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’Amato\(^1\) 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 could 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 over 3 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 criminals after a peace agreement was reached. Because D’Amato regarded the dual goals of a peace agreement and a war crimes tribunal as conflicting, he created a proposal in an essay that sought to reconcile the two.

The proposal was met with harsh criticism by prominent legal scholars, who attacked D’Amato for questioning the desirability of prosecuting war criminals.\(^5\) None of the critics chose to analyze the proposal, and attacked only D’Amato’s assumptions. In a subsequent letter of defense, D’Amato defended his essay as

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\(^1\) Leighton Professor of International Law, Northwestern University

\(^2\) See Anthony D’Amato, Peace vs. Accountability in Bosnia, 88 AJIL 500 (1994) [hereinafter D’Amato, Peace v. Accountability]

\(^3\) See id. at 500

\(^4\) 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 Williams and Michael Scharf, Peace with Justice? War Crimes and Accountability in the Former Yugoslavia, (1st printing, Rowman & Littlefield Publishers, Inc., 2002) at 49

\(^5\) D’Amato, Peace v. Accountability, supra note 2, at 503. The essay was also 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 AJIL 715 (1994) [hereinafter Paust, Correspondence]; Benjamin C. Ferencz, Correspondence, 88 AJIL 717 (1994) [hereinafter Ferencz, Correspondence]; and, Payam Akhavan, Correspondence, 89 AJIL 92 (1995) [hereinafter Akhavan, Correspondence]. See also Anthony D’Amato, Correspondence, 89 AJIL 94 (1995) [hereinafter D’Amato, Correspondence]. 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. See Paust, Correspondence 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. See Ferentcz, Correspondence 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. See Akhavan, Correspondence at 92-94. See also Payam Akhavan, Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities? 95 A.J.I.L. 7. In attacking the piece, none chose to take up D’Amato’s proposal to prove or disprove him.
questioning the feasibility, not the desirability, of a Tribunal in such circumstances. Since 1994, no author has taken up an analysis of D’Amato’s proposal.

In this Article, I undertake the first analysis of his essay in the form of a law and economics analysis. The analysis is based on his assumptions, the most fundamental of which is there is an absolute duty to prosecute war crimes under international law. This is also a fundamental assumption of critics of D’Amato’s essay. Critics have argued that bargaining away a war crimes tribunal suggested that all war crimes did not require prosecution, which contradicts the existence of an absolute duty to prosecute. D’Amato, on the other hand, argued that a Tribunal was not feasible if the negotiators, who were suspected war criminals themselves, were required to sign a peace agreement that guaranteed their prosecution by the Tribunal, given the absolute duty to prosecute under international law. Both D’Amato and his critics assume there is an absolute duty to prosecute under international law, but their respective conceptions differ as to how this duty may be applied in practice.

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. 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 economics analysis in exploring his essay. Game theory is valued for predicting the behavior of individual actors in particular situations, assuming all parties possess full information and act rationally. Also, game theory has become an increasingly valued form of analysis in international law in the prediction of the behavior of individual actors and nation-states. More recent applications have been to understand the behavior of nation-

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6 D’Amato, Correspondence, supra note 5 at 94. I agree with D’Amato’s assessment of these critiques, and therefore, will not address the critiques directly in my paper.
7 See generally Paust, Correspondence; Akhavan, Correspondence; Ferencz, Correspondence, supra note 5
8 D’Amato, Correspondence, supra note 5, at 94.
9 See generally ROBERT GIBBONS, A PRIMER IN GAME THEORY (Harvester Wheatsheaf 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 GIBBONS at 5.
10 In international relations, a game theory analysis of the behavior of the US and USSR during Cuban Missile Crisis of 1963 is often used. See Stephen J. Brams, Game Theory and the Cuban Missile Crisis, PLUS MAGAZINE Jan. 2001, at http://plus.maths.org/issue13/features/brams. A more recent, novel use of game theory analysis is Robert Wright’s book NONZERO, which attempts to explain human evolution using the logic of game theory. See generally Robert Wright, NONZERO: THE LOGIC OF HUMAN DESTINY (Vintage Books, 2001)
states under international tax treaties and the behavior of nation-states under
international law. When applied to D’Amato’s proposal, game theory can predict
the outcome for a hypothetical negotiation 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
Article. In Section II, I offer a brief synopsis of the events that led to war in the
former Yugoslavia (Section II.A), and a summary of D’Amato’s article (Section II.B).
In Section III, I will establish the preference profiles of all three parties for the game
theory analysis. In Section 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 (Section IV.D), I will also
suggest why the eventual outcome at the Dayton Peace Accords, a peace agreement
establishing a War Crimes Tribunal, resulted.

In the second prong of my analysis (Section 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 (Section V.A). I conclude that the
analysis suggests that the duty to prosecute and the credibility of the threat of

Concededly, a game theory analysis, particularly as to law, has its limitations. See Stephen A. Salant & Theodore S. Sims,
The Law, by Douglas G. Baird, Robert H. Gertner, and Randal C. Picker, Cambridge: Harvard University Press (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.”); Compare
g a counterargument to game theory as its being close to “pure theory”, because “game theoretic models of [industrial
organization] have not been empirically verified in a meaningful sense” and that “conclusions drawn from the 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.”).

11 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. Ms. Dagan’s work was a direct inspiration for this Article. 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, as
actors in international law are self-interested actors 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);
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 (Section V.B). I explore his argument that his proposal serves as a deterrent to would-be war criminals (Section V.C), and his decision to leave his proposal open-ended and undefined (Section 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 (Section 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, it is not because I 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

A historical background to D’Amato’s proposal is necessary to explain both his assumptions and mine. The history of the Balkans also provides some background as to why there was civil war in that 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 with the concession that “Nothing is simple in the Balkans. History pervades everything and the complexities confound even the most careful study.”

A. Historical Context

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12 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 of the roots and history of the conflict, and a foundation for my assertions as to why I assume the order of strategies for each negotiator.

13 See David Owen, A Balkan Odyssey (Harvest/Harcourt Brace 1995) at 1.
The former Federal Republic of Yugoslavia (FRY) was founded in 1943 upon fragile foundations. It was comprised of eight Balkan republics, all of whom represented different ethnicities within region, and between whom there was little concord. The 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 1980's and 1990's.

The Balkan Peninsula was settled by Slav tribes in the 6th and 7th centuries AD.14 Fifteen hundred years later, the three largest ethnic groups in the Balkans are all of Slavic descent – Serbs, Croatians, and Muslim Slavs, or Bosniacs.15 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.16 Rather, 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. The Croats, or Croatians, reside in the westernmost parts of the Balkans. They are concentrated heavily in Croatia and the western region of Bosnia called Herzegovina, though are spread throughout the Balkans.17 Croatians have a traditionally strong affiliation with Western Europe dating from the Hapsburg occupation, which in turn has left a legacy of Catholicism.18 In the easternmost parts of the Balkans reside the Serbs. Serbs are the ethnic majority of Serbia, and there exists a strong concentration of Bosnian Serbs in the eastern region of Bosnia. Serbs have had a traditionally strong affiliation with Russia and Central Europe, and are Eastern Orthodox Christians.19 Because of their geographic proximity and religious differences, Serbia and Croatia have historically served as the

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14 See WILLIAMS AND SCHARF, supra note 4, at 40
15 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 ROBERT KAPLAN, BALKAN GHOSTS (Vintage Departures 1996) (1993) at 22
16 See Margaret Macmillan’s account of the negotiations between the Serbs and Croatians at the Treaty of Versailles for the creation of Yugoslavia. MARGARET MACMILLAN, PARIS 1919: SIX MONTHS THAT CHANGED THE WORLD (2002), 114-120
17 See WILLIAMS AND SCHARF, supra note 4, at 40. Bosnian Croats have historically uniformly occupied Western Herzegovina, and consider themselves part of the Croatian nation, while most others live in Central and Northern Bosnia, which are more assimilated regions of Bosnia. See LAURA SIBER AND ALAN LITTLE, YUGOSLAVIA: DEATH OF A NATION (rev., 1997) at 293. Bosniacs are spread throughout the former republic. See KAPLAN, supra note 15.
19 See WILLIAMS AND SCHARF, supra note 4, at 69 ("Russia is linked to Serbia by religion, alphabet, and history.")
fringe battlegrounds between Eastern Orthodox Christianity and Catholicism in Europe.  

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 15th Century. 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. Bosnia has ultimately served as an ethnically integrated buffer zone between the Serbs and Croats. However, it has also served as a region for Croat-Serb, Catholic-Eastern Orthodox Christian tensions to play 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.

Despite this history of ethnic tensions, the nation-state of Yugoslavia was created from a merging of these regions in 1919 by the Treaty of Versailles. Its borders, both internal and external, and government were defined by European diplomats, with minimal shaping of the region by Yugoslav diplomats. 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. 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. Hostilities simmered until the mid-1930s, when the Croatian Ustashe, Croatia's military arm, assassinated the Serbian king, and a civil war began Yugoslavia. The war continued through WWII, driven by competing visions of Yugoslavia: the Serbs sought to preserve the Yugoslav nation-state; Croatia, now occupied by the Nazis and Italy, sought to break away. By the beginning of WWII, Serbs and Croats were at war.

20 See KAPLAN, supra note 15, 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 16th century, and, although occupied by the Ottomans in the 16th and 17th centuries, returned under Hapsburg control until the end of World War I. Serbia and Bosnia-Herzegovina fell under the control of the Ottomans in the 14th century, and continued to until the dissolution of the empire in the 19th and 20th 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.

21 See KAPLAN, supra note 15, at 22

22 Id.

23 See MACMILLAN, supra note 16, at 110-111

24 See KAPLAN, supra note 15, at 27, and SILBER AND LITTLE, supra note 17, at 28. Also included were the provinces of Montenegro and Kosovo, to which the Serbs had strong ethnic and historical ties. See discussion infra., note 28

25 See WILLIAMS AND SCHARF, supra note 4 at 42
Yugoslavia was initially divided by the occupation of Croatia and other regions by Axis powers. However, a military campaign by Marshal Josip Broz, “Tito” liberated Yugoslavia from its occupiers, and reunited the country by 1945. Tito’s Yugoslavia, officially founded in 1943 during the war, was a Communist nation-state governed under a federal parliament, including local parliaments for each of the six republics. Tito governed Yugoslavia from the end of WWII until his death in 1980 as a repressive dictatorship.

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 up to 1,500,000 ethnic Serbs, a third of whom were killed and the rest of whom became refugees. Upon the surrender of the Ustashe at the end of the War, Serb nationalists murdered over 100,000 Croats in retaliation for these crimes. 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. Strong handed governance was ultimately his most effective tool in repressing these movements.

