

SYRIA, REBELS, AND CHEMICAL WEAPONS:  
A DEMONSTRATION OF THE INEFFECTIVENESS OF  
THE INTERNATIONAL CRIMINAL COURT.

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I. INTRODUCTION

In 1945, World War II ended and the international community began its journey of bringing the Nazi war criminals to justice.<sup>1</sup> The International Military Tribunal was the ultimate result of this journey and represented the culmination of great international collaboration and the effective creation of contemporary international criminal law.<sup>2</sup> As a result of the tribunal, which brought twenty-two high-ranking Nazi officials to justice,<sup>3</sup> the global community had its first demonstration of international<sup>4</sup> criminal law.<sup>5</sup>

Previously, nations relied on treaties between each other, such as non-aggression pacts, to seek desired ends.<sup>6</sup> Prior to Nuremberg, all “international law” was treaty-based, meaning a country needed to sign onto a treaty or a convention in order to be held accountable to the terms that it specified.<sup>7</sup> Nuremberg was in many ways a formal expression of what is known as customary law,

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1. ELLEN S. PODGOR & ROGER STENSON CLARK, UNDERSTANDING INTERNATIONAL CRIMINAL LAW 206-07 (2d ed. 2008).

2. *Id.*

3. *Id.* at 209. The Nuremberg War Tribunal was concerned mainly with prosecuting only the high-ranking officials in the Nazi party and left the prosecution of lower players to local courts within Germany, Poland, and the USSR.

4. *Id.* Nuremberg was the first formal expression of “international” criminal law; however, contemporary observers would view the International Military Tribunal as a “multi-national” expression of law (only the USA, the UK, France, and the USSR were involved) as opposed to “international” where every country in the world has an opportunity to partake.

5. PODGOR & CLARK, *supra* note 1, at 210.

6. Perhaps the most famous non-aggression pact was the Molotov-Ribbentrop Pact between Soviet Russia and Nazi Germany in 1939. This pact provided that neither party would attack or engage in any act of aggression towards the other. Treaty of Non-Aggression between Germany and the Union of Soviet Socialist Republics, Ger.-Russ., Aug. 23, 1939, [http://www.lituanus.org/1989/89\\_1\\_03.htm](http://www.lituanus.org/1989/89_1_03.htm).

7. M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 549 (Martinus Nijhoff ed., 2d ed. 2012).

where a nation is held accountable to a law even if they do not actually sign onto a treaty or formally recognize it.<sup>8</sup>

The world now had a formal expression of international criminal law, a contribution that would prove to be tremendously important, to go along with the important task of bringing those responsible for the atrocities of the Holocaust to justice.<sup>9</sup> The international community after World War II had a strong feeling of “never again.”<sup>10</sup> Never again, they said, would the world sit back idly and remain neutral while a dictator committed heinous acts and violations within or outside the borders of their country.

Since the events of World War II, the international community has consistently demonstrated its dedication to memorializing human rights and dealing with international criminal events via numerous declarations by the United Nations,<sup>11</sup> various conventions aimed at ridding the world of many repugnant behaviors,<sup>12</sup> and convening special criminal courts and tribunals to deal with specific cases of violations of the law.<sup>13</sup> Since Nuremberg, there

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8. Christian Tomuschat, *The Legacy of Nuremberg*, 4 J. INT'L CRIM. JUST. 830, 839-40 (2006). Customary law is often memorialized into treaties; however, this is not necessary to prove its equity. “Customary” law is so widely agreed upon as true that one need not have signed a treaty to be aware of its existence. In fact, the opposite is true: where customary law is binding, the nation-state who wishes to not be held accountable under said law must declare themselves to not agree to it. *See also* Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 CHI. L. REV. 1113, 1117-18 (1999); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §102 (1986).

9. The members of the Nuremberg prosecution team were well aware of the future implications of their actions as evidenced so eloquently in some of Justice Jackson’s opening statements. “We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well.” 2 IMT 101 (1947) (opening argument, Nov. 21, 1945), *available at* <http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson/opening-statement-before-the-international-military-tribunal/> (last visited Feb. 19, 2014).

10. Sean McCollum, “*Never Again*”, SCHOLASTIC.COM, [www.scholastic.com/teachers/article/x201cnever-againx201d](http://www.scholastic.com/teachers/article/x201cnever-againx201d) (last visited Jan. 15, 2014).

11. *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217(III)A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); *see also* International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171.

12. *See, e.g.*, Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Jan. 13, 1993, S. Treaty Doc. No. 21, 103d Cong., 1st Sess. (1993), *reprinted in* 32 I.L.M. 800 [hereinafter Chemical Weapons Convention]. Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 (entered into force Mar. 5, 1970) [hereinafter NPT].

13. *See* BASSIOUNI, *supra* note 7, at 569.

have been various “ad hoc” international tribunals established such as the Tribunal for the Former Yugoslavia, Tribunal for Rwanda, and the Special Court for Sierra Leone to name a few.<sup>14</sup> Each of these “courts” was singular in its breadth and jurisdiction; they were created specifically to deal with a particular problem or crisis usually after which they were named.<sup>15</sup>

In 1998, due in part to the cost and time expense necessary with setting up “ad hoc” tribunals,<sup>16</sup> the international community via the United Nations had come to an agreement that it was necessary to set up a permanent “International Criminal Court” to deal with international crime.<sup>17</sup> It is a mass-funded endeavor with 122 state-parties.<sup>18</sup> The International Criminal Court (ICC) is, however, a treaty-based establishment, meaning that the same problems arise as those with traditional treaties: every country is not bound under the jurisdiction of the ICC.

In some domestic law theories, one gives tacit consent to abide by certain laws by remaining under those laws after one has had a chance to decide whether a certain law or way of life is acceptable.<sup>19</sup> In international law, especially international criminal law such as that which is heard before the ICC (a treaty), one is not born under these laws, but rather one must expressly declare to be

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14. *Id.* at 569-75.

15. KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW: VOLUME 1: FOUNDATIONS AND GENERAL PART 19-22 (2013).

16. For example, the Special Court for Sierra Leone was established to deal with criminal violations occurring after November 30, 1996, and throughout the Sierra Leone Civil War. The President of Sierra Leone asked for international assistance in 2000. The United Nations and Sierra Leone reached an agreement on a court in 2002. The official court building opened in 2004. During that time in between, criminals were committing more violations and were also largely able to escape or elude justice, and in a few cases, violators had died before the court was able to catch up with them. The Special Court for Sierra Leone, *Statute of the Special Court for Sierra Leone* (Jan. 16, 2002), available at <http://www.scl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3d&tabid=70>.

17. The prospect of an International Criminal Court has been discussed for decades. Interest was revitalized after Trinidad and Tobago sought intervention from the United Nations because of drug traffickers wreaking havoc in their country. Lucy Martinez, *Prosecuting Terrorists at the International Criminal Court: Possibilities and Problems*, 34 RUTGERS L.J. 1, 13-14 (2002).

