

D'AMATO'S EQUILIBRIUM: GAME THEORY AND A RE-EVALUATION OF THE DUTY TO PROSECUTE UNDER INTERNATIONAL LAW

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I. INTRODUCTION

In 1994, Anthony D'Amato¹ proposed offering the International War Crimes Tribunal for the Former Yugoslavia as a bargaining chip in the ongoing peace negotiations.² He reasoned that a peace accord might not be reached as long as the leaders of the three sides of the Balkan war (the former Yugoslav Republics of Serbia, Croatia, and Bosnia-Herzegovina) were also the potential targets of the tribunal to be established by any peace accord.³

At the time, the international community had been actively seeking to end the brutal civil war that had been ongoing since 1989.⁴ Negotiations to end the war and to create a lasting peace had lasted more than three years, with little success. At the same time, a War Crimes Commission had been investigating war crimes, and an international political consensus was growing to establish a War Crimes Tribunal to prosecute war

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2. See Anthony D'Amato, *Peace vs. Accountability in Bosnia*, 88 AM. J. INT'L L. 500, 503 (1994).

3. See *id.* at 500 ("Is it realistic to expect them to agree to a peace settlement in Bosnia if, directly following the agreement, they may find themselves in the dock?").

4. War crimes had been committed by all sides in the war, and the international public was learning of them through television images of concentration camps and press reports of slaughter. See PAUL R. WILLIAMS & MICHAEL P. SCHARF, *PEACE WITH JUSTICE? WAR CRIMES AND ACCOUNTABILITY IN THE FORMER YUGOSLAVIA* 49 (2002).

criminals after a peace agreement was reached.⁵ Because D'Amato regarded the dual goals of a peace agreement and a war crimes tribunal as conflicting, he proposed a theoretical solution that sought to reconcile the two.⁶

The proposal was met with harsh criticism by prominent legal scholars, who attacked D'Amato for questioning the desirability of prosecuting war criminals.⁷ None of the critics chose to analyze the proposal—they attacked only D'Amato's assumptions. In a subsequent letter of defense, D'Amato defended his essay as questioning the feasibility, not the desirability, of a tribunal in such circumstances.⁸ Since 1994, no author has taken up an analysis of D'Amato's proposal.

In this Note, I undertake the first law and economics analysis of his essay. The analysis is based on his assumptions, the most fundamental of which is that the commission of war crimes requires postwar criminal accountability, or in other words, that there is an absolute duty to prosecute war crimes under international law. This is also a fundamental assump-

5. S.C. Res. 780, U.N. SCOR, 47th Sess., 3119th mtg. at 36, U.N. Doc. S/RES/780 (1992); S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg. at 28, U.N. Doc. S/RES/808 (1993).

6. See D'Amato, *supra* note 2, at 503.

7. The essay was attacked for its seeming disregard of the importance of justice in long-term peace-building and because of its potential misrepresentation of each leader's aims in the Dayton Peace Accords. See generally Jordan J. Paust, *Correspondence*, 88 AM. J. INT'L L. 715 (1994); Benjamin B. Ferencz, *Correspondence*, 88 AM. J. INT'L L. 717 (1994); Payham Akhavan, *Correspondence*, 89 AM. J. INT'L L. 92, 92 (1995) [hereinafter Akhavan, *Correspondence*]. See also Anthony D'Amato, *Correspondence*, 89 AM. J. INT'L L. 94, 94 (1995) [hereinafter D'Amato, *Correspondence*] (responding to his critics). All three authors object to D'Amato's proposal on various grounds. Paust argues that the proposal is *contra obligatio erga omnes*, as peace is conditioned by both justice and law. Paust, *supra*, at 717. Ferencz argues that D'Amato's proposal betrays those victims of war crimes because it does not punish perpetrators and, similarly, does not deter future perpetrators. Ferencz, *supra*, at 718-19. Akhavan believes that individual accountability assists in establishing a long-term peace by absolving various ethnic groups of collective guilt, and that it is essential that individual accountability is established through a war crimes tribunal. Akhavan, *Correspondence, supra*, at 92. See also Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7, 8 (2001). In attacking the piece, none chose to take up D'Amato's proposal to prove or disprove him.

8. D'Amato, *Correspondence, supra* note 7, at 94. I agree with D'Amato's assessment of these critiques and, therefore, will not address the critiques directly in this Note.

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tion of critics of D'Amato's essay. However, they argued that bargaining away a war crimes tribunal suggested that all war crimes did not require prosecution—a contradiction of his assumption an absolute duty to prosecute.⁹ D'Amato also regarded a tribunal as desirable, but did not think it was feasible if the negotiators, who were suspected war criminals themselves, were required to sign a peace agreement that guaranteed their prosecution.¹⁰ D'Amato thus agreed with his critics as to the assumption of an absolute duty to prosecute under international law, but their respective conceptions differed as to how the duty may be applied in practice.¹¹

I will argue that D'Amato's proposal and the implications of his proposal suggest that the duty to prosecute under international law cannot exist as an absolute duty. I will do so below by exploring D'Amato's proposal with a two-pronged analysis.

The first prong of my analysis will be the construction and undertaking of a game theory analysis of the proposal. D'Amato suggested the feasibility of his proposal could be predicted via a law and economics analysis.¹² Because D'Amato's proposal seeks to analyze the competing interests of an individual leader and his nation-state, game theory is a particularly helpful form of economic analysis in exploring his essay.

9. See generally Paust, *supra* note 7; Akhavan, *Correspondence*, *supra* note 7, at 93; Ferencz, *supra* note 7.

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10. D'Amato, *supra* note 2, at 500; D'Amato, *Correspondence*, *supra* note 7, at 94.

11. D'Amato states that the Far East and Nuremberg tribunals originated a tradition of postwar criminal accountability. See D'Amato, *supra* note 2, at 501. This tradition requires prosecution and punishment of war crimes under international law. In other words, postwar criminal accountability is the absolute duty to prosecute war crimes under international law. Interestingly, D'Amato labels the tradition of Nuremberg as "the very real possibility individual responsibility for war crimes." See *id.* D'Amato applies this label not because he does not assume the absolute duty to prosecute—he believes the idea of a war crimes accountability is "desirable . . . in the abstract." See *id.* Rather, the tradition of Nuremberg is a possibility because, in practice, the tradition of accountability is conspicuous to suspected war criminals, but, since Nuremberg, there has been "significant negative precedent for international accountability" of the failure of the international community to set up war crimes tribunals. See *id.* That is, he assumes the duty to prosecute to be absolute in theory, but does not believe the international community has applied it in a manner that reflects this duty.

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12. See D'Amato, *supra* note 2, at 505-06.

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Game theory is valued for predicting the behavior of individual actors in particular situations, assuming all parties possess full information and act rationally.¹³ Also, game theory has become an increasingly valued form of analysis in international law for predicting the behavior of individual actors and nation-states.¹⁴ More recently, game theory has been used to understand the behavior of nation-states under international tax treaties and the behavior of nation-states under international law.¹⁵ When applied to D'Amato's proposal, game theory can predict the outcome for a hypothetical negotiation

13. See generally ROBERT GIBBONS, *A PRIMER IN GAME THEORY* (1992). The most common and oft-applied example of game theory analysis is the Prisoner's Dilemma, which predicts whether two prisoners arrested for jointly committing a crime will confess individually or collectively when acting to minimize a potential prison sentence. See *id.* at 5.

14. For example, a game theory analysis of the behavior of the United States and the Soviet Union during the Cuban Missile Crisis of 1963 has been widely discussed. See Steven J. Brams, *Game Theory and the Cuban Missile Crisis*, PLUS (Jan. 2001), at <http://plus.maths.org/issue13/features/brams>. Concededly, a game theory analysis, particularly as to law, has its limitations. Compare Stephen A. Salant & Theodore S. Sims, *Game Theory and The Law: Ready For Prime Time?*, 94 MICH. L. REV. 1839, 1841 (1996) (reviewing DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* (1994)) (recognizing "there are those who will approach both game theory generally and GTL particularly in a skeptical frame of mind, vigilant for the possibility that this may constitute an instance of cutting perhaps too wide a swath through the law with perhaps too simple, or too simplified, an economic thought"), with Bruce H. Kobayashi, *Game Theory and Antitrust, A Post-Mortem*, 5 GEO. MASON. L. REV. 411, 412 (1997) (He argues that game theory is close to "pure theory," because "game theoretic models of [industrial organization] have not been empirically verified in a meaningful sense" and notes that "conclusions drawn from game theoretic models tend to be very sensitive to the way problems are defined and the assumptions that follow." Additionally, "little effort has been made by economists to empirically test the models built on these definitions and assumptions.").

15. For a game theory analysis of the behavior of nation-states under tax treaties, see Tsilly Dagan, *The Tax Treaties Myth*, 32 N.Y.U. J. INT'L L. & POL. 939, 950 (2000). Ms. Dagan's work was a direct inspiration for this Note. For an example of the use of game theory analysis of actors in international law, see Ronald Cass, *Economics and International Law*, 29 N.Y.U. J. INT'L L. & POL. 473, 505 (1997) (positing that game theory offers an ideal framework for addressing issues in international law because actors in international law are rationally pursuing their self-interest in settings where the conduct of other actors is important to each decision-maker). See also Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999); Mark A. Chinen, *Game Theory and Customary International Law: A Response to Professors Goldsmith and Posner*, 23 MICH. J. INT'L L. 143 (2001).

while accounting for both the interests of the leaders and the interests of the nation-state.

The construction and analysis of the games form a substantial part of this Note. In Part II, I offer a brief synopsis of the events that led to war in the former Yugoslavia (Part II.A), and a summary of D'Amato's article (Part II.B). In Part III, I will establish the preference profiles of all three parties for the game theory analysis. In Part IV, I construct a game theory analysis of D'Amato's proposal. The games will prove that, given certain assumptions, the parties could theoretically agree to such a proposal. In a separate game (Part IV.D), I will also suggest why the eventual outcome of the Dayton Peace Accords was a peace agreement establishing a War Crimes Tribunal.

In the second prong of my analysis (Part V), I use the results of the game theory analysis to revisit the assumptions and the predictions of D'Amato's essay. I explore the implications of the games, first to the larger international conceptions that underlie D'Amato's essay and, then, to the arguments and predictions of D'Amato's essay. I will argue that the results of the games are more valuable for what they imply than as proof that the parties could have theoretically agreed to D'Amato's proposal.

I first explore the implications of the results of the game theory analysis on the concept of the duty to prosecute under international law and to the related concept of the credibility of the threat of prosecution (Part V.A). I conclude that the analysis suggests that the duty to prosecute and the credibility of the threat of prosecution are inversely related—any peace agreement that establishes a war crimes tribunal will be unable to preserve duty without compromising credibility, and vice versa. This inverse relationship reflects the empowerment of war criminals in the game theory analysis to prevent an agreement with a tribunal.

Given both this conclusion and the results of the games, I then revisit D'Amato's essay and the assumptions behind his proposal (Part V.B). I explore his argument that his proposal serves as a deterrent to would-be war criminals (Part V.C) and his decision to leave his proposal open-ended and undefined (Part V.D). I conclude the second prong of my analysis by exploring the feasibility of his proposal under the Rome Statute

for the International Criminal Court and the effects of the statute given that the proposal is left undefined (Part V.E). It is from this second prong of analysis that I conclude that the duty to prosecute under international law cannot be absolute.

It is important to note that, although my assumptions are the same as D'Amato's in the first prong of analysis, I do not agree with all of D'Amato's assumptions or assertions. Rather, I am asserting that D'Amato's proposal is an important illustrative tool, and, in order to do so, I must work within his assumptions. Where D'Amato and I diverge will be evident when I explore the implications and potential problems of D'Amato's proposal in the second prong of my analysis.

II. D'AMATO'S PROPOSAL

An historical background to D'Amato's proposal is necessary to explain both his assumptions and mine.¹⁶ The history of the Balkans provides some background as to why there was civil war in the 1990s and to the historical motivations of each party to the negotiation. The intent of this section is to provide a broad overview of the historical and modern roots of the war in the former Yugoslavia, but conceding: "Nothing is simple in the Balkans. History pervades everything and the complexities confound even the most careful study."¹⁷

A. *Historical Context*

The former Federal Republic of Yugoslavia (FRY) was created in 1943 upon fragile foundations. It was comprised of eight Balkan republics, all of which represented different ethnicities within the region and between whom there was little concord. This instability was the consequence of a multitude of factors, most prominently a history of religious and ethnic conflicts fueled by imperial occupations. The legacy of these ethnic and religious conflicts ultimately led to the dissolution of the FRY in the 1980s and 1990s.

16. This section is meant to create a foundation for assertions I make later in the paper. It is not meant to be a complete history, as countless books have been written on the subject. Rather, it is meant to be a primer for the uninformed reader on the roots and history of the conflict and a foundation for my assertions on the order of strategies employed by each negotiator.

17. DAVID OWEN, *A BALKAN ODYSSEY I* (1995).

The Balkan Peninsula was settled by Slav tribes in the sixth and seventh centuries A.D.¹⁸ Fifteen hundred years later, the three largest ethnic groups in the Balkans are all of Slavic descent: Serbs, Croats, and Muslim Slavs, or Bosniacs.¹⁹ Other ethnicities reside in the region and share the same language. However, it was not until 1919, at the Treaty of Versailles, that a collective identity for the Balkan region as “Yugoslavia” was established.²⁰ Indeed, despite shared ethnic roots and language amongst the residents of the Balkans, the history of the region has been rich with division and war.

Differences and tensions between the groups have been largely driven by religious differences, which, in turn, have been fueled by competing imperial occupations of the region: by the Ottoman Empire from the East and by the Hapsburg Empire from the West.²¹ The Croats, or Croatians, reside in the westernmost parts of the Balkans. Although they are spread throughout the Balkans, Croats are concentrated heavily in Croatia and the western region of Bosnia called Herzegovina.²² Croats have a traditionally strong affiliation with Western Europe dating from the Hapsburg occupation, which also left a legacy of Catholicism.²³ The Serbs reside primarily in the easternmost parts of the Balkans. Serbs are the ethnic majority of Serbia, and there exists a strong concentra-

18. ROBERT KAPLAN, *BALKAN GHOSTS* 23-24 (1993).

19. I use the term “Bosniac” because it has become the accepted title for residents of Bosnia. It also avoids the religious implications of labeling all Bosnian residents “Muslims,” which is not a demographic reality. See Paul C. Szasz, *The Dayton Accord: The Balkan Peace Agreement*, 30 *CORNELL INT’L L.J.* 759, 762 n.19 (1997) (stating that the “Muslims renamed themselves ‘Bosniacs’ in 1994, presumably to de-emphasize their sectarian nature). See also KAPLAN, *supra* note 18, at 22 (1993).

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20. See MARGARET MACMILLAN, *PARIS 1919: SIX MONTHS THAT CHANGED THE WORLD*, 114-120 (2002) (providing an account of the negotiations between the Serbs and Croats for the creation of Yugoslavia).

21. WILLIAMS & SCHARF, *supra* note 4, at 41.

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22. See WILLIAMS & SCHARF, *supra* note 4, at 40-42. Bosnian Croats have historically occupied Western Herzegovina, which, with a nearly 100 percent Croat population, is also a hot-bed of extreme nationalism. Most others live in Central and Northern Bosnia, which are more assimilated regions of Bosnia. See LAURA SILBER & ALAN LITTLE, *YUGOSLAVIA: DEATH OF A NATION* 293 (1997). Bosniacs are spread throughout the former republic. See KAPLAN, *supra* note 18.

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23. The Catholic Church has historically encouraged anti-Serb hostility. See KAPLAN, *supra* note 18, at 26-27.

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tion of Bosnian Serbs in the eastern region of Bosnia.²⁴ Serbs have traditionally had a strong affiliation with Russia and Central Europe and are Eastern Orthodox Christians.²⁵ Because of their geographic proximity and religious differences, Serbia and Croatia have historically served as the fringe battlegrounds between Eastern Orthodox Christianity and Catholicism in Europe.²⁶

Between Serbia and Croatia lies Bosnia-Herzegovina, in which reside Bosniacs, Bosnian Croats, and Bosnian Serbs. Bosniacs are Slavs, both Croat and Serb, whose ancestors converted to Islam under the Ottoman rule in the fifteenth century.²⁷ Bosniacs have been traditionally regarded by the Christian Slavs as inferior because of their observance of Islam and because of the conversion of their ancestors.²⁸ Bosnia has ultimately served as an ethnically integrated buffer zone between the Serbs and Croats. However, it has also served as a region in which Croat-Serb and Catholic-Eastern Orthodox Christian tensions have played out, both against each other and against the Muslim Bosniacs. The ethnic integration of Bosnia has thus resulted in Bosnia having the most intense ethnic and religious tensions in the region, despite being home to Sarajevo, the former capitol of, and the most diverse city in, Yugoslavia.²⁹

24. SUSAN L. WOODWARD, *BALKAN TRAGEDY: CHAOS AND DISSOLUTION AFTER THE COLD WAR* 172 (1995).

25. See WILLIAMS & SCHARF, *supra* note 4, at 69 ("Russia is linked to Serbia by religion, alphabet, and history.").

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26. See KAPLAN, *supra* note 18, at 25 ("Were it not originally for religion, there would be no Serb-Croat enmity."). Croatia fell under the control of the Hapsburg empire in the early sixteenth century and, although occupied by the Ottomans in the sixteenth and seventeenth centuries, returned to Hapsburg control until the end of World War I. Serbia and Bosnia-Herzegovina fell under the control of the Ottomans from the fourteenth century until the dissolution of the empire in the nineteenth and twentieth centuries. The legacy of imperial occupation has been defining for both peoples. For the Serbs, Ottoman occupation represented an arrested development of a nation and created a deep sentiment for revenge against Muslims. For Bosniacs, Ottoman occupation meant the creation of a new identity as Muslims. *Id.* at 24-27.

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27. KAPLAN, *supra* note 18, at 22.

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28. SILBER & LITTLE, *supra* note 22, at 208.

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29. KAPLAN, *supra* note 18, at 22.

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The nation-state of Yugoslavia was created from a merging of these regions in 1919 by the Treaty of Versailles.³⁰ Its borders, both internal and external, and government were defined by European diplomats, with minimal shaping of the region by Yugoslav diplomats.³¹ The state was comprised of the Balkan states of Croatia, Serbia, Bosnia-Herzegovina, Slovenia, Macedonia, and Vojvodina and was to be ruled by a Serbian dynasty.³² Almost immediately, Yugoslavia was unable to resolve or successfully address historical Croatian-Serbian hostilities, which were further fueled by Croatian resentment of being governed by Serbs.³³ Hostilities simmered until the mid-1930s, when the Croatian Ustashe, Croatia's military arm, assassinated the Serbian king, and a civil war began in Yugoslavia.³⁴ The war continued through WWII, driven by competing visions of Yugoslavia: The Serbs sought to preserve the Yugoslav nation-state; whereas Croatia, then occupied by the Nazis and Italy, sought to break away.³⁵ By the beginning of World War II, Serbs and Croats were at war.

Yugoslavia was initially divided by the occupation of Croatia and other regions by Axis powers. However, a military campaign by Marshal Josep Broz, or "Tito," liberated Yugoslavia from its occupiers and reunited the country by 1945.³⁶ Tito's Yugoslavia, officially founded in 1943 during the war, was a Communist nation-state governed by a federal parliament, including local parliaments for each of the six republics.³⁷ Tito

30. Treaty of Versailles, June 28, 1919, annex, in CARNEGIE ENDOWMENT FOR INT'L PEACE, THE TREATIES OF PEACE, 1919-1923, at 22 (1924).

31. MACMILLAN, *supra* note 20, at 110-11; *see also* Introduction to CARNEGIE ENDOWMENT FOR INT'L PEACE, THE TREATIES OF PEACE, 1919-1923, at xlviii (1924).

32. *See* KAPLAN, *supra* note 18, at 27; SILBER & LITTLE, *supra* note 22, at 28. Also included were the provinces of Montenegro, Vojvodina, and Kosovo, to which the Serbs had strong ethnic and historical ties. *See generally* SILBER & LITTLE, *supra* note 22, at 31-81.

33. KAPLAN, *supra* note 18, at 27.

34. *Id.* at 27.

35. *See* WILLIAMS & SCHARF, *supra* note 4, at 41-42.

36. *See* SILBER & LITTLE, *supra* note 22, at 28.

37. *See id.* at 27. Communist, post-WWII Yugoslavia was not affiliated solely with the Soviet Union; rather, it engaged under Tito in a careful dance between East and West. *Id.* at 28. The United States kept Yugoslavia as a close ally throughout the Cold War, but, following the fall of the Communist Bloc, the United States saw few reasons to keep a close alliance alive. For

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governed Yugoslavia as a repressive dictatorship from the end of WWII until his death in 1980.³⁸

Tito's governance was ultimately a delicate balancing act between the interests of all sides, mixed with the repression of nationalist movements. Nationalist movements were virulent after the end of the civil war and WWII, fueled by the commission of war crimes by both Croats and Serbs during both wars. Over the course of WWII, the Croatian Ustashe had "cleansed" the Serb-populated Krajina region in central Croatia of as many as 1,500,000 ethnic Serbs, a third of whom were killed and the rest of whom became refugees.³⁹ Upon the surrender of the Ustashe at the end of the War, Serb nationalists murdered more than 100,000 Croats in retaliation for these crimes.⁴⁰ As Tito sought to govern and unify post-war Yugoslavia, these mass murders would serve as fuel for an uneasy balance between Serb and Croatian nationalist movements.⁴¹ Strong handed governance was ultimately his most effective tool in repressing these movements.⁴²

The death of Tito in 1980 left a power vacuum, despite a federal structure established by Tito to preserve order. In his last years, Tito had created an eight-member federal presidency to replace him, in which leaders of each Republic had one vote and the presidency of the body alternated annually.⁴³ He had also promulgated a new Constitution in 1974 to decen-

_____ this reason, it did little to prevent Yugoslavia from falling apart after 1989. *Id.* at 29.

38. *See id.* at 29.