The death of Tito in 1980 left a power-vacuum, despite a federal structure established by Tito to preserve order. An eight-member federal presidency, where leaders of each Republic had one vote and the presidency of the body alternated annually, had been created by Tito in his last years to replace him. He had also promulgated a new Constitution in 1974 to decentralize power. Notably, the Constitution granted autonomy to the Serbian-controlled states of Montenegro and

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26 Communist, post-WWII Yugoslavia was not affiliated solely with the Soviet Union, rather engaging under Tito in a careful dance between East and West. See SILBER AND LITTLE, supra note 17, at 27. The US kept Yugoslavia as a close ally throughout the Cold War, but following the fall of the Communist Bloc, the US saw few reasons to keep a close alliance alive. For this reason, it did little to prevent Yugoslavia from falling apart after 1989. Id. at 28.
27 See KAPLAN, supra note 15, at 17. The Krajina was the area that the Habsburgs had created in Croatia for Serbs who escaped the persecution of the Ottoman Empire, creating a permanent defensive barrier against Ottoman expansion. See SILBER AND LITTLE, supra note 17, at 93-94.
28 See SILBER AND LITTLE, supra note 17, at 93-94.
29 Tito actively repressed Serbian movements to placate the Muslims and Croats. See Kaplan at 38. In seeking to balance the interests of Serbs and Albanians, Tito gave the Albanian Muslims the province of Kosovo, located in Serbia. Serbs would long resent this, as Kosovo was the situs of the last stand by the Serbs against the Ottomans before being conquered. Serbs perceived the region being controlled by non-Serb Muslims as an additional insult to a historical injury. Tito also 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 rest of Tito’s reign. See SILBER AND LITTLE, supra note 17, at 82.
30 Nationalism was also suppressed by the fear of Soviet invasion, and by Tito’s success in governing the economy. See WILLIAMS AND SCHARF, supra note 4, at 42.
31 See SILBER AND LITTLE, supra note 17, at 29
Kosovo, thereby taking away land from Serbia only, and no other republics.\textsuperscript{32} But without a neutral figure to collectively govern the Republics, or repress nationalism, Yugoslavia and its Republics devolved into a clash between nationalist movements and federalist movements. Nationalist movements sought to tear Yugoslavia apart, whereas federalist movements sought to preserve the Constitutional structure of Yugoslavia.\textsuperscript{33} 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 in Serbia by Slobodan Milosevic, who rose to power as party leader in Serbia in 1987.\textsuperscript{34} Milosevic rallied Serbs around nationalist themes. Perhaps most effective was his call to arms over the loss of Kosovo to ethnic Albanians, a consequence of the adoption of the new Constitution. In Kosovo lay the battlefield where at the Battle of the Blackbirds in 1389 Serbia was vanquished by the Ottoman Empires, and was a strong symbol of Serb identity.\textsuperscript{35} In speeches to Serbs across Yugoslavia, Milosevic played to Serb nationalist sentiments by suggesting the loss of Kosovo marked the loss of Serb identity to Yugoslavia.\textsuperscript{36} Milosevic also stoked anti-Croatian sentiment by playing on old hostilities, including the treatment of Serbs in the Krajina in WWII.\textsuperscript{37} His ability to rally popular Serb support around him created the grounds for a quick rise to the Serbian Presidency in 1987.

As Serbian President, Milosevic sought to use his seat within the Federal Presidency overturn the 1974 Constitution. His intent was to create Serbian control of Yugoslavia and to divide the country into ethnically pure regions. Milosevic utilized political maneuvering within the Federal government to amend the Yugoslav Constitution, ending the independence of Montenegro and Kosovo and incorporating them into Serbia.\textsuperscript{38} In doing so, Milosevic was able to establishing greater constitutional and Presidential power for Serbia in proportion to the rest of the republics – in the Federal presidency, Serbia now controlled three of the eight seats and therefore, three of the eight votes. He was also able to establish Serbian control

\textsuperscript{32} Id. at 29, 59-61.
\textsuperscript{33} Serb and Croatian nationalist propaganda portrayed Muslims not as Muslims, but as Serbs and Croats who had succumbed to external pressure and converted to Islam. See SİLBER AND LİTTLĖ, supra note 17, at 208.
\textsuperscript{34} For a detailed history of Milosevic’s maneuverings along his rise to power, See generally SİLBER AND LİTTLĖ, supra note 17, at 31-81.
\textsuperscript{35} See supra note 28
\textsuperscript{36} Milosevic’s most famous speech occurred on April 24, 1987 on the field where the Battle of the Blackbirds had occurred. Milosevic is quoted as saying to a mass rally of Serbs, “No one should dare to beat you.” See SİLBER AND LİTTLĖ, supra note 17, at 37-47.
\textsuperscript{37} Id.
of the Yugoslav National Army (JNA), as the federal presidency served as commander-in-chief to the army. 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.\(^{39}\) Croatian nationalism had been actively repressed by Tito, but following Tito’s death, re-emerged in the absence of a repressive, neutral Yugoslav leader. Nationalism was further stoked by the gradual seizure of power by Milosevic and the Serbs. After the fall of Communism in 1989, the nationalist movement directed itself towards Serbian control of the Federal Presidency and of the JNA.\(^{40}\) Croatian nationalism believed Croatia was Western and modern, and Serbia was backwards and poor, and above all else, too powerful within the Republic.\(^{41}\) Tudjman seized upon the increasing popularity of this sentiment, pledging Croatian independence in 1989, and further pledging the conversion of neighboring Bosnia-Herzegovina into a Croatian state.\(^{42}\)

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. The two most direct 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. Beyond a view of Bosnia as terra nullius, both threats were also fueled by the traditional view by ethnic Serbs and Croats of Bosniacs as inferior.\(^{43}\) Bosnia also was unstable internally. It had become a boiling pot for nationalist movements, with Bosniacs, Serbs, and Croatians seeking to create new national entities or to join the new national entities being created from the former Yugoslavia.\(^{44}\) However, unlike Serbia, Croatia or Slovenia, Itzebegovic could

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\(^{39}\) A similar, but more peaceful movement, took place in Slovenia. See Silber and Little, supra note 17, at 82-91. Silber and 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

\(^{40}\) Id. at 83.

\(^{41}\) Id.

\(^{42}\) Id. at 85-86. Tudjman found local support in Herzegovina from Croat émigrés who sought a national expansion.

\(^{43}\) Bosnian Serbs sought to keep Bosnia as part of a continued federalist Yugoslavia, and anti-Muslim sentiment among Bosnian Croats was also on the rise in 1990-1991. Id. at 211-212.

\(^{44}\) Bosnia was comprised of 44% Muslim, 31% Serb, and 17% Cro at. Susan L. Woodward, Balkan Tragedy: Chaos and Dissolution after the Cold War 172 (1st Ed., 1995). Bosnia was also a target for division: in March 1991, Tudjman began secret negotiations with Milosevic about the division of Bosnia and Herzegovina. The result of that meeting was an agreement to dissolve Yugoslavia, but no agreement as to who would control the Serb-majority regions of Croatia, or Bosnia-Herzegovina. See Silber and Little, supra note 17, at 132. See also, Woodward at 172.
not declare Bosnia an independent nation-state because there was not enough of a Muslim majority to allow him to do so. Even after Croatian and Slovenian secession, Itzebegovic sought to preserve the Federal republic.

Itzebegovic also sought international assistance, including arms and European Community (EC) recognition of Bosnian independence to establish international recognition of its territorial integrity. However, official EC recognition of Bosnia’s independence would come in April 1992, three years after the declared secession of Croatia and Slovenia. Bosnia was unable to secure arms from the international community, particularly as a result of Croatian diplomatic objections, and thus was unable to protect its Muslim citizens or its territory from both Serb and Croat forces. EC recognition in 1992 also created more problems, as the gesture compelled Bosnians Serbs to declare the independence of the Republika Srpska in Eastern Bosnia that same year.

In a last ditch effort to prevent secession, there were diplomatic entreaties between the Republics of Yugoslavia to preserve the nation-state after the fall of Communism. In peace negotiations between 1989 and 1990, most Republics sought to preserve the Federalist structure in order to prevent war. They were unable to placate each other given Serbia’s intent for control, and Croatia and Slovenia’s concern for Croatian 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.

War began in June 1991 when Slovenia and Croatia 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. This advantage provided Serbia initial military and territorial advantages, including quick victories in

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45 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 AND LITTLE, supra note 17 at 208. Itzebegovic “felt he had to establish Bosnia’s independence” from Serbia once “nationalism found its expression in Croatia and Slovenia. See OWEN, supra note 13, at 41.
46 In Summer 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, though still part of the Federation. See SILBER AND LITTLE, supra note 17, at 148. The proposal was rejected, despite its seeming ability to accommodate the interests of all republics.
47 Id. at 198-99
48 Id.
49 See generally, id. at 154-189. Slovenian independence was less of a concern for Serbia, though; for this reason, Slovenia was able to secede from Yugoslavia with less conflict over territory. Id. at 154-55.
the Krajina region that enabled Serbia to create immediate territorial cohesion for Croatian Serbs. 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 and/or the internment of Muslims and Croats in concentration camps. The JNA and paramilitaries also engaged in “ethnic cleansing” to expand Serbia into Eastern and Northern Bosnia. 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. Ethnic cleansing resulted in quick successes for Serbian and Croatian forces throughout Bosnia and the former Yugoslavia.

Because of its diplomatic isolation and relative military weakness, Bosnia bore a heavy brunt early on from military defeats of its forces and ethnic cleansing within its territory. Ethnic cleansing resulted in the displacement of over 2 million Bosnians by December 1992, and in turn, a refugee crisis. 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 in turn escalated ethnic tensions. Bosnia was thus immediately destabilized by the onset of war.

After a period of tentative diplomatic efforts to resolve the growing crisis in Yugoslavia, the UN and EC chose to intervene in 1991. There were multiple reasons for this 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

50 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 the South of Croatia, Croatian Serbs were seeking to extend Serbian control over regions of Bosnia-Herzegovina. See SILBER AND LITTLE, supra note 17, at 138, 188.
51 Id. at 222
52 Id. at 244
53 Id. at 184-88
54 Id.
55 Id. at 301
56 See discussion supra, note 25 as to why the US opted not to initially intervene.
concentration camps and war casualties in Bosnia. The UN directly intervened by sending peacekeeping troops (UNPROFOR) to Bosnia to set up “safe areas” for the protection of Bosnian refugees. The UN also intervened via international law, passing Resolution 764, which held individuals responsible for violations of international humanitarian law in the former Yugoslavia, establishing the War Crimes Commission by UN Resolution 780 in July 1992, and the ICTY in Resolution 808 in September 1992.

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 the Declaration. But the Declaration excluded language about any use of force by foreign countries if Serbia did not comply. The Declaration signified the indecision of the international community as to how to intervene – the UN and EC were horrified at the apparent war crimes committed by the Serbs, but were unsure of how to end the war.

Despite the presence of UNPROFOR, Bosnian Serb forces defied the international community by surrounding and shelling these UNPROFOR areas from the hills around them. Bosnian Serbs particularly targeted the Bosnian city of Srebenica and the former Yugoslav capitol of Sarajevo. Serbs forces also continued to engage in ethnic cleansing despite a growing international determination to end the war, establish peace, and punish war criminals. The UN, spurred by the continued shelling of Srebenica, passed financial sanctions against Serbia. But Bosnian Serb forces remained undeterred, believing there was no credible threat of intervention.

The EC and UN 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. It offered to reconstitute Bosnia into 10 provinces: 3 Serbian, 3 Muslim, 2 Croat, 1 Croat-Muslim, and a 10th province would retain power-sharing amongst all three

57 Milosevic allowed international peacekeeping forces because they were deployed on his terms. See SILBER AND LITTLE, supra note 17, at 301.
58 Id. at 259-61
59 Id. at 262
60 This indecision was consistent from the very outset of civil war. See supra FN 23. See generally WARREN ZIMMERMAN, ORIGINS OF A CATASTROPHE 176-177 (Time Books, 1996) (Describing the indecision of the outgoing Bush Administration as to the developments in Bosnia); RICHARD HOLBROOK, TO END A WAR 21-33 (1st Ed., 1998) (Describing the failure of the EC, Bush Administration, and incoming Clinton Administration to adequately address the situation as “the greatest collective failure.”); SILBER AND LITTLE, supra note 17, at 201 (Suggesting the US Secretary of State James Baker’s handling of the war under the Bush Administration meant that the US felt Yugoslavia “wasn’t America’s problem.”)
61 See WOODWARD, supra note 44, at 307; SILBER AND LITTLE, supra note 17, at 268-270.
62 See OWEN at 144-45; SILBER AND LITTLE, supra note 17, at 276-77
groups. 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. 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 in to the very heart of central Bosnia." Croatia initially objected, though Tudjman would agree to a peace agreement that establishes a Bosnian state, weak and highly decentralized, in order to facilitate the potential future merging of the Croatian parts of Bosnia into Croatia. Itzebegovic saw the plan as the legitimization of ethnic cleansing, so initially would not sign on. The Bosnian Serbs ultimately rejected the plan, citing the substantial amount of land that was to be handed over to the Muslims and a fear of a substantial UN presence. Mladic was virulently against giving up any land to Bosniacs. The VOPP failed to create any progress between the sides or end the war.