18. *The States Parties to the Rome Statute*, INT'L CRIM. CT., [http://www.icc-pi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](http://www.icc-pi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx) (last visited Jan. 28, 2014).

19. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 146-48 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

“under” these laws via signing a treaty and adhering to them.<sup>20</sup> The complication with international criminal law is obvious: often the people who wish to do wrong in the world are unwilling to acquiesce themselves to laws that they plan to break. It is this point which is at the crux of this note and is demonstrated in the current events in Syria. The international community is in the predicament of finding a way to deal with Syria, who has not signed onto the ICC or until recently the Chemical Weapons Convention<sup>21</sup> (both of which are treaties), yet has been accused of gross violations of international law and customs.<sup>22</sup>

This note will begin with a discussion of the International Criminal Court by explaining the history of other international court endeavors prior to the ICC. It will discuss the establishment of the ICC via the Rome Statute and the crimes that fall under ICC jurisdiction. This note will then point out some of the criticisms the ICC has encountered along the way.

The International Criminal Court will then be compared to the Nuremberg War Tribunals, which occurred after the Second World War. It is useful to show where the ideas of international criminal law began, where they are today, and of course some of the steps along the way. The ICC is a direct descendant of Nuremberg, and many of the lessons learned in Nuremberg were evident in setting up the ICC.<sup>23</sup>

This note will discuss the current international crisis taking place in Syria. Syria is alleged to have used chemical weapons against its own civilian population during the recent Arab Spring

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20. BASSIOUNI, *supra* note 7.

21. On September 14, 2013, Syria acceded to join the convention and agreed to place their chemical weapons in international control. See *Secretary-General Receives Syria's Formal Accession to Treaty Banning Chemical Weapons*, GLOBALSECURITY.ORG (Sept. 14, 2013), [www.globalsecurity.org/wmd/library/news/syria/2013/syria-130914-unnews02.htm](http://www.globalsecurity.org/wmd/library/news/syria/2013/syria-130914-unnews02.htm).

22. See *infra* note 74; use of chemical weapons in any capacity is a violation of “customary” law. See *supra* note 12. As such, international intervention may be necessary but note that commencing a non-UNSC sanctioned military strike would be a violation of international criminal law. See Mary Ellen O’Connell, *Attack Needs U.N. Approval to Be Legal*, N.Y. TIMES, Aug. 26, 2013, [www.nytimes.com/roomfordebate/2013/08/26/is-an-attack-on-syria-justified/what-the-un-says-about-chemical-weapons-and-unauthorized-military-force](http://www.nytimes.com/roomfordebate/2013/08/26/is-an-attack-on-syria-justified/what-the-un-says-about-chemical-weapons-and-unauthorized-military-force).

23. Philippe Kirsch, President of the Int’l Criminal Court, *From Nuremberg to The Hague – The Nuremberg Heritage: A Series of Events Commemorating the Beginning of the Nuremberg Trials* (Nov. 19, 2005), available at [http://www.icc-cpi.int/NR/rdonlyres/08AB9F8F-53A2-4533-BCE0-887419726332/143894/PK\\_20051119\\_En.pdf](http://www.icc-cpi.int/NR/rdonlyres/08AB9F8F-53A2-4533-BCE0-887419726332/143894/PK_20051119_En.pdf).

uprising and many western countries, including the United States, wish to bring the Syrian leaders to justice for these alleged violations.<sup>24</sup> Though countries like the United States wish to take more direct responses to these alleged chemical weapons offenses (i.e. through the use of military strikes) the focus of this note is to discuss how a more effective and more potent ICC could remove the need for violence and handle international crime under the law.<sup>25</sup>

After that, there will be a brief discussion on the International Criminal Court and its potential implications on the current issues in Syria and the reasons for and against ICC intervention. Further, there will be a brief discussion on how the chemical weapons violations alleged to have occurred in Syria would actually fit into an ICC case.

Finally, this note will discuss a few potential changes to the current ICC model in an effort to make the ICC more effective. It will show how a more effective ICC could intervene in the current Syrian situation. An ICC intervention would potentially obviate the need for world powers, like Russia and the United States, who are at odds concerning the current situation, to square off on the world's political stage.

## II. THE INTERNATIONAL CRIMINAL COURT

The International Criminal Court was created as the first permanent "court" that would hear cases involving international criminal violations.<sup>26</sup> The court has limited jurisdiction in terms of what cases it can hear and how cases are brought before it.<sup>27</sup> First,

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24. The United States government has made multiple allegations concerning Syria's use of chemical weapons. The United States has made many pleas for the international community to intervene in Syria due to the instability of the government there. *See Syria: Cameron and Obama Threaten 'Serious Response'*, BBC (Aug. 25, 2013, 6:58 PM), [www.bbc.co.uk/news/uk-23830590](http://www.bbc.co.uk/news/uk-23830590) (stating there will be a "serious response" if it emerges Syria used chemical weapons last week); *see also Syria: Cameron and Obama Move West Closer to Intervention*, GUARDIAN, Aug. 25, 2013, <http://www.theguardian.com/world/2013/aug/24/syria-cameron-obama-intervention#start-of-comments> ("[U]se of chemical weapons would merit a serious response from the international community."); *see also* Frederik Pleitgen & Tom Cohen, 'War-weary' Obama says Syria chemical attack requires response, CNN (Aug. 30, 2013), <http://www.cnn.com/2013/08/30/world/europe/syria-civil-war/> ("[He] hinted at a military strike that sources and experts say would entail cruise missiles fired from U.S. Navy ships.").

25. *Id.*

26. *See* Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute].

27. *Id.* at pt. 2, art. 11-13.

the ICC is functionally a complementary court and does not have jurisdiction to hear a case if a particular national court with jurisdiction takes the case instead.<sup>28</sup> The ICC can only intervene if the national criminal courts in the jurisdiction where the alleged crime took place are 1) unable or unwilling to carry out its legal obligations in regard to the law, and 2) where the national legal system has collapsed entirely.<sup>29</sup>

The ICC only has jurisdiction over subjects who 1) have committed a crime in or against a party to the court, or 2) who are nationals of a party to the court, or 3) when each of these fails and the incident is found to be particularly egregious, the United Nations Security Council<sup>30</sup> can make a referral to the ICC, and the ICC will investigate and bring forth a case.<sup>31</sup> The ICC does not have far-reaching powers; in fact they are quite limited in some respects, especially regarding nations that are not party to the Rome Statute.<sup>32</sup>

The Rome Statute for the International Criminal Court is the treaty that established the International Criminal Court, adopted on July 17, 1998, and entered into force on July 1, 2002.<sup>33</sup> As of May 1, 2013, 122 nations are parties to the statute.<sup>34</sup> The statute itself serves a handful of very specific functions; it lays out jurisdiction and structure of the court and also details how the court will operate.<sup>35</sup> The ICC will hear cases involving only four crimes: genocide, crimes against humanity, war crimes, and crimes of ag-

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28. *Id.* at pt. 1, art. 1.