39. *See WILLIAMS & SCHARF, supra* note 4, at 42. The Hapsburgs had created the Krajina in Croatia for Serbs—Orthodox Christians—who escaped the persecution of the Ottoman Empire, and it functioned as a permanent defensive barrier against Ottoman expansion. *See SILBER & LITTLE, supra* note 22, at 93-94.

40. WILLIAMS & SCHARF, *supra* note 4, at 42.

41. SILBER & LITTLE, *supra* note 22, at 29 ("Enforcing his doctrine of 'Brotherhood and Unity,' [Tito] carried out purges of Serbs, Croats and Muslims, Slovenes, Macedonians and Albanians, balancing his repression of any one nation against that of the others."); *see also* KAPLAN, *supra* note 18, at 38. Tito suppressed a Croatian nationalist movement in 1971, after which Croatia earned the title of "The Silent Republic" for not manifesting its nationalist sentiments throughout the remainder of Tito's reign. *Id.* at 82.

42. Nationalism was also suppressed by the fear of Soviet invasion, and by Tito's success in governing the economy. *See WILLIAMS & SCHARF, supra* note 4, at 42.

43. *See SILBER & LITTLE, supra* note 22, at 29.

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tralize power.⁴⁴ Notably, the Constitution granted autonomy to the Serbian-controlled states of Vojvodina and Kosovo, thereby taking away land from Serbia, but not from other republics.⁴⁵ Without a neutral figure to collectively govern the republics, or repress nationalism, Yugoslavia and its republics devolved into a clash between nationalist and federalist movements. Nationalist movements sought to tear Yugoslavia apart, whereas federalist movements sought to preserve the Constitutional structure of Yugoslavia.⁴⁶ Tito's constructions thus did little to preserve stability in Yugoslavia after his death and, instead, contributed to fomenting nationalist movements across the nation.

The most virulent nationalist movement was led by Slobodan Milosevic—the Communist party leader—in Serbia.⁴⁷ Milosevic rallied Serbs around nationalist themes. Perhaps most effective was his call to arms over Kosovo, a strong symbol of Serb identity which had been granted to ethnic Albanians as an autonomous region under the 1974 Constitution.⁴⁸ In their rhetoric to Serbs throughout Yugoslavia, Milosevic and his nationalist compatriots played to Serb nationalist sentiments: Suggesting that the expulsion of Serbs from Kosovo was an affront to a Serbian identity to Yugoslavia;⁴⁹ and stoking anti-Croatian sentiment by playing on hostilities, including the treatment of Serbs in the Krajina in WWII.⁵⁰ His ability to rally popular Serb support around him

44. *Id.* at 29, 34.

45. *Id.*

46. Serb and Croatian nationalist propaganda portrayed Muslims not as a separate ethnic community, but as Serbs and Croats who had succumbed to external pressure and converted to Islam. *Id.* at 208.

47. *See generally id.* at 37-47.

48. In the 1974 constitution, Tito gave the Albanian Muslims autonomous control over Kosovo. Serbians would long resent this, as Kosovo was considered by Serbians to be the cradle of Serbian civilization and was the *situs* of the last stand of the Serbs against the Ottomans. Serbs perceived control of the region by non-Serb Muslims as an additional insult to a historical injury. *See* SILBER & LITTLE, *supra* note 22, at 34.

49. WOODWARD, *supra* note 24, at 90-93. Milosevic's most famous speech occurred on April 24, 1987, in Kosovo. Milosevic is quoted as saying to a mass rally of Kosovo Serbs, "No one should dare to beat you." *See* SILBER & LITTLE, *supra* note 22, at 37-39.

50. SILBER & LITTLE, *supra* note 22, at 93.

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created the grounds for a quick rise to the Serbian Presidency in 1987.⁵¹

As Serbian President, Milosevic sought to use his seat within the Federal Presidency to overturn the 1974 Constitution. His intent was to create Serbian control of Yugoslavia and to divide the country into ethnically pure regions.⁵² Milosevic utilized political maneuvering within the Federal government to amend the Yugoslav Constitution, ending the independence of Montenegro, Vojvodina, and Kosovo and incorporating them into Serbia.⁵³ In doing so, Milosevic was able to establish greater constitutional and Presidential power for Serbia in proportion to the rest of the republics: Serbia now controlled three of the eight seats of the Federal presidency and, thereby, established Serbian control of the Yugoslav National Army (JNA).⁵⁴ By 1989, Milosevic had a formidable political grasp on the leadership of Yugoslavia.

Slovenia and Croatia reacted to Milosevic's power grab by declaring their secession from the Federal Republic of Yugoslavia in 1989 and 1990, respectively. Croatian secession was primarily the result of a nationalist revival, led by President Franjo Tudjman.⁵⁵ Croatian nationalism had been actively repressed by Tito but, following Tito's death, re-emerged in the absence of a repressive, neutral Yugoslav leader.⁵⁶ After the fall of Communism in 1989, Croatian nationalism was further stoked by the gradual seizure of power by Milosevic and the Serbs.⁵⁷ Croatian nationalism fostered a belief that Croatia was Western and modern, while Serbia was backwards and poor and, above all else, too powerful within the Republic.⁵⁸ Tudjman seized upon the increasing popularity of this sentiment, pledging Croatian independence and further pledging

51. *See generally id.* at 31-81.

52. *Id.* at 61.

53. *Id.* at 59-61, 73.

54. *Id.* at 26, 73.

55. A similar, but more peaceful movement, took place in Slovenia. *See id.* at 82-91. Laura Silber and Allan Little argue that the Slovenes were more successful in their secession from Yugoslavia in that they had prepared for secession, establishing internal controls to ensure autonomous governance and enforcement of borders following the declaration of secession. *Id.* at 154.

56. *See id.* at 82.

57. *Id.*

58. *Id.* at 83.

the conversion of neighboring Bosnia-Herzegovina into a Croatian state.⁵⁹

Bosnia, led by President Alija Itzebegovic, also regarded Milosevic's power-maneuvering as dangerous to its interests. However, unlike Croatia, Bosnia could not secede because it was stuck in a precarious situation. It faced multiple, substantive threats to its territorial integrity and security. Two immediately dangerous threats were the aim of Bosnian Serbs to carve out a Bosnian Serb state (a Republika Srpska) from the Bosnian Republic and the open goal of Croatia and Bosnian Croats to annex Herzegovina and further expand into Bosnia.⁶⁰ Beyond a view of Bosnia as *terra nullius*, both threats were also fueled by the traditional views of ethnic Serbs and Croats that Bosniacs were inferior.⁶¹ Bosnia was also internally unstable. It had become a boiling pot for nationalist movements, with Bosniacs, Serbs, and Croatians seeking to create their own national entities or to join the new national entities created from the former Yugoslavia.⁶² However, unlike Serbia, Croatia, or Slovenia, Itzebegovic could not declare Bosnia an independent nation-state because it lacked a Muslim majority that would allow him to do so.⁶³ Even after Croatian and Slovenian secession, Itzebegovic sought to preserve the Federal republic.⁶⁴

59. *Id.* at 84-86. Tudjman found local support in Herzegovina from Croat émigrés who sought a national expansion. *Id.* at 86.

60. *Id.* at 218, 293.

61. Bosnian Serbs sought to maintain Bosnia as part of a federal Yugoslavia, and anti-Muslim sentiment among Bosnian Croats was on the rise in 1990-1991. *See id.* at 211-12.

62. The residents of Bosnia were 44 percent Muslim, 31 percent Serb, and 17 percent Croat. WOODWARD, *supra* note 24. Bosnia was also a target for division: In March 1991, Tudjman began secret negotiations with Milosevic about the division of Bosnia and Herzegovina. *Id.* at 172; SILBER & LITTLE, *supra* note 22, at 132, 212.

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63. Bosnia had been created as a homeland for Muslims, but Itzebegovic regarded it as a homeland for Croats and Serbs, too. This view was met with hostility by Bosnian Serbs, especially their leader, Radovan Karadzic. *See SILBER & LITTLE, supra* note 22, at 208-09. Itzebegovic "felt he had to establish Bosnia's independence from Serbia" once "nationalism had found its expression in Croatia and Slovenia." OWEN, *supra* note 17, at 41.

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64. In the summer of 1991, Itzebegovic, with Macedonia, proposed an asymmetrical confederation for a new Yugoslav Constitution—Serbia and Montenegro as the heart of the Federation, Bosnia and Macedonia as constituent republics, and Croatia and Slovenia as autonomous and sovereign,

Itzebegovic initially sought and failed to secure international assistance towards establishing international recognition of Bosnian territorial integrity, including arms and European Community (EC) recognition of Bosnian independence.⁶⁵ It would not be until three years later that he would secure this assistance via official EC recognition of Bosnia's independence on April 6, 1992.⁶⁶ Nor were Itzebegovic and Bosnia initially able to secure arms from the international community. This was particularly the result of Croatian diplomatic objections, and, consequently, Bosnia was unable to protect Muslim citizens or Bosnian territory from both Serb and Croat forces.⁶⁷

In the peace negotiations between 1989 and 1990, the Republics of Yugoslavia engaged in a last ditch effort to prevent secession. There were diplomatic entreaties between them to preserve the post-Communist nation-state of Yugoslavia; most Republics sought to preserve the Federalist structure in order to prevent war. They were unable to placate each other—Serbia was intent for control and Croatia and Slovenia were concerned for Serbian power. Croatia and Slovenia declared independence once negotiations with the other Yugoslav Republics failed to produce an outcome that addressed their concerns for Serbian power.⁶⁸

War began in June 1991 when the Slovenian and Croatian governments officially declared their secession from Yugoslavia; in response, Serbia declared war. Serbia had an initial military advantage with its control of the JNA, comprised mainly of Serbs, allowing it to use troops already stationed in Croatia and Slovenia.⁶⁹ This advantage provided Serbia initial military and territorial advantages, including quick victories in the

though still part of the Federation. SILBER & LITTLE, *supra* note 22, at 148. The proposal was rejected, despite its seeming ability to accommodate the interests of all republics. *Id.* at 191.

65. *See id.* at 198, 216-17.

66. *See id.* at 154, 228.

67. *See id.* at 198-99.

68. *Id.* at 147-52.

69. *See generally id.* at 154-189. Slovenian independence was less of a concern for Serbia; for this reason, Slovenia was able to secede from Yugoslavia with less conflict over territory. *Id.* at 154-56.

Krajina region that enabled Serbia to create immediate territorial cohesion for Croatian Serbs.⁷⁰

The war spread into Bosnia after its declaration of independence in April 1992. Bosnian Serb paramilitaries, the Serb-dominated JNA, and the Bosnian Serb army, led by General Ratko Mladic, immediately set out to create an ethnically pure Republika Srpska. They pursued a campaign of ethnic cleansing, involving attacks on predominantly Muslim towns in Bosnia and the mass murder or internment of Muslims and Croats in concentration camps.⁷¹ The JNA and paramilitaries also engaged in ethnic cleansing to expand Serbia into Eastern and Northern Bosnia.⁷² The practice of ethnic cleansing was not limited to the Serbs—Croatian troops also engaged in ethnic cleansing against both ethnic Serbs and Muslims in Bosnia and in Croatia.⁷³ Ethnic cleansing resulted in quick successes for Serbian and Croatian forces throughout Bosnia and the former Yugoslavia. An independent Republika Srpska in Eastern Bosnia was declared later in 1992.⁷⁴

Because of its diplomatic isolation and relative military weakness, Bosnia suffered early on from military defeats and ethnic cleansing within its territory. Ethnic cleansing resulted in the displacement of more than two million Bosnians by December 1992 and, in turn, a refugee crisis.⁷⁵ Bosnia's territorial size decreased quickly—territorial encroachment and Serbian and Croatian disregard for international recognition of Bosnia's territorial integrity resulted in an increasingly smaller Bosnia. In turn, the combination of smaller Bosnian territory and the refugee crisis physically compressed Muslims and Bosnian Croats closer together. The compression from displacement and lack of land fueled resentment between ethnic Croats and Bosniacs and resulted in escalated ethnic ten-

70. At the commencement of fighting, Tudjman had lost a third of Croatia to occupation, and, physically, Croatia had been almost cut in half by the end of 1991. Additionally, Croatian Serbs had declared independence in and seized parts of the Krajina region of Southeastern Croatia. In southern Croatia, Croatian Serbs were seeking to extend Serbian control over regions of Bosnia-Herzegovina. *See id.* at 138, 188.

71. *Id.* at 222-23.

72. *Id.* at 244-45.

73. *Id.* at 296-99.

74. *See id.* at 205, 216-17

75. *Id.* at 252.

sions.⁷⁶ Bosnia was thus immediately destabilized by the onset of war.

The U.N. and EC intervened in 1991 and 1992, respectively, after a period of tentative diplomatic efforts to resolve the growing crisis in Yugoslavia. There were multiple reasons for this delayed intervention, but the international community was spurred primarily by the commencement of fighting in Croatia, by intelligence suggesting the commission of atrocities by Bosnian Serbs, and by popular reaction to news images of concentration camps and war casualties in Bosnia.⁷⁷ The U.N. directly intervened by sending peacekeeping troops (UNPROFOR) to Bosnia to set up “safe areas” for the protection of Bosnian refugees.⁷⁸ The U.N. also intervened via international law by passing Resolution 764, which held individuals responsible for violations of international humanitarian law in the former Yugoslavia, by establishing the War Crimes Commission under Resolution 780 in July 1992, and by establishing the International Criminal Tribunal for the Former Yugoslavia (ICTY) under Resolution 808 in September 1992.⁷⁹

The EC led a diplomatic intervention by hosting The London Conference in 1992. At this conference, the warring parties agreed to a Declaration that called for all parties to respect each other’s borders, for an end to ethnic cleansing, and for sanctions against Serbia if it did not comply with the Declaration.⁸⁰ But the Declaration excluded language about any use of force by foreign countries if Serbia did not comply.⁸¹ The Declaration signified the indecision of the international community as to how to intervene—the U.N. and EC were horrified at the apparent war crimes committed by the Serbs but were unsure of how to end the war.⁸²

76. *Id.* at 301.

77. See WOODWARD, *supra* note 24, at 146-47.

78. S.C. Res. 758, U.N. SCOR, 47th Sess., 3083d mtg. at 17-18, U.N. Doc. S/RES/758 (1992).

79. S.C. Res. 764, U.N. SCOR, 47th Sess., 3093d mtg. at 20, U.N. Doc. S/RES/764 (1992); S.C. Res. 780, *supra* note 5, at 36; S.C. Res. 808, *supra* note 5, at 28.

80. See SILBER & LITTLE, *supra* note 22, at 259-61.

81. See *id.* at 262.

82. This indecision existed from the very outset of civil war. See WILLIAMS & SCHARF, *supra* note 4, at 43; WARREN ZIMMERMAN, ORIGINS OF A CATASTROPHE 176-77 (1996) (describing the indecision of the outgoing Bush Administration over responses to the developments in Bosnia); RICHARD HOL-

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The international interventions were not initially effective. Despite the presence of UNPROFOR, Bosnian Serb forces defied the international community by surrounding and shelling these UNPROFOR areas from the hills around them.⁸³ Bosnian Serbs particularly targeted the Bosnian city of Srebrenica and the former Yugoslav capitol of Sarajevo.⁸⁴ Serb forces also continued to engage in ethnic cleansing despite a growing international determination to end the war, establish peace, and punish war criminals. The U.N., spurred by the continued shelling of Srebrenica, passed financial sanctions against Serbia.⁸⁵ But Bosnian Serb forces remained undeterred, believing there was no credible threat of intervention.

The EC and U.N. continued to pursue peace initiatives after the London Conference. The first international initiative came in the form of the Vance-Owen Peace Plan (VOPP), which was created and offered to all sides in January 1993.⁸⁶ It offered to reconstitute Bosnia into ten provinces: three Serbian, three Muslim, two Croat, one Croat-Muslim, and a tenth province in which power would be shared among all three groups.⁸⁷ The VOPP was intended to push the Bosnian Serbs to withdraw from cleansed territories, but the Bosnian Serbs did not feel any pressure to do so, perceiving the plan as a negotiating ploy.⁸⁸ Bosnian Croats strongly supported the plan and immediately signed on to it because “their provinces formed large blocks of territory, joined to Croatia proper and stretching into the very heart of central Bosnia.”⁸⁹ Croatia ini-

BROOKE, *TO END A WAR* 21-33 (1st ed. 1998) (describing the failure of the EC, the Bush Administration, and the incoming Clinton Administration to adequately address the situation as “the greatest collective failure”); SILBER & LITTLE, *supra* note 22, at 201 (suggesting that U.S. Secretary of State James Baker’s handling of the war for the Bush Administration meant that the United States felt that Yugoslavia “was not an American problem”).

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83. See WOODWARD, *supra* note 24, at 307, 312-14, 320-21. See also SILBER & LITTLE, *supra* note 22, at 268-70.

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84. See WOODWARD, *supra* note 24, at 307, 312; SILBER & LITTLE, *supra* note 22, at 257.

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85. See OWEN, *supra* note 17, at 144; SILBER & LITTLE, *supra* note 22, at 276.

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86. See SILBER & LITTLE, *supra* note 22, at 276.

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87. *Id.*; see also OWEN, *supra* note 17, at 94-95.

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88. See OWEN, *supra* note 17, at 96, 98.

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89. SILBER & LITTLE, *supra* note 22, at 277.

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tially objected, though Tudjman would have agreed to a peace agreement that established a Bosnian state, weak and highly decentralized, in order to facilitate the potential future merging of the Croatian parts of Bosnia into Croatia.⁹⁰ Itzebegovic saw the plan as the legitimization of ethnic cleansing, so, initially, he would not agree.⁹¹ The Bosnian Serbs ultimately rejected the plan, citing the substantial amount of land that would be lost to the Muslims and a fear of a substantial U.N. presence.⁹² Mladic was virulently against giving up any land to Bosniacs.⁹³ Ultimately, the VOPP failed to create any progress between the sides or end the war.

After the rejection of the VOPP, the United States and other NATO countries soon found an alternative in and signed onto the Joint Action Plan. This plan called for the sealing of Bosnian borders from Serbia and Croatia, and the establishment of six Muslim “safe areas” throughout Bosnia.⁹⁴ The goal was not to roll back the Serbs from land attained via ethnic cleansing, but rather, “in the words of a senior [American] Administration official, ‘to contain and stabilize the situation and to put the brakes on the killing.’”⁹⁵ The failure of the VOPP had spurred this international effort at halting Serbia; undeterred Serbian forces continued to occupy areas around U.N. safe zones, including Srebrenica and Sarajevo.⁹⁶

90. See Szasz, *supra* note 19, at 762 (Croatia sought “the Croatian parts of BH to be either independent (as Herzeg Bosna) or merged into the Republic of Croatia”); SILBER & LITTLE, *supra* note 22, at 292-94. Tudjman, after Dayton, would continue to hold expansionist aims in Bosnia. *Id.* at 384.

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91. Itzebegovic later backed off this position after pressure from negotiators, thereby demonstrating that he was amenable to external pressure. See discussion *infra* Part IV.E. Nonetheless, “the damage was done,” as public sympathy for Itzebegovic’s initial stance prevented Bosnian Muslim compromise. See OWEN, *supra* note 17, at 99.

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92. By April 1993, only the Bosnian Serbs remained unconvinced, as Milosevic changed his initial skepticism to support once economic sanctions had been passed by the U.N. and it became clear that a viable Serbian state could be guaranteed by the U.N. General Mladic brought down any peace prospects. See SILBER & LITTLE, *supra* note 22, at 277, 285.

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93. See *id.* at 285-87; OWEN, *supra* note 17, at 164-65.

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94. See SILBER & LITTLE, *supra* note 22, at 289.

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95. OWEN, *supra* note 17, at 181 (quoting Elaine Sciolino, *U.S. and Russia Agree on Strategy Accepting Serbian Gains for Now*, N.Y. TIMES, May 21, 1993, at A1).

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96. Cf. *id.* at 176 (noting that the U.S. opinion on the VOPP had gone from being too generous to Muslims to being too hard on Serbs).

The Joint Action Plan would lay the foundation for a future international intervention in the war.