After the rejection of the VOPP, the US 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 established six Muslim "safe areas" throughout Bosnia. The goal was to "roll back" the Serbs from land attained via ethnic-cleansing. The failure of the VOPP had spurred this international effort at rolling back Serbia, but undeterred Serbian forces continued to occupy areas around UN safe zones, including Srebenica and Sarajevo. 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 on 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% of Bosnia would be Serbian, 17% would be Croatian, divided into two parts, and 30% would go to Bosnian Muslims. However, the proposed Bosnia was a
misshapen and disjointed state, and Itzebegovic ultimately rejected it for its recognition of territorial gains by Serbia. 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.  

The month of 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 for the Serbs: withdraw from around Sarajevo or face bombing. The Serbs responded by lifting the siege of Sarajevo, but withdrawing only partially. Simultaneously, a US-led diplomatic initiative created the Croat-Muslim Federation, which convinced the Croats to agree to allowing the Bosniacs to be fully armed, and to a peace agreement between the two sides. 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 opponent against the Serbs. As the fighting continued, the momentum in the war began to shift more towards the Federation and away from the Serbs.

By June 1994, international efforts further evolved into a more interventionist approach. The international community created a “Contact Group” consisting of France, Germany, Russia, the United Kingdom, and the US. The Contact Group sought to expedite an end to the war using all means necessary up until military intervention. They offered Serbia a “take it or leave it deal”, calling for the surrender of territory, including part of highly valued territory and towns seized through ethnic cleansing. Otherwise, the Contact Group would intervene militarily.

Whereas the Serbs had presented a united front before, they 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. Milosevic, seeking to end Serbia’s economic isolation and wanting Karadzic out as

74 Id. at 308
75 Id. 319. Interestingly, there are different conceptions of the significance of this agreement. Silber and Little write that this agreement allowed the Croatians and Muslims to fight the Serbs. However, Lord Owen writes that Tudjman said the Alliance was not directed against the Serbs, but was for peace. See Owen, supra note 13, at 288.
76 See Silber and Little, supra note 17, at 308
77 Included in this “highly valued territory” was the Northern Corridor, a passage that connected Serbian enclaves in Bosnia with Serbia. Id. at 337.
Bosnian Serb leader, wanted to accept the plan. 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, though were both still considered to represent the Republika Srpska. The Serbs were willing to continue to fight, but 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. This work was actively supported by the international community, particularly the US. The UN Security Council had created the Commission in 1992 in response to US pressure for an effective measure from the UN. The UN 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. The Commission was thus seen as a more effective means of addressing the war crimes in the war.

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. 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. It nonetheless was able to issue a preliminary Report in early 1993, which convinced US, European, and UN diplomats of the necessity of establishing a Nuremberg-style Court. The result was UN Resolution 808, establishing the ICTY. 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. The final report had substantive evidence of war crimes by all parties and of implications of the involvement of the leaders in the ordering of the commission of these war crimes. There was thus a fertile foundation for a Tribunal to proceed.

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78 Id. at 338. Milosevic had hoped that Karadzic would approve the VOPP because it was weak structurally, and had bet on the agreement collapsing in the future.
79 See WILLIAMS AND SCHARF, supra note 4, at 93
80 The US regarded the Commission as more favorable to a Tribunal because the US State Department inherently distrusted Tribunals, and viewed Tribunals as entities capable of taking independent actions contrary to the terms of a peace agreement. Id.
81 Id. at 94
82 Id.
83 Id. at 95. The report was 84 pages long and contained twenty-two annexes containing 3,300 pages of detailed information and analysis.
84 Id. at 96
85 Williams and Scharf describe initial and later 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, but perceive it differently than I do. The authors regard it not as a proposal for, but rather a description of the ICTY as a bargaining chip. Id. at 100.
All warring parties had knowledge of the report upon its release, and were aware of the progress of the Tribunal. They were also aware of the growing international support for a Tribunal. Nonetheless, ethnic cleansing and land grabs continued.

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, Croatians, and Muslims) to agree to a peace settlement in Bosnia when the leaders themselves were in jeopardy of being prosecuted as war criminals. Specifically, he wondered whether immunity from the ICTY can be a condition for peace, and whether UN negotiators have in fact made such an offer.

In his search for an answer to this question, D’Amato found “scant historical precedent” for this “novel dilemma.” 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. At the time of D’Amato’s article, the war in Yugoslavia had been 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. Second, there was weak historical precedent for the prosecution of war crimes. In contrast to Nuremberg and Tokyo, he argued that the war in the former Yugoslavia was not fertile ground for peace, as any peace would be conditional and

86 See generally Id. at 96-112
87 See D’Amato, Peace v. Accountability, supra note 2, at 500.
88 Id.
89 Id.
90 See WILLIAMS AND SCHARF, supra note 4, at 173-174. Cf. Makau Mutua, Never Again: Questioning the Yugoslav and Rwanda Tribunals. 11TMPICLJ 167 at 175 (Arguing that the Yugoslav and Rwanda Tribunals were established because the UN and the international community were eventually “shamed” into establishing the Tribunals).
91 See D’Amato, Peace v. Accountability, supra note 2, at 501. D’Amato believed the conditions following WWII were “favorable” to a war crimes tribunal because 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.
there existed “significant negative precedent for international accountability” for individual war crimes after Nuremberg.\(^92\)

Instead, he took inspiration from the US domestic tort model, where Courts “strongly encourage parties to settle their case on their own terms.”\(^93\) In such settlement negotiations, the “prevailing judicial attitude” is that parties may achieve exact justice among themselves.\(^94\) 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.\(^95\) D’Amato viewed this state interest as an interest in deterrence of future criminals. 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.\(^96\) 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 the leaders might have refused to agree to a peace agreement if the terms of that peace required their own prosecution for the commission of war crimes. In other words, 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 was immunity. However, if the leaders were guaranteed immunity from the tribunal in exchange for peace with a tribunal, the credibility of the tribunal may be undermined by “the repeated spectacle of witnesses shown to be more culpable than the accused.”\(^97\) The immunization of political and military leaders while prosecuting their subordinates would be a “simply... unacceptable” outcome.\(^98\) 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 having no trial at all.”\(^99\) Therefore, if the Tribunal was to proceed, the leaders of all

\(^{92}\)Id. D’Amato believed the failure of the international community to establish war crimes tribunals following the Vietnam War, the Korean War, and the Persian Gulf War served as this “negative precedent.” Id.
\(^{93}\)Id. at 502
\(^{94}\)Id.
\(^{95}\)Id.
\(^{96}\)Id., 503.
\(^{97}\)See D’Amato, Peace v. Accountability, supra note 2, at 503
\(^{98}\)Id.
\(^{99}\)Id.
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.

These perceptions of D’Amato led him to predict that the pursuit of “the goal of a war crimes tribunal may simply result in prolonging a war of civilian atrocities.” In response to these significant limitations on the effectiveness of a war crimes tribunal, D’Amato proposed that the UN instruct all warring parties that the ICTY would proceed unless all parties agree inter se to ask the UN to dissolve the tribunal. In doing so, the UN would offer the tribunal as “an explicit bargaining chip” in the negotiations. With this model in mind, D’Amato assumed that if all parties were to agree to this proposal, the UN Security Council would grant their request.

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.” Second, all parties to the peace negotiations have assets (in this particular case, territories of the former Yugoslavia) that the others desire. Given these assumptions, D’Amato believed that his proposal had two advantages. First, it would remove the tribunal as “a practical impediment to peace.” 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 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.”

Second, D’Amato argued that if the tribunal was offered as a bargaining chip, it might achieve most of the deterrence objectives of the international community. He argued: “[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 punishment that fit their crimes.” 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.\textsuperscript{110} 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, thus making the commission of war crimes an eventual cost of war.\textsuperscript{111} 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 their own 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.\textsuperscript{112} Once war crimes committed for the sake of securing territory became a cost of war, a war crime would lose its military justification.\textsuperscript{113}

Additionally, D’Amato believed there is an important theoretical payoff from this approach for the international community. He argued that the international community’s interest in prosecuting war criminals was an externality that was internalized by the negotiations by allowing it to be used as a bargaining chip.\textsuperscript{114} In doing so, he predicted, “international law will be able to bring to a successful conclusion the theory that war crimes are not required by, and indeed are counterproductive to, military necessity.”\textsuperscript{115}

In sections 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.

\section*{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 analyses may be undertaken. A game theory analysis is appropriate here because D’Amato invites an economic analysis, and because his proposal focuses on the behavior of individual actors in a negotiation.\textsuperscript{116} 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 predicts an outcome based

\begin{footnotesize}
\begin{enumerate}
\item[110] Id., at 504
\item[111] Id.
\item[112] Id.
\item[113] Id., at 506
\item[114] Id.
\item[115] Id.
\item[116] It is also appropriate because it is increasingly being used as a form of analysis in international legal theory. See supra note 10.
\end{enumerate}
\end{footnotesize}
on the combination of strategies pursued by the parties based on these preferences.\textsuperscript{117} Through game theory, we are 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, we are able to adjust the variables of the game to see if a different outcome results.

In game theory, there are two basic assumptions: first, each player knows the payoffs for his own strategies and the payoffs for the other players, and second, that the other players are rational. Given these assumptions, there are two means by which we can determine an outcome using game theory. The games either may be dominance solvable or may result in a Nash Equilibrium, or both.

If the game is approached as dominance solvable, the players eliminate a strategy if there exists another strategy that is always at least as good as the 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 strategies that were not dominated before but are now. If a player has one strategy that is always as 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 solvable is considered 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., a player will play $P_T$, even though it results in the outcome $W$, 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.\textsuperscript{118}

\textsuperscript{117} See Gibbons at 2
\textsuperscript{118} Id. at 7-8. Gibbons provides a model from which this can be understood best (NOTE: unlike in the games above, payoffs are described numerically. In this instance, the greater the number, the more that outcome is valued by a player). In this game, Player 1 must decide to move Top, Middle, or Bottom when Player 2 moves Left, Center, or Right.
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. Therefore, 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).

The preference profiles of each actor will consist of three potential outcomes. 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 negotiations. The order of these preferences for each party will mirror their actual preferences over the course of the war and peace negotiations.

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<tr>
<th>Player</th>
<th>2</th>
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<tr>
<td>T</td>
<td>0,4</td>
<td>4,0</td>
<td>5,3</td>
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<tr>
<td>M</td>
<td>4,0</td>
<td>0,4</td>
<td>5,3</td>
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<tr>
<td>B</td>
<td>3,5</td>
<td>3,5</td>
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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 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: “no strategies are eliminated; anything could happen.”

119 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 Cuba Missile Crisis suggest that rational actors may opt to use nuclear weapons. See Brams, supra, note 10. This question is an interesting one that is not addressed by this paper, but which the Author encourages readers to pursue.