29. *Id.* at art. 17.

30. The United Nations Security Council is an organ of the UN, which is charged with keeping peace in the world. It is comprised of fifteen members with five being permanent members. For the purposes of the discussion, it is important to note that the five permanent members (the United States, the United Kingdom, France, Russia, and China) hold a veto power over any resolution being proposed. This is important because any of the five can veto a referral to the ICC, even if there is overwhelming international support. *See* U.N. Charter ch. V, art. 23.

31. Rome Statute, *supra* note 26, at art. 12-14.

32. *Id.*

33. *Id.*

34. *ICC at a Glance*, INT'L CRIM. CT., [http://www.icc-cpi.int/en\\_menus/icc/about%20the%20court/icc%20at%20a%20glance/Pages/icc%20at%20a%20glance.aspx](http://www.icc-cpi.int/en_menus/icc/about%20the%20court/icc%20at%20a%20glance/Pages/icc%20at%20a%20glance.aspx) (last visited Jan. 15, 2014).

35. *See, e.g.*, Rome Statute, *supra* note 26.

gression.<sup>36</sup> The fourth, crimes of aggression, is an unsettled concept and its role in the ICC is still unclear.<sup>37</sup>

The ICC was set up to hear cases of international criminal activity and to hold accountable those who wreak havoc in the world.<sup>38</sup> However, through the principle of complementarity, the ICC also has the implied purpose of encouraging and allowing nations to take responsibility for the prosecution of criminals in their own country.<sup>39</sup> Theoretically, the ICC could be a successful endeavor even if it never heard or prosecuted one single case, as long as it had the effect of encouraging national governments to “comply with their responsibilities under international humanitarian law” by prosecuting violators within their country.<sup>40</sup> That being said, however, there is disparity among observers on the effectiveness and success of the International Criminal Court.

### III. THE INTERNATIONAL CRIMINAL COURT AND NUREMBERG

The ICC is a direct descendant of the International Military Tribunals (Nuremberg Trials) which took place after the Second World War.<sup>41</sup> Nuremberg was the genesis of a long and, at times, tumultuous road towards worldwide, all-encompassing international criminal law. Even today, there is still no entity that has direct jurisdiction over every single international crime or every single country.<sup>42</sup> The ICC is, however, the first “permanent” court to address issues of international criminal law violations.<sup>43</sup>

The Nuremberg Trials were a “multi-national” war tribunal established to punish those who committed war crimes during the Second World War; it was not a permanent court and had no other

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36. *Id.* at art. 5.

37. For more information about the new role of crimes of aggression, see Matthew Gillett, *The Anatomy of an International Crime: Aggression at the International Criminal Court*, 13 INT'L CRIM. L. REV. 829 (2013).

38. Rome Statute, *supra* note 26, at pmb1.

39. DOMINIC MCGOLDRICK, PETER ROWE & ERIC DONNELLY, *THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES* 468 (2004).

40. *Id.*

41. Kirsch, *supra* note 23.

42. It probably is not necessary to have a court that hears every single crime, but it would definitely give the ICC more credibility if it had universal jurisdiction over every country to prosecute the particular international crimes under its jurisdiction.

43. MCGOLDRICK ET AL., *supra* note 39, at 453-456.

stated purpose than to punish European Axis war criminals.<sup>44</sup> The ICC, on the other hand, is a permanent court;<sup>45</sup> it presumably exists in perpetuity regardless of world events. The purpose of the ICC is to punish international criminals of any title, rank, race, ethnicity, and nationality and not merely those who committed their acts during any specific conflict, situation, or war.<sup>46</sup> The Nuremberg war tribunal was convened to prosecute the big players in the Nazi regime while allowing local German courts to prosecute the lower level offenders.<sup>47</sup> The ICC is set up to investigate, prosecute, and punish international criminals of any kind.<sup>48</sup>

The other major difference between the ICC and Nuremberg is that in its charter the ICC is identified as a court of complement.<sup>49</sup> Its existence is to ensure that crimes are punished; however, the crimes do not necessarily have to be punished or heard before the ICC.<sup>50</sup> As previously stated, the ICC could be a success even if it never heard a single case, as long as the result was greatly increased prosecution of criminals in the jurisdiction of the offense. This idea of complementarity is a significant departure from Nuremberg. Nuremberg was created to be the only tribunal with jurisdiction over the high ranking offenders in the Nazi party. The general consensus at both Nuremberg and the International Military Tribunal for the Far East was that the national courts would not be equipped to prosecute and punish these men. The lack of complementarity was evidenced in the fact that the tribunals generally did not acknowledge any requests made by Germany or Japan regarding the criminals on trial.<sup>51</sup>

As Nuremberg was convened in 1945, and the ICC went into effect in 2002, the international community had a wealth of experience in trial and error in establishing international criminal law.<sup>52</sup>

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44. The Avalon Project, *Charter of the International Military Tribunal*, YALE L. SCH., available at <http://avalon.law.yale.edu/imt/imtconst.asp> (last visited Jan. 31, 2014).

45. GEORGHIOS M. PIKIS, *THE ROME STATUTE FOR THE INTERNATIONAL CRIMINAL COURT* 21 (2010).

46. Rome Statute, *supra* note 26, art. 25.

47. PODGOR & CLARK, *supra* note 1, at 209.

48. See Rome Statute, *supra* note 26, art. 27-28. ("This statute shall apply equally to all persons without any distinctions based on official capacity . . .").

49. *Id.* at art. 1.

50. *Id.* at art.17.

51. PHILIPPE SANDS, *FROM NUREMBERG TO THE HAGUE* 63 (2003).

52. *Id.* at 109 (explaining the development of international law and its effect on the Rome Statute).

Nuremberg, the International Military Tribunal for the Far East,<sup>53</sup> as well as many of the more recent ad-hoc Tribunals were reactionary endeavors. They were created after a violation of international law, a process which was ultimately decided to be inappropriate and ineffective because it allowed for impunity and “selective justice” for certain criminals and failed to help end conflicts in a timely manner.<sup>54</sup> The cost and time of setting up a post-facto tribunal for each violation of international law is quite burdensome and, in many cases, obviates the purposes of law in the first place as it removes preventative ideas of punishment and largely casts doubt upon any essence of deterrence.<sup>55</sup> Justice often came slowly and in many cases not at all.<sup>56</sup> Similarly, critics point to the fact that the ICC has only tried twenty criminals in eight situations and only reached one conviction<sup>57</sup> in ten years and point to this as a failure.<sup>58</sup> The problem with that view has already been stated; the ICC functions as a court of complement and under that system is not always necessarily the court which will hear the cases it is put in place to ensure are adjudicated.