NATO led a new effort to negotiate a peace accord, held onboard the British carrier *HMS Invincible* in July 1993. The international community drew up a constitutional agreement for a Union of Republics in Bosnia-Herzegovina, partitioned among ethnic lines: 53 percent of Bosnia would be Serbian; 17 percent would be Croatian, divided into two parts; and 30 percent would go to Bosnian Muslims.⁹⁷ However, the proposed Bosnia was a misshapen and disjointed state, and Itzebegovic ultimately rejected it for its recognition of territorial gains by Serbia.⁹⁸ Despite the negotiations and the increasingly active international intervention, Croatia and Serbia continued to carve out more territory from Bosnia by ousting more Bosniacs from Bosnian towns and villages.⁹⁹

February 1994 was a significant turning point in the war. International efforts had thus far failed to deter either the Croats or Serbs and had done little to protect the Bosniacs from the further commission of war crimes. NATO began to take actions implying it would engage in an international military intervention. Acting under the purview of the Joint Action Plan, the NATO countries collectively issued an ultimatum to the Serbs: Withdraw from around Sarajevo or face bombing.¹⁰⁰ The Serbs responded by lifting the siege of Sarajevo, but withdrawing only partially.¹⁰¹ Simultaneously, a U.S.-led diplomatic initiative created the Croat-Muslim Federation; the initiative convinced the Croats to agree to allow the Bosniacs to be fully armed and led to a peace agreement between the two sides.¹⁰² This alliance was important for the stabilization of Bosnia, as it led to the end of Croat and Muslim territorial division of Bosnia and an end to Croat-Muslim fighting. The alliance also created a more formidable military oppo-

97. See SILBER & LITTLE, *supra* note 22, at 305.

98. See *id.*; OWEN, *supra* note 17, at 228, 235-37.

99. See SILBER & LITTLE, *supra* note 22, at 306.

100. *Id.* at 315.

101. See *id.* at 316-318.

102. See *id.* at 319. Interestingly, there are different conceptions of the significance of this agreement. Laura Silber and Allan Little write that this agreement allowed the Croats and Muslims to fight the Serbs. *Id.* However, Lord Owen writes that Tudjman said the Alliance was not directed against the Serbs, but was for peace. OWEN, *supra* note 17, at 288.

ment for the Serbs. As the fighting continued, the momentum in the war began to shift more towards the Federation and away from the Serbs.¹⁰³

By June 1994, international efforts took on an even more interventionist approach. The international community created a Contact Group consisting of France, Germany, Russia, the United Kingdom, and the United States. The Contact Group sought to expedite an end to the war using all means necessary short of military intervention.¹⁰⁴ They offered Serbia a “take it or leave it” deal, calling for the surrender of territory, including part of the highly valued territory and towns seized through ethnic cleansing.¹⁰⁵ If Serbia failed to comply, the Contact Group planned military intervention.

Whereas the Serbs had presented a united front before, they were divided on this offer. Radovan Karadzic, the Bosnian Serb President, rejected the plan because it required the surrender of territory, particularly within the new Republika Srpska.¹⁰⁶ Milosevic, seeking to end Serbia’s economic isolation and wanting Karadzic out as Bosnian Serb leader, wanted to accept the plan.¹⁰⁷ In a diplomatic power play, Milosevic seized the role of negotiator from the Bosnian Serbs. After June 1994, Milosevic acted as representative of Serbia, and both Karadzic and Mladic were minimized diplomatically, although both were still considered to represent the Republika Srpska.¹⁰⁸ The Serbs were willing to continue to fight, but also were willing to end the war if they could keep their acquired territory.

Beyond the diplomatic negotiations, the work of the War Crimes Commission was gaining momentum behind the scenes. The international community, particularly the United States, actively supported this work. The U.N. Security Council had created the Commission in 1992, in response to U.S. pressure for an effective measure from the U.N. The United States favored the Commission as a more effective means of

103. See SILBER & LITTLE, *supra* note 22, at 319-23.

104. See *id.* at 336-37.

105. Included in this highly valued territory was the Northern Corridor, a passage that connected Serbian enclaves in Bosnia with Serbia. *Id.* at 337.

106. *Id.* at 338.

107. *Id.* at 335, 337-38.

108. *Id.* at 338-39.

addressing war crimes.¹⁰⁹ The U.N. was also spurred by the failure of Resolution 764, which implicitly held leaders responsible for violations of international humanitarian law in the former Yugoslavia, to have any effect on the war.¹¹⁰

From its creation, the Commission researched reports of rape and ethnic cleansing to create an analysis of the law applicable to the reported atrocities in the former Yugoslavia.¹¹¹ However, the Commission had been hindered by a lack of funding and by a diplomatic concern that its pursuit of war criminals could undermine the VOPP negotiations.¹¹² Nonetheless, it was able to issue a preliminary Report in early 1993, which convinced U.S., European, and U.N. diplomats of the necessity of establishing a Nuremberg-style Court. The result was Resolution 808, establishing the ICTY.¹¹³ The Commission was ultimately able to issue a final report in April 1994, which detailed war crimes in Croatia and Bosnia and revealed a connection between the Serbian leadership and ethnic cleansing by Bosnian Serbs in Bosnia.¹¹⁴ The final report had substantive evidence of war crimes by all parties implicated governmental leaders in ordering the commission of these war crimes.¹¹⁵ There was thus a fertile foundation on which the Tribunal could proceed.¹¹⁶

All warring parties had knowledge of the report upon its release and were aware of the progress of the Tribunal and the growing international support for it.¹¹⁷ Nonetheless, ethnic cleansing and land grabs continued.

109. The United States regarded the Commission, alone, as more favorable than a tribunal because the U.S. State Department inherently distrusted tribunals and viewed tribunals as entities capable of taking independent actions contrary to the terms of a peace agreement. *Id.*

110. See WILLIAMS & SCHARF, *supra* note 4, at 93.

111. *Id.* at 94.

112. *Id.*

113. S.C. Res. 808, *supra* note 5, at 28.

114. WILLIAMS & SCHARF, *supra* note 4, at 95.

115. *Id.* at 96.

116. Paul Williams and Michael Scharf describe the initial and subsequent international reaction to the Tribunal as skeptical. Diplomats and scholars are described as having regarded the Tribunal as a public relations tool. Williams and Scharf perceive D'Amato's essay as one such reaction. The authors regard it not as a *proposal to use* the ICTY as a bargaining chip—as I do—but rather as a *description of* the ICTY as such. *Id.* at 100.

117. See *generally id.* at 96-112.

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This was the status of the war in the Balkans, relations between the parties, and the ICTY at the time of D'Amato's article.

B. *The Proposal*

After three years of war in the former Socialist Federal Republic of Yugoslavia (SFRY), Anthony D'Amato wondered if it was realistic to expect the leaders of all three warring parties (Serbians, Croats, and Muslims) to agree to a peace settlement in Bosnia when the leaders themselves were in jeopardy of being prosecuted as war criminals.¹¹⁸ Specifically, he wondered whether immunity from the ICTY could be a condition for peace, and whether U.N. negotiators had, in fact, made such an offer.¹¹⁹

In his search for an answer to this question, D'Amato found "scant historical precedent" for this "novel dilemma."¹²⁰ First, he believed there was little or no chance of an unconditional surrender. He argued that the Nuremberg and Tokyo trials benefited from the unconditional surrender of the Axis political and military leaders and their surprise at the international community's determination to prosecute them.¹²¹ At the time of D'Amato's article, the war in Yugoslavia was ongoing, and the international community's multiple efforts to end the war had been unsuccessful. Furthermore, those persons most responsible for war crimes were still at large or at the negotiating table, and they were aware of their potential prosecution by the Tribunal.¹²² Second, there was weak historical precedent for the prosecution of war crimes. In contrast to Nuremberg and Tokyo, D'Amato argued that the war in the former Yugoslavia was not fertile ground for peace, as any peace would be conditional and there existed "significant negative precedent for international accountability" for individual war crimes after Nuremberg.¹²³

118. D'Amato, *supra* note 2, at 500.

119. *Id.*

120. *Id.* at 500-01.

121. *Id.* at 501 (stating that the unconditional surrender of both Germany and Japan left "little, if any, opportunity" for the leaders of either country to place the matter of war crimes tribunals on the bargaining table).

122. *Id.*

123. *Id.* D'Amato believed the failure of the international community to establish war crimes tribunals following the Vietnam War, the Korean War,

Instead, he took inspiration from the U.S. domestic tort model, in which “[c]ourts strongly encourage parties to settle their case on their own terms.”¹²⁴ In such settlement negotiations, the “prevailing judicial attitude” is that parties may achieve exact justice among themselves.¹²⁵ However, when the tort dispute is over a murder, the state interest in prosecuting the murderer exists above and beyond the victim’s interest in full compensation, even if the parties can secure perfect justice among themselves.¹²⁶ D’Amato viewed this state interest as an interest in deterrence of future criminals.¹²⁷ D’Amato analogized this model to the ongoing negotiations in the former Yugoslavia: The parties may reach a peace agreement, but all leaders would continue to face the threat of prosecution by the ICTY because there exists, above and beyond the interests of the parties, a strong international interest in the deterrence and punishment of war crimes.¹²⁸ In both the peace negotiations and the tort dispute, despite the ability of the parties to reach an exact justice among themselves, the interests of the community, as embodied either in the international community or the state, cannot be set aside.

In the particular case of Yugoslavia, D’Amato perceived a dilemma. The international community was committed to a war crimes tribunal. But there seemed little incentive for the leaders to agree to a peace agreement that required their own prosecution for the commission of war crimes. One theoretical incentive for a peace agreement is immunity from prosecution. Immunizing the political and military leadership, while prosecuting their subordinates, would be an unacceptable outcome: A trial where the “the world would be treated to a repeated spectacle of witnesses shown to be more culpable than the accused,” he argued, “might be considerably worse than

and the Persian Gulf War served as this “negative precedent.” *Id.* Cf. Makau Mutua, *Never Again: Questioning the Yugoslav and Rwanda Tribunals*, 11 TEMP. INT’L & COMP. L.J. 167, 174 (arguing that the Yugoslav and Rwanda Tribunals were established because the U.N. and the international community were eventually “shamed” into establishing the tribunals).

124. D’Amato, *supra* note 2, at 502.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 503.

having no trial at all.”¹²⁹ Therefore, if the Tribunal was to proceed, the leaders of all parties would have to face a credible threat of prosecution, and it was unlikely that any leader would turn himself in to be prosecuted in a Nuremberg-style trial.

Hence, D’Amato predicted that the pursuit of “the goal of a war crimes tribunal may simply result in prolonging a war of civilian atrocities.”¹³⁰ In response to these significant limitations on the effectiveness of a war crimes tribunal, D’Amato proposed that the U.N. instruct all warring parties that the ICTY would proceed unless all parties agreed *inter se* to ask the U.N. to dissolve the Tribunal.¹³¹ In doing so, the U.N. would offer the tribunal as “an explicit bargaining chip” in the negotiations.¹³² With this model in mind, D’Amato assumed that if all parties were to agree to this proposal, the U.N. Security Council would grant their request.¹³³

The proposal is guided by two fundamental assumptions. First, the peace negotiators “must have a realistic fear of being prosecuted if the war crimes tribunal is to become a credible bargaining chip.”¹³⁴ Second, all parties to the peace negotiations have assets (in this case, territories of the former Yugoslavia) that the others desire.¹³⁵

Given these assumptions, D’Amato believed that his proposal had two advantages. First, it would remove the tribunal as “a practical impediment to peace.”¹³⁶ Specifically, with respect to the efficacy of the approach, the leaders would be expected to arrive at a peace treaty if they were granted immunity from the tribunal. D’Amato believed that this advantage

129. *Id.*

130. *Id.* at 502.

131. *Id.* at 503.

132. *Id.*

133. *Id.* This is the most problematic element of D’Amato’s argument. It is a prediction that requires a political consensus within the U.N. Additionally, Richard Goldstone, the former Prosecutor for the War Crimes Tribunal for the Former Yugoslavia, does not believe such a political consensus was extant at the time of the Tribunal. Interview with Richard Goldstone, Visiting Professor, New York University School of Law, in New York City, N.Y. (Nov. 8, 2001). *Cf.* WILLIAMS & SCHARF, *supra* note 4, at 69-70 (describing Russia’s role throughout the conflict as acting in its own geopolitical interests against those of NATO and the EC).

134. *See* D’Amato, *supra* note 2, at 505.

135. *Id.*

136. *Id.* at 503.

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was justified by the “natural” assumption that the leaders of all three parties “can be expected to arrive at a peace treaty if they do not personally face subsequent prosecution as war criminals.”¹³⁷

Second, D’Amato argued that, if the tribunal was offered as a bargaining chip, then it might achieve most of the deterrence objectives of the international community.¹³⁸ He argued: “Because each of them suffered equally from the commission of war crimes that they equally perpetrated, the suffering they sustained was in effect a punishment that fit their crimes.”¹³⁹ However, he also argued that it was more likely that one party was responsible for the commission of more war crimes than the other parties, thereby allowing the other parties to use the threat of a tribunal as a means of securing other assets in exchange.¹⁴⁰ For this reason, assets gained over the course of the war through the commission of war crimes by one party would have to be conceded to other parties, thereby making the commission of war crimes an eventual cost of war.¹⁴¹ D’Amato predicted a deterrent effect for future political and military leaders because of the “double-barrel uncertainty” that this scenario creates: Leaders will face either potential prosecution as war criminals if the peace process does not result in an agreement to eliminate the war crimes tribunal or the potential loss of valued territory in order to obtain an agreement to eliminate the tribunal.¹⁴² Once war crimes committed for the sake of securing territory became a cost of war, a war crime would lose its military justification.¹⁴³

Additionally, D’Amato believed there was an important theoretical payoff for the international community from this approach. He argued that the international community’s interest in prosecuting war criminals was an externality that was internalized within the negotiations by presenting it as a bargaining chip.¹⁴⁴ In doing so, he predicted, “international law will be able to bring to a successful conclusion the theory that

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 503-04.

141. *Id.*

142. *Id.*

143. *Id.* at 505-06.

144. *Id.*

war crimes are not required by, and indeed are counter-productive to, military necessity.”¹⁴⁵

In Parts III and IV, the application of game theory to D’Amato’s proposal will explore both the hypothetical feasibility of the proposal and D’Amato’s assumptions and predictions for the proposal.

III. APPLICATION OF GAME THEORY TO D’AMATO’S PROPOSAL

D’Amato invites a law and economics analysis of his proposal, which suggests many types of such analysis may be undertaken—I have chosen a game theory analysis. This analysis is especially appropriate here because his proposal focuses on the behavior of individual actors in a negotiation.¹⁴⁶ Game theory enables us to create a hypothetical negotiation in which each party has a series of preferences as to the outcome of the negotiation, and it predicts an outcome based on the combination of strategies pursued by the parties based on these preferences.¹⁴⁷ Through game theory, one is able to predict the outcome of a negotiation when D’Amato’s proposal is not on the table and the outcome when the proposal is on the table. Additionally, one is able to adjust the variables of the game to see if a different outcome results if our assumptions change.

Using D’Amato’s proposal as a template, I undertake two basic assumptions: (1) Each player knows the payoffs for his own strategies and the payoffs for the other players; and (2) each player knows that the other players are rational. Given these assumptions, we can determine an outcome when games are dominance solvable, when they result in a Nash Equilibrium, or both.¹⁴⁸

If the game is approached as dominance solvable, the players eliminate a particular strategy if there exists another strategy that is always at least as good as the selected strategy and sometimes better. An eliminated strategy is called a dominated strategy. Once a strategy has been eliminated, the player looks to the reduced game to see if there are any strate-

145. *Id.*

146. This approach is also appropriate because game theory is increasingly used as a form of analysis in international legal theory. *See supra* note 14.

147. *See* GIBBONS, *supra* note 13, at 2.

148. *Id.* at 4-8.

gies that were not dominated before but are now. If a player has one strategy that is always at least as good a strategy as all his other strategies, then that strategy is dominant. A dominant strategy is essentially the best choice for a player no matter what the other players are doing. The game will reach an outcome with a unique payoff for all players once all players have iteratively eliminated their dominated strategies. However, this outcome does not necessarily occur. Dominance solvability is an appealing property because it assumes that rational players do not play dominated strategies, thereby facilitating the prediction of the optimal outcome.

A game also may be solved to find the Nash Equilibrium. This approach determines the best choice of strategies given the particular strategies the other players are using. At the Nash Equilibrium, a player is doing the best that he can do even if there are other strategies that are just as good. In the games below, this may mean that a player will play a strategy that he prefers, even if it results in an outcome he does not want (e.g., in a game with outcomes A and B, a player will play A, even though it results in the outcome B because it is the best that he can do given the other players' strategies). A Nash Equilibrium is preferred to a dominance solvable outcome because a Nash Equilibrium always results from the iterated elimination of dominated strategies, but the iterated elimination of dominated strategies does not necessarily result in a Nash Equilibrium.¹⁴⁹

149. *Id.* at 7-8. Gibbons provides a model from which this can be understood best. In this particular game, payoffs are described numerically: The greater the number, the more valuable that outcome is for a player. In this game, Player 1 must decide to move Top, Middle, or Bottom when Player 2 moves Left, Center, or Right.

		Player 2		
		L	C	R
Player 1	T	0,4	4,0	5,3
	M	4,0	0,4	5,3
	B	3,5	3,5	6,6*

In this two-player game, the Nash Equilibrium may be found by establishing for each player and each potential strategy for that player, the other player's best response to that strategy. These responses are highlighted in bold. Player 1's best strategies are to play M when Player 2 plays L, T when Player 2 plays C, and B when Player 2 plays R. Player 2's best strategies are to play L when Player 1 plays T, C when Player 1 plays M, and R when Player 1

In the games, I will attempt to make the actors and their preference profiles as reflective of historical realities in 1994 as is possible, given D'Amato's assumptions. I also assume that the actors are rational.¹⁵⁰ There will be three actors involved in the negotiations, and each of three actors will be represented by a letter. The first party will consist of Serbia and Bosnian Serbs (S); the second party will be Croatia (C); and, the third party will consist of Bosniacs (B).¹⁵¹ As D'Amato's article was written in 1994, when the momentum of the war shifted towards the Croats and Bosniacs, I will assume that each party's evaluation of the factors will be colored by this momentum shift.

The preference profiles of each actor will consist of three potential outcomes.¹⁵² Two of the outcomes, war (W) and peace *with* a war crimes tribunal (P_T) were essentially the two outcomes that parties faced over the course of the peace nego-

plays B. The Nash Equilibrium is therefore at [B,R], as it is each player's best response given the other player's strategies. However, this outcome cannot be attained by iterated elimination of strictly dominated strategies, as there are no dominated strategies for either player. Instead, iterated elimination of strictly dominated strategies leads to the following outcome: "[N]o strategies are eliminated; anything could happen." *Id.* at 10.

150. This is a concededly debatable assumption. Given the complex history of the war, particularly the use of genocide as a strategic weapon, were the leaders acting rationally? A more important question is: Does a rational actor commit genocide in order to achieve his aims? It is important to note that game theory analyses of the Cuban Missile Crisis suggest that rational actors may opt to use nuclear weapons. See Brams, *supra* note 14. This question is an interesting one that is not addressed by this Note, but which the author encourages readers to pursue.

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151. See Szasz, *supra* note 19, at 762. Paul Szasz's article constructs a helpful summary of the principal objectives of the parties involved in the Dayton Accords, as these objectives were consistent throughout the war. For additional historical context, see generally OWEN, *supra* note 17, HOLBROOKE, *supra* note 82, and SILBER & LITTLE, *supra* note 22.

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152. Concededly, viewing the State as a body with one uniform interest and with the outcome as simply "war" or "peace" is an oversimplification. The interests of the country and the interests of the leaders are much more multifaceted and include intricately woven factors. In order to better lay these out, we would need to understand the interests and the power relations of the different actors and groups within each country. See Dagan, *supra* note 15, at 950 n.23 (conceding that assuming that state interest are uniform for purposes of game theory analysis can result in oversimplification). Therefore, I assume that the preferences and the outcomes reflect the optimal versions of those outcomes for all parties.

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tiations. The order of these preferences for each party will mirror their actual preferences over the course of the war and peace negotiations.

A third category will be introduced in the second game. It is D'Amato's proposal, and is called peace *without* a war crimes tribunal (P_N). Each actor's preference profile will then be adjusted to hypothetically represent how the actors would have reacted and strategized had they been presented with D'Amato's proposal.

The ranking of the preferred outcomes can be determined by the balancing of four factors, derived from an analysis of the Dayton Accords by Paul Szasz.¹⁵³ Szasz narrowed down the priorities of the warring Balkan parties to four. I frame these factors in light of D'Amato's proposal in order to establish the preference profiles of each party.

The first factor is each leader's desire for peace. Each leader considers whether he is better off continuing the war or pursuing a peace agreement. How heavily a leader considers this factor will depend on his relative military strength.

The second factor is each leader's desire to keep the assets that his country has secured over the course of the war, or his desire to secure more land.¹⁵⁴ This factor also reflects the leader's desire to protect ethnic enclaves in various regions of the former Yugoslavia. This factor will bear some weight on a leader's willingness to continue with war.

The third factor is each leader's desire for justice. How a leader weighs this desire will depend on whether he represents a party that has been predominantly victimized by the war crimes or whether he represents a party that has been

153. There are many factors to consider theoretically, but I have found Szasz's factors to be particularly helpful in the construction of this model. I have established these factors based on Paul Szasz' assessment of the preferences of the parties over the course of the war, as well as in light of its history. Szasz, *supra* note 19, at 762. These factors assist in explaining why each party ranks their preferences in their respective manners. They are necessary because D'Amato's argument that all parties made decisions primarily based on the credibility of the Tribunal is not historically accurate. Each factor is both an historically accurate concern and within the purview of D'Amato's proposal.