120 See Szasz, supra note 66, at 762. 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, I rely on Szasz’s assessment primarily, though additional historical context has been derived generally from three additional sources: Owen, supra note 13; Holbrooke, supra note 60; and, Silber and Little, supra note 17. 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. See Silber and Little, supra note 17 at 393.

121 Concededly, viewing the State as a body with one uniform interest and an outcome as simply “war” or “peace” are oversimplifications. The interests of the country and the interests of the leaders are much more multifaceted, 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. Therefore, I assume that the preferences and the outcomes reflect the optimal versions of those outcomes. Cf. Dagan, supra note 11 (Conceding that in a game theory analysis where the interests of the state are one uniform interest are an oversimplification).
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 (”Pn”). 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 strategies of ranking the preferred outcomes are determined by the balancing of four factors, derived from an analysis of the Dayton Accords by Paul Szasz.122 There are many factors to theoretically consider, but I have found Szasz’s factors to be particularly helpful in the construction of this model. 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 will be a 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.123 This factor also includes 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 will be 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 predominantly guilty of the commission of war crimes. In D’Amato’s terms, this desire is weighed by how much a party has “suffered.” 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, each leader weighs his desire for active international intervention in the conflict.124 Active international intervention is when the international community is a

122 I have established these factors based on Paul Szasz’ assessment of the preferences of the parties over the course of the war, and in light of the history of the war, also. See Szasz, supra note 66, 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 weighed by the actors is both a historically accurate concern and within the purview of D’Amato’s proposal. 
123 I will assume, as D’Amato does, that these assets were largely land seizures, and were predominantly portions of Bosnia and Croatia. 
124 Szasz indirectly considered this to be a factor, as he weighed the effect of the US’s strong-arming, and of the threat of war crimes prosecution, on the parties. See Szasz, supra note 66, at 762. The definition of and contrast between active
military participant seeking to end the war; or, when its takes the role of investigator of and judge for the commission of war crimes. I assume W implies the international intervention can be military, given the precedent of the Joint Action Plan and NATO’s threats. I assume \( P_T \) implies an intervention where the intervention may be military, but also where the international community is investigator and judge.\(^{125}\) Passive international intervention is presumed to be 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 either 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. These factors will determine each party’s strategy of pursuing an outcome of peace or war in each game.\(^{126}\) Each actor will act in its respective 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 has developed between the three leaders, I assume that they agree to the order of all most strategies, but in order to reflect history as well as possible, not to the final order of all strategies, as will be evident below.\(^{127}\)

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\(^{125}\) This was the precedent of the Dayton Accords, See infra. Sect. IV.E; Szasz, supra note 66, at 762.

\(^{126}\) 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 Szasz’ article as legitimate concerns of each party. See, Szasz, supra note 66, at 762. Because D’Amato only addresses his proposal in terms of war and peace, I will stay within those parameters. See D’Amato, Peace v. Accountability, supra note 2, at 500. 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.

\(^{127}\) 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
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 and territories gained in Bosnia. 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. 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, and some evidence points to Milosevic, who bore close ties to the Bosnian Serb army. 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 international). 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. For these reasons, the Serbs are assumed to seek to avoid any outcome with a Tribunal.

The Serb party did not fear an active international intervention in 1994. As is evident above, threats of international intervention had not been followed through by the international community, even when Serb forces partially acceded to them.

of ethnic Serbs. See SILBER AND LITTLE, supra note 17, at 287. 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 Mladic and Karadzic became those scapegoats. Id. at 335-336.

128 See supra, notes 45, 50
129 See SILBER AND LITTLE, supra note 17, at 277
130 See SILBER AND LITTLE, supra note 17, at 336. Milosevic has been indicted for these war crimes, and is currently being tried at The Hague for these and other war crimes throughout the decade. See generally, WILLIAMS AND SCHARF, supra note 4, at 233-336
131 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, which prevented their travel beyond Republika Srpska. This indictment was considered to be a strategic move to minimize their involvement in Dayton. See WILLIAMS AND SCHARF, supra note 4, at 159. The indictment of Milosevic in May 1999 led to Milosevic’s arrest and trial at The Hague in 2001-2002. Id at 228-366
Therefore, the risk of pursuing the W strategy is less risky. Also, as was evident in the
VOPP and other peace plans, the UN had been accommodating to the Serbs
territorial conquest by recognizing their gains. Another factor, though less obvious,
was Russian diplomatic support. The Russians diplomatically represented the
interests of the Serbs in the Contact Group, primarily due to a desire to protect the
interests of its allies, and also due to a fear of loss of regional influence in the post-
Cold War era. In doing so, they were able to temper Western ambitions to
intervene militarily. Therefore, there was 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
were most concerned with preserving their territorial gains. Although Milosevic
strategically considered failed agreements as potential threats to his political future,
both Karadzic and Mladic regarded successful peace agreements as threats to the
territorial gains they had made in Bosnia over the course of the war. For the latter
two, any agreement that sacrificed territory meant the sacrifice of the vision of a
Greater Serbia, of its military advantage, as well as the protection of ethnic Serbs in
unconquered regions. Therefore, I assume the Serb desire to preserve assets acquired
in war is maximal.

For these reasons listed above, I assume the Serbs prefer W to P\text{\textsubscript{T}}.

When P\text{\textsubscript{N}} is presented as an option, I will assume that the leaders will prefer P\text{\textsubscript{N}}
to W if the tribunal is a credible threat. Presumably, it is fair to argue that because the
Serbian leadership was seeking a Greater Serbia, they would prefer W to P\text{\textsubscript{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 was 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.

An additional factor to consider is that P\text{\textsubscript{N}} requires that the Serbian leaders give
up all assets secured during the war. Such a sacrifice does not reconcile with the
maximal desire to preserve all assets acquired during the war. The initial conclusion,
then, given the parameters laid out above, is that the Serbs cannot prefer P\text{\textsubscript{N}} to W. I

\begin{footnotesize}
\footnotesize 132 Id. at 82
\footnotesize 133 See supra, WILLIAMS AND SCHARF, note 4, at 70. ("By so strongly allying itself with the Serbian regime, Russia was able
to secure for itself a renewed foothold in Europe.")
\footnotesize 134 See supra, note 78.
\footnotesize 135 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 60, at
106-07. See also SILBER AND LITTLE, supra note 17, at 367. Again, it is important to note that the momentum of the war
was shifting in 1994.
\end{footnotesize}
nonetheless assume that they do have such a preference. Given that I am working within the assumptions of D’Amato’s model, and because D’Amato predicts that the fear of the threat of prosecution outweighs the desire to obtain land, I will assume that the Serbs prefer $P_N$ to $W$. Some elements of the parameters laid 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.\footnote{It is also worth considering here that Milosevic’s territorial ambitions progressively diminished up until the Dayton Accords. See Silber and Little, \textit{supra} note 17, at 353.} 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 $W$.\footnote{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.} Again, given that I work within D’Amato’s assumptions, and the viability of this preceding argument, I assume this to be the case. For these reasons, I will 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. $P_N = \text{establishment of peace; no war crimes tribunal; exchange of assets secured in war; and, passive international intervention.}$
2. $W = \text{continued war; expansion of Greater Serbia and increase in assets secured from war; potential war crimes tribunal; and, active international military intervention (low risk).}$
3. $P_T = \text{establishment of peace; war crimes tribunal; some exchange of assets secured in war; and, active international intervention.}$\footnote{Szasz describes the behavior of the actors as consistent throughout the peace efforts, both before and during the Dayton Accords. See Szasz, \textit{supra} note 66. 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 existence in hiding 8 years later instead indicates that they would not likely have been willing to give up their hold on power in exchange for peace.}

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 is the disproportionate losses the Republic has 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 Croatians.139 But Bosnia has also suffered territorial encroachment. Any peace agreement, therefore, must not only include the punishment of war criminals, but must also allow 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.140 Additionally, this intervention has been sought for the prevention and punishment of war crimes. 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.141 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 will initially assume the Bosniacs prefer \( P_T \) to \( W \). For this same reason, I will assume that the Bosniac interest in justice will also lead them to prefer \( P_T \) to \( P_N \).

The Bosniacs prioritize an outcome where Bosnia’s original boundaries are re-established. However, the last three proposals – the VOPP, London Conference, and Contact Group ultimatum – have recognized at least most of the Serbian territorial gains. Because \( P_N \) involves the return of territory but the sacrifice of justice, it is unclear whether it can be assumed the Bosniacs will prefer \( P_N \) to \( W \), or \( W \) to \( P_N \). Presumably, the Bosniacs would 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 make the assumption that the Bosniacs would prefer \( W \) to \( P_N \).142 Another factor to consider is what type of international

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139 See Szasz, supra note 66, at 762
140 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.
141 See WILLIAMS AND SCHARF, supra note 4, at 153-55
142 I factor into this statement that by 1994, the arms embargo on the Bosniacs had been mostly lifted following the establishment of the Croat-Muslim Federation. See SILBER AND LITTLE, supra note 17, at 323.
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 $P_N$. On the other hand, if they prefer that the UN 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 tenable to assume that the Bosniacs prefer $P_N$ to $W$, and vice versa.\footnote{International military intervention would take place a year after D’Amato’s article. See infra Section IV.E.} 

For the first game, I will assume that they prefer $W$ to $P_N$ because they would 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. $P_T = \text{none of to some assets from war exchanged; active international intervention; war crimes tribunal; and establishment of peace.}$
2. $W = \text{assets are fought over; potential war crimes tribunal; active international intervention; and no establishment of peace.}$
3. $P_N = \text{assets exchanged, no war crimes tribunal, passive international intervention, and establishment of peace.}$

C. Croatian Preferences

Croatia is represented by President Franjo Tudjman, who has capitalized on the popular Croatian sentiment for independence by having seceded from Yugoslavia and is seeking more territory in Bosnia. However, there is also evidence that Tudjman ordered war crimes to be committed against both ethnic Muslims and Serbs.\footnote{ICTY Prosecutor Carla Del Ponte had been arranging an indictment of Tudjman in 1999 for crimes committed in 1995 in the Krajina, but was unable to indict because of Tudjman’s death that same year. See \textsc{Williams and Scharf}, supra note 4, at 51} In other words, Croatia seeks 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 will assume that the Croatian preferences mirror those of the Serbs.\footnote{Another historical basis for this assumption is that Croatia and Serbia were in secret negotiations as to the division of Bosnia since 1991. See supra, note 44. For this reason, and the fact that they were both seeking more territory similar means, this appears to be a reasonable assumption.}

\footnote{The Bosniacs could prefer $P_N$ to $W$ if they believe they are able to 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 72.}
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 Bosnian state, weak and highly decentralized, in order to facilitate the potential future merging of the Croatian parts of Bosnia into Croatia.\textsuperscript{147} 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 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 in interest if they pursue some form of justice. The Commission has evidence of the commission of war crimes by Croatian troops, but proportionately less than the Serbian army. On the other hand, Bosnian Croats and Krajina Croats have been victims of ethnic cleansing by Bosnian Serbs. There thus 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 would imply a military intervention in their favor. Additionally, the US has brokered a deal in their behalf to give them greater momentum in the war, and the threats by the US and NATO to military intervene against the Serbs is also positive for Croatians. Therefore, the Croatians could be assumed to want an active international intervention. On the other hand, evidence of war crimes by Croatian soldiers implies that any active international intervention also may result in the punishment of Croatian leaders.\textsuperscript{148} Given this latter reason and the factors laid out above, I assume that \( P_I \) is the most unattractive option for the Croatians. It is unlikely that they will 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

\textsuperscript{147} See supra, note 50
\textsuperscript{148} A transcript of Tudjman's direct orders for ethnic cleansing has been published in Harper's Magazine. See HARPER'S, December 2001 at 20-22. There was evidence of war crimes by Croatian troops against Muslims between 1992 and 1994. See WILLIAMS AND SCHARF, supra note 4, at 50.
involves active international military intervention, the opportunity to seize more land, and no punishment by a Tribunal, I assume the Croatians prefer W to P_T.