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53. The International Military Tribunal for the Far East was the sister court to the Nuremberg Trials and was established to prosecute Japanese officials for their crimes during World War II. See Charter for the International Military Tribunal for the Far East, Apr. 26, 1946, T.I.A.S. No. 1589, at 11, 4 Bevans 27 [hereinafter IMTFE Amended Charter].

54. There are ad-hoc tribunals to deal with the situations in the former Yugoslavia, Rwanda, and Sierra Leone; but there was no international response for other situations like; Algeria, Liberia, El Salvador, and Cambodia. Overview of Rome Statute, <http://legal.un.org/icc/general/overview.htm> (last visited Feb. 20, 2014).

55. *Id.*

56. *Id.* For example, in Cambodia, there was no international response to the alleged genocide that took place there from 1975 until 1979. It was only after an overthrow of the government that the responsible parties were even tried (in absentia). Further, it took until 2001 for legislation to be passed to establish a tribunal to prosecute members of the KR regime. *Cambodian Genocide Program*, YALE.EDU, <http://www.yale.edu/cgp/index.html> (last visited Feb. 20, 2014). For an overview of the situation in Algeria see *Algeria*, GENOCIDE WATCH, <http://www.genocidewatch.org/algeria.html> (last visited Feb. 20, 2014). For an overview of the situation in Mozambique see *Mozambique*, GENOCIDE WATCH, <http://www.genocidewatch.org/mozambique.html> (last visited Feb 20, 2014).

57. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-2842, Judgment (Mar. 14, 2012), [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/Pages/democratic%20republic%20of%20the%20congo.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/Pages/democratic%20republic%20of%20the%20congo.aspx).

58. *Situations and Cases*, INT'L CRIM. CT., [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx) (last visited Jan. 28, 2014).

Along with the statutory and logistical similarities and differences between the Nuremberg Trials and the ICC, there is room for a discussion on concept and substance. One criticism of any intervention in Syria by the ICC or any international entity is the fact that the events alleged to have taken place in Syria took place within the borders of Syria singularly, and Syria is not a party to the Rome Statute.<sup>59</sup> The ICC has jurisdiction only over states that are party to the Rome Statute, and even then only over matters that involve the three major crimes in the Rome Statute.<sup>60</sup> The ICC is set up so that an individual can only be brought before the court if they violate the Rome Statute after their country becomes a party to the court.<sup>61</sup>

The Nuremberg War Tribunals had no such restrictions. First, there was no statute written or signed beforehand (that is, before their crimes took place) that bound the Nazi leaders to abide by any particular set of laws.<sup>62</sup> Second, though many of the atrocities that occurred during the Holocaust did occur internationally, many did not.<sup>63</sup> Further, while the defendants at Nuremberg were tried for their “international” actions in waging a “war of aggression”, the indictment charged them with “War Crimes” and “Crimes Against Humanity” that occurred domestically as well.<sup>64</sup> The Fourth Count in the indictment which covers the “Crimes Against Humanity” does not even consider whether the crimes occurred internationally and simply charges the defendants with

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59. Brad Plumer, *Everything You Need to Know About Syria's Chemical Weapons*, WASH. POST (Sept. 5, 2013, 9:00 AM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/09/05/everything-you-need-to-know-about-syrias-chemical-weapons/>.

60. Rome Statute, *supra* note 26, at art. 12-14.

61. *Id.* at art. 11.

62. Critics of Nuremberg suggest that imposing punishment on the Nazi leaders for laws that were not explicitly written out beforehand is synonymous with *ex post facto* laws and unjust. Defenders of the Nuremberg trials claim that the international norms outlined by Geneva and other conventions created substantive international law, and that the defendants broke this law during the Holocaust. See Anthony Nicholls, *The Nuremberg Trials: Victors' Justice or a Categorical Imperative*, U. OXFORD, <http://www.sant.ox.ac.uk/events/lecturesarchive/nicholls.html> (last visited Jan. 15, 2014).

63. See Anne Kelly Knowles et al., *Mapping the SS Concentration Camp System Over Space and Time*, U.S. HOLOCAUST MEMORIAL MUSEUM, <http://www.ushmm.org/learn/mapping-initiatives/geographies-of-the-holocaust/mapping-the-ss-concentration-camp-system/> (last visited Jan. 15, 2015).

64. The Avalon Project, *Nuremberg Trial Proceedings: Indictment*, YALE L. SCH., available at <http://avalon.law.yale.edu/imt/count.asp> (last visited Feb. 20, 2014).

designing and executing a plan of “murder and persecution of all who were or who were suspected of being hostile to the Nazi Party”.<sup>65</sup> In the parts of the indictment where specific instances are discussed, the prosecutors point to events that occurred within the borders of Germany and also in other parts of Europe; so we see that the Nazi leaders were being held accountable both for their international crimes as well as their domestic crimes.<sup>66</sup>

It was evident, via the experience of the Nuremberg and IMT for the Far East, that in order to hold these international criminals accountable and for future tribunals to stand on firmer ground, there needed to be a permanent set of basic criminal laws established before atrocities took place that would serve functions of deterrence.<sup>67</sup> In contrast to the criticisms that were lodged against the Nuremberg Trials like, imposing *ex post facto* laws and imposing victor’s justice; the ICC has a plainly written constitution and countries have submitted to its jurisdiction.

#### IV. CURRENT UNREST IN SYRIA AND THE EVENTS OF AUGUST 21, 2013

There has been growing unrest in Syria for the better part of the last decade;<sup>68</sup> observers see the problem in Syria to be on par with, if not more volatile than, the problems that were facing Iraq and Libya.<sup>69</sup> Estimates put the number of deaths in the country anywhere between 50,000 and 100,000 in the last two years alone.<sup>70</sup> Along with the mass number of deaths, approximately five million people have been displaced within Syria because of the civil war, with over two million fleeing to Turkey, Lebanon, and Jordan to escape the violence.<sup>71</sup>

Earlier in 2013, the United States accused the Syrian government of using chemical weapons against the rebels in the civil

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65. *Id.*

66. *Id.*

67. Nicholls, *supra* note 62.

68. M. Cherif Bassiouni, *The “Arab Revolution” and Transitions in the Wake of the “Arab Spring”*, 17 *UCLA J. INT’L L. & FOREIGN AFF.* 133, 161 (2013).

69. *Id.* at 163.

70. *Statistics for the Number of Martyrs*, VIOLATIONS DOCUMENTATION CENTER SYRIA, <https://www.vdc-sy.info/index.php/en/home> (last visited Jan. 15, 2014).