154. See D'Amato, *supra* note 2, at 504. I will assume, as D'Amato does, that these assets were largely land seizures and were predominantly portions of Bosnia and Croatia.

predominantly guilty of the commission of war crimes. In D'Amato's terms, this desire is weighed by how much a party has "suffered."¹⁵⁵ This desire for justice may be substantially determined by each leader's individual desire, or his representation of a collective desire, to avoid prosecution by a war crimes tribunal.

Last, the fourth factor is each leader's desire for active international intervention in the conflict.¹⁵⁶ Active international intervention occurs when the international community is a military participant seeking to end the war or when it takes the role of investigator of and judge for the commission of war crimes. I assume W implies that international intervention can be military, given the precedent of the Joint Action Plan and NATO's threats. I assume P_T implies that intervention may be military but also that the international community is both investigator and judge.¹⁵⁷ Passive international intervention is presumed to occur when the international community takes on the role of mediator in peace negotiations without military or international legal threat and is implied by P_N. Whether a leader wants the international community to take on any of these roles will affect how he weighs the four factors and, consequently, will shape his preference profile of preferred outcomes.

Thus, the balancing of these four factors will determine how each party will strategize to pursue an outcome of peace or war in each game.¹⁵⁸ Each actor will act in its respective

155. *Id.* at 503.

156. Paul Szasz indirectly considered this to be a factor, as he weighed the effect of the U.S.'s strong-arming and of the threat of war crimes prosecution on the parties. Szasz, *supra* note 19, at 762-64. The definition of and contrast between active and passive intervention is my own construction, based on the increasingly active role the international community began to play in the conflict.

157. This was the precedent of the Dayton Accords. *See infra* Part IV.E.

158. More historically specific considerations, particularly each party's desire for a unified Bosnia, are expressly not discussed for the sake of simplicity, but are implied in each party's desire for peace. These issues are raised in Paul Szasz's article as legitimate concerns of each party. Szasz, *supra* note 19, at 762. Because D'Amato only addresses his proposal in terms of war and peace, I will stay within those parameters. *See generally* D'Amato, *supra* note 2. Although I concede that each party's desire for a unified Bosnia may be used as a measuring stick for each party's preferred outcome, I will not do so here because D'Amato does not do so. *Id.*

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best interests but also will take into account the actions that other players are taking based on their own preferences. Whether there is a peaceful outcome will depend on the respective preferences of each player, each player's strategies in light of the strategies of the other players, and which outcome best accommodates each player's preferences in light of the preferences and strategies of the other players.

The preferences of each party are outlined below.

A. *Preferences of the Serb Party*

The Serb party, representing both the Republic of Serbia and Republika Srpska, is led by Serbian President Milosevic, Bosnian Serb President Karadzic, and General Mladic. Their collective goals are a Greater Serbia via a Bosnia cleared of Bosniacs, the Krajina carved out of Croatia, and the protection of Serb enclaves elsewhere in Bosnia. Although a rift had developed between the three leaders, I assume that they agree to the order of most strategies, but, in order to reflect history as well as possible, I do not assume that they agree to the final order of all strategies, as will be evident below.¹⁵⁹

War is the most advantageous of alternatives for Serbia, and all three Serb leaders are willing to continue the war. Serbian control of the JNA, the JNA's support of the Bosnian Serbs, and General Mladic's tactical use of ethnic cleansing has given the Serbs the military advantage up through 1994. Additionally, war is the best means of securing territory. Despite the rift in leadership, all three leaders concur that war is the best means of preserving territory and obtaining more. For Karadzic and Mladic, there is no interest in agreeing to peace until a Greater Serbia has been created out of territories

159. A potential problem here is that, historically, all three leaders did not necessarily act as a collective. Rather, Milosevic's interests for self-preservation veered away from Karadzic and Mladic's goals for a Greater Serbia and a Bosnia cleansed of ethnic Serbs. *See generally* SILBER & LITTLE, *supra* note 22, at 335-44. Milosevic eventually divorced his interests from those of the Bosnian Serb leaders when it became clear after Karadzic's rejection of the VOPP that the risk of international military intervention was growing, which, in turn, was a risk to the future of Serbia. Milosevic needed a scapegoat for the failures of the Serbs to gain more territory, for ethnic cleansing, and for Serbia's economic isolation. Both Karadzic and Mladic became those scapegoats. *Id.* at 335-36.

gained in Bosnia.¹⁶⁰ Milosevic has shown in prior negotiations that he is willing to let the war continue if he is not able to keep certain land parcels. However, Milosevic is wary of the further economic and diplomatic isolation of Serbia and, therefore, is more willing to compromise on land.¹⁶¹ Nonetheless, all three agree that, overall, war is the most advantageous strategy.

The Serbian interest in justice is minimal. The Commission has collected evidence that Karadzic and Mladic ordered ethnic cleansing,¹⁶² and some evidence points to Milosevic.¹⁶³ Therefore, assuming prosecution to be a credible threat, any prosecution by the Tribunal would not only be of Serbian soldiers and ethnic Serbs guilty of the crimes, but also of the Serbian leadership (both local and national). There also exists the implication, given a credible threat of prosecution, that an indictment by the War Crimes Tribunal for the three leaders would weaken their power significantly, both politically and militarily.¹⁶⁴ For these reasons, the Serbs are assumed to seek to avoid any outcome with a Tribunal.

The Serb party does not fear an active international intervention in 1994. As is evident above, the international community had not followed through on threats of international intervention, even when Serb forces partially acceded to them. Therefore, pursuing the W strategy is less risky. Also, as was evident in the VOPP and other peace plans, the U.N. had

160. *See supra* notes 63, 70.

161. *See* SILBER & LITTLE, *supra* note 22, at 277-78.

162. *See id.* at 336, 345-46.

163. The indictments of Milosevic before the ICTY suggest that Milosevic is individually criminally responsible for war crimes under the theory of participation in a "joint criminal enterprise." *See* Prosecutor v. Milosevic, Amended Indictment, Case No. IT-02-54-T (April 21, 2004) (Bosnia); Prosecutor v. Milosevic, Second Amended Indictment, Case No. IT-02-54-T (July 28, 2004) (Croatia); Prosecutor v. Milosevic, Second Amended Indictment, Case No. IT-99-37-PT (October 29, 2001) (Kosovo).

164. This assertion is both theoretical and fact-based. It is theoretical in the sense that a credible threat of prosecution implies a credible threat of arrest by the international community. It is fact-based in the sense that neither Mladic nor Karadzic were permitted to participate in the 1995 Dayton Accords after ICTY Prosecutor Richard Goldstone indicted them on charges of war crimes, preventing their travel beyond Republika Srpska. *See* WILLIAMS & SCHARF, *supra* note 4, at 159. The indictment of Milosevic in May 1999 led to Milosevic's arrest and current trial before the ICTY. *Id.* at 228, 233.

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been accommodating to the Serbs territorial conquest by recognizing their gains.¹⁶⁵ Another factor, though less obvious, is Russian diplomatic support. The Russians diplomatically represented the interests of the Serbs in the Contact Group, primarily to assert national power due to its fear of losing regional influence in the post-Cold War era.¹⁶⁶ In doing so, they were able to temper Western ambitions to intervene militarily. Therefore, there is little precedent for the Serbs to fear the risk of an active military international intervention.

The Serbs' rejection of peace agreements in 1994 and before suggested they are most concerned with preserving their territorial gains. Although Milosevic strategically considered failed agreements as potential threats to his political future, both Karadzic and Mladic regard successful peace agreements as threats to the territorial gains they had made in Bosnia over the course of the war.¹⁶⁷ For the latter two, any agreement that sacrifices territory means the sacrifices of the vision of a Greater Serbia, of its military advantage, and of the protection of ethnic Serbs in unconquered regions. Therefore, I assume the Serb desire to preserve assets acquired in war is maximal.

For the reasons listed above, I assume the Serbs prefer W to P_T . When P_N is presented as an option, I assume that the leaders will prefer P_N to W if the tribunal is a credible threat. Presumably, it is fair to argue that, because the Serbian leadership is seeking a Greater Serbia, they would prefer W to P_N . But W assumes that there is a risk of international military intervention and, given the events leading up to D'Amato's essay, this risk is not credible. Therefore, it is equally fair to assume that a credible international threat of prosecution would have significantly influenced the behavior of the Serbian leadership.¹⁶⁸

165. *See id.* at 82, 155.

166. *See id.* at 70 ("By so strongly allying itself with the Serbian regime, Russia was able to secure for itself a renewed foothold in Europe.")

167. *See supra* note 107.

168. After D'Amato's article, this risk changed, and so did the Serbian strategy. Following the NATO bombing of Serb positions in late 1994, the Serbian strategy immediately changed to accommodation. *See HOLBROOKE, supra* note 82, at 106-07. *See also* SILBER & LITTLE, *supra* note 22, at 367. Again, it is important to note that the momentum of the war was shifting in 1994.

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An additional factor to consider is that P_N requires that the Serbian leaders give up all assets secured during the war. Such a sacrifice does not reconcile with the desire to maximize the preservation all assets acquired during the war. The initial conclusion, then, given the parameters laid out above, is that the Serbs cannot prefer P_N to W . I nonetheless assume that they do have such a preference. Given that I am working within the assumptions of D'Amato's model and that D'Amato predicts that the fear of the threat of prosecution outweighs the desire to obtain land, I assume that the Serbs prefer P_N to W . Some elements of the parameters laid out above could support such a conclusion: Given the diplomatic rift between Milosevic and the Bosnian Serbs, it could be argued that the order of preferences of the Serb party ultimately represent those of Milosevic. Milosevic was increasingly willing to sacrifice territory and, in creating the rift, was performing an act of self-preservation.¹⁶⁹ So, if the Serb preferences could represent those of Milosevic, and he and the Bosnian Serbs differ only on this one point, then the Serbs could prefer P_N to W .¹⁷⁰ For these reasons, I assume that, because prosecution by the war crimes tribunal is a credible threat to the future of the Serbian leadership and Serbian people, they prefer P_N to both W and P_T .

I therefore assume the preferences of the Serbian leadership are as follows:

1. P_N = establishment of peace, no war crimes tribunal, exchange of assets secured in war, and passive international intervention;
2. W = continued war, expansion of Greater Serbia and increase in assets secured from war, potential war crimes tribunal, and active international military intervention (low risk);

169. It is also worth considering here that Milosevic's territorial ambitions progressively diminished up until the Dayton Accords. See SILBER & LITTLE, *supra* note 22, at 353-54.

170. Concededly, this is a tenuous assumption. But, given the parameters of D'Amato's proposal, combined with the complexity of the circumstances surrounding the war, this and other assumptions must be made.

3. P_T = establishment of peace, war crimes tribunal, some exchange of assets secured in war, and active international intervention.¹⁷¹

B. *Preferences of the Bosniac Party*

The Bosniacs are represented by President Alija Izetbegovic, who refuses to sign any deal that does not adequately address the war crimes committed against the Bosniacs and that does not guarantee the future of Bosnia as a state with its original borders restituted. In the negotiations, the Bosniacs are in the most precarious position. They are seeking a peace agreement to end the war, to create a unified Bosnian state, and to allow refugees to return to their homes. These goals are fundamentally in conflict with the goals of the Croats and Serbs.

Driving the Bosnian strategy are the disproportionate losses the Republic suffered, both in terms of populace and territory. As is evident above, the Bosniacs were disproportionately the victims of ethnic cleansing, both by Serbs and Croats. But Bosnia also suffered territorial encroachment. Any peace agreement, therefore, must include not only the punishment of war criminals, but also an allowance for Bosniacs to return to the towns from which they fled.

In mid-1994, the Bosniacs have recently been rearmed, and are now military allies of the Croats, but the Serbs remain the strongest party militarily. Therefore, the Bosniacs could either prefer W to P_T or P_T to W . However, since the beginning of the war, Bosniacs have sought active international intervention to protect them, to expedite an end to the war, and to ensure a fair peace.¹⁷² Additionally, this intervention has been sought for the prevention and punishment of war crimes.

171. Paul Szasz describes the behavior of the actors as consistent throughout the peace efforts, both before and during the Dayton Accords. Szasz, *supra* note 19. Whether the leaders would opt for martyrdom over continued power is for historians to speculate upon. However, the refusal of Karadzic and Mladic to turn themselves over to NATO troops and their continued ability to elude ICTY prosecutors for the past eight years suggests that they would not likely have been willing to give up their hold on power in exchange for peace.

172. Additionally, a peaceful resolution with a unified Bosnia is advantageous because, in a multi-ethnic state, the Bosniacs would dominate through numerical weight and faster growth. *Id.*

The international community has been somewhat passive, empathizing with the Bosniacs' plight and threatening intervention, despite accommodating the Serbs by not following through on threats of military intervention.¹⁷³ On the other hand, the international community has been actively intervening through the work of the War Crimes Commission and by dispatching UNPROFOR. Because the collective preferences of the Bosniacs most mirror those found in the outcome P_T , I initially assume the Bosniacs prefer P_T to W . For this same reason, I assume that the Bosniac interest in justice will also lead them to prefer P_T to P_N .

The Bosniacs prioritize an outcome that re-establishes Bosnia's original boundaries. However, the last three proposals—the VOPP, London Conference, and Contact Group ultimatum—recognized at least most of the Serbian territorial gains.¹⁷⁴ Because P_N involves the return of territory but the sacrifice of justice, it is unclear whether it can be assumed that the Bosniacs prefer P_N to W , or W to P_N . Presumably, the Bosniacs view P_N with mixed ambitions. On the one hand, they would be able to achieve a peace agreement and the restoration of Bosnia's original borders. However, there would be no means for justice established by the agreement, either legally or militarily. A factor to consider is that the momentum in the war has changed, providing some basis to assume that the Bosniacs prefer W to P_N .¹⁷⁵ Another factor to consider is what type of international intervention the Bosniacs prefer. If they prefer a military intervention by NATO, as it may be a more effective means of restoring their land, then they will prefer W to P_N .¹⁷⁶ On the other hand, if they prefer that the U.N. and the Contact Group continue to serve as peace negotiators, they could be presumed to be content with the promise contained in an agreement for the return of land. It is therefore equally

173. See WILLIAMS & SCHARF, *supra* note 4, at 153-55.

174. See generally SILBER & LITTLE, *supra* note 22, at 258-62, 278-80, 335-41.

175. For instance, by 1994 the arms embargo on the Bosniacs had been mostly lifted following the establishment of the Croat-Muslim Federation. See SILBER & LITTLE, *supra* note 22, at 323.

176. International military intervention took place one year after D'Amato's article. See *infra* Part IV.E.

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tenable to assume that the Bosniacs prefer P_N to W , and vice versa.¹⁷⁷

For the first game, I will assume that they prefer W to P_N because they prefer war to any agreement that does not provide the punishment of Serbs for war crimes and because, after having been rearmed, they are now more confident militarily.

Therefore, the preferences of the Bosniacs in Games I and II are the following:

1. P_T = none of to some assets from war exchanged, active international intervention, war crimes tribunal, and establishment of peace;
2. W = assets are fought over, potential war crimes tribunal, active international intervention, and no establishment of peace;
3. P_N = assets exchanged, no war crimes tribunal, passive international intervention, and establishment of peace.

C. *Preferences of the Croatian Party*

Croatia is represented by President Franjo Tudjman, who has capitalized on the popular Croatian sentiment for independence by seceding from Yugoslavia and is seeking more territory in Bosnia. However, there is also evidence that Tudjman ordered the commission of war crimes against both ethnic Muslims and Serbs.¹⁷⁸ In other words, Croatia has sought territory in Bosnia, but has committed war crimes in doing so. Furthermore, Croatia's goals, by and large, mirror those of the Serbs: a larger nation carved out of Bosnia, the expulsion of ethnic minorities, and independence. Thus, for all games, I assume that the Croatian preferences mirror those of the Serbs.¹⁷⁹

177. The Bosniacs could prefer P_N to W if they believed they could prosecute war criminals domestically. Throughout much of the war, however, the Bosniacs found themselves compromised in most peace negotiations by the international community's willingness to accommodate the Serbs. See *supra* note 96.

178. ICTY Prosecutor Carla Del Ponte had been arranging the indictment of Tudjman in 1999 for crimes committed in Knin and Krajina in 1995, but was unable to proceed due to Tudjman's death that same year. See WILLIAMS & SCHARF, *supra* note 4, at 51.

179. Another historical basis for this assumption is that Croatia and Serbia had been in secret negotiations as to the division of Bosnia since 1991. See

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However, the respective rationales behind each party's preference profile differ. Like Serbia, Croatia has a strong military, though it does not have the support of the JNA. Additionally, it has newfound momentum in its alliance with the Bosniacs. Therefore, it is willing to continue the war.

Although Croatia seeks to create a Greater Croatia and seeks the expulsion of Serbs from the Krajina, Croatia is not as dedicated to holding to its gains as the Serbs. Tudjman is willing to compromise his vision of Croatia, as he would agree to a peace agreement that establishes a weak and highly decentralized Bosnian state, in order to facilitate the potential future merging of the Croatian parts of Bosnia into Croatia.¹⁸⁰ Also, Croatia's territorial ambitions have been tempered by the Muslim-Croat Federation. However, the Croatians still seek to purge the Krajina region of ethnic Serbs. Thus, Croatia is amenable to staying within the borders of the former Croatian Republic and ending its seizure of Bosnian territory, but still has territorial aspirations both in Bosnia and in re-obtaining the Krajina.

The Croatians face a conflict of interest if they pursue some form of justice. The Commission has evidence that Croatian troops committed war crimes, but proportionately less evidence than it has against the Serbian army. On the other hand, Bosnian Croats and Krajina Croats have been victims of ethnic cleansing by Bosnian Serbs. Thus, there exists a conflict between the Croatians' suffering and the injustices they have been accused of committing. For this reason, I assume the Croatian interest in justice is presumably greater than that of the Serbians, but small nonetheless.

Croatia is ambivalent about international intervention. Its historically close ties with the West should imply a military intervention in their favor. Additionally, the United States has brokered a deal on their behalf to give them greater momentum in the war. Threats by the U.S. and NATO to intervene militarily against the Serbs are also positive for Croatians. Therefore, one can assume the Croatians want an active international intervention. On the other hand, evidence of war

supra note 62. For this reason, and due to the fact that they were both seeking more territory by similar means, this appears to be a reasonable assumption.

180. See *supra* note 70.

crimes by Croatian soldiers implies that any active international intervention also may result in the punishment of Croatian leaders.¹⁸¹ Given this latter reason and the factors laid out above, I assume that P_T is the most unattractive option for the Croats. It is unlikely that they want an agreement that punishes them in two different ways: First, in the sacrifice of control over various regions, including the Krajina region and, second, in the potential prosecution of the political and military leadership. As W involves active international military intervention, the opportunity to seize more land, and no punishment by a tribunal, I assume the Croats prefer W to P_T .

P_N confronts the Croats with a difficult choice. Based on the analysis above, the Croats should prefer an outcome with no tribunal, which is either W or P_N . The Croats should also prefer an outcome in which control of the Krajina is returned to them and in which they do not have to give up land in Bosnia. Also, because of its historical ties to the West, Croatia should want an outcome in which the international community is actively intervening. Therefore, Croatia should prefer W to P_N . I make the converse assumption for two reasons. First, under P_N , the return of territory to Croatia guarantees the return of the valued Krajina region, as opposed to no guarantee of this territorial return under W . Second, P_N could also result in a peace agreement with Croatia's alternative preferred outcome of a weakened Bosnian state. As the latter scenario implies that Croatia would not necessarily sacrifice territory, there is also present the likelihood that Croatia could reacquire territory in the future from a weakened neighboring Bosnian state. Therefore, because territory seems to fuel the Croatian war strategy, I assume this latter scenario applies, and thus I assume that the Croats prefer P_N to W .

Therefore, I assume the preferences of the Croats are the following:

1. P_N = establishment of peace, no war crimes tribunal, exchange of assets secured in war and indirect control over a weakened Bosnian state, and passive international intervention;

181. There was evidence of war crimes by Croatian troops against Muslims between 1992 and 1994. See WILLIAMS & SCHARF, *supra* note 4, at 50. For a transcript of Tudjman's direct orders for ethnic cleansing, see *Planning Croatia's Final Solution*, HARPER'S MAG., Dec. 2001, at 20-22.

2. W = continued war, expansion of Greater Croatia and increase in assets secured from war, potential war crimes tribunal, and active international intervention;
3. P_T = establishment of peace, war crimes tribunal, some exchange of assets secured in war, and active international intervention.