P_N confronts the Croats with a difficult choice. Based on the analysis above, the Croatians should prefer an outcome with no tribunal, which is either W or P_N. The Croats should also prefer an outcome where control of the Krajina is returned to them, and where they would not have to give up land in Bosnia. Also, because of its historical ties to the West, Croatia should want an outcome where 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 would guarantee the return of the valued Krajina region, as opposed to no guarantee of this territorial return under W. Secondly, 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 be sacrificing territory, Croatia implicitly would have a likelihood of reacquiring the territory in the future with 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 Croatians prefer P_N to W.

Thus, I assume the preferences of the Croatians are the following:

4. 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.
5. W = continued war; expansion of Greater Croatia and increase in assets secured from war; potential war crimes tribunal; and, active international intervention.
6. P_T = establishment of peace; war crimes tribunal; some exchange of assets secured in war; and, active international intervention.
IV. Games

In this section, a game theory analysis of D’Amato’s proposal is undertaken. The analysis is in 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. Second, all parties must believe there is a credible threat of being prosecuted by the international community. 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 above. If they are unable to unanimously agree to an outcome, I assume the result is that the war continues, and the outcome is therefore W.149

The representation of the games below will be as follows: the Bosniac party’s strategies are represented in rows, the Serbian party’s strategies are represented in columns, and the Croatian party’s strategies are represented in arrows pointing to different matrixes. Within each of the boxes of a matrix is the particular outcome from the particular combination of each party’s strategies.150 Parties strategize as to which outcome they will seek based on their order of preferences for outcomes, and based on the order of 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 via Game I.151

A. Game I

In order to understand how the offer of PN affects each of the actors in a negotiation, we must first understand the outcome when the parties interact before they are offered PN. The interaction of the strategies of all three parties is summed up in Table 1. There are two matrixes – 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.

![Matrix Diagram](image)

**Table 1**

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. Similarly, neither C nor S will play $P_T$, as they prefer the outcome W to $P_T$ and all outcomes when each one plays W results 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. All players have two potential strategies: W or Pₜ. When S and C play W, B has the option of playing Pₜ or W. B would prefer the outcome Pₜ, but is only able to get that result if both S and C play Pₜ. Neither S nor C will play Pₜ because they would rather play W in order to get the outcome W. However, B won’t play W because it prefers the outcome Pₜ, so B must play Pₜ. Similarly, because they prefer the outcome W to Pₜ, both S and C will play W when B plays Pₜ. Also, neither S nor C will play Pₜ because if they did, B will also play Pₜ, resulting in the outcome Pₜ, which is the least-preferred outcome for both S and C. Thus, a unique Nash Equilibrium results at [Pₜ, W, W] because it is the best response for all parties given the other parties’ potential strategies.

B. Game II

D’Amato’s proposal predicts that the outcome should change if the parties are presented with the option of Pₙ. The interaction of the parties’ preferences when presented with Pₙ 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 Pₙ.

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152 See Gibbons at 9

153 It is important to note that with the exception of [Pₜ, Pₜ, Pₜ], 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 still are not the sole determinants of a particular outcome.
D’Amato believes that with $P_N$ as a choice, the outcome will be $[P_N, P_N, P_N]$. This is not the outcome in this game.\footnote{The result $[P_N, P_N, P_N]$ would result if the Bosniacs were to prefer $P_N$ to $P_T$; however, based on the history of the conflict and the factors as laid out 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.}

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.

Neither Croatia nor Serbia will play $P_T$ because for both of them it is dominated by both $W$ and $P_N$. This is because they are able to reach a more preferable outcome if they play $W$ or $P_N$, as 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 both $S$ and $C$’s dominant strategy.

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, but not ever 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, both S and C’s best strategy, 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 parties. Therefore, playing $P_N$ is S and C’s best strategy. 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 $P_T$, he has a chance of attaining his most preferred outcome of $P_T$; when he plays $W$, there is no chance of that outcome, and the other actors would strategize to ensure the outcome $[W,W,W]$. Therefore, the outcome $[P_T, P_N, P_N]$ is 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 also be concluded that the preference profiles, ordered based on a couple of 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. It is for this reason that 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 B would prefer to fight for a military justice than sign a peace agreement that leaves the Serbs unpunished.
However, there was an equally strong argument for B to prefer P_N to W. 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, they all would prefer P_T to P_N. B’s order of preferences is now the following:

1. P_T
2. P_N
3. W

The new interaction of B’s new preferences with the other parties’ may be seen in Table 3 below:

### Table 3

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This game is also dominance solvable. In this game, B will not play W because it 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 below:

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155 The question surrounding what would constitute an acceptable P_N for all parties will be addressed later. See infra, Section V.D
In this reduced game, W is dominated by P for both S and C because they prefer the outcome P to W, and P is not attainable when either plays W. In other words, P is as least as good a strategy as W but better because they may be able to get the result P. P, then, is both S and C’s dominant strategy, resulting in the game in Table 5:

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

This result is also a Nash Equilibrium. In Game II, the outcome [P, P, P] mirrored the players’ most-preferred outcomes. In Game III, the outcome mirrors two of the players’ most-preferred outcomes, and one of the players’ second-most preferred outcomes. The difference can be understood through B’s change in order of preferences. Both S and C strategize knowing that B will seek to avoid the
outcome W. Therefore, given B’s preferences, and the fact that S and C will not play B’s most-preferred outcome $P_T$, they are better off strategizing for their preferred outcome $P_N$ – either way, they attain their second (W) or first preferred outcomes. The difference is whereas before, B prefers all other outcomes to $P_N$, in this game B prefers all other outcomes to W. For B then, the 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 playing $P_N$. Therefore, $[P_N, P_N, P_N]$ is the best result that each party can do given in response to the strategies of the other players, and is 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 given assumptions that attempt to mirror the behavior of the parties in 1994. Another conclusion is that D’Amato’s proposal works only if a particular assumption about a party’s preferences is modified, but even then, that assumption is tenuous.156 Either way, D’Amato’s proposal has been demonstrated to be possible, given assumptions that reflect the historical circumstances the underlay the conflict at the time.

D. Game IV

Is there another, better game where 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 US-led peace negotiations at Dayton, Ohio in 1995, which resulted in the Dayton Accords. The fourth party is the US, whose aggressive push for peace at the negotiations resulted in the Accords.157

The US, as a party, prioritizes peace as an outcome. If having to choose between the two peace outcomes of $P_N$ and $P_T$, the US would prefer $P_T$, as the US is not only representing its own interests at the negotiating table, but also the international community’s commitment to the tribunal.158 Furthermore, as a peace

156 Concededly, whether any set of preferences is actually the set of preferences of any party at any given point in time is, at best, a tenuous assertion, and is subject to difficult justifications of each party’s rationale. 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 of diplomats involved in the peace talks. See Szasz at 762. Compare generally HOLBROOKE, supra note 60, and OWEN, supra note 13
157 The US 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 US has its own preference profile. I will assume the latter of the two because the US interests are better represented as a preference profile, and the outcome is more interesting for this analysis.
158 The US actively moved the responsibility for negotiations away from the UN toward the Contact Group, and ultimately, into the hands of the US. See WILLIAMS AND SCHARF, supra note 4, at 68.
negotiator, the US does not want war at all. Therefore, the preference profile of the US will be:

1. $P_T$
2. $P_N$
3. $W^{159}$

There is an additional change to the game. Given the US’s role as the aggressive arbiter of a peace accord, I will assume that unanimous agreement is no longer necessary. Instead, for an agreement, three out of four parties must agree. That is to say, if all three warring parties agree to peace, either with or without a tribunal, then the US is happy. Alternatively, if two warring parties agree to peace and the US 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 US 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 US 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 US and B.

It is easier to understand what happens next by focusing on B’s decisions, and the US’s decisions given B’s decisions. If B plays $P_T$, both S and C will play $P_N$. In this case, if the US 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 US plays $P_N$ [$P_T, P_N, P_N, P_N$].

If B plays $P_N$, it does not matter whether the US chooses $P_T$ and $P_N$. The outcome will be $P_N$ if the US 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 US and B are better off playing $P_N$. The result, then, 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 US 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 US can do in light of the strategies of the other parties.

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159 This argument assumes that the US would agree to $P_N$ as an outcome of the negotiation. Would they have? 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 parties to the Accords by only allowing arrests of locals in accordance with the international legal standards of the Office of the Prosecutor of the ICTY. This hampered justice by putting prosecutions in the hands of the ICTY Prosecutor, which had limited capacity to handle the large caseload for war criminals. See WILLIAMS AND SCHARF, supra note 4, at 118.
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 US, $W$ 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 US’ decision in response to B’s strategies. If B plays either $W$ or $P_T$, and the US 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 US 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 US 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 US 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 US sacrifice $P_T$ for $P_N$? Would the Bosniac party consent to being forced into a peace agreement it does not want? These questions are of legitimate concern when attempting to draw lessons from a theoretical analysis for the purposes of application. Nevertheless, with the US as a party to the negotiations, the outcome will be $P_N$.

160 The US had previously applied pressure on Itzebegovic to accept the VOPP. See Silber and Little, supra note 17, at 293-94.

161 D’Amato wonders whether the tribunal was offered as a bargaining chip in UN-led peace negotiations in the early 1990’s. See D’Amato, Peace v. Accountability, 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 infra. Section V.E.
E. The Dayton Accords

The Dayton Accords, negotiated over the course of November 1995, focused primarily on reallocating territory and establishing a peace. It was the result of an active intervention by the US that had been brought on by Serbian noncooperation and Bosniac-Croat cooperation with the US. They were also the result of a shift in NATO policy that resulted from further atrocities by Bosnian Serbs, particularly a massacre in Srebrenica, and a renewed campaign of territorial aggression. In response to the renewed Serb aggression, NATO bombings of Serb positions across Bosnia began in the Summer of 1995. The bombings resulted in a cease-fire agreement, secured through shuttle diplomacy by the US, in October 1995.

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, but also no pursuit by NATO troops for the arrest of these war criminals. 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.

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 reducing their share of Bosnia from 70% to almost 50%. 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

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162 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 UN protection and murdered them, burying them in mass graves. See Silber and Little, supra note 17, at 345-348. 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. Id. at 353, 358-359

163 See Holbrooke, supra note 60, at 198

164 See Owen, supra note 13, at 367-68

165 Following will be a summary of the highlights of the Dayton Accords. For a detailed recollection of the Dayton Accords from the perspective of the Accords’ chief architect, see generally Holbrooke, supra note 60, at 231-312. For a presentation of the international legal dynamics of the Dayton Accords, see Williams and Scharf, supra note 4, at 151-69.

166 Silber and Little, supra note 17, at 368
thus wanted peace more than the other parties. Croatians and Bosniacs sought to continue the war, especially following the weakening of the Serb army after the bombings, but were held back by the US.\footnote{Id.}

Second, all parties had been persuaded that the proportion of Bosnia that they each possessed now was the best that they could get, with minor changes.\footnote{See HOBROOKE, supra note 60, at 289-312.} Through diplomacy, all sides would be able to retain their gains from the war, but more importantly, would be able to protect their fellow Serbs, Croats, or Bosniacs in more isolated regions of Bosnia. Again, Croatians and Bosniacs were in the position to make military advances, but US diplomacy prevented them from doing so, focusing them more on accomplishing goals via diplomatic negotiations.