71. *Syria Regional Refugee Response-Regional Overview*, UN REFUGEE AGENCY, <http://data.unhcr.org/syrianrefugees/regional.php> (last visited Jan. 15, 2014).

war.<sup>72</sup> In the spring of 2013, the international community weighed in and ultimately the United Nations determined that although chemical weapons had been used, it was impossible to figure out who was actually using them based on the information at the time and decided not to take any action.<sup>73</sup> Later that summer, the United Nations established a mission to send investigators into the country to work with both rebels and government forces to investigate chemical weapons.<sup>74</sup> These U.N. representatives landed in the country on August 18, 2013, and less than three days after their arrival a major event occurred outside the city of Damascus.<sup>75</sup> On the night of August 21, 2013, an estimated 1,200<sup>76</sup> people were murdered during an attack on several areas outside of Damascus with the number of reported deaths continually rising.<sup>77</sup>

On August 21, 2013, a major attack occurred with mass numbers of casualties and injured.<sup>78</sup> Included in the fatalities were many innocent civilian women and children.<sup>79</sup> This attack is of great international concern because it was allegedly perpetrated by Syria's own government and involved the use of sarin gas.<sup>80</sup>

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72. Hayes Brown & Ben Armbruster, *How We Got Here: A Timeline of the Syria Chemical Weapons Saga*, THINKPROGRESS (Aug. 28, 2013, 12:20 PM), <http://thinkprogress.org/security/2013/08/28/2539341/syria-chemical-weapons-saga/>.

73. *Id.*

74. U.N. Office for Disarmament Affairs [UNODA], *Report on the Alleged Use of Chemical Weapons in the Ghouta Area of Damascus, United Nations Mission to Investigate Alleged Uses of Chemical Weapons in the Syrian Arab Republic: on 21 August 2013*, U.N. Doc. A/67/997/S/2013/553 (Sept. 16, 2013) (prepared by Åke Sellström), available at [http://www.un.org/disarmament/content/slideshow/Secretary\\_General\\_Report\\_of\\_CW\\_Investigation.pdf](http://www.un.org/disarmament/content/slideshow/Secretary_General_Report_of_CW_Investigation.pdf).

75. *Id.* at 3.

76. Reports vary greatly on the number of people killed during this attack. U.S. reports say 1,429 Syrians were killed in this chemical weapons attack. See Steve Holland & Roberta Rampton, *U.S. Says 1,429 Syrians Killed in August 21 Chemical Weapons Attack*, REUTERS (Aug. 30, 2013, 1:42 PM), [www.reuters.com/article/2013/08/30/us-syria-crisis-intelligence-report-idUSBRE97T0QZ20130830](http://www.reuters.com/article/2013/08/30/us-syria-crisis-intelligence-report-idUSBRE97T0QZ20130830).

77. *Bodies Still Being Found After Alleged Syria Chemical Attack: Opposition*, DAILY STAR-LEBANON (Aug. 22, 2013, 7:08 PM), <http://www.dailystar.com.lb/News/Middle-East/2013/Aug-22/228268-bodies-still-being-found-after-alleged-syria-chemical-attack-opposition.ashx#axzz2chzutFua>.

78. The following is taken directly from the United Nations Mission Report. UNODA, *supra* note 74.

79. *Id.*

80. Sarin is a highly potent, toxic compound that is often used as a chemical weapon. It can be lethal even at low concentrations. Sarin is noted to paralyze the respiratory system, with death following within two to three minutes. See *Facts*

U.N. investigators retrieved soil samples and also medical specimens including blood and urine from victims.<sup>81</sup> The investigators also found impacted and exploded mortars capable of carrying a chemical payload that contained sarin.<sup>82</sup> Results confirmed the presence of the nerve agent sarin.<sup>83</sup>

The United States government claims to have undisputed proof that the Syrian national government was responsible for this attack.<sup>84</sup> In contrast, the Russian government is alleging that Syrian rebels in the area used the chemical weapons in an effort to bring further scrutiny to the al-Assad regime.<sup>85</sup> Regardless of who actually used the weapons, this situation would ordinarily be ripe for international scrutiny simply because of the use of chemical weapons.<sup>86</sup> The United Nations Mission Report gives a detailed analysis of findings about the presence of sarin and its use against civilians, but does not give an opinion on who actually used the weapons.<sup>87</sup>

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*About Sarin*, CENTERS FOR DISEASE CONTROL & PREVENTION (May 20, 2013), <http://emergency.cdc.gov/agent/sarin/basics/facts.asp>.

81. UNODA, *supra* note 74, at 3. The investigators interviewed fifty people who all provided corroborating stories about an early morning attack using “Surface-to-Surface” rockets. Blood, urine, and hair samples were taken from thirty-six injured victims. Most patients were diagnosed as “intoxicated by an organophosphate compound.” Further, blood and urine samples contained sarin and “sarin signatures.”

82. *Id.* Also, close to the impact sites, the environment was found to be contaminated with sarin.

83. *Id.*

84. The United States government has made multiple allegations concerning Syria’s use of chemical weapons. The United States has made many pleas for the international community to intervene in Syria due to the instability of the government there. *See Syria: Cameron and Obama Threaten ‘Serious Response’*, *supra* note 24.

85. Sergei L. Loiko, *Russia Says It Has Evidence of Chemical Weapons Use by Syrian Rebels*, L.A. TIMES, (Sept. 18, 2013, 4:12 PM), <http://www.latimes.com/world/worldnow/la-fg-wn-russia-syria-chemical-weapons-20130918,0,332281.story#axzz2jikki2PI>.

86. The Chemical Weapons Convention prohibits the obtaining, stockpiling, and general use of any chemical weapons. It should be noted that Syria (was) not a party to this convention at the time of these attacks, so one would need to argue that this convention is a demonstration of customary law to hold Syria accountable under it. *See The Convention on the Prohibition of the Development, Production and Stockpiling and Use of Chemical Weapons and on Their Destruction*, art. III, IV, Jan. 13, 1993 [hereinafter Chemical Weapons Convention], available at <http://disarmament.un.org:8080/wmd/cwc/index.html>.

87. UNODA, *supra* note 74.

Shortly after the attack, the President of the United States began to call for action from the international community to intervene on behalf of the people of Syria.<sup>88</sup> Syria, as we now know via the diplomatic end to this situation,<sup>89</sup> definitely has a massive stockpile of chemical weapons. The al-Assad regime has vehemently denied possessing or using chemical weapons, but on September 10, 2013, agreed to accede to the Chemical Weapons Convention and place its entire chemical weapon stockpile into the hands of the OPCW.<sup>90</sup> The United States and other Western countries have taken a hardnosed stance on the situation and have warned Syria that the use of chemical weapons in any fashion, either internationally or domestically, will result in action from the international community including sanctions and potentially military strikes.<sup>91</sup> Prior to the diplomatic resolution to the situation, there was no consensus from the international community as to the proper path to take in dealing with these alleged violations.<sup>92</sup>

The main question in this situation is: what are “we” as an international community to do with the Syrian regime led by al-Assad? The solution touted at the outset of the writing of this note was for a multi-national military strike against Syria. This solution was primarily, and for the most part singularly, put forth by President Obama while also somewhat supported by the Prime Minister of the United Kingdom.<sup>93</sup> The problem is that the very same international laws and customs on which Obama relies as legal justification for a strike actually prevents the exact action that he wants to take.<sup>94</sup> The Syrian situation is complicated for a

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88. *Syria: Cameron and Obama Threaten ‘Serious Response’*, *supra* note 24.