IV. GAMES

In this section, I undertake a game theory analysis of D'Amato's proposal. The analysis takes the form of a hypothetical negotiation. There are two fundamental assumptions guiding the negotiation, as established by D'Amato. First, all parties have assets the others desire.¹⁸² Second, all parties must believe there is a credible threat of prosecution by the international community.¹⁸³ The rule of the game requires all parties to unanimously agree to an outcome for it to be in effect. All assumptions that guide the parties' individual behavior are established in Part III, *supra*. If the parties are unable to unanimously agree to an outcome, I assume the result is that the war continues, and the outcome is therefore W.¹⁸⁴

The representation of the games below will be: The Bosnian party's strategies (B) are represented in rows, the Serbian party's strategies (S) are represented in columns, and the Croatian party's strategies (C) are represented in arrows pointing to different matrixes. The particular outcome from the particular combination of each party's strategies is contained in each box of the matrix.¹⁸⁵ Parties strategize as to which outcome they will seek based on their order of preferences for

182. D'Amato, *supra* note 2, at 505.

183. *Id.*

184. This is true even if, for example, two parties agree to P_T and the third party prefers W.

185. Often, game theory matrices present the outcome in each box as a set of numbers, which in this case would be in the form (B, S, C), where each party's strategic choice is represented by a number corresponding to ranking of that player's strategy in his preference profile. *See supra* note 149. Typically, these numbers are in reverse order of preference, so a party's first preference (of two choices) would be presented in the matrix as 2, and his second preference would be presented as 1. For example, in the box where B plays P_T, S plays W, and C plays P_T, the outcome would be represented by (1,1,2), instead of the W that is currently found. For the games in this pa-

outcomes and the preferred outcomes of the other parties. An outcome will not necessarily result because a particular party prefers it most; rather, an outcome results from the combination of the strategies played by each party. The interaction of the parties' strategies may ultimately result in a final outcome to which all three parties agree, which will be represented by a box in a matrix. Understanding how the game works and how to follow the analysis may be better understood by analyzing Game I.

A. *Game I*

In order to understand how the offer of P_N affects each of the actors in a negotiation, we must first understand the outcome when the parties interact before they are offered P_N . The interaction of the strategies of all three parties is summed up in Table 1. There are two matrices—the first of which represents how B and S strategize when C plays its P_T strategy, and the second of which represents how B and S strategize when C plays W. The various outcomes are represented in each of the four boxes of the matrix. Each outcome results from the combination of strategies of B and S given C playing W. For instance, when C plays W, if both B and S also play W, the outcome W results in the upper-left box of the matrix. In a textual description of the game, this outcome is represented by [W,W,W]. This will be how the reader should address each of the model games.

In this game, each player strategizes as to whether it will continue at war or whether it will agree to sign a peace agreement with a war crimes tribunal. B will not play W, for when it plays P_T the outcomes are at least as good and sometimes better than when it plays W. In other words, when it plays P_T , B can achieve the preferred outcome P_T , but cannot ever attain that outcome when it plays W. Therefore, P_T dominates W for the Bosniac Party and is its dominant strategy.¹⁸⁶ Similarly, neither C nor S will play P_T , as they prefer the outcome W to

per, it is much easier for the reader to follow if only the ultimate outcomes (e.g., W, P_T , or P_N) are produced in the matrices.

186. In Games II and III, dominated strategies will be visually eliminated, and the matrix will be represented in reduced form. This is done in order to clarify how the parties perceive the negotiation once they have eliminated strategies.

Table 1: Game I

		S		S			
		W	P _T	W	P _T		
B	W	W	W	B	W	W	W
	P _T	W	P _T		P _T	W*	W
		P _T		W			
		←		→			
		C		C			

P_T, and all outcomes when each one plays W result in W. Although they can attain W when they play P_T, this is not true in all instances; however, they can always attain W when they play W. Therefore, W dominates P_T for both S and C and thus is each party's dominant strategy. No matter what the other players decide to do, each player's first preference will always provide better (or at least as good) results for them. More specifically, B will only play its P_T row, S will only play its W column, and C will only play W. Therefore, the solution to the game will only result in the second matrix. Here, as B is only playing the bottom row and S is only playing the first column, the answer will be found at the juncture of the two, which is [P_T, W, W]. This outcome is the combination of all three parties' dominant strategies.

This outcome is also a Nash equilibrium because it is the best choice for each party given what strategies the other parties are using. The easiest way to find the Nash equilibrium is, for each player and for each potential strategy for that player, to determine the other player's best response to that strategy.¹⁸⁷ All players have two potential strategies: W or P_T. When S and C play W, B has the option of playing P_T or W. B would prefer the outcome P_T but is only able to get that result if both S and C play P_T. Neither S nor C will play P_T because they would rather play W in order to get the outcome W. However, B won't play W because it prefers the outcome P_T, so

187. See GIBBONS, *supra* note 13, at 8.

B must play P_T .¹⁸⁸ Similarly, because they prefer the outcome W to P_T , both S and C will play W when B plays P_T . Also, neither S nor C will play P_T because if they did, B will also play P_T , resulting in the outcome P_T , which is the least-preferred outcome for both S and C. Thus, a unique Nash Equilibrium results at $[P_T, W, W]$ because it is the best response for all parties given the other parties' preferred strategies.

B. *Game II*

D'Amato's proposal predicts that the outcome should change if the parties are presented with the option of P_N .¹⁸⁹ The interaction of the parties' preferences when presented with P_N is presented below in Table 2. As is evident below, there has been an addition of a third matrix to represent the outcomes when the parties strategize in response to C's playing P_N .

D'Amato believes that, with P_N as a choice, the outcome will be $[P_N, P_N, P_N]$.¹⁹⁰ However, P_N is not the outcome in this game.¹⁹¹

Like the first game, the second game is dominance solvable. For B, P_N is dominated by both P_T and W, as there is a chance when B plays P_T or W, B will get a more preferable outcome than when it plays P_N . For similar reasons, W is dominated by P_T . When B plays W the outcome will always be W, but when B plays P_T , at least one outcome is P_T , which B prefers to W. Therefore, P_T is B's dominant strategy.

188. It is important to note that, with the exception of $[P_T, P_T, P_T]$, all strategies will result in the outcome W. Because both S and C prefer the outcome W, it is arguable that, in these circumstances, the B party is at a considerable disadvantage. However, game theory analysis does not hold that the outcome of the negotiation is determined by the disadvantage of B—the ordering of preferred outcomes by other parties are equally determinative but are not the sole determinants of a particular outcome.

189. See D'Amato, *supra* note 2, at 503-05.

190. See *id.* at 503-04 (positing that putting the tribunal in play removes a major barrier to a peacefully negotiated outcome and would give all sides more negotiating room to work toward a negotiated outcome).

191. That result— $[P_N, P_N, P_N]$ —would occur if the Bosniacs preferred P_N to P_T ; however, based on the history of the conflict and the factors above, this preference profile is difficult to support. The author welcomes any attempt to prove that such a preference profile is feasible within these parameters.

Table 2: Game II

		S			S			S		
		W	P _T	P _N	W	P _T	P _N	W	P _T	P _N
B	W	W	W	W	W	W	W	W	W	W
	P _T	W	P _T	W	P _T	W	W	P _T	W	W*
	P _N	W	W	W	P _N	W	W	P _N	W	P _N
		P _T			W			P _N		
		←			↑			→		
					C					

Neither C nor S will play P_T because it is dominated by both W and P_N for both parties—both parties rank the outcome P_T the lowest. W is also a dominated strategy, as both S and C may be able to attain their most favored outcome if they play P_N. Therefore, P_N is the dominant strategy for both S and C.

Consequently, all three parties will agree to the outcome [P_T, P_N, P_N], which is a failure to reach an agreement, and therefore the outcome of the game is W. Only one outcome produces the unanimous agreement on P_N, which is at [P_N, P_N, P_N]. Such an outcome requires that all three parties play P_N. Both S and C will play P_N, as their preferred outcome P_N occurs when they do so, not when they play W. But B will not play P_N, as this strategy is dominated by its other two strategies, and a party does not play its dominated strategies.

The outcome of this game is also a Nash Equilibrium. There are three potential strategies for each player in this game. As in Game I, S and C will never play P_T because it is their least preferred outcome, and, if both did, B would play P_T in order to attain its preferred outcome. Similarly, neither will play W because they can get a better outcome, P_N, by playing P_N. Hence, the best strategy for both S and C, given that they prefer the outcome P_N, is to play P_N; otherwise, if S and C play W or P_T, B will strategize to ensure a less preferable outcome to both. Because neither S nor C will play P_T or W, B is

best off playing its most preferred strategy, which is P_T , even if it results in the outcome W in this particular instance. When B plays P_T , it has a chance of attaining its most preferred outcome of P_T . When it plays W , there is no chance of obtaining P_T and the other actors would strategize to ensure the outcome $[W, W, W]$. Therefore, the outcome $[P_T, P_N, P_N]$ is the best outcome that all three parties can attain given each others' strategies and, thus, is the Nash Equilibrium.

C. Game III

There are two conclusions that may be reached from the result of Game II. It may be concluded that D'Amato's proposal is incorrect and that P_N is not feasible. Or, it may be concluded that the preference profiles, ordered based on some ambiguous assumptions, need to be re-ordered. If the latter conclusion is right, then we may revisit these assumptions to determine whether D'Amato's proposal succeeds under different assumptions.

In the first two games, the results were largely dictated by each player's reliance on their dominant strategies. Therefore, the result $[P_N, P_N, P_N]$ would not occur in Game II. Additionally, P_T would never occur because it is a dominated strategy for both S and C . It is for this reason also that the result $[P_T, P_T, P_T]$ would not occur in this game either.

One reason for the outcome $[P_T, P_N, P_N]$ is the order of B 's preferred outcomes. The initial assumption was that B would prefer W to P_N if presented with the choice between the two. The assumption was that B would prefer to fight for military justice than to sign a peace agreement that leaves the Serbs unpunished. However, there was an equally strong argument for B to prefer P_N to W .¹⁹² Given this ambivalence and the results above, it is worth exploring the results of a game when W is dominated by P_N . P_T will remain B 's first preference because, as the party that has disproportionately suffered from ethnic cleansing, it would prefer P_T to P_N . B 's order of preferences is now the following:

1. P_T
2. P_N

192. The question surrounding what would constitute an acceptable P_N for all parties will be addressed later. See *infra* Part V.D.

3. W

The new interaction of B's revised preferences with those of the other parties may be seen in Table 3:

Table 3: Game III

		S			S			S		
		W	P _T	P _N	W	P _T	P _N	W	P _T	P _N
B	W	W	W	W	W	W	W	W	W	W
	P _T	W	P _T	W	P _T	W	W	P _T	W	W
	P _N	W	W	W	P _N	W	W	P _N	W	P _N *
		P _T			W			P _N		
		←			↑			→		
					C					

This game is also dominance solvable. In this game, B will not play W because W always results in B's least-preferred outcome. For B, therefore, W is dominated by both P_T and P_N. Neither S nor C will play P_T, as it is their least preferred outcome. P_T is therefore dominated by both W and P_N for both parties. The reduced game appears in Table 4:

In this reduced game, W is dominated by P_N for both S and C because they prefer the outcome P_N to W, and P_N is not attainable when either plays W. In other words, P_N is as least as good a strategy as W in all cases, but better in some cases because they may be able to get the result P_N. Therefore, P_N is the dominant strategy for both S and C, resulting in the game in Table 5:

For simplification, the game has now been reduced to B's decision: B must choose between playing P_T and P_N. If B plays P_T, the outcome will be W, which is B's least preferred outcome. Instead, B will prefer to play P_N when the other two parties play P_N because it prefers the outcome P_N to W. Thus, as D'Amato predicted, all three parties are able to agree to [P_N, P_N, P_N].

the best option is to play either P_N or P_T . If B plays P_T , S and C will still play P_N and the outcome will be W, B's least preferred outcome. If B plays P_N , the outcome will be P_N because S and C will strategize to achieve their most preferred outcome given B's choice of P_N . Therefore, $[P_N, P_N, P_N]$ is the best result that each party can do in response to the strategies of the other players and is, therefore, the Nash Equilibrium.

There are contradicting conclusions to be drawn from the results above. One conclusion from Game III is that D'Amato's proposal works when following assumptions that attempt to mirror the behavior of the parties in 1994. Another conclusion is that D'Amato's proposal works if all assumptions are accepted to reflect historical circumstances but a particular assumption about a party's preferences requires modification—but even then, that assumption is tenuous.¹⁹³ In either case, the parties agree to his proposal in circumstances similar to the actual history of the negotiation.

D. *Game IV*

Is there another, better game, in which there are fewer ambiguities in the outcome? There is such a game, but the interesting twist is that a fourth party is added. This game is modeled after the U.S.-led peace negotiations at Dayton, Ohio, in 1995, which resulted in the Dayton Accords. The fourth party is the United States, whose aggressive push for peace at the negotiations resulted in the Accords.¹⁹⁴

The United States, as a party, prioritizes peace as an outcome. If required to choose between the two peace outcomes of P_N and P_T , the United States would prefer P_T , as the United

193. Concededly, calling any set of preferences the actual set of preferences of a given party at a given point in time is, at best, a tenuous proposition. As a result, D'Amato's proposal is questionable under a game theory approach. Nonetheless, I rely on Paul Szasz's outline of the parties' preferences as a foundation because they do mirror the accounts given by diplomats involved in the peace talks. See Szasz, *supra* note 19, at 762. Compare generally HOLBROOKE, *supra* note 82, with OWEN, *supra* note 17.

194. The U.S. posturing could either be the rule of the negotiation (an agreement must be reached) or it could figure into the negotiations as having interests of a party, where the United States has its own preference profile. I will assume the latter of the two because the U.S. interests are better represented as a preference profile and the outcome is more interesting for this analysis.

States not only represents its own interests at the negotiating table, but also those of an international community committed to a tribunal.¹⁹⁵ Furthermore, as a peace negotiator, the United States does not want war at all. Therefore, the preference profile of the United States will be:

1. P_T
2. P_N
3. W ¹⁹⁶

There is an additional change to the game. Given the role of the United States as the aggressive arbiter of a peace accord, I will assume that unanimous agreement is no longer necessary. Instead, I assume that only three out of four parties must agree in order to reach an agreement that binds all four. If all three warring parties agree to peace, either with or without a tribunal, then the United States will agree to that outcome. Alternatively, if two warring parties agree to peace and the United States also supports that particular peace, then the warring party who does not agree to that outcome is assumed to eventually agree to this peace accord under U.S. pressure.

Again, this game is dominance solvable. Assume all three Balkan parties have the same preference profiles as in Game III and recall that only three parties need to agree on a particular outcome. In this new game, neither S nor C will play either P_T or W, as they are dominated by P_N . Neither B nor the United States (U.S.) will play W, as it is dominated by both P_N and P_T . This leaves P_N as the dominant strategy of both S and C and P_N and P_T as the remaining strategies of both the U.S. and B.

It is easier to understand what happens next by focusing on B's decisions and the U.S.'s decisions given B's decisions. If

195. The United States actively moved the responsibility for negotiations away from the U.N. toward the Contact Group and, ultimately, into the hands of the United States. See WILLIAMS & SCHARF, *supra* note 4, at 68.

196. This argument assumes that the United States would agree to P_N as an outcome of the negotiation. Is that historically realistic? The answer may be found in an agreement reached between Ambassador Holbrooke and Milosevic following the Dayton Accords in 1996. The "Rules of the Road" Agreement hampered the pursuit of justice by only allowing the arrest of local war criminals (as opposed to war criminals at higher levels of leadership) in accordance with the international legal standards of the Office of the Prosecutor of the ICTY, which had limited capacity to handle its large caseload. See *id.* at 118-19.

B plays P_T , both S and C will play P_N . In this case, if the U.S. also plays P_T [P_T, P_N, P_N, P_T], the outcome will be W. But the outcome will be P_N if the U.S. plays P_N [P_T, P_N, P_N, P_N].

If B plays P_N , it does not matter whether the U.S. chooses P_T and P_N . The outcome will be P_N if the U.S. plays either P_N [P_N, P_N, P_N, P_N] or if it plays P_T [P_N, P_N, P_N, P_T]. In this game, then, both the U.S. and B are better off playing P_N . The result, therefore, is [P_N, P_N, P_N, P_N], as predicted by D'Amato. This is true when all three warring parties agree to P_N , even if the U.S. prefers P_T to P_N ; it will settle for P_N because all the other parties have agreed to it, and it is the best that the U.S. can do in light of the strategies of the other parties.

If this game were to proceed with B's preferences as they are in Game II, the outcome will be P_N but via a different set of strategies. For B, P_N is now dominated by both W and P_T . S and C will continue to play their dominant strategy of P_N . For the U.S., W continues to be a dominated strategy, leaving it the option of playing P_T or P_N . Again, it is easiest to understand how this game turns out by following the decision of the U.S. in response to B's strategies. If B plays either W or P_T and the U.S. plays P_T , then the outcome is W, as no three parties are in agreement ([W, P_N, P_N, P_T] or [P_T, P_N, P_N, P_T]). If B plays either W or P_T , and the U.S. plays P_N , then the outcome is P_N ([W, P_N, P_N, P_N] or [P_T, P_N, P_N, P_N]), as three parties are in agreement as to the outcome. Therefore, regardless of B's strategies, the outcome is P_N because the U.S. prefers the outcome P_N to W.

There are two interesting twists to this game. First, regardless of whether B prefers P_N to W or vice versa, the U.S. will strategize in order to guarantee the outcome P_N , even though it prefers P_T to P_N . Second, B is at a disadvantage if it prefers W to P_N , as it is forced by all three parties to an agreement it does not want. Although these scenarios are interesting theoretically, it is unclear how likely they are to occur in reality. Would the U.S. sacrifice P_T for P_N ? Would the Bosniac party consent to being forced into a peace agreement it does not want?¹⁹⁷ These questions are of legitimate concern when attempting to draw practical lessons from a theoretical analy-

197. The United States had previously applied pressure on Itzebegovic to accept the Vance-Owen Peace Plan. See SILBER & LITTLE, *supra* note 22, at 303-04.

sis. Nevertheless, with the U.S. as a party to the negotiations, the outcome will be P_N.¹⁹⁸

E. *The Dayton Accords*

The Dayton Accords, negotiated during November 1995, focused primarily on reallocating territory and establishing a peace.¹⁹⁹ The Accords were the result of an active intervention by the United States, brought on by Serbian noncooperation and Bosniac-Croat cooperation with the United States.²⁰⁰ The Accords were also the result of a shift in NATO policy that resulted from further atrocities by Bosnian Serbs, particularly a massacre in Srbenica, and a renewed campaign of territorial aggression.²⁰¹ In response to the renewed Serb aggression, NATO bombings of Serb positions across Bosnia began in the Summer of 1995.²⁰² The bombings resulted in a cease-fire agreement, secured through shuttle diplomacy by the United States in October 1995.²⁰³

Overall, the Dayton Accords resulted in the following accomplishments: The creation of a single Bosnian state with internationally recognized borders; the division of Bosnia into the Federation of Bosnia and the Republika Srpska, each with substantial autonomy and its own army; special arrangements for refugees and displaced persons; and no role in public life for indicted war criminals in conjunction with no pursuit by

198. D'Amato wonders whether preventing the tribunal from occurring was offered as a bargaining chip in U.N.-led peace negotiations in the early 1990s. D'Amato, *supra* note 2, at 500. This did not appear to be true at the 1995 Dayton Accords, where the outcome of the peace negotiations was P_T. In fact, diplomats at Dayton sought to minimize the importance of the Tribunal altogether. See discussion *infra* Part IV.E.

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199. WILLIAMS & SCHARF. *supra* note 4, at 54-55.

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200. *Id.* at 160-61.

201. In July 1995, Bosnian Serbs in the hills surrounding Srebrenica shelled the town, despite the presence of UNPROFOR teams. Because the UNPROFOR soldiers were not allowed to fight back under international law, the Serbs took thousands of Bosniac civilians from under U.N. protection and murdered them, burying them in mass graves. See SILBER & LITTLE, *supra* note 22, at 345-48. In the same month, Krajina Serbs joined with Bosnian Serbs in attacking Croats in Bihac, within the Krajina region. Croatia launched a counteroffensive that pushed into Bosnia, and which ultimately led to the cleansing of the Krajina of ethnic Serbs. See *id.* at 353, 358-59.

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202. *Id.* at 365-66.

203. See HOLBROOKE, *supra* note 82, at 198.

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NATO troops for the arrest of these war criminals.²⁰⁴ The ICTY began its prosecution of criminals against whom it had evidence during the negotiations and issued indictments following the Accords. In other words, Dayton resulted in P_T.

Why did the Dayton Accords result in P_T? It is best to understand this result in light of the factors set out above.²⁰⁵

First, each leader's desire for peace had substantially changed by 1995. Milosevic sought an end to the NATO bombings, as it had weakened the Bosnian Serbs, forcing them to withdraw from certain territories and thereby reduced their share of Bosnia from 70 percent to almost 50 percent.²⁰⁶ The Croats and Bosniacs had momentum behind them, particularly after the victories in the Krajina, the NATO bombing campaign, and the consequent disarray of the Bosnian Serb Army. Serbia thus wanted peace more than the other parties. Croats and Bosniacs sought to continue the war, especially following the weakening of the Serb army after the bombings, but were held back by the United States.²⁰⁷

Second, all parties had been persuaded that the proportion of Bosnia that they each possessed at that time was the best that they could get, with minor changes.²⁰⁸ Through diplomacy, all sides would be able to retain their gains from the war but, more important, would be able to protect their fellow Serbs, Croats, or Bosniacs in more isolated regions of Bosnia. Again, Croats and Bosniacs were in position to make military advances, but U.S. diplomacy prevented them from doing so, thereby shifting their focus towards achieving their goals via diplomatic negotiations.

Third, the Bosnians wanted an agreement most conducive to the work of a War Crimes Tribunal,²⁰⁹ but the Serbs and Croats would do so only if there was no credible threat of

204. See OWEN, *supra* note 17, at 367-68.

205. For a detailed recollection of the Dayton Accords from the perspective of the Accords' chief architect, see generally HOLBROOKE, *supra* note 82, at 231-312. For a presentation of the international legal dynamics of the Dayton Accords, see generally WILLIAMS & SCHARF, *supra* note 4, at 151-69.