Third, the Bosnians wanted an agreement most conducive to the work of a War Crimes Tribunal\footnote{See WILLIAMS AND 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)}, and the Serbs and Croatians would do so only if there was no credible threat of prosecution.\footnote{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 13, at 371.} This resulted in a middle ground solution, whereby the Tribunal would exist but would not be a credible threat to the leaders involved.\footnote{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., Neil Tweedie, Prosecutors Pay Price for Milosevic ‘Opera’, THE DAILY TELEGRAPH (London), May 25, 2002} 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 UN (in 1993, UN-Secretary General Boutros Boutros-Ghali withheld funding for the ICTY contingent on the success of the Vance-Owen Peace Plan), or at the level of the diplomats negotiating the peace agreements.\footnote{See WILLIAMS AND SCHARF, supra note 4, at 201. See also id. at 94 (Describing the UK’s actively seeking a limited role for the War Crimes Commission before the creation of the Court. This was symbolic of the international community’s approach to the tribunal – support the work, but limit the role and limit the funding.)} Second, and more directly, negotiators perceived the ICTY to be either an obstacle to peace\footnote{See OWEN, supra note 13, at 400.} or as a disruption to the implementation of peace.\footnote{See HOBROOKE, supra note 60, at 332-33 (an account by the chief architect of the Dayton Accords of the complications to implementing the Dayton Accords caused by the arrests of senior Bosnian Serb officials General Djordje Djukic and Colonel Aleksa Krumanovic).} Therefore, the parties did not fear prosecution by the Tribunal at the Dayton Accords.

\footnote{Id.}
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. For the Croats and Bosniacs, although they had displayed inclinations to continue the war, active international intervention in the form of diplomatic hardball by US diplomats forced both Presidents Itzebegovic and Tudjman to sign the Accords.\textsuperscript{176} 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 or both the US and the international community had to be willing to give up on the ICTY. But diplomats felt that Dayton “was more than just a political settlement”,\textsuperscript{177} and therefore \( P_N \) was an inconceivable option to negotiators. It could be argued that the active compromising of the work of the ICTY at Dayton was in fact a form of \( P_N \). But D’Amato suggested taking the Tribunal off the table – for diplomats at Dayton, the Tribunal would have to be part of any peace agreement, even if compromised in efficacy by the Accord.\textsuperscript{178} 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 for the leaders negotiating the agreement, or if a peace agreement is reached, whether that peace is ideal.\textsuperscript{179} The game theory analysis above demonstrates that peace, and therefore an agreement requiring a war crimes tribunal, may not be feasible if this 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 other parties involved, and moreover, despite the desire of the international community for an outcome where war crimes are punished. Furthermore, the games portray negotiators as able to

\textsuperscript{176} See Silber and Little, supra note 17, at 376. The accommodation of the Serbs at Bosnia had a long-term negative effect. Scharf and Williams 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.” See Williams and 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 2002. For an account of the events leading up to the arrest and trial of Milosevic at the ICTY, see generally Williams and Scharf, supra note 4, at 233-336.

\textsuperscript{177} See Holbrooke supra note 60, at 261

\textsuperscript{178} See Williams and Scharf, supra note 4, at 96

\textsuperscript{179} See D’Amato, Peace v. Accountability, supra note 4, at 502
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 if he is to be punished at all. This suggests the international community is
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 a questioning of the desirability of a war crimes tribunal.180 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 they, too, are guided
by: there exists, “in the abstract”,181 a duty under international law to prosecute all war
crimes.182

I will seek to prove below that the games suggest 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 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.183

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. The leading

180 See supra, note 5
181 See supra, note 6.
183 This argument of feasibility expands on a similar point made by D’Amato in response to the critiques of his essay. See D’Amato, Correspondence, supra note 5.
proponent of this duty in absolute form has been Diane Orentlicher, who argues, "international law requiring punishment of atrocious crimes – and, more to the point, international pressure for compliance – can provide a counterweight to those groups seeking impunity." 184 An absolute duty implies a credible threat of prosecution – 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, the leaders will opt to 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.

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 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 do agree to a deal. 185 In such a situation, a leader may repeatedly frustrate the continuing work and conclusive establishment of a tribunal by refusing to agree to any agreement that permits it to proceed with prosecutions and in turn, his own prosecution and potential punishment. 186 The international community would have no counterweight, as 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 interest. 187 Moreover, the conceptual and practical damage will have been done – in particular, given the leaders’ ability to determine

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184 See Orentlicher at 2548. This duty 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, International Legal Obligation, supra note 182, at 49-50.

185 Again, diplomats may not want the Tribunal to proceed with a tribunal until peace accords have been signed. See supra, note 82.

186 By “conclusive establishment” I assume that a tribunal is not conclusively established until it may proceed with all potential prosecutions. As long it cannot proceed with all potential prosecutions because of negotiations for a peace agreement, a tribunal is not conclusively established. 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 Case No. IT-94-1-AR72 (Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995). In other words, despite handing down over 50 indictments before Dayton, the ICTY could not proceed with prosecutions until the Dayton Accords had been signed, and all parties had acceded to the Court’s jurisdiction. See WILLIAMS AND SCHARF, supra note 4, at 161-66 (discussing the parties’ maneuvering around the jurisdiction of the ICTY at the Dayton Accords).

187 The problem of the lack of 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.
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.\textsuperscript{188} Thus, Game I suggests guilty leaders not as fearful of the international community, but rather empowered by the international community’s pursuit of an absolute duty to prosecute.

There exists a counterargument to Orentlicher’s notion of “duty” which claims there does not exist a duty to prosecute war crimes if they occur in an internal conflict.\textsuperscript{189} 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.”\textsuperscript{190} In other words, Scharf argues that there may exist a duty to prosecute war crimes, but it has not 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.\textsuperscript{191}

In the games above, if the threat of prosecution isn’t credible, then the leaders may opt for P\textsubscript{T}. Specifically, for the Serbian and Croatian parties, a compromised P\textsubscript{T} will allow them to make few concessions, preserve their gains over the course of the war, and avoid prosecution by the tribunal.\textsuperscript{192} The Bosniac party may be happy with the outcome of peace with a tribunal, but this assumes that a weaker form of P\textsubscript{T} would be acceptable to them. Regardless, all three parties will prioritize P\textsubscript{T} in a negotiation, and P\textsubscript{T} will be the outcome.\textsuperscript{193}

\begin{footnotesize}
\begin{enumerate}
\item[188] The potential of the commission of war crimes continuing despite the presence of a tribunal would conceivably further undermine the deterrent effect and credibility of a tribunal.
\item[189] See Scharf, International Legal Obligation, supra note 182, at 59-60; See also Roman Boed, The Effect of a Domestic Amnesty on the Ability of Foreign States to Prosecute A Legied Perpetrators of Serious Human Rights Violations, 33 Cornell Int'l L.J. 297, 314-15
\item[190] Scharf, International Legal Obligation, supra note 182, at 59-60
\item[191] See Theodore Meron, International Criminalization of Internal Atrocities, 89 AJIL 554, 555 (“What is needed is a uniform and definite corpus of international law that can be applied apolitically [emphasis added] to internal atrocities everywhere.”)
\item[192] This outcome mirrors the outcome of the Dayton Accords. See supra, Section IV.E
\item[193] Three 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. See D’Amato, Peace v. A countability, 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, must be counted as significant negative precedent for international accountability”). Cf. Michael Scharf, Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti? 31 Tex. Int'l L.J. 1 (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, diplomats may minimize the significance of the tribunal in order to achieve a peace agreement. See supra, note 161; See also WILLIAMS AND SCHARF, supra note 4 (arguing Americans sought to accept some limited role for justice, while pursuing a primary approach of accommodation of the Balkan leaders.) Third, the UN itself may minimize the significance of the tribunal. It may do so simply through underfunding, which plagued the Tribunal throughout its initial phases. See WILLIAMS AND SCHARF, supra note 4, at 198, 201 [Secretary Boutros Boutros-Ghali takes money away from the Tribunal in support of the Vance-Owen Peace Plan]. See also RICHARD GOLDSTONE, FOR HUMANITY, 77, 82-83 (Yale University
\end{enumerate}
\end{footnotesize}
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. 194 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. 195 In order for the international community to achieve $P_T$ as an outcome, then, it must sacrifice the integrity of its duty to prosecute all parties guilty of war crimes. But if the duty to prosecute is apolitical, the international community may be unwilling to make this sacrifice, and the parties will be unwilling to agree to peace in return. 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. 196

It is thus evident that the duty to prosecute and the credibility of this threat of prosecution go hand in hand in an inverse relationship, and any $P_T$ is 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. 197 This argument may seem counterintuitive if the duty to prosecute exists as Orentlicher envisions it, for the abandonment of the tribunal Press, 2000). It may also do so through the language of the resolution, as in the case of UN Security Council Resolution 780, which made no reference to the creation of a tribunal. See WILLIAMS AND SCHARF, supra note 4, at 173 (arguing the lack of specificity of Resolution 780 made creation of the Tribunal “not as straightforward or automatic as those arguing for an enhanced role of justice might have desired.”). Compare Payham Akhavan, The Yugoslav Tribunal At A Crossroads, 18 Human Rights Quarterly 259, 261-265 (1996) (discussing the various perceptions within the international community of the Tribunal). Last, the credibility of the threat of prosecution would be compromised by politics. It may be that political leaders seek an immediate peace, much like the diplomats. See M. Cherif Bassamouni, Searching For Peace and Achieving Justice: The Need For A Countability, 59 Law & Contemp. Prob. 9, 12. (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 being a political resolution, as countries could not agree on what the appropriate mechanism should be for dealing with war crimes in the former Yugoslavia until the passage of UN Security Council Resolution 808. See WILLIAMS AND SCHARF, supra note 4, at 173-176.

194 See supra, notes 187-88.
195 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.” See D’Amato, Peace v. Accountability, supra note 2, at 503.
196 See Hockhammer, supra note 38, at 124; See also Bernard Meltzer, "War Crimes": The Nuremberg Trial and the Tribunal for the Former Yugoslavia, 30 Va. L. Rev. 895, 909, n63.
197 See D’Amato, Peace v. Accountability, supra note 2, at 504.
appears to abandon this duty, and consequently, the credibility of the threat of prosecution. However, under D’Amato’s proposal, both duty and credibility are arguably preserved.

First, neither duty nor credibility may be compromised by any political offers or concessions to the leaders, as Scharf argues have occurred in the past. As seen above, for the leaders to reach a peace agreement with a tribunal requires such compromises, but these ultimately compromise the tribunal itself. Also, D’Amato’s agreement enables the leaders to accomplish many of their goals without punishment, and offers the additional, implicit incentive of determining the fate of the tribunal. 198 Concededly, in the game theoretic analysis above, the actors still may determine whether or not the tribunal will prosecute them; however, in order to so, it is important to understand that no compromise is necessary.

Second, D’Amato’s proposal allows the leaders the choice to eliminate the tribunal, but only with regard to the determination of the existence of the tribunal, and at a significant cost to each of them individually. Any concerns for this empowerment of the leaders, which at first glance may appear significant, are outweighed by the significant risks inherent in their decision not to accept the proposal. In the historical context 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. 199 There are other factors that suggest the leaders are gambling their own futures if they do not agree to peace without a tribunal. 200 But if leaders agree to continue the war, they continue to face a series of potential risks: the risk of prosecution in the future; a potential momentum change in the war; a potential international intervention; and, potential domestic

198 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. See Ferentcz, Accountability, supra note 5.