89. Since the writing of this note began, Syria has agreed to place its entire chemical weapon stockpile into international control and has acceded to the Chemical Weapons Convention. See Thomas Grove, *Syria Will Sign Chemical Weapons Convention, Declare Arsenal, Foreign Ministry Says*, HUFFINGTON POST (Sept. 10, 2013, 5:36 PM), [www.huffingtonpost.com/2013/09/10/syria-chemical-weapons-convention\\_n\\_3901417.html](http://www.huffingtonpost.com/2013/09/10/syria-chemical-weapons-convention_n_3901417.html); see also *Syria: We Will Turn over Chemical Weapons*, ASSOCIATED PRESS (Sept. 10, 2013, 2:43 PM), <http://nypost.com/2013/09/10/syria-to-halt-chemical-weapons-production-declare-arsenal/>.

90. *Id.*

91. Plumer, *supra* note 59.

92. *Id.*

93. *Syria: Cameron and Obama Threaten ‘Serious Response’*, *supra* note 24.

94. The Geneva Convention for example, which the President says was violated by Al-Assad and provides the legal justification for an attack, actually specifies that non-parties to an armed conflict should not engage unless attacked. See Paul Campos, *Striking Syria is Completely Illegal*, TIME, Sept. 5, 2013, available

handful of reasons: 1) Syria is not a party to the International Criminal Court,<sup>95</sup> 2) Syria is not a party to many of the international treaties which would criminalize the behavior they are alleged to have committed,<sup>96</sup> 3) and perhaps most importantly, the events taking place in Syria did not occur outside or across national boundaries.<sup>97</sup> In the presence of these issues, the legal justification for many of the interventionist options open to the international community is limited.

There are three legal and realistic remedies to the situation in Syria: 1) a Security Council-backed military strike, 2) bringing the situation before the ICC via a Security Council or Article 12 referral, and 3) a diplomatic agreement, similar to what transpired. This situation presented a worst-case scenario for advocates of international justice as the remedies available were restricted in many ways. Although the United States and others did consider military strikes,<sup>98</sup> the primary focus of this note considers the possibility of bringing the situation in Syria before the ICC.

The factors preventing this case being brought before the ICC are: 1) there is no direct jurisdiction because Syria did not ratify the Rome Statute; 2) there is very little chance of the situation being referred via the United Nations Security Council because of a

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at <http://ideas.time.com/2013/09/05/obamas-plan-for-intervention-in-syria-is-illegal/>.

95. *The States Parties to the Rome Statute*, *supra* note 18.

96. Chemical Weapons Convention, *supra* note 12. Syria is a party to the earlier convention which banned the international use of chemical weapons; however, it makes no mention of use of those weapons within the borders of one's own country. See Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571.

97. President Obama would be on more solid ground in proposing a military strike if the attack was "international."

98. A military strike is prohibited because the events taking place do not cross international borders (Syria is not attacking another country), and there is no direct proof that the government used sarin gas. Customary international law dictates that the use of any chemical weapons against soldiers or civilians in any fashion is prohibited. The collective peoples of the world through the latest "Chemical Weapons Convention" have shown their agreement that the world should be rid of any and all chemical weapons. In October 2013, the Nobel Peace Prize was awarded to the Organization for the Prohibition of Chemical Weapons (OPCW), which is the intergovernmental organization tasked to ensure worldwide adherence to the Chemical Weapons Convention and has aided in destroying over 80% of known chemical weapons in the world. See Peter Walker, *Nobel Peace Prize Won by Chemical Weapons Watchdog for Work in Syria*, GUARDIAN, Oct. 11, 2013, <http://www.theguardian.com/world/2013/oct/11/nobel-peace-prize-chemical-weapons-syria-opcw>.

veto from Russia and China, and 3) the events took place inside the borders Syria and not internationally against a State party.

## V. SYRIA AND THE INTERNATIONAL CRIMINAL COURT

If in an ideal world the ICC is supposed to handle all egregious violations of international criminal law, then the Syrian situation (regardless of who used the chemical weapons) is likely ripe for investigation.<sup>99</sup> The crimes that the United States and other Western countries have alleged against the Syrian regime are those involving use of chemical weapons against civilians. Though there is no mention of chemical weapons in Article 5 of the Rome Statute, the fact that civilians who were not participants to the fighting were attacked would violate the “War Crimes” subsection under Rome Statute Article 8(2)(e)(1).<sup>100</sup> There, it is criminalized to intentionally direct attacks against a civilian population or those who are not engaged in the fighting.<sup>101</sup>

Further, the use of chemical weapons has undoubtedly become repugnant in most of the world. Over the last 100 years, the peoples of the world have declared that using chemical weapons against soldiers or civilians is condemned.<sup>102</sup> Several treaties and declarations have acknowledged that use of chemical weapons by any person or nation is a violation of international norms and possibly even international law.<sup>103</sup> The President of the United States has made strong statements regarding Syria’s use of these chemi-

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99. The use of chemical weapons in any sense has become a violation of customary international law.

100. Rome Statute, *supra* note 26, art. 8. The Rome Statute distinguishes between “international” and “non-international” armed conflict in Article 8. The list of forbidden acts is considerably longer and more specific in regards to “international” armed conflict. Under Article 8(2)(b)(xviii) chemical weapons are specifically accounted for as a violation of international criminal law. In Article 8(2)(e)(i) the prohibition is simply stated to include “intentionally directed attacks against the civilian population” and no reference is made to chemical weapons. This may change soon, however, as an amendment to Article 8 was passed and is awaiting the necessary signatures to become official. That amendment would criminalize, among other things, the use of chemical weapons in “armed conflict not of an international character.” See RC/Res.5: Amendments to article 8 of the Rome Statute, [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/RC-Res.5-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.5-ENG.pdf) (last visited Feb. 24, 2014).

101. *Id.* at art. 8(2)(e)(i).

102. Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, *supra* note 96; see also Chemical Weapons Convention, *supra* note 12.