206. SILBER & LITTLE, *supra* note 22, at 368.

207. See *id.*

208. See HOLBROOKE, *supra* note 82, at 288-312.

209. See WILLIAMS & SCHARF, *supra* note 4, at 163 (quoting Kenneth Doubt as to Bosnia's desire for justice appearing less and less like a desire for peace over the course of the negotiations).

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prosecution.²¹⁰ This resulted in a middle ground solution, whereby the Tribunal would exist but would not be a credible threat to the leaders involved.²¹¹ Hence, unlike D'Amato's assumption that the Tribunal was determinative of a peace agreement, in actuality the effect of the Tribunal on the negotiating parties at Dayton was minimal. There were two reasons for this. First, the international community did not demonstrate much commitment to the ICTY, either at the level of the U.N. or at the level of the diplomats negotiating the peace agreements.²¹² Second, and more directly, negotiators perceived the ICTY to be either an obstacle to peace²¹³ or a disruption to the implementation of peace.²¹⁴ Therefore, the parties did not fear prosecution by the Tribunal at the Dayton Accords.

Last, no leader desired active international intervention in the conflict. Consequently, the appeal of continuing the war was minimal. For the Serbs, the NATO bombing campaign had taken its toll.²¹⁵ For the Croats and Bosniacs, al-

210. Tudjman acted as if he had immunity following the Dayton Accords. Tudjman promoted a senior officer indicted by the War Crimes Tribunal, and released another indicted officer. Bosnian Serbs disregarded the War Crimes Tribunal and continued to carry out ethnic cleansing around Banja Luka. See OWEN, *supra* note 17, at 371.

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211. Milosevic was later indicted for war crimes committed in Kosovo, and evidence of war crimes in Bosnia has also been used in his trial. See, e.g., Marlise Simons, *Milosevic to Face New Charges for Bosnian War*, N.Y. TIMES, Nov. 13, 2001, at A8.

212. See WILLIAMS & SCHARF, *supra* note 4, at 111, 201 (noting that Secretary Boutros Boutros-Ghali took the opportunity to slow the flow of funds to the Tribunal as part of his comprehensive efforts to support the Vance-Owen Peace Plan and that the diplomat-negotiators at Dayton attempted to delete references to the ICTY).

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213. See OWEN, *supra* note 17, at 400 (citing the views of members of the international community).

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214. See HOLBROOKE, *supra* note 82, at 332-33 (providing an account by the chief architect of the Dayton Accords of the complications in implementing the Dayton Accords caused by the arrests of senior Bosnian Serb officials General Djordje Djukic and Colonel Aleksa Krsmanovic).

R

215. Paul Williams and Michael Scharf argue that "the accommodation of Milosevic at Dayton . . . emboldened him in his efforts to create a Greater Serbia and encouraged his attempt to ethnically cleanse Kosovo." WILLIAMS & SCHARF, *supra* note 4, at 159. It was these war crimes that ultimately brought Milosevic down as President of Serbia and served as a basis for his arrest in 2001. For an account of the events leading up to the arrest and trial of Milosevic at the ICTY, see WILLIAMS & SCHARF, *supra* note 4, at 233-34.

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though they had displayed inclinations to continue the war, active international intervention in the form of diplomatic hardball by U.S. diplomats forced Presidents Itzebegovic and Tudjman to sign the Accords.²¹⁶ In other words, the Croats and Bosniacs had no choice.

In retrospect, could Dayton have resulted in P_N ? No. For P_N to be true, either the United States or the international community, or both, had to be willing to give up on the ICTY. But diplomats felt that Dayton “was more than just a political settlement,”²¹⁷ and therefore P_N was an inconceivable option to negotiators. It could be argued that actively compromising the work of the ICTY at Dayton was, in fact, a form of P_N . D’Amato suggested taking the Tribunal off the table completely; but, for the diplomats at Dayton, the Tribunal would be part of any peace agreement, even if it was compromised by the Accord or by the failure of the U.N. to provide adequate funding.²¹⁸ Hence, Dayton did not result in P_N , but rather a different, compromised form of P_T .

V. EVALUATION OF D’AMATO’S PROPOSAL IN LIGHT OF GAME THEORY

D’Amato’s proposal, when scrutinized under a game theory analysis, presents a dilemma. D’Amato perceives the dilemma to be whether peace is feasible when the threat of prosecution looms over the leaders negotiating the agreement, or if a peace agreement is reached, whether that peace is ideal.²¹⁹ The game theory analysis above demonstrates that peace and, therefore, an agreement requiring a war crimes tribunal may not be feasible if the threat of prosecution is credible.

Game theory analysis illustrates a different, more serious dilemma: Leaders guilty of war crimes may be empowered at the negotiation table when faced with the choice of agreeing to peace with a tribunal or war. Leaders may strategize in order to assure a particular outcome, despite the desires of the

216. See SILBER & LITTLE, *supra* note 22, at 376.

217. See HOLBROOKE, *supra* note 82, at 261.

218. See WILLIAMS & SCHARF, *supra* note 4, at 96-97 (noting that the establishment of a Tribunal was not automatic under Security Council Resolution 780, yet describing the unlikelihood of establishing national prosecutions as an alternative).

219. See D’Amato, *supra* note 2, at 502.

other parties involved, and, moreover, despite the desire of the international community for an outcome in which war crimes are punished. Furthermore, the games portray negotiators as able to determine not only the efficacy of a tribunal, but its future, too, thereby allowing them to undermine both the tribunal and its deterrent effect on future leaders. Therefore, regardless of the credibility of the threat of prosecution, the international duty to prosecute war crimes, and the international interest in the deterrence behind the threat, a leader guilty of war crimes may benefit from participating in negotiations. In fact, a leader may not only benefit, but he may be able to dictate his own punishment, or whether he is to be punished at all. This suggests that the international community could be powerless in these games. Moreover, despite a noble pursuit for an ideal outcome, the international community appears to create the conditions for an outcome antithetical to its aims and ideals.

Counterarguments to D'Amato's proposal have stated that this dilemma implicates whether a war crimes tribunal is desirable.²²⁰ The game theoretic analysis above also may suggest this question, especially in light of the suggested empowerment of war criminals at the bargaining table. However, these critics miss a fundamental assumption of D'Amato's essay, which also guides their criticism: There exists, "in the abstract," a duty under international law to prosecute all war crimes.²²¹

I will seek to prove below that the games suggest that this concept of a duty remains fundamental to the prosecution of war crimes, and to the credibility of the threat of prosecution. However, I will also show that the results of the games above suggest the necessity of refocusing this notion of duty away from arguments of moral necessity. Instead, arguments in favor of a duty to prosecute, of war crimes tribunals, and of an International Criminal Court must begin to refocus towards

220. See *supra* note 7.

221. See D'Amato, *supra* note 2, at 501; see also *supra* note 11. See generally Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991); M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63 (1996); Michael Scharf, *The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes*, 59 LAW & CONTEMP. PROBS. 41 (1996).

questions of the feasibility of preserving the integrity of the concept of duty and of institutions of justice, particularly in light of the empowerment of war criminals at the negotiation table as demonstrated in the games above.²²²

A. *The Duty to Prosecute*

D’Amato’s argument is guided by the assumption that there exists a duty to prosecute war crimes under international law. This duty, in its absolute form, requires the prosecution of all war crimes, both in international and internal wars.²²³ The leading proponent of this duty in absolute form is Diane Orentlicher, who argues, “[i]nternational law requiring punishment of atrocious crimes—and, more to the point, international pressure for compliance—can provide a counterweight to pressure from groups seeking impunity.”²²⁴ An absolute duty implies a credible threat of prosecution—that all war crimes will be prosecuted by the international community.

D’Amato’s proposal questions whether peace with a tribunal is feasible when such a counterweight exists. If the international community believes this duty exists, then they will pursue a tribunal and will not be willing to present peace without a tribunal as an option. But, at the negotiating table, as Game I demonstrates, as long the threat of prosecution is credible, warring leaders will strategize in order to guarantee an outcome that does not involve their prosecution. Because P_N is not an option when there is a duty to prosecute, the outcome will be war.

222. The feasibility argument expands on a similar point made by D’Amato in response to the critiques of his essay. See D’Amato, *Correspondence*, *supra* note 7, at 94.

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223. See Rome Statute of the International Criminal Court, pmbl., U.N. Doc. A/CONF. 183/9 (1998), available at http://www.un.org/law/icc/statute/99_corr/cstatute.htm [hereinafter Rome Statute]; Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT’L L.J. 507, 522 (1999) (“The Rome Statute’s Preamble suggests that deferring a prosecution because of the existence of a national amnesty would be incompatible with the purpose of the Court, namely to ensure criminal prosecution of persons who commit serious international crimes.”).

224. Orentlicher, *supra* note 221, at 2549. The duty to prosecute has found difficult ground—if not a gap between the duty itself and the punishment of guilty leaders—when confronting leaders guilty of war crimes. See Scharf, *supra* note 221, at 57-58.

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Game I further suggests that leaders who fear punishment by the international community, and therefore act accordingly in their own interests, do not face any real counterweight. In other words, a leader may act to ensure his own impunity. A tribunal may be created before peace negotiations but will be unable to effectively pursue its work until the leaders eventually agree to a deal.²²⁵ In such a situation, a leader may repeatedly frustrate the continuing work and conclusive establishment of a tribunal by refusing to agree to any outcome that permits a tribunal to proceed with prosecutions and, in turn, the leader's own prosecution and potential punishment.²²⁶ The counterweight is ineffective because the guilty parties would continue to frustrate efforts to permit a tribunal to proceed and, worse, would opt to continue the war in their own interests.²²⁷ Moreover, the conceptual and practical damage will have been done—in particular, given the leaders' ability to determine their own fate in the face of potential criminal prosecution, the deterrent effect and credibility of the Tribunal will have been undermined by the time any such deal is reached.²²⁸ Thus, Game I suggests that the international com-

225. Again, diplomats may not want to proceed with a tribunal until peace accords have been signed. *See supra* note 112.

226. By "conclusive establishment," I assume that a tribunal is not conclusively established until it may proceed with all potential prosecutions. My grounds for this assumption are based on the fact that the first prosecution by the ICTY was of Dusko Tadic in October 1995, immediately after the Dayton Accords. *See generally* Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-I-AR72 (October 2, 1995). In other words, despite handing down more than fifty indictments before Dayton, the ICTY could not proceed with prosecutions until the Dayton Accords had been signed and all parties had acceded to the Tribunal's jurisdiction. *See WILLIAMS & SCHARF, supra* note 4, at 161-66 (discussing the parties' maneuvering around the jurisdiction of the ICTY at the Dayton Accords).

227. The problem of the lack of a counterweight is particularly evident in this scenario. If the war continues, then the commission of war crimes presumably continues, despite the existence of a war crimes tribunal. It is also important to consider Game IV when W and P_T are the only options. Even if the international community is a party to the negotiations, and P_N is not an option, the final outcome will be $[P_T, W, W, P_T]$, as no party can do any better than playing its most preferred strategy as long as Croatia and Serbia do not want a war crimes tribunal.

228. The potential for the commission of war crimes continuing despite the presence of a tribunal would conceivably further undermine the deterrent effect and credibility of a tribunal.

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munity's pursuit of an absolute duty to prosecute does not daunt guilty leaders, but empowers them.

There exists a counterargument to Orentlicher's notion of duty that claims there does not exist a duty to prosecute war crimes if they occur in an internal conflict.²²⁹ Michael Scharf argues that:

[A history of] appeals to exceptions or justifications supposedly contained within the rule [of the duty to prosecute] do not in fact confirm the rule, but rather deny its existence and in its place assert an alternative rule that would allow amnesty for crimes against humanity whenever justified by needs for political reconciliation.²³⁰

In other words, Scharf argues that there may exist a duty to prosecute war crimes, but it has rarely, if ever, been pursued apolitically. Such an argument essentially states that the threat of prosecution is not credible because exceptions have been and may be made in order to accommodate political realities.²³¹

In the games above, if the threat of prosecution is not credible, then the leaders may opt for P_T . Specifically, for the Serbian and Croatian parties, a compromised P_T will allow them to make few concessions, preserve their gains over the course of the war, and avoid prosecution by the tribunal.²³² The Bosniac party may be happy with the outcome of peace with a tribunal, but this assumes that a weaker form of P_T would be acceptable to them. Regardless, all three parties will prioritize P_T in a negotiation, and P_T will be the outcome.²³³

229. See Scharf, *supra* note 221, at 58; see also Roman Boed, *The Effect of a Domestic Amnesty on the Ability of Foreign States to Prosecute Alleged Perpetrators of Serious Human Rights Violations*, 33 CORNELL INT'L L.J. 297, 314-15.

230. Scharf, *supra* note 221, at 58-59.

231. See Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 555 (1995) ("What is needed is a uniform and definite corpus of international humanitarian law that can be applied *apolitically* to internal atrocities everywhere.") (emphasis added).

232. This outcome mirrors the outcome of the Dayton Accords. See *supra* Part IV.E.

233. There are a number of reasons why the threat of prosecution would not be credible. First, as D'Amato points out, the historical precedent establishes that there has not been a duty to prosecute. D'Amato, *supra* note 2, at 501 ("Whatever the reason, the failure of the international community to set up such a war crimes tribunal, when it had the means and ability to do so,

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A weaker form P_T presents a paradox. If the international community pursues its duty to prosecute war criminals, then the war will continue with further civilian casualties, as D'Amato predicts, and, moreover, the continued commission of war crimes.²³⁴ If the international community is willing to compromise this duty, making the threat of prosecution less credible to the leaders at the negotiating table, P_T will result,

must be counted as a significant negative precedent for international accountability.”). Cf. Michael P. Scharf, *Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?*, 31 TEX. INT'L L.J. 1 (1996) (arguing that crimes committed in Haiti by the brief rule of the military regime in 1994 constituted violations of international law and a tribunal should have been established for their prosecution).

Second, international diplomats may minimize the significance of a tribunal in order to achieve a peace agreement. See discussion *infra* Part V.E. See also WILLIAMS & SCHARF, *supra* note 4, at 64-69 (arguing that the United States sought to accept some limited role for justice, while pursuing a primary approach of accommodating Balkan leaders).

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Third, the U.N. may minimize the significance of a tribunal. It may do so simply through under-funding, which plagued the ICTY throughout its initial phases. See WILLIAMS & SCHARF, *supra* note 4, at 111 (noting that Secretary Boutros Boutros-Ghali took the opportunity to slow the flow of funds to the ICTY as part of his comprehensive efforts to support the Vance-Owen Peace Plan); see also RICHARD GOLDSTONE, FOR HUMANITY: REFLECTIONS OF A WAR CRIMES INVESTIGATOR 77, 82-83 (2000). It may also do so through the language of the resolution, as in the case of U.N. Security Council Resolution 780, which called for the “setting up of a tribunal” but avoided establishing a tribunal as the appropriate mechanism for dealing with war crimes. See WILLIAMS & SCHARF, *supra* note 4, at 97 (arguing the lack of specificity of Resolution 780 made creation of the ICTY “not as straightforward or automatic as those arguing for an enhanced role for justice might have desired”). Cf. Payam Akhavan, *The Yugoslav Tribunal at a Crossroads: The Dayton Peace Agreement and Beyond*, 18 HUM. RTS. Q. 259, 261-65 (1996) (discussing the various perceptions within the international community of the ICTY).

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Last, the credibility of the threat of prosecution may be compromised by politics. That is, the general political and individual self-interests of leaders and diplomats at all levels (e.g., within negotiations, U.S. and EU, and U.N.) may interfere. See M. Cherif Bassaiouni, *Searching For Peace and Achieving Justice: The Need For Accountability*, 59 LAW & CONTEMP. PROBS. 9, 12 (1996) (arguing that “bartering away justice for political results, albeit in the pursuit of peace is the goal of most political leaders who seek to end conflicts or facilitate transitions to non-tyrannical regimes”). Additionally, Resolution 780 has been described as a “political resolution,” as countries could not agree on the appropriate mechanism for dealing with war crimes in the former Yugoslavia until the passage of U.N. Security Council Resolution 808. See WILLIAMS & SCHARF, *supra* note 4, at 93-96.

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234. See *supra* notes 70-71 and accompanying text.

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but at the cost of the integrity of its duty to prosecute all parties guilty of war crimes.²³⁵ Such a dilemma confronts the argument that there is an absolute duty to prosecute head-on. Moreover, this dilemma suggests the existence of the Tribunal does not necessarily facilitate negotiations towards a peace settlement, as some scholars have predicted.²³⁶

Given the logic behind an absolute duty to prosecute, it is evident from the analysis above that the duty to prosecute and the credibility of the threat of prosecution for war crimes are inversely related, and, any outcome P_T may be unable to preserve one without compromising the other.

B. *The Preservation of Duty and Credibility Without a Tribunal*

D'Amato believes his proposal is guided by an absolute duty to prosecute and, therefore, will serve to preserve the credibility of the threat of prosecution and to deter future war criminals.²³⁷ This argument may seem counterintuitive, for the abandonment of a tribunal appears to abandon this duty and, consequently, the credibility of the threat of prosecution.²³⁸ However, under D'Amato's proposal, both duty and credibility are arguably preserved.

It is first necessary to understand D'Amato's rationale for this belief. D'Amato appears to be arguing that sacrificing a tribunal is a better option than compromising the work of a tribunal; this seems to imply there exists a difference between sacrifice and compromise. When the duty is *compromised*, the implication is that the duty can exist in weaker forms; when the duty is *sacrificed*, the implication is that there is only one concept of the duty which is absolute and does not apply in these circumstances, yet may be applied in future circumstances. *Compromise*, as Scharf argues, constitutes any political offers or concessions to the leaders against their prosecution

235. Another result, D'Amato points out, may be the undermining of the credibility of the tribunal by the "repeated spectacle of witnesses shown to be more culpable than the accused." D'Amato, *supra* note 2, at 503.

236. See Karl A. Hockhammer, *The Yugoslav War Crimes Tribunal: The Compatibility of Peace, Politics, and International Law*, 28 VAND. J. TRANSNAT'L L. 119, 124 (1995); see also Bernard D. Meltzer, "War Crimes": *The Nuremberg Trial and the Tribunal for the Former Yugoslavia*, 30 VAL. U. L. REV. 895, 909 n.63 (1996).

237. See D'Amato, *supra* note 2, at 504.

238. See Orentlicher, *supra* note 221, at 2605.

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by a tribunal.²³⁹ *Sacrifice*, in this instance, can only be understood in the terms as D'Amato understands it: By offering not to prosecute, the international community is offering an either/or proposal.²⁴⁰ There will either be prosecution of war criminals, including the leaders, or there will be no tribunal, at the cost of land acquired over the course of the war. D'Amato's argument thus assumes that, when the duty to prosecute is sacrificed, the cost to the integrity of the duty to prosecute is compensated by the cost of concessions to suspected war criminals.²⁴¹

Applying this rationale to the results of the games above, it can be argued that neither duty nor credibility is compromised by D'Amato's proposal. First, D'Amato's proposal does not include any such compromises or political offers against prosecutions, nor as is evident above, does the outcome P_N require such compromises for the parties to agree to it. It is only the outcome P_T that requires such compromises and bargains. Nor is the Tribunal's credibility affected: The future credibility of the Tribunal is not hamstrung or compromised by any political bargains. Instead, under P_N , the Tribunal simply will not continue. Moreover, credibility is preserved because all future war criminals will still face a credible threat of being prosecuted by other tribunals and may be required to make similar concessions in order to avoid prosecution (and therefore may be deterred from committing war crimes in the first place, see *infra*. Part V.C). Hence, according to D'Amato, when the duty to prosecute is sacrificed, its integrity can still be preserved, as can the credibility of the threat of prosecution.²⁴²

Second, D'Amato's proposal does not empower leaders at the expense of duty or credibility. For the leaders, the decision to accept P_N will not arise because the leaders envision it as an advantageous opportunity. As the game theoretic analysis above demonstrates, the parties agree to D'Amato's proposal as empowered individuals because it is the best option they have based on the preferences and strategies of the others. Al-

239. See Scharf, *supra* note 229, at 57-58.

240. See D'Amato, *supra* note 2, at 504.

241. *Id.*

242. See D'Amato, *supra* note 2, at 503 (suggesting that the tribunal could be dissolved, upon the request of the interested parties, once a successful peace agreement is in place, thereby avoiding the dilemma posed by D'Amato).

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though the offer of sacrificing a tribunal may appear to significantly empower leaders, the leaders confront significant risks inherent in their decision not to accept D'Amato's proposal. These risks may be understood by looking beyond the games to the history of the war: Refusals by all sides to accept international peace proposals resulted in heavy costs, both in terms of the casualties suffered and the compromise of the goals sought.²⁴³ This history further suggests that if leaders agree to continue the war, they continue to face a series of potential risks: the risk of prosecution in the future;²⁴⁴ a potential change in the momentum of the war; a potential international intervention; and potential domestic unpopularity.²⁴⁵ They also risk the international community's unwillingness to present D'Amato's proposal again. Above all else, they risk the unknown.²⁴⁶ Essentially, leaders may be gambling their own futures if they do not accept D'Amato's proposal.²⁴⁷ As it may

243. The heavy costs incurred varied for both sides. It is important to recall that the Serb refusal to accept peace offers led to the international community's refusal to negotiate and, further, to bombing of the Serbs by NATO forces. Similarly, the Bosniac and Croatian desire to continue the war ultimately resulted in a final accord, which they were strong-armed into signing and where the goals of neither party were attained. *See supra* Part IV.E.