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

200 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 and Paul Williams, Peace Before Prosecution, The Washington Post, August 25, 2003 at A17; see also, infra, note 28. It is also possible that they are gambling their political futures if they do accept the treaty. See SILBER AND LITTLE, supra note 17, at 383-85. The Charles Taylor example raises the question of whether D’Amato’s proposal would successfully apply in an internal power struggle where territory cannot be exchanged. Again, the Author encourages readers to explore such a situation.

201 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 AND LITTLE, supra note 17, at 384, but Milosevic was deposed from power four years later following his indictment in 1999. See WILLIAMS AND SCHARF at 233-366 (Exploration and discussion of extradition of Milosevic).
unpopularity. They also risk the international community’s unwillingness to present D’Amato’s proposal again. Above all else, they risk the unknown. Thus, the decision to accept PN will not arise because the leaders envision it as an advantageous opportunity. This result is a paradox, as the leaders will choose peace with a tribunal because it is an advantageous opportunity given the lack of credibility of the threat of prosecution.

Third, D’Amato’s proposal is particularly compelling because the analysis above shifts the international community’s burden away from the community and to the individual actor. As the game theoretic analysis above demonstrates, the parties agree to D’Amato’s proposal as empowered individuals, as it is the best option they have based on the preferences and strategies of the others. As individuals making choices, they are particularly aware of the risks they face if they do not accept the peace proposal. Therefore, any compromise for an outcome will not come from the international community, but rather between them. In other words, any outcome will not be determined by the international community’s willingness to make compromises on the outcome, but rather by the individual leader’s strategies to ensure a particular outcome. Hence, the burden of compromise is shifted away from the international community and into the hands of the leaders. In this scenario, it appears that the integrity of the duty to prosecute and the credibility of the threat of prosecution are left intact by D’Amato’s proposal.

Last, it appears that the integrity of the concept of a duty to prosecute under international law is left intact by D’Amato’s proposal. Given the assumed absolute nature of the duty to prosecute, D’Amato appears to be arguing that sacrificing a Tribunal is a better option than compromising the work of a tribunal. However, there is a difference between sacrifice and compromise, particularly when duty is framed between Orentlicher and Scharf’s perceptions of it. When the duty is compromised, the implication is that the duty can exist in weaker forms; when the duty is sacrificed, D’Amato seems to say, the implication is that there is only one concept of the duty that is absolute but does not apply in these circumstances, yet may be applied in future circumstances. However, sacrifice is technically an exception to the rule, which, with compromise, Scharf associates with a nonabsolute conception of duty. As D’Amato has assumed an absolute duty to prosecute, and the idea of sacrifice may contradict this assumption, it appears D’Amato has made an arguable assumption.

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202 See D’Amato, supra note 2, at 504
203 Though precedent now dictates that the “unknown” now consists of a substantial likelihood of military intervention by foreign powers. See generally supra, Section II.A, IV.E
204 See Scharf, International Legal Obligation, supra note 182, at 59-60.
Under D’Amato’s assumptions, when the duty to prosecute is sacrificed, its integrity can still be preserved. In this instance, it is important to define “sacrifice” in the terms that D’Amato defines it: by offering to not prosecute, the international community is offering an either/or proposal. 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. Either way, all war criminals, including leaders, in this particular instance will be prosecuted unless they otherwise agree, and similarly, all future war criminals will be prosecuted unless they make similar concessions. 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.

There is a problem with this rationale. Within D’Amato’s logic, compensation for sacrifice is better than compromise to preserve the integrity of the duty to prosecute. However, from the perspective of counterarguments to D’Amato, and from Orentlicher’s perspective, the absolute duty to prosecute is not something which can be compensated with something else.205 Because this duty is absolute, there can be no exceptions or variations, or else it is a duty of the political kind that Scharf describes. The implication, then, is that D’Amato cannot be assuming an absolute duty to prosecute, but he has explicitly stated that he does.206 Hence, D’Amato has rested his argument upon a questionable assumption. It remains unclear whether the integrity of the absolute duty to prosecute is still intact because it has been compensated for – according to D’Amato, it is, but according to Scharf’s definition, it cannot be.

There is another problem with this rationale when viewed from a similar but slightly different angle. There exists the implication because the integrity of the duty to prosecute has been sacrificed in a particular instance, it is still absolute in all other current and future applications. By this logic, the conceptual integrity of the absolute duty to prosecute remains intact 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, then, is that a duty uncompromised is still absolute. This is perhaps a more convincing argument, but still flawed in light of Scharf’s definition of the duty to prosecute having exceptions: 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 implies the prosecution of all war crimes, an exception does imply that the duty cannot be absolute.

205 See Orentlicher, supra note 182
206 See D’Amato, Correspondence, supra note 5
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 there are substantial questions as to whether both are preserved under D’Amato’s logic.

C. The Deterrent Effect

Each leader must weigh his own risks in 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.” 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.” 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. 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 his 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 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

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207 See D’Amato, Peace v. Accountability, supra note 2, at 503
208 D’Amato’s proposal has been criticized for failing to address issues of accountability. See Meltzer, supra note 196. 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. 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 the paper. See infra, Section V.D
209 See D’Amato, Peace v. Accountability, supra note 2, at 506
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 in order not to be prosecuted.\textsuperscript{210} 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.\textsuperscript{211} Another factor, which he 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.\textsuperscript{212} This would be a 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 where 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, as the analysis confirms a future leader’s ability to commit war crimes and then strategize in a negotiation so as to ensure that they are not prosecuted by a tribunal. It portrays an empowerment of the actors that 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 “\textit{jus cogens} places upon states the \textit{obligatio erga omnes} not to grant impunity to the violators of war crimes.”\textsuperscript{213} Specifically, it becomes evident that the will of the individual, especially the individual guilty of war crimes, may have the ability to trump \textit{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 undergirds this concept of duty. Therefore, the precedent of imposing a morality on leaders

\textsuperscript{210} A particularly relevant question not answered by D’Amato: at what point a concession is substantial enough to constitute adequate compensation for not being prosecuted by a war crimes tribunal?
\textsuperscript{211} It is important to recall that if the threat of prosecution were not credible when \( P_N \) was offered, Serbian and Croatian would be better off with \( P_T \). As I assume that the Bosniacs still would prefer the outcome \( P_T \), in this scenario, all three parties agree to \( P_T \).
\textsuperscript{212} 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, Section V.E.
\textsuperscript{213} See Bassaiouni, supra note 192, at 66
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.\textsuperscript{214}

Rather, 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 excepted. 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.\textsuperscript{215} Whatever means is chosen, it is evident that a Tribunal may not be 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 the leaders will face, if any, when there is peace agreement without a tribunal, he leaves the question of what may actually constitute $P_N$ unanswered.\textsuperscript{216} Within a game theory analysis, the uncertainty of what constitutes $P_N$ raises a number of issues as to how the actors may behave when confronted with this uncertainty.

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

\textsuperscript{214} Akhavan seems to agree, arguing that the Dayton Peace Accords may have set an unfortunate precedent: “... political 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.” See Akhavan, Yugoslav Tribunal, supra note 192, at 259.

\textsuperscript{215} See Jennifer L. Balint, The Place of Law in Addressing Internal Regime Conflicts, 59 Law & Contemp. Prob. 103 at 125 (1996) (arguing “... institutions other than law need to be explored, and, where necessary, strengthened 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 Patricia Hayner, Unspeakable Truths: Confronting State Terror and Atrocity (Routledge, 2001) 86-107; Martha Minow, Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence (Beacon Press, 1998) at . See also Stephen Castle and Vesna Peric Zimonjic, War Crime Suspects May Be Tried, THE INDEPENDENT (London), May 2, 2002 at p. 13

\textsuperscript{216} See D’Amato, Peace v. Accountability, supra note 2, at 503.
the benefits, assuming the threat of prosecution is credible and the option to choose \( P_N \) is on the table. Instead, he 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 him or his people. 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 punishment that fit their crimes.” \(^{217}\) 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.\(^{218}\)

This argument disregards two important points. First, implicit in D’Amato’s proposal is the assumption that leaders desire to preserve themselves, for the tribunal represents a threat to their ability to continue to stay in power following the war.\(^{219}\) If the leaders do consider this factor, there exist practical uncertainties for them to choose \( P_N \). 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.\(^{220}\) Whether a leader will still have the support of the military and of popular opinion once he has sacrificed all that he led them into war for is uncertain.\(^{221}\) It is unclear that leaders fear prosecution enough to sacrifice popular support or certain assets that would allow them to continue their hold on power.\(^{222}\) In other words, \( P_N \) requires a leader not to act in his self-interest, 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.

\(^{217}\) See D’Amato, Peace v. Accountability, supra note 2, at 503

\(^{218}\) Id. at 504.

\(^{219}\) That is, if a leader is indicted, he will be arrested, transported to, and tried at the Tribunal.

\(^{220}\) The example of Milosevic raises a couple of 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 October 2002. His ability to do so, as a precedent, may represent an additional factor that is to be considered by future leaders in the peace negotiations similar to those in the war in Yugoslavia. Second, after Dayton, Milosevic turned his attention to Kosovo. Williams and Scharf implicitly allege that the lack of credibility behind the threat of prosecution may have led him to direct his attention to Kosovo. See Williams and Scharf, supra note 4, at 186-87.

\(^{221}\) The October 2002 arrest and the ongoing trial of Slobodan Milosevic following his failure to ethnically cleanse Kosovo may mark an exemplary precedent for future leaders. See generally id. at 233-366 (discussing history and international legal aspects of extradition of Milosevic)

\(^{222}\) Interestingly, Mary Margaret Penrose argues that current state practice leans toward eradicating immunity for leaders guilty of war crimes or human rights violations: “state practice currently 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 begin to face the increasing likelihood of losing immunity and amnesty, and facing the very real prospect of being tried: “The Pinochet and [former dictator of Chad Hissene] Habre precedents, to the extent that they eviscerate 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 213.
Second, accountability for war crimes may be sacrificed if $P_N$ is agreed to, though this may ultimately depend on what $P_N$ constitutes.\footnote{See supra, note 208} 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.\footnote{See Bassaouni, supra note 192, at 12} First, long-term peace may not be viable.\footnote{See Akhavan, Correspondence, supra note 5} Second, group accountability may replace individual accountability, which may only perpetuate imbalances in a society.\footnote{See Meltzer supra note 194, at 909} Third, domestic legal institutions in a post-war society may not yet be strong enough to manage the investigation and prosecution of war criminals.\footnote{See Orentlicher, supra note 184, at 2548} 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 $P_N$ open-ended 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 what $P_N$ constitutes. 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.