103. Chemical Weapons Convention, *supra* note 12.

cal weapons, seemingly with these very ideas and concerns that use of chemical weapons is a gross violation of the law and must be handled immediately.<sup>104</sup>

The International Criminal Court was created with the idea that it would be the tool to bring situations like this to an end and restore justice and peace to the world. It has not. The ICC's underlying purpose is to remove the necessity for armed intervention and Cold War-style political stalemates. It did not do that here. The President of the United States called for military strikes and other action against Syria. The President, at times, relied on the theory put forth by many after World War II, "Never again." He reasoned that we as an international community could not sit by idly while these gross atrocities occurred in Syria.<sup>105</sup> If the crimes alleged against the Syrian government can be proven then the President may be correct in his conviction that the situation requires international intervention. However, that intervention cannot be a military strike by the United States as the President initially threatened as his first resort tactic. A military strike will likely escalate the tension in the region and will have the United States and Russia squaring off in the media and possibly, as Russia threatened, in armed conflict.<sup>106</sup> Also, as previously stated, armed intervention in this particular conflict, with this set of alleged facts would itself consist of a violation of international criminal law.<sup>107</sup>

The second potential solution to the problems in Syria would be to reach a diplomatic resolution where the key players including Syria, the United States, Russia, and the UK could agree upon terms for Syrian chemical weapons disarmament. In fact, this is the solution that was reached in this case after the United States was criticized by the international community for their insistence on the use of military strikes.<sup>108</sup> Syria has acceded to the Chemical Weapons Convention and has agreed to turn over all of their chemical weapons to the Organization for the Prohibition of Chemical

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104. "Significant use of chemical weapons would merit a serious response from the international community." *Syria: Cameron and Obama Threaten 'Serious Response'*, *supra* note 24.

105. *Id.* Obama and Cameron agree that it is "vital that the world upholds the prohibition on the use of chemical weapons and deters further outrages."

106. Dan Roberts, *Vladimir Putin Warns US Not to Launch Attack in Syria*, *GUARDIAN*, Sept. 12, 2013, <http://www.theguardian.com/world/2013/sep/12/putin-warns-us-not-to-attack-syria>.

107. See O'Connell, *supra* note 22.

108. See *supra* note 21; see also Grove, *supra* note 89.

Weapons.<sup>109</sup> Considering the circumstances, this solution seems the most tenable. Russia and the United States no longer need to square off against each other on the world's stage. Syria, for the moment, does not have chemical weapons, and no nation had to use its military in an international strike to accomplish it.<sup>110</sup>

That being said however, even this diplomatic solution has potential to be a band-aid on a large wound. First, Al-Assad and his regime are still in power and allegations of government commissioned attacks have continued even months after Syria acceded to the CWC.<sup>111</sup> Second, though the regime no longer has control over their chemical weapons, they still have all of their other conventional weapons.<sup>112</sup> Further, though the allegations that brought this situation to the forefront of the international conscience were those involving chemical weapons, many more of the allegations center around conventional weapons rather than chemical weapons.<sup>113</sup> Third, there is nothing stopping the regime from creating different chemical weapons elsewhere or backing out of the agreement.<sup>114</sup> A full investigation by an effective International Criminal Court is the best solution to their problems that plague Syria.

With these complications in mind, I propose changes to the current ICC model that would allow for a more effective and wider reaching International Criminal Court. These changes will allow for a court that could have jurisdiction over the current situation in Syria and could remove the possibility and discussion of military strikes and the United States and Russia squaring off on the world stage.

## VI. PROPOSED CHANGES TO THE ICC MODEL

For the "proposed changes" portion of this note, the following set of facts is assumed to be true: 1) there were chemical weapons used on the night of August 21, 2013 and at other points throughout the current Syrian civil war; 2) the Syrian government, via al-

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109. The Organization for the Prohibition of Chemical Weapons was established by the Chemical Weapons Convention to ensure that the world is rid of these weapons. *See supra* note 98.

110. *Id.*

111. *Syria: Dozens of Government Attacks in Aleppo*, HUM. RTS. WATCH (Dec. 21, 2013), <http://www.hrw.org/news/2013/12/21/syria-dozens-government-attacks-aleppo>.

112. *Id.*

113. *Id.*

114. *Id.*

Assad and his regime, is responsible for these chemical weapons attacks; 3) the chemical and conventional weapons attacks were used against civilians and non-combatants; and 4) use of chemical weapons is a breach of customary international law.

*A. Encouraging non-party states to grant jurisdiction to the ICC on an ad-hoc basis.*

In order for the ICC to reach its maximum effectiveness, as many states as possible must submit to its jurisdiction. The current setup involves vast numbers of states who have signed but have not ratified, and others who have no connection to the court at all.<sup>115</sup> Along with ratification issues, there comes with it the issue of the ICC jurisdiction attaching to nationals of a ratifying nation but not those criminals that are nationals of a non-party state who happen to be in a party state wreaking havoc.<sup>116</sup> One way to address both of these issues is to encourage the legitimate state government of a country where the havoc is being wreaked to allow ad-hoc jurisdiction to the situation without submitting themselves to the ICC's jurisdiction permanently. The Rome Statute codified this in Article 12 §3 saying that a state may "by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question."<sup>117</sup> Though this is codified in the Rome Statute, it was only used twice in the first ten years of the ICC's existence.<sup>118</sup>

Non-party states are apprehensive to grant this ad-hoc jurisdiction for reasons as varied as those that prevented them from ratifying the statute in the first place.<sup>119</sup> The reasons for lack of utilization of this provision of the statute include; disinclination to incur duties that granting jurisdiction would manifest, lack of clar-

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115. *The States Parties to the Rome Statute*, *supra* note 18.

116. HARRY M. RHEA, *THE UNITED STATES AND INTERNATIONAL CRIMINAL TRIBUNALS* 173-75 (2012).

117. Rome Statute, *supra* note 26, art. 12.

118. On October 2003, the Ivory Coast accepted jurisdiction of the ICC concerning events of September 19, 2002. January 2009, Palestine sent a letter to the Registrar of the ICC submitting to jurisdiction under article 12 section 3. Due to uncertainties within the international community concerning the state status of Palestine, nothing has yet become of this exercise of jurisdiction. *See Palestine*, INT'L CRIM. CT., [http://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-cdnp/palestine/Pages/palestine.aspx](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-cdnp/palestine/Pages/palestine.aspx) (last visited Jan. 15, 2014).