244. The success of the International Criminal Tribunal for Rwanda (ICTR) may be regarded as positive precedent that may reinforce a leader's concern for prosecution in the future *under the circumstances hypothesized above*. On the other hand, the risk of prosecution may be minimized by the leader's own realization that he may be able to determine its future and its efficacy at the negotiation table. In either case, however, a risk of prosecution exists. It is important to note here that Tudjman was able to hold onto power after Dayton because of his ability to stifle democracy after the war. *See* SILBER & LITTLE, *supra* note 22, at 384. However, Milosevic was deposed four years later following his indictment in 1999. *See* WILLIAMS & SCHARF, *supra* note 4, at 233-34 (discussing the extradition of Milosevic).

245. *See* D'Amato, *supra* note 2, at 504.

246. However, precedent now dictates that the unknown consists of a substantial likelihood of military intervention by foreign powers. *See generally supra* Parts II.A, III.A, and IV.E.

247. Milosevic is a prime example, but the recent indictment of Charles Taylor by the special tribunal in Sierra Leone also suggests such a problem. *See* Morton Abramowitz & Paul Williams, Editorial, *Peace Before Prosecution?*, WASH. POST, Aug. 25, 2003, at A17. It is also possible that they are gambling their political futures if they do accept the treaty. *But see* SILBER & LITTLE, *supra* note 22, at 385-86 (suggesting that the legacy of the Dayton Accord was the establishment of a dictatorship headed by Milosevic and bolstered by the Yugoslav United Left, the political party headed by his wife, Mirjana Markovic). The Charles Taylor example raises the question of whether

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be too costly for leaders to refuse a proposal that offers sacrifice in exchange for peace, neither duty nor credibility are threatened or affected because no bargains or compromises are necessary.

Third, as the second point illustrates, the international community need not make any compromises or bargains in order to achieve its desired outcome. In other words, D'Amato's proposal is particularly compelling because the analysis above shifts the burden of compromise away from the international community and to the individual actor. Consequently, the international community's commitment to duty and credibility is not a determinative factor of the outcome P_N . It is important to recall that for any outcome P_T above, the international community must make particular compromises or bargains to the leaders to assure that outcome. But, for any outcome P_N , the international community is not required to make any such compromises or bargains because, as demonstrated above, none are necessary. Concededly, the leaders are empowered by D'Amato's proposal—they are able to accomplish many of their goals without punishment and are offered the additional, implicit incentive of determining the fate of the tribunal.²⁴⁸ But herein lies a crucial difference from a compromised P_T : Although the leaders may determine whether or not the tribunal will prosecute them, it is important to understand that no compromises by the international community are necessary in order for them to do so.

D'Amato's rationale in this instance is nevertheless problematic: D'Amato's contrast between compromise and sacrifice is flawed under Scharf's definition, and cannot be true according to Orentlicher's definition. For Scharf, sacrifice is technically an exception to the rule, which, along with compromise, Scharf associates with a non-absolute conception of duty.²⁴⁹ According to Scharf, then, D'Amato cannot be assuming an absolute duty to prosecute when sacrifice is involved.

D'Amato's proposal would function in an internal power struggle in which territory could not be exchanged. Again, the author encourages readers to explore such a situation.

248. Benjamin Ferencz took particular issue with this logic, arguing that D'Amato's proposal betrays those victims of war crimes because it does not punish perpetrators and, similarly, does not deter future perpetrators. Ferencz, *supra* note 7.

249. See Scharf, *supra* note 221, at 60-61.

Orentlicher's argument presents a different problem. Within D'Amato's logic, compensation for sacrifice is better than compromise to preserve the integrity of the duty to prosecute. However, from Orentlicher's perspective, the absolute duty to prosecute is not something that can be compensated with something else.²⁵⁰ Also, an uncompromised duty with exceptions or variations is not absolute or else it is a duty of the political kind that Scharf describes. D'Amato's approach to crafting his proposal is to assume particular exceptions are permissible so, according to Orentlicher, D'Amato cannot be assuming an absolute duty to prosecute. It is thus evident that D'Amato's rationale relies on an assumption of the duty to prosecute that only he believes to be true.

There is another problem with D'Amato's rationale when viewed from a similar, but slightly different, angle. D'Amato's rationale implies that, although the integrity of the duty to prosecute has been sacrificed in a particular instance, it can remain absolute in all other current and future applications. In other words, the conceptual integrity of the absolute duty to prosecute remains intact even when sacrificed because it has not been compromised. By comparison, when the duty to prosecute has been compromised, it can no longer be considered to exist in absolute form in all other current and future applications. The argument is that a duty uncompromised is still absolute. This is perhaps a more convincing argument, but one that is still flawed in light of Scharf's definition of the duty to prosecute: An uncompromised duty with exceptions is not absolute. Thus, within D'Amato's rationale, an exception is not a compromise, but, given that absolute duty requires the prosecution of all war crimes, an exception does imply that the duty cannot be absolute.

Ultimately, the duty to prosecute and the credibility of the threat of prosecution are arguably preserved by D'Amato's proposal. But this is only true given certain assumptions, and

250. See Orentlicher, *supra* note 221, at 2595-2603 (noting that practical concerns can make full prosecution of all abuses impossible, Orentlicher posits that customary international law could support a system of prosecutions for only those most responsible for the most severe war crimes; but, short of prosecutions posing a serious threat to vital national interests, she finds no option under international law for a country to abandon entirely the duty to prosecute).

there are substantial questions as to whether both are preserved under D'Amato's logic.

C. *The Deterrent Effect*

Each leader must weigh the risks he faces when strategizing in a negotiation. D'Amato believes that, like the leaders in the games above, future leaders will weigh various factors and make a decision as to whether war crimes are the best means of accomplishing their goals. The decision, he predicts, will be not to commit war crimes. For this reason, he believes his proposal upholds "the international interest [in] deterring would-be war criminals."²⁵¹ This aspect of his essay is the most speculative, but should nonetheless be considered in light of the results above.

The deterrent D'Amato perceives is a "double-barreled uncertainty" for the leaders: "their own possible prosecution as war criminals . . . or the possible loss of valued territory."²⁵² He also argues that future leaders will be deterred because, once war crimes committed for the sake of securing territory become a cost of war, a war crime loses its military justification.²⁵³ It is evident from the game theoretic analysis above that this prediction may be correct. Since the parties will never agree to P_T when the threat of prosecution is credible, the double-barreled uncertainty that each party faces when presented with this proposal is actually whether each one is better off continuing the war or possibly losing valued territory. A leader may opt for W , but the implication of

251. See D'Amato, *supra* note 2, at 503.

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252. *Id.* at 504. D'Amato's proposal has been criticized for failing to address issues of accountability. See Meltzer, *supra* note 236, at 909 n.63. However, as P_N is not defined, this criticism is not necessarily fair. P_N may constitute a number of things: criminal punishment at the local level (which would likely leave leaders immune); a truth commission run at the state level; a truth commission run by the international community; or nothing at all, providing no means of redress for the victims. If the leaders possess knowledge of what P_N will constitute, then their preference profiles may change in response to this knowledge, and consequently, the outcomes of the games above may change. Nevertheless, D'Amato's failure to define what constitutes P_N leaves a speculative gap in his proposal that merits further exploration, particularly in light of the results of the games above. I consider some of the implications of D'Amato's failure to define P_N later in this Note. See *infra* Part V.D.

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253. See D'Amato, *supra* note 2, at 506.

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D'Amato's proposal is that the commission of war crimes in furtherance of a leader's ambitions will come at a greater cost in a future P_N . Thus, it is theoretically possible that a leader could be deterred.

There are two additional reasons why D'Amato's proposal appears to be effective at preserving the future deterrent effect of threat of prosecution. First, as D'Amato argues, the commission of war crimes will not be ultimately advantageous in light of the final outcome because a leader must make substantial concessions, both territorial and non-territorial, in order not to be prosecuted.²⁵⁴ Second, the international community will have displayed an apolitical commitment to the prosecution of war criminals, thereby setting a precedent for all future potential war criminals that it is not willing to compromise the efficacy of a tribunal.²⁵⁵

Another factor, which D'Amato does not consider, is that the credibility of the international community's ability to pursue war criminals may be better enhanced by its ability to stop and start the machinery of the tribunal.²⁵⁶ Such a technique would be in marked contrast to a willingness to negotiate away the tribunal's efficacy but nevertheless pursue justice with a weakened international mechanism. Whereas in the first instance, the international community displays an uncompromising ability to prosecute war crimes when necessary, in the latter instance, the international community implies that it requires some form of consent from the suspected war criminals to proceed.

However, a game theory analysis also demonstrates that the deterrent effect does not necessarily exist because the analysis confirms a future leader's ability to commit war crimes and then strategize in a negotiation to ensure that they are not prosecuted by a tribunal. The apparent empowerment of the

254. *See id.* at 504. There is a particularly relevant question not answered by D'Amato: At what point is a concession substantial enough to constitute adequate compensation for not being prosecuted by a war crimes tribunal?

255. *See id.* at 505. It is important to recall that, if the threat of prosecution is not credible when P_N is offered, Serbia and Croatia would be better off with P_T . As I assume that the Bosniacs would still prefer the outcome P_T , in this scenario all three parties would agree to P_T .

256. Concededly, this is an impractical, if not infeasible, proposal. However, it is important to note that the jurisdiction of the ICC does permit it to stop and start prosecutions when necessary. *See infra* Part V.E.

actors may be troubling in light of the arguments for an absolute duty—if all suspected war criminals must be punished, the games above suggest that the criminals can strategize to avoid punishment. This establishes a fundamental challenge to the claim that “*jus cogens* places upon states the *obligatio erga omnes* not to grant impunity to the violators of war crimes.”²⁵⁷ Specifically, it becomes evident that the will of the individual, especially the individual guilty of war crimes, may have the ability to trump *jus cogens*. This is especially true in light of Orentlicher’s argument for duty, which conceives duty to be an overarching moral concept that should guide all actors. Even if the international community was to commit to the integrity of this notion of duty, the game theoretic analysis above shows that this concept is one of many factors that the leaders may weigh at the negotiation table. Or, they may not weigh it at all, as the commission of war crimes in the first place marks an explicit rejection of the morality that is the foundation of this concept of duty. Therefore, the precedent of imposing a morality on leaders when they themselves are empowered enough to manipulate it to their own ends sets a precedent that can only encourage future would-be war criminals.²⁵⁸

Instead, it may be best to pursue the creation of alternative solutions that preserve the credibility of punishment in the eyes of would-be war criminals. D’Amato’s proposal is one such alternative, as it is one that all parties will agree to, given the assumptions established above. Although a tribunal is sacrificed under these circumstances, the duty to prosecute war crimes has not been compromised, though perhaps made subject to exceptions. Other alternative means of pursuing justice, particularly truth commissions, may provide a means of preserving the integrity of the duty to prosecute without sacrificing the duty itself.²⁵⁹ Whatever means is chosen, it is evi-

257. See Bassiouni, *supra* note 221, at 66.

258. Payam Akhavan seems to agree, arguing that the Dayton Peace Accords may have set an unfortunate precedent: “[P]olitical and military leaders who planned and instigated systematic abuses for their own political ends, far from being held accountable, have been granted international legitimacy solely because of their power to sabotage the process of conflict resolution.” Akhavan, *supra* note 233, at 259.

259. See Jennifer L. Balint, *The Place of Law in Addressing Internal Regime Conflicts*, 59 LAW & CONTEMP. PROB. 103, 125 (1996) (arguing that “institutions other than law need to be explored, and, where necessary, strength-

dent that a tribunal may not be a necessary precedent for the deterrence of would-be war criminals. Nonetheless, such a conclusion may only be drawn from the more speculative elements of D'Amato's proposal.

Ultimately, it appears that D'Amato's prediction of a deterrent effect is speculation. There is no concrete or conceptual evidence to suggest that this prediction would be true. Game theory analysis does little to reinforce the basis for his prediction and raises substantial questions as to the feasibility of the effectiveness of his predicted deterrent effect.

D. *The Open Question of P_N*

Because D'Amato leaves to speculation the punishment that leaders will face, if any, when there is a peace agreement without a tribunal, he leaves the question of what may actually constitute P_N unanswered.²⁶⁰ Within a game theory analysis, the uncertainty of what constitutes P_N makes it difficult to predict how the actors may behave.

In the games above, the leaders choose P_N based on the weighing of certain factors. D'Amato argues that the costs of choosing war, or of choosing P_T , outweigh the benefits, assuming the threat of prosecution is credible and the option to choose P_N is on the table.²⁶¹ D'Amato believes that leaders will be more willing to give up assets gained over the course of the war in return for the guarantee that the international community will not punish them or their people.²⁶² Under his proposal, leaders will still face punishment "[b]ecause each of them suffered equally from the commission of war crimes that they equally perpetrated, the suffering they sustained was in effect a

ened in order to do the job we may have hoped or assumed law would do"). For an assessment of the relative advantages of truth commissions over war crimes tribunals, see PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY 86-106 (2001), and MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 57-90 (1998). See also Stephen Castle & Vesna Peric Zimonjic, *War Crimes Suspects May Be Tried in Yugoslavia*, INDEP. (London), May 2, 2002, at 13 (reporting that The Hague may send some of its prosecutions back to the courts in the former Yugoslavia).

260. See D'Amato, *supra* note 2, at 503.

261. See *id.* at 504-05.

262. See *id.*

punishment that fit their crimes.”²⁶³ He also argues that it is more likely that one party is responsible for the commission of more war crimes than the other parties, thereby allowing the other parties to use the threat of a tribunal as a means of securing other assets in exchange.²⁶⁴

This argument disregards two important points. First, implicit in D’Amato’s proposal is the assumption that leaders desire to preserve themselves, as the tribunal represents a threat to their ability to continue to stay in power following the war. If the leaders do consider this factor, there exist practical uncertainties in choosing P_N . One can only speculate as to the ability of a leader to hold on to power in the long term if he chooses to sacrifice a tribunal in return for the sacrifice of his justifications for going to war, especially in the context of the former Yugoslavia.²⁶⁵ It is unclear whether a leader will still have the support of the military and of popular opinion once he has sacrificed the goals that led his country to war. Moreover, it is unclear whether leaders fear prosecution enough to sacrifice popular support or certain assets that would allow them to continue their hold on power.²⁶⁶ In other words, P_N

263. *Id.* at 503.

264. *Id.* at 503-04.

265. The example of Milosevic raises interesting issues with respect to this point. First, although he gave up a Greater Serbia at Dayton, he was able to hold on to power until his arrest in April 2001. His ability to do so, as a precedent, may represent an additional factor that will be considered by future leaders in peace negotiations similar to those in the war in Yugoslavia. Second, after Dayton, Milosevic turned his attention to Kosovo. Paul Williams and Michael Scharf imply that the lack of credibility behind the threat of prosecution may have led him to direct his attention to Kosovo. WILLIAMS & SCHARF, *supra* note 4, at 169-86, 233-34.

266. Mary Margaret Penrose argues that current state practice “weighs more heavily on the side of Truth Commissions and Amnesties than on the side of criminal prosecutions.” Mary Margaret Penrose, *It’s Good to Be the King!: Prosecuting Heads of State and Former Heads of State Under International Law*, 39 COLUM. J. TRANSNAT’L L. 193, 214 (2000). Penrose argues that, following the Pinochet decision, leaders may face the increasing likelihood of losing immunity and amnesty and face the very real prospect of being tried: “The Pinochet and [former dictator of Chad Hissene] Habre precedents, to the extent that they evince state practice, confirm that only those dictators who have lost support at home, in their place of refuge, and abroad will find themselves seated in the dock, finally facing the possibility of punishment.” *Id.* at 214. However, Penrose indicates that the Pinochet case “cuts against existing state practice” and “may ultimately be referred to with the same uneasiness that Nuremberg is.” *Id.* at 205-06.

requires a leader not to act in his self-interest when strategizing, but a game theory analysis suggests that a leader will act in his self-interests in a negotiation when he is a suspected war criminal.

Second, accountability for war crimes may be sacrificed under P_N, though this may ultimately depend on the nature of P_N.²⁶⁷ This outcome may be problematic for a variety of reasons, given the importance of accountability in societies recovering in the aftermath of human rights violations.²⁶⁸ First, long-term peace may not be viable.²⁶⁹ Second, group accountability may replace individual accountability, which may only perpetuate imbalances in a society.²⁷⁰ Third, domestic legal institutions in a post-war society may not yet be strong enough to manage the investigation and prosecution of war criminals.²⁷¹ Or, alternatively, a post-war criminal justice system may still be comprised of investigators and judges with allegiances to the former regime. These concerns are legitimate and raise reasonable questions as to the potential viability of D'Amato's proposal.

Thus, D'Amato's decision to leave P_N openly-defined raises substantive questions about the proposal. A game theory analysis suggests further that these questions may in fact undermine his proposal, as the self-interest that D'Amato attempts to address with the proposal may also undermine the proposal, depending on the nature of P_N. Nevertheless, D'Amato's decision to leave P_N undefined appears to create a fertile foundation for future theorists and diplomats to construct a P_N that addresses the weaknesses discussed above.²⁷²

E. P_N Under The Rome Statute

D'Amato did not consider his proposal with the prospect of the Rome Statute and the permanent International Criminal Court (ICC) in mind. It is worthwhile to consider the

267. See *supra* note 252.

268. See Bassiouni, *supra* note 233, at 12.

269. See Akhavan, *Correspondence*, *supra* note 7, at 92.

270. See Meltzer, *supra* note 236, at 909 n.63.

271. See Orentlicher, *supra* note 221, at 2548.

272. Although it is fair to concede that different circumstances may dictate altogether new weaknesses and challenges for P_N.

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open-ended nature of P_N against both.²⁷³ At first glance, the

273. D'Amato's proposal of P_N was substantially influenced by the *ad hoc* status of the ICTY: His proposal of simply disbanding the Tribunal suggests that the ICTY could be dissolved as quickly as it was established. It would seem, therefore, that P_N may only apply to *ad hoc* tribunals. Given the existence of the *permanent* ICC, it could be argued that P_N is no longer applicable because the ICC seems to rule out the necessity of *ad hoc* tribunals. In particular, Articles 12 and 13 of the ICC grant the U.N. Security Council the power to bring cases involving violations of international criminal law under the jurisdiction of the ICC. See Rome Statute, *supra* note 223, art. 13; see also Payam Akhavan et al., *The Contribution of the Ad Hoc Tribunals to International Humanitarian Law*, 13 AM. U. INT'L L. REV. 1509, 1537 ("We must assume that many of the rogue states will not accede to the jurisdiction of the ICC. Thus, in order to have a court with muscle, we absolutely must reserve this capacity for the Security Council to do that.") (quoting Theodor Meron in response to a question from the audience). Cf. Marcella David, *Grotius Repudiated: The American Objections to the International Criminal Court and the Commitment to International Law*, 20 MICH. J. INT'L L. 337, 369 (1999) (discussing the implications of Articles 12 and 13 of the Rome Statute in light of U.S. arguments against signing on to the Court's jurisdiction).

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There are two problems with this argument. First, although it is unclear whether *ad hoc* tribunals are necessary given their track record of costliness and the creation of the ICC, they are still feasible under the U.N. Security Council's power to create such tribunals, under its Chapter VII powers, without Assembly approval. U.N. CHARTER art. 41; see also WILLIAMS & SCHARF, *supra* note 4, at 101-02. This is true despite the fact that no *ad hoc* tribunals have been established since the ICTY or the International Criminal Tribunal for Rwanda (ICTR). However, a newer, alternate form of tribunal has been the special tribunal, or hybrid tribunal. A hybrid tribunal is "a system that shares judicial accountability jointly between the state in which it functions and the United Nations." See Suzanne Katzenstein, *Hybrid Tribunals: Searching for Justice in East Timor*, 16 HARV. HUM. RTS. J. 245 (2003) (describing the hybrid tribunal established in East Timor). A hybrid tribunal has also been a solution in Sierra Leone. See Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, U.N. SCOR ¶¶ 9-11, U.N. Doc S/2000/915 (2000). For example, the Sierra Leone tribunal is a "treaty-based sui generis court of mixed jurisdiction and composition" between the U.N. and Sierra Leone. *Id.* However, it does not receive U.N. funds and its international staff is not paid by the U.N. See Katzenstein, *supra* at 245 n.2.

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Second, because special tribunals are a variation of *ad hoc* tribunals, future P_N 's in which a tribunal is abolished may still be theoretically feasible. See also *supra* note 252. However, it must be conceded that such special tribunals can facilitate the rebuilding of the local judiciary, see Katzenstein, *supra* at 246, and therefore they cannot be abolished. P_N may in fact be more detrimental than beneficial to the future of a country if it calls for the abolishment of a tribunal, or its equivalent. On the other hand, hybrid tribunals may just be a form of P_N —as they abolish prosecution under purely international legal institutions and perhaps under international law. However, it is unclear how these hybrid tribunals may operate alongside the ICC,

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Rome Statute does not seem to permit P_N as a solution: The ICC's existence is non-negotiable by virtue of its permanence. Moreover, any future peace negotiation with future leaders suspected of war crimes must start with the assumption that amnesty is not negotiable: the Preamble affirms that "the most serious crimes of concern to the international community . . . must not go unpunished."²⁷⁴ Given these two factors alone, it would seem no version of P_N would be feasible under the Rome Statute.