E. $P_N$ Under The Rome Statute

The open-ended nature of $P_N$ must be considered against the Rome Statute and the permanent International Criminal Court (ICC), as D’Amato did not consider his proposal with the prospect of ICC in mind.\footnote{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, then, 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 it was intended to apply to ad hoc tribunals only. Moreover, the ICC seems to rule out the necessity of ad hoc tribunals. In particular, Articles 12 and 13 of the ICC grant the UN Security Council the power to bring cases involving violations of international criminal law under the jurisdiction of the ICC. See Rome Statute of the International Criminal Court, U.N. Docs A/CONF. 183/9 (1998), arts. 12, 13, at http://www.un.org/law/icc/statute/99_com/cstatute.htm [hereinafter Rome Statute]. See also Payam Akhavan, Theodor Meron, W. Hays Parks, Patricia Viseur-Sellers, The Contribution of The Ad Hoc Tribunals to International Humanitarian Law, 13 Am. U. Int’l L. Rev. 1509 at 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 a muscle, we absolutely must reserve this capacity for the Security Council to do that.” (quoting Theodor Meron’s response to an audience question.)). 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 (discussing the implications of Articles 12 and 13 of the Rome Statute in light of US arguments against signing on to the Court’s jurisdiction).} At first glance, the 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 states that all violations of international criminal law “must not go unpunished.” 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. Scharf highlights these different areas of “creative ambiguity” as means for amnesty deals under the ICC, despite the strong wording of

There are two problems with this argument. First, although it is unclear whether ad hoc tribunals are still necessary given the ICC and their track record of costliness, they are still feasible under the UN Security Council’s powers to create such tribunals, especially without Assembly approval under its Chapter VII powers. See Williamsand 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. However, a newer, alternate form of tribunal has been the special tribunal, or “hybrid tribunal” as labeled by Suzanne Katzenstein. 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, 245. “Hybrid tribunals” have been solutions in East Timor and Sierra Leone (however, the tribunal established in Sierra Leone is in title called a “special tribunal.”) See UN SCOR, REPORT OF THE SECRETARY-GENERAL ON THE ESTABLISHMENT OF A SPECIAL COURT FOR SIERRA LEONE, U.N Doc S/2000/915 (2000) §9 and generally §§9-11. For example, the Sierra Leone tribunal is a “treaty-based sui generis court of mixed jurisdiction and composition” between the UN and Sierra Leone. Id. However, it does not receive UN funds and its international staff is not paid by the UN. See Katzenstein, n.2.

Second, because special tribunals are a variation of ad hoc tribunals, future \( P_N \’s \) where a tribunal is abolished may still be theoretically feasible. See also supra, note 208. However, it must be conceded that such special tribunals are established with the purpose of rebuilding the local judiciary, and therefore they cannot be abolished. See Katzenstein at 245. \( P_N \) 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 be a form of \( P_N \), as they abolish trial under purely international legal institutions, and perhaps under international law. However, it is unclear how these “hybrid tribunals” may operate alongside the ICC, especially given the Court’s jurisdiction over cases involving violations of international criminal law under Articles 12 and 13. Given the precedent of East Timor and Sierra Leone, occurring in 1999 and 2000, respectively, situations may still arise that require special tribunals, which allows for a future for \( P_N \) involving 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 the future of hybrid tribunals as a substitute for ad hoc tribunals merits skepticism. See Katzenstein at 277. Regardless, the general assumption appears to be that ad hoc and special tribunals are still feasible.

220 Rome Statute, supra note 226, preamble. “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... . Reckoning that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.” There is a sense of absoluteness in this phrasing that mirrors Orentlicher’s conception of an absolute duty to prosecute: “... the most serious crimes must not go unpunished”; “... an end to impunity... “; and “the duty of each state” – this phrasing, as Michael Scharf suggests, is incompatible with any conception of the duty to prosecute under international law permitting amnesty. See Rome Statute, supra note 226, preamble; Michael Scharf, SY MPOSIUM: The Amnest y E x tinction to the Jurisdiction of the International Criminal Court, 32 Cornell Int’l L.J. 507, 522 [hereinafter A mnesty E x tinction]. Moreover, as Scharf argues, “The 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.” Scharf, A mnest y E x tinction, at 522.

220 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.” Id. at 526.
the Preamble. In terms of $P_N$, these provisions, or loopholes, permit the ICC to be technically “abolished” in return for a peace agreement. Although they do not permit the abolition of the ICC itself, these loopholes suggest means by which the threat of prosecution by the ICC to suspected war criminals could be abolished either by diplomatic agreement or a technicality in the Court’s jurisdiction. The implications of these loopholes as to $P_N$ 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 UN 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. In terms of $P_N$, Article 16 permits for the cessation of a prosecution of war criminals if the UN Security Council permits it. Like D’Amato’s envisioned $P_N$, Article 16 requires the UN 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 12 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 substantial likelihood that any promised amnesty may in fact be fleeting.

The requirement of UN Security Council approval also requires any feasible $P_N$ under Article 16 to be further subject to two conditions: first, that the request for deferral in prosecution is necessary because the Security Council has determined a threat to the peace, a breach of the peace or an act of aggression under Article 39; and, second, because the request is consistent with the purposes and principles of the UN 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

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231 Scharf suggests 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.

232 Id.

233 Id.

234 Id.

235 It must be recalled that Milosevic was arrested 6 years after the Dayton Accords. See WILLIAMS AND SCHARF, supra note 4, at 234. Additionally, Karadzic and Mladic, among other suspected war criminals, have not been arrested yet. The UN, given its commitment to the Rome Statute, may not want this type of delay to take place again. Therefore, any future war criminal, when confronted with $P_N$, likely may be confronted with a $P_N$ of a limited life of 12 months. For this reason, the proposed amnesty under Article 16 for any war criminal could be fleeting relative to past amnesties, and therefore may make any $P_N$ less feasible.

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the UN Charter. Under the first condition, the UN 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 PN as it mirrors D’Amato’s rationale for PN. However, it was suggested above that UN Security Council approval of D’Amato’s PN 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. Under the second condition, PN also would be required to be consistent with principles of justice and international law. D’Amato’s PN does not appear to meet this condition, as it proposes the novel notion of compensating the removal of the threat of prosecution with the sacrifice of seized territory by all guilty parties. However, other such compensatory mechanisms for PN may be permitted under international law, and perhaps may be created by future attempts at devising future forms of PN. Thus, Article 16 does create a foundation for PN to be a solution under the ICC, but there exist substantial questions as to its viability given the requirement for UN 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 this request. Article 17(1)(b) is the provision most relevant to PN, as it requires the Court to defer to a state’s decision not to prosecute. In terms of PN, 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 PN. Article 17(1)(a) is also relevant but is more problematic for PN. This provision requires the Court to dismiss a case where 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.” Hence, a PN which 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, it is unclear as to what PN may constitute under Article 17(1)(a) because of the ambiguity as to what constitutes a genuine investigation or prosecution. Scharf suggests that the phrasing “genuinely” is flexible, thereby permitting truth commissions and other

236 See Scharf, Amnesty Exception, supra note 229, at 523; See also, UN Charter, art. 24.
237 See Interview with Richard Goldstone, supra, note 103. Although this proposal less controversial than the proposal of abolishing a Tribunal, it seems nonetheless to be a politically sensitive question.
238 See supra, Section V.B.
239 See supra, note 208.
240 See Rome Statute, supra note 228, art. 17
241 Id.
242 Id. It is important to note that the applicability of Article 17 to any PN is limited because it does not apply to international conflicts. In the former Yugoslavia, war crimes committed occurred both within and beyond state borders. In contrast, Article 17 seems limited to the commission of war crimes within state borders only. This suggests that PN remains feasible under Article 17 but limited to conflicts within national borders. With the establishment of the ICC, it appears that the UN Security Council faces the choice of whether to establish a "hybrid tribunal" or send a case to the ICC under Article 17. Cf. supra Katzenstein, note 228.
versions of P_N to be created. But Scharf also argues that under the qualifying provision 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.” 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 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. Notably, Article 20 provides a suspected war criminal with the right to challenge the Court’s jurisdiction. 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(3) establishes the exception that Article 20 does not apply when the other trial was “otherwise not conducted independently or impartially in accordance with international legal norms for due process.” Also, as in Article 17(2), Article 20 does not recognize trials “otherwise inconsistent with an intent to bring the concerned person to justice.” 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

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243 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, A mnesty E xoption, supra note 227, 525. See also infra., discussion of Rome Statute, art. 20
244 Rome Statute, supra note 228, art. 17(2)(a)
245 Id. art.20
246 Scharf, A mnesty E xoption, supra note 227, at 525.
247 Id.
248 Id.
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 after $P_N$ has been agreed to by all parties. 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 be punished in criminal 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. However, Scharf argues that the Article 20’s definition of “another court” does not include truth commissions, or proceedings inconsistent with an intent to bring the concerned person to justice. Hence, this dilemma creates another conflict between any $P_N$ and Article 20: despite a guarantee by $P_N$ involving non-criminal proceedings as form of amnesty to a suspected war criminal, the ICC’s 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 UN Security Council has not acted under Article 16, Article 53(1)(c) permit the ICC’s 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. Any agreement constituting a form of $P_N$, it would seem, would not be feasible under Article 53 without 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. 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 presents a doubly problematic scenario for international negotiators: first, a Prosecutor’s concession to an amnesty deal may still be overruled by the Pre-Trial Chamber; and, second, given this power of the Pre-

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249 See supra, Section V.D.
250 Scharf, Amnesty Exception, supra note 228, at 525.
251 See Rome Statute, supra note 226, art.53
252 Id.
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. Moreover, both risks exist beyond the risk of UN Security Council approval of any \( P_N \), thereby making the Article 53 the riskiest provision for any \( P_N \). 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 \( P_N \) 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 UN Security Council: diplomats must not only work to secure the approval of all parties to the agreement, but in order to ensure an agreement’s success under Article 16, the UN Security Council also. When Article 16 does not apply, diplomats may find substantial obstacles in the Prosecutorial and Court discretion established in Articles 17, 20 and 53: these provisions establish uncertainty beyond the certainty within the framework of a signed peace treaty providing amnesty.\(^{253}\) 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 compromise, and have compromised, the credibility of the threat of prosecution in order to attain \( P_T \).\(^{254}\) But given the permanent status of the ICC, the gravity 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.\(^{255}\) 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.\(^{256}\)

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\(^{253}\)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 suspected war criminals for amnesty. Given the off-the-record dealing of diplomats during the Dayton Accords, this discretion may be particularly problematic - a diplomat promising amnesty or off-the-record promises of avoiding prosecution to suspected war criminals faces the prospect of undermining the ICC. See supra, note 161. See also WILLIAMS AND SCHARF, supra note 4, at 159-169.

\(^{254}\)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, Section III.B, III.C. It is also important to recall the Rules of the Road agreement reached between Holbrooke and Milosevic.

\(^{255}\)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, Section III.B.

\(^{256}\)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 Section III. Nonetheless, given Michael Scharf’s
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 as to 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, “...sometimes it may be better to ‘let bygones be bygones’... but not always.” 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, but at a substantial cost to the relieved parties. The game theory analysis above proves that this proposal could be agreed to in 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.

The first evidence of this suggestion manifests 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 turn 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, then, 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.

The second evidence of this suggestion manifests 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 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 breakdown of the “creative ambiguity” within the Rome Statute, the analysis in Section V.E and the implications of this conclusion must still be considered in analogous situations.
way, it is not an overarching morality for them, as it is for the international community. This conflict of moralities ends up being 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 the tribunal in order to attain a seemingly moral outcome. However, when credibility has been sacrificed, the integrity of the morality of the 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 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, where the Preamble’s affirmations of an absolute duty to prosecute are compromised by loopholes permitting amnesty in the provisions for the Court’s jurisdiction.\(^{257}\)

Instead, arguments for the duty to prosecute under international law must be refocused away from conceptual and moral justifications, and instead toward 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. Or, the international community could be an active party with its own interests in the negotiation, and strategically alter its preferences so as to

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\(^{257}\) It is important to note that Scharf suggests 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, A amnesty Exception, supra note 231.
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 either 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 future scholars and diplomats to create proposals for future conflicts that address both the concerns for achieving 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 within the structure of the ICC’s jurisdiction. Given the suggestion above that any credible outcome of $P_T$ may prevent diplomatic success in establishing peace agreements, alternatives to $P_T$ must be considered. Therefore, although obstacles exist to $P_N$ 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.