Columbia University, 2011 in preparation).

[10] Adam Branch, "Uganda's Civil War and the Politics of ICC Intervention," *Ethics and International Affairs* 21.2(2007): 179-198.

[11] 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.

[12] See Valentino et al., "Draining the Sea," 375. The authors argue that governments commit atrocities as part of a calculated military strategy.

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

[14] See International Criminal Court at http://www.icc-cpi.int/Menus/ICC/About+the+Court/

[15] Antonio Cassese, *International Criminal Law* (New York: Oxford University Press , 2003), 360.

[16] Article 1 Rome Statute.

[17] Branch, "Uganda's Civil War," 188.

[18] See Public Statement at Uganda Human Rights Commission's Conference on "The Implications of the ICC Investigations on Human Rights and the Peace Process in Uganda," Kampala, Uganda, October 5, 2004.

[19] 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". See M. Cherif Bassiouni ed., *Crimes Against Humanity in International Criminal Law* (Dordrecht, The Netherlands: Marinus Nijhoff Publishers, 1999), 170.

[20] See ICISS, *The Responsibility to Protect* (Canada: IDRC, 2001); J. Donnelly, "State Sovereignty and international intervention: The case of Human Rights," in *Beyond Westphalia? State Sovereignty and International Intervention,* ed.G. Lyons and M. Mastanduno,115-146. Baltimore: John Hopkins University Press, 1995.

[21] Chapter VII powers of the United Nations Charter is a provision that renders power to the United Nations Security Council (UNSC) to decide what measures to take to stabilize situations that constitute a threat to peace and security. Moreover, once a measure has been decided upon, all states are duty bound to assist in fulfilling the UNSC decision. In other words, all states party to the UN Charter must ensure cooperation with the court. Extended subject matter jurisdiction enables the tribunal to prosecute crimes ranging from war crimes, genocide, crimes against humanity, and other violations of international criminal law during internal armed conflict. This measure criminalizes acts that violate international human rights laws during armed conflict of an internal nature. Temporal jurisdiction marks the period which the court has jurisdiction to prosecute violations of international crimes, and the principle of primacy gives the international court primacy over national courts to deal with violations of international criminal law.

[22] Hazel Genn, *Hard Bargaining: Out of Court Settlement in Personal Injury Actions* (New York: Oxford University Press, 1987), 3.

[23] Genn, *Hard Bargaining,* 11.

[24] Genn, *Hard Bargaining,* 11.

[25] Genn, *Hard Bargaining,* 3.

[26] D'Amato, "Peace vs. Accountability," 505.

[27] D'Amato, "Peace vs. Accountability," 504.

[28] Candace Blake-Amarante, "Justice vs. Peace: D'Amato's Code to Efficient Court Design" (PhD diss., Columbia Univeristy, 2011 in preparation).

[29] 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.

[30] See Filson and Werner, "A Bargaining Model for War and Peace," 819-38.

[31] See Valentino et al., "Draining the Sea," 375-407.

[32] 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.

[33] Like D'Amato, I am referring specifically to the period in which the War Crimes Commission was established with Resolution 780 in July 1992 and the creation of the actual ICTY created in September 1992. I consider further the massacres of Bosniac civilians in Srebrenica , and the cleansing of ethnic Serbs in Krajina in July 1995 . I do not consider events that took place after this period (i.e. Dayton Accords negotiated November 1995).

[34] 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.

[35] In general, I refrain from writing down either the full normal form or the full extensive form of the game as this is quite cumbersome and space-consuming.