However, the Rome Statute may permit amnesty via "creative ambiguity" in the language of four particular provisions, which Michael Scharf has outlined and interpreted in a separate article.²⁷⁵ Scharf highlights these different areas of creative ambiguity as means for amnesty deals under the ICC, de-

especially given the ICC's jurisdiction over cases involving violations of international criminal law in Articles 12 and 13. As is seen in the precedent of East Timor and Sierra Leone, occurring in 1999 and 2000, respectively, situations may still arise that require special tribunals, suggesting a future for P_N in such tribunals and, perhaps, a future for P_N not limited by the ICC. Katzenstein expresses some doubt on this point, believing the track record of the hybrid tribunals has been "mixed," and therefore that the future of hybrid tribunals as a substitute for *ad hoc* tribunals merits skepticism. See Katzenstein, *supra* at 277-78. Regardless, the general assumption appears to be that *ad hoc* and special tribunals are still feasible.

274. Rome Statute, *supra* note 223, pmbl. There is a sense of absoluteness in the phrasing of the Preamble that mirrors Orentlicher's conception of an absolute duty to prosecute:

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Affirming that the most serious crimes of concern to the international community as a whole *must not go unpunished* and that their effective prosecution must be ensured Determined to put *an end to impunity* for the perpetrators of these crimes and thus contribute to the prevention of such crimes Recalling that it is the *duty of every State* to exercise its criminal jurisdiction over those responsible for international crimes.

Id. (emphasis added). Michael Scharf suggests that this phrasing is incompatible with any conception of the duty to prosecute under international law permitting amnesty. See Scharf, *supra* note 223, at 522. Moreover, as Scharf argues, "[t]he Preamble's language is important because international law provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." *Id.* (citation omitted).

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275. Notably, Scharf concludes that these provisions of the Rome Statute support his argument regarding the political duty to prosecute under international law in that "international procedural law imposing a duty to prosecute is far more limited than the substantive law establishing international offenses." Scharf, *supra* note 223, at 526.

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spite the strong wording of the Preamble.²⁷⁶ In terms of P_N, these provisions, or loopholes, permit the ICC to be technically “abolished” in return for a peace agreement.²⁷⁷ Although they do not permit the abolition of the ICC itself, these loopholes suggest means by which the prosecution by the ICC of suspected war criminals could be avoided either by diplomatic agreement or by a technicality in the Court’s jurisdiction. The implications of these loopholes for P_N may be understood by looking at the relevant articles of the Rome Statute individually. It will be evident that all four loopholes do provide creative ambiguity for any P_N, but also restrict the creative potential of D’Amato’s proposal and, therefore, restrict its feasibility.

There are two provisions that seem to permit agreements that exchange peace for amnesty: Articles 16 and 17. Article 16 requires the ICC to defer to the U.N. Security Council if the Security Council adopts a resolution under Chapter VII of the United Nations Charter requesting the Court not to commence an investigation or prosecution, or to defer any proceedings already in progress.²⁷⁸ In terms of P_N, Article 16 permits for the cessation of a prosecution of war criminals if the U.N. Security Council requests it.²⁷⁹ Like D’Amato’s envisioned P_N, Article 16 requires the U.N. Security Council to approve of any cessation. However, under Article 16, this cessation is technically a deferral of prosecution, which lasts for a period of twelve months, renewable upon Security Council approval. Hence, any P_N may face the potential uncertainty of an approval period required to last only 12 months, creating a likelihood that any promised amnesty may in fact be fleeting

The requirement of U.N. Security Council approval also subjects any feasible P_N under Article 16 to two conditions: First, that the deferral request is necessary because the Secur-

276. Scharf suggests that the apparent conflict between the Preamble and the Statute was due to the “schizophrenic nature of the negotiations at Rome: the preambular language and the procedural provisions were negotiated by entirely different drafting groups, and in the rush of the closing days of the Rome Conference, the Drafting Committee never fully integrated and reconciled the separate portions of the Statute.” *Id.* at 522 (citation omitted).

277. *Id.*

278. Rome Statute, *supra* note 223, art 16.

279. *Id.*

ity Council has determined a threat to the peace, a breach of the peace, or an act of aggression, under Article 39; and, second, that the request is consistent with the purposes and principles of the U.N. with respect to maintaining international peace and security, resolving threatening situations in conformity with principles of justice and international law, and promoting respect for human rights and fundamental freedoms under Article 24 of the U.N. Charter.²⁸⁰

Under the first condition, the U.N. Security Council must conclude that the threat of prosecution for war crimes under international law must be removed in order for a peace accord to be reached. This condition seems conducive to P_N as it mirrors D'Amato's rationale for P_N. However, it was suggested above that U.N. Security Council approval of D'Amato's P_N would be unlikely—it is unclear whether the Security Council would agree instead to the deferral of a prosecution or amnesty for suspected war criminals.²⁸¹ Under the second condition, P_N must be consistent with principles of justice and international law. D'Amato's P_N does not appear to meet this condition, as it proposes the novel concept of compensating the removal of the threat of prosecution with the sacrifice of seized territory by all guilty parties.²⁸² However, other such compensatory mechanisms for P_N may be permitted under international law and may be created by future attempts at devising future forms of P_N.²⁸³ Thus, Article 16 does create a foundation for P_N to be a solution under the ICC, but there exist substantial questions as to its viability given the requirement for U.N. Security Council approval.

Article 17 generally allows a state to request the ICC or Prosecutor to defer to a national amnesty when neither the Security Council nor the Prosecutor has made such a request.²⁸⁴ Article 17(1)(b) is the provision most relevant to P_N,

280. See Scharf, *supra* note 223, at 523; Rome Statute, *supra* note 223, art. 16; U.N. CHARTER arts. 24, 39. See also, Commentary on the Rome Statute of the International Criminal Court 377-78; 708-09, 384-94 (Otto Triffterer ed., 1999).

281. See Interview with Richard Goldstone, *supra* note 133. Although this proposal less controversial than the proposal of abolishing a tribunal, it seems nonetheless to be a politically sensitive question.

282. See *supra* Part V.B.

283. See *supra* note 252.

284. See Rome Statute, *supra* note 223, art. 17.

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as it requires the Court to defer to a state's decision not to prosecute.²⁸⁵ In terms of P_N , a state may request the Court to respect its accession to a peace agreement that grants amnesty to a suspected war criminal or criminals within the state, and the Court will, in turn, honor P_N . Article 17(1)(a) is also relevant but is more problematic for P_N . This provision requires the Court to dismiss a case when the case is being "investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution."²⁸⁶ Hence, a P_N that provides for the investigation or prosecution by the State of leaders who are also suspected war criminals may be feasible under Article 17(1)(a). However, the possible nature of P_N is unclear under Article 17(1)(a) because of the ambiguity as to what constitutes a genuine investigation or prosecution. Scharf suggests that the term "genuinely" is flexible, thereby permitting truth commissions and other versions of P_N to be created.²⁸⁷ But Scharf also argues that, under the qualifying provision in Article 17(2)(c), truth commissions may not be permitted because the provision does not recognize proceedings "inconsistent with an intent to bring the person concerned to justice."²⁸⁸ This ambiguity suggests that truth commissions and other forms of non-criminal prosecution cannot be recognized as a form of permitted investigation under the Rome Statute. Consequently, a variation of the dilemma D'Amato perceived results: Despite the terms of a peace agreement, a leader who is also a suspected war criminal would face prosecution by the ICC because the peace agreement offers an amnesty deal that is not recognized under Article 17. Such a scenario effectively would turn any P_N into a credible P_T , to which the games above demonstrate no leader would agree. Nevertheless, Article 17

285. *Id.*

286. *Id.* With the establishment of the ICC, it appears that, in the future, the U.N. Security Council will face the choice of whether to establish a hybrid tribunal under Article 17 or send a case to the ICC.

287. Michael Scharf also states that "[Article 17(2)] suggests that the standard for determining that an investigation is not genuine is whether the proceedings are inconsistent with an intent to bring the person concerned to justice." Scharf, *supra* note 223, at 525 (citation and internal quotations omitted).

288. Rome Statute, *supra* note 223, art. 17(2)(c).

provides foundations for P_N to be feasible upon a state's request.

The other two loopholes, Articles 20 and 53, appear to be geared specifically to allow the Prosecutor to terminate a prosecution. They also appear to leave less diplomatic leeway than Articles 16 and 17, and, therefore, make P_N less likely in scenarios where either Article applies.

Article 20 codifies the *ne bis in idem* principle, protecting a person tried in a national court for conduct proscribed under the jurisdiction of the ICC from being retried in the ICC for the same conduct.²⁸⁹ Notably, Article 20 provides a suspected war criminal with the right to challenge the Court's jurisdiction under the principle of *ne bis in idem*.²⁹⁰ With respect to P_N, any P_N that establishes the investigation or prosecution of war criminals by national courts and not international courts will also establish the protection of persons suspected of conduct proscribed under the ICC from trial or retrial under the ICC. The suspected war criminal thus has some individual protection from the jurisdiction of the ICC after signing P_N. However, Article 20(b) renders Article 20 inapplicable when the other trial was "otherwise not conducted independently or impartially in accordance with international legal norms for due process."²⁹¹ Also, as in Article 17(2), Article 20 does not recognize trials otherwise "inconsistent with an intent to bring the person concerned to justice."²⁹² These exceptions create an interesting question for any future P_N: Although P_N may trade a peace agreement in exchange for the end to the threat of prosecution under international law, the national courts of the parties to the peace agreement are still required under the Rome Statute to prosecute their leaders under and in adherence to international law. In other words, Article 20 establishes an international legal standard that domestic courts must meet if all parties agree to P_N. Like Article 17, Article 20 effectively converts any P_N into a credible P_T, to which no suspected war criminal would agree.

It is important to recall that P_N does not necessarily imply that suspected war criminals will be punished in criminal

289. *Id.* art. 20.

290. Scharf, *supra* note 223, at 525.

291. Rome Statute, *supra* note 223, art. 20(b).

292. *Id.*

courts. Under D'Amato's open-ended definition of P_N , a truth commission is as viable an option as criminal proceedings by national courts.²⁹³ However, Scharf argues that the Article 20's definition of "another court" does not include truth commissions, and is "not applicable to proceedings 'inconsistent with an intent to bring the person concerned to justice.'"²⁹⁴ Hence, this dilemma creates another conflict between any P_N and Article 20: Despite a guarantee by P_N involving non-criminal proceedings as a form of amnesty to a suspected war criminal, the ICC Prosecutor may be required to prosecute under Article 20. This creates an uncertainty beyond the framework of any P_N for a suspected war criminal, and again, effectively converts any P_N into a credible P_T , to which no suspected war criminal would agree. Thus, Article 20 may impede any future P_N by failing to define what would constitute an acceptable court for the national prosecution of war crimes.

Article 53 appears to be the least conducive to P_N . When the U.N. Security Council has not acted under Article 16, Article 53(1)(c) permit the ICC Prosecutor to respect an amnesty deal by declining to initiate an investigation where the Prosecutor concludes that an investigation would not serve the interests of justice.²⁹⁵ Any agreement constituting a form of P_N , it would seem, would not be feasible under Article 53 without securing the Prosecutor's discretion as to whether to proceed with an investigation, despite the presence of a feasible, and perhaps signed, peace agreement. But, under Article 53(3)(b), the Prosecutor's decision not to proceed with a prosecution is subject to further review by the ICC's Pre-Trial Chamber, and may not be effective without this review.²⁹⁶ Hence, Article 53 creates additional levels of discretion: Any P_N is confronted with both the potential hurdle of the discretion of the ICC Prosecutor and of the Pre-Trial Chamber. For this reason, Article 53 appears to be the most problematic aspect of ICC jurisdiction for any P_N : Even if a Prosecutor chooses to respect a feasible P_N under Article 53, the Pre-Trial Chamber has additional discretion to opt not to do so. This

293. See *supra* Part V.D.

294. Scharf, *supra* note 223, at 525 (citations and internal quotations omitted).

295. Rome Statute, *supra* note 223, art.53(1)(c).

296. *Id.*, art. 53(3)(b).

presents a doubly problematic scenario for international negotiators. First, the Pre-Trial Chamber may overrule a Prosecutor's concession to an amnesty deal. Second, given this power of the Pre-Trial chamber, a leader suspected of war crimes will have little incentive to sign a deal knowing that the Prosecutor's approval of the deal does not guarantee immunity from the ICC's jurisdiction. Hence, by creating substantial uncertainty beyond the framework of any P_N , Article 53 appears to be the least conducive to P_N .

Given that all four provisions create diplomatic loopholes, and that P_N was a proposal inspired by the difficulties of diplomats, the diplomatic perspective may shed some additional light on the effects of the ICC provisions on P_N . Overall, it seems that the fate of any P_N under the Rome Statute rests upon the approval of the U.N. Security Council: Diplomats must work to secure the approval of all parties to the agreement, as well as the U.N. Security Council in order to ensure an agreement's success under Article 16. When Article 16 does not apply, diplomats may find substantial obstacles in the prosecutorial and judicial discretion established in Articles 17, 20, and 53: These provisions establish uncertainty beyond the framework of a signed peace treaty providing amnesty.²⁹⁷ Faced with these uncertainties, and an otherwise guaranteed outcome of P_T , future diplomats may face a dilemma: Whether to undermine the future credibility of the ICC in order to secure a peace agreement. As was evidenced above, diplomats must sometimes compromise, and have compromised, the credibility of the threat of prosecution in order to attain P_T .²⁹⁸ But, given the permanent status of the ICC, the gravity

297. This discretion seems to go above and beyond the terms of any peace agreement, creating little room to negotiate for post-war investigations or prosecutions that satisfy both the Rome Statute and the desires of negotiating amnesty. Given the off-the-record dealing of diplomats during the Dayton Accords, this discretion may be particularly problematic—a diplomat promising amnesty or making off-the-record promises of avoiding prosecution to suspected war criminals faces the prospect of undermining the ICC. *See supra* note 198. *Cf.* WILLIAMS & SCHARF, *supra* note 4, at 167 (discussing the ability of suspected war criminals to continue to enjoy a privileged status in society because of their control of political and economic institutions).

298. It is important to recall here that Games II and III suggest that such a decision would be necessary to achieve P_T . *See supra* Part III.B, III.C. It is also important to recall the "Rules of the Road" agreement reached between Richard Holbrooke and Milosevic.

of this dilemma is relatively greater given that, unlike an abolished ICTY for D'Amato, a permanent ICC could no longer sustain the commitment of its Preamble once this compromise has occurred.²⁹⁹ In other words, framed in terms of the results above, the only feasible outcome of P_T under the Rome Statute may be a compromised P_T , which in turn may compromise the future credibility of the threat of prosecution by the ICC. For this reason, P_N may be an especially useful, and perhaps necessary, alternative to any peace agreement that guarantees prosecution by the ICC.

This conclusion does not imply that the ICC presents a diplomatic obstacle to all future peace negotiations for conflicts involving the commission of war crimes by the negotiating leaders. Rather, this conclusion must be considered in light of both the historically unique circumstances underlying the conflict in the former Yugoslavia, the assumptions made in this paper, and the game theory analysis undertaken above in Part IV.³⁰⁰

Ultimately, the above problems suggest any future P_N will be conceptually restricted by the Rome Statute. Given the varied implications of the Rome Statute for any P_N , it is unlikely that any future P_N will be able to mirror the simplicity of the trade-off in D'Amato's proposal. Nevertheless, P_N is still a feasible option, and perhaps necessary, given that game theory suggests P_T may only result when the threat of prosecution under the ICC has been compromised.

VI. CONCLUSION

Lea Brilmayer suggests, “[s]ometimes it may be better to ‘let bygones be bygones’ . . . but not always.”³⁰¹ Anthony D'Amato's proposal to use a war crimes tribunal as a bargaining chip in peace negotiations raises a variant of this suggestion: Sometimes it may be better to let bygones be bygones,

299. It should be noted, however, that the game theory analysis above suggests that once diplomats choose to compromise the Rome Statute, they will in fact be guaranteeing the outcome P_T . See *supra* Part IV.B.

300. Nonetheless, given Michael Scharf's breakdown of the creative ambiguity within the Rome Statute, the analysis in Part V.E. and the implications of this conclusion must still be considered in analogous situations.

301. Lea Brilmayer, *International Justice and International Law*, 98 W. VA. L. REV. 635, 656 (1996).

but at a substantial cost to the relieved parties. The game theory analysis presented herein proves that this proposal could be adopted within a hypothetical negotiation. However, an exploration of the implications of the analysis highlights how the results of the games affect traditional assumptions under international law. The most notable conclusion from this exploration is that game theory analysis suggests that the duty to prosecute under international law cannot be absolute.

This conclusion is illustrated within the games. The international community may be committed to the concept of a duty to prosecute, but this duty may be, at best, a factor for the parties to consider and, at worst, a factor that the parties may use against the international community. Moreover, the games suggest that the war criminal is empowered by the efforts of the international community to secure a peace agreement in the interest of international criminal justice. He is empowered by his ability to strategize to continue the war in the face of the insistence of the international community for a peace agreement with a tribunal. For the international community, therefore, there can be no outcome of P_T without compromising the integrity of the duty to prosecute or the credibility of the threat of prosecution.

This conclusion is also illustrated when the results of the games are framed against larger arguments in international law. Here, there is the suggestion of a conflict of moralities between the war criminal and the international community. The warring parties may weigh the gravity of war crimes under international law as a factor in determining their best strategies, or they may reject it altogether. Either way, it is not an overarching morality for them, as it is for the international community. This conflict of moralities is problematic because the international community's desire for justice is undermined by the parties' willingness to continue with war. The international community cannot create a moral outcome when the negotiating parties do not share it and can frustrate its manifestation. Moreover, the international community's pursuit of a moral outcome when the parties have expressly rejected that morality will require the community to sacrifice the credibility of a tribunal in order to attain a seemingly moral outcome. However, when credibility has been sacrificed, the integrity of the morality of a tribunal also has been sacrificed. In such an outcome, the duty to prosecute must be compromised.

There is no question that this duty to prosecute under international law exists or that it is necessary, especially as it is stated in the Preamble to the Rome Statute. But given the suggestive evidence above, combined with the actual outcome of a compromised P_T at the Dayton Accords and the creative ambiguity found in the Rome Statute, it cannot be absolute. There is, concededly, a prevalence of arguments for, or that assume, an absolute duty to prosecute. But, ironically, those who argue for its integrity appear to be those who, in the hopes of attaining the outcome P_T , are also most willing to sacrifice a tribunal's integrity for the sake of allowing it to exist. This irony is reflected in the Rome Statute itself, in which the Preamble's affirmations of an absolute duty to prosecute are compromised by loopholes in the provisions for the Court's jurisdiction that permit amnesty.³⁰²

Instead, arguments for the duty to prosecute under international law must be refocused away from conceptual and moral justifications and, instead, towards building strategies for the preservation of the integrity of this duty. Given both the history of the conflict and the theoretical analysis above, these strategies should avoid accommodating or empowering the war criminal at the negotiation table. Looking ahead within the framework of game theory, this may mean the creation of an option that is the best that each party can do in light of the preferences of the other parties.

Game theory provides some guidelines for the international community to create such an outcome. With the understanding that leaders strategically act in their own interests in peace negotiations, the international community can seek to accommodate these leaders without sacrificing the credibility of the threat of prosecution or the tribunal. Alternatively, the international community could be an active party pursuing its own interests in the negotiation and strategically alter its preferences so as to create the outcome of P_T . Regardless of what the international community chooses to do, it cannot act with heavy-handed moralism or with a willingness to make compromises for the sake of establishing a tribunal because, in ei-

302. It is important to note that Michael Scharf suggests that this "schizophrenic" aspect of the Rome Statute may have inadvertently resulted from the procedure of drafting the Rome Statute and, therefore, was not intentional. See Scharf, *supra* note 223, at 522.

ther case, it does not accomplish its objectives and, further, may undermine international law, both conceptually and in practice. In the alternative, D'Amato's proposal is a theoretically feasible approach. Given that he leaves P_N undefined, this appears to be a fertile foundation for scholars and diplomats to create proposals for future conflicts that address concerns for achieving both peace and justice. Furthermore, P_N is feasible despite D'Amato's speculative prediction of a deterrent effect.

Looking ahead, the ICC's jurisdiction under the Rome Statute presents inevitable obstacles to the conceptual freedom of P_N implied by D'Amato's vision. Although not insurmountable for any P_N , these obstacles nonetheless exist. Given the suggestion above that any credible version of P_T may prevent diplomatic success in establishing peace agreements, alternatives to P_T must be considered. Therefore, although obstacles to P_N exist within the Rome Statute, P_N must nonetheless be considered, if not reimagined, under the Rome Statute. Otherwise, by guaranteeing the outcome P_T in all similar scenarios in the future, the Rome Statute may impede the establishment of peace agreements and, perhaps worse, unintentionally empower war criminals at the negotiating table.

Thus, a game theoretic analysis presents D'Amato's proposal as one that may be successful in achieving the goals of the international community and in avoiding the moral and practical pitfalls of modern international law. Although not a panacea for the dilemma underlying the international duty to prosecute war criminals, it nonetheless presents novel opportunities and paths for this duty to evolve and adapt.