119. MCGOLDRICK ET AL., *supra* note 39, at 72-82 (citing nationality and territoriality issues among different nation states as an issue).

ity about the parameters of such a granting of jurisdiction regarding timeline and crimes to be investigated, and fears about being investigated for crimes themselves as has already been discussed.<sup>120</sup> Non-party states are not always as likely to grant jurisdiction on an ad-hoc basis because doing so requires the granting state to provide full cooperation without any delay or exception.<sup>121</sup> That means if a state wants ICC intervention for any particular situation, the state themselves could potentially be opening themselves up to investigation for international crimes and are essentially bringing duties under the ICC that the nation likely was intending to avoid.<sup>122</sup> Often in situations involving international crime, there are no completely innocent parties.<sup>123</sup>

In Syria, this solution does not seem likely to be effective on its face. It is unlikely that al-Assad would grant jurisdiction to the ICC to investigate the situation. The only way to circumvent this issue is if the international community was to fail to recognize the al-Assad regime as the legitimate governing body of Syria.<sup>124</sup> In that case, the actual legitimate governing body of Syria (whomever that is decided to be) could grant jurisdiction on an ad-hoc basis to bring the al-Assad regime before the ICC. This however, is a fairly backhanded approach and one that is unlikely to be supported by many nation-states. Also, though the United States (Syria's biggest critic in the western world) and other countries have at times questioned the legitimacy of the al-Assad regime, the regime is widely considered the legitimate government of Syria throughout international spheres.<sup>125</sup>

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120. *Id.*; see also *supra* discussion Parts I, IV.

121. Rome Statute, *supra* note 26, at art. 12, ¶ 3.

122. Rome Statute, *supra* note 26, at art. 12, ¶ 3; see also Steven Freeland, *How Open Should the Door Be? – Declarations by non-States Parties under Article 12(3) of the Rome Statute of the International Criminal Court*, 75 *NORDIC J. INT'L L.* 211 (2006) (providing a thorough discussion on article 12 paragraph 3 of the Rome Statute).

123. Take this situation for example. The Syrian government is accused of using the chemical weapons, but some of the rebel militants that they are fighting have been accused of being affiliated with terrorist organizations. Catherine E. Shoichet, *Syria's Rebels: 20 Things You Need to Know*, CNN (Sept. 6, 2013), <http://www.cnn.com/2013/09/06/world/meast/syria-rebels/>.

124. al-Assad has been in power since 2000 and his father for approximately thirty years before that. See *List of Presidents of Syria*, WORLD PRESIDENTS DATABASE, [www.worldpresidentsdb.com/list/countries/Syria/](http://www.worldpresidentsdb.com/list/countries/Syria/) (last visited Jan. 15, 2014).

125. Syria, with al-Assad as its president is recognized as a State by the UN. See *Permanent Mission of the Syrian Arab Republic to the United Nations*, UNITED NATIONS, <http://www.un.int/syria/> (last visited Jan. 15, 2014).

Alternatively, this tool in the Rome Statute that allows for states to grant ad-hoc jurisdiction could definitely be used in a more judicious and productive manner than it has been thus far. The Rome Statute allows for the Prosecutor of the International Criminal Court (the Prosecutor) to write to heads of state and inquire as to their intention to make a declaration regarding a particular situation.<sup>126</sup> With this ability, the Prosecutor could negotiate with the heads of state to garner jurisdiction. For example, the Prosecutor could agree to only pursue certain criminal activity during a certain timeframe, or the party seeking the ad-hoc jurisdiction could limit the declaration under Article 12(3).<sup>127</sup> If one major goal of international criminal law is to prevent future injustice then this solution could be useful.<sup>128</sup> Currently, the ICC is ill-equipped and/or completely without jurisdiction to intervene on many of the violations of international criminal law. It would be much more practical to the goals of preventing and punishing international crime if more countries were under the jurisdiction of the ICC and if some percentage of those criminals who are nationals of a non-party State and operating with impunity were brought to justice as opposed to the zero that are brought to justice now.<sup>129</sup>

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126. PIKIS, *supra* note 45, at 52-53.

127. Freeland *supra* note 122, at 217. The ability of a non-party state to limit their declaration under Article 12(3) is not entirely settled. However, in light of many international law practices regarding treaties, it would be a major departure to not allow the accepting State to dictate the “precise nature of the circumstances” in which they accept jurisdiction. *Id.* at 232.

128. This solution would be useful if it were used in a way to prevent future violations. The issues in Syria are not as straightforward as simply bringing al-Assad to justice. First, many of the rebel groups that are active within Syria are terrorist groups themselves, they are committing acts just as heinous as those that al-Assad is alleged to have committed or ordered. Shoichet, *supra* note 123. Second, the goals of criminal law especially in the international sphere should be practical as well as just. Currently the system in place does not allow for any of the atrocities in many countries around the world including those alleged Syria to be punished. In a system where the Prosecutor had the ability to make deals, he could greatly increase the amount of criminals he could prosecute and could find justice for at least some of the crimes where before he could not.

129. Tactics like this are often used in the judicial system in the United States where a prosecutor will offer plea bargains and deals to certain criminals in order to gain access to the ability to prosecute other criminals. *See Plea Bargain*, LEGAL INFO. INST., [www.law.cornell.edu/wex/plea\\_bargain](http://www.law.cornell.edu/wex/plea_bargain) (last visited Jan. 15, 2014).

### B. Altering the Referral System

During the negotiations of the Rome Statute, the United States and a few other world powers pushed for the U.N. Security Council to have the ability to refer a situation to the ICC in cases involving non-party states.<sup>130</sup> This is problematic because of the veto power of the states with permanent membership in the UNSC. History has shown us that one powerful country (while using the veto power in the Security Council) can hamstring the entire UNSC and render it useless.<sup>131</sup> Without Security Council referrals, the ICC's main sources of jurisdiction are those nations that have signed and ratified the treaty. As discussed previously, the countries that are signing onto treaties like this are those that do not intend to violate them, while countries that will intend to violate them will not sign. Often times this leaves the ICC without jurisdiction over a very large pool of international crimes. This is, of course, fairly ineffective. This veto power is interesting because two countries that hold veto powers are not parties to the Rome Statute: Russia and the United States.<sup>132</sup> The United States was a major force behind the UNSC becoming the entity to send the ICC referrals.<sup>133</sup> In fact, without this insistence, the ICC would probably look a lot different.<sup>134</sup>

My recommendation would be to alter the referral system of the ICC. The referral system could be given to a more democratic

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130. See RHEA, *supra* note 116.

131. In 1950, after North Korea attacked South Korea, the United Nations was at an impasse on solutions. Russia was blocking any Security Council discussion on aid to South Korea. The General Assembly of the United Nations ultimately passed Resolution 377 A (V), otherwise known as the "Uniting for Peace" Resolution. This resolution essentially circumvented the Security Council veto of the Soviets under the premise that they were preventing the Council from performing its duties of restoring international peace and security. This was a much criticized move and one that is unlikely to be repeated. See Christian Tomuschat, *Uniting for Peace, General Assembly Resolution 377*, AUDIOVISUAL LIBR. INT'L L., available at <http://legal.un.org/avl/ha/ufp/ufp.html> (last visited Jan. 15, 2014). Céline Nahory, *The Hidden Veto*, GLOBAL POL'Y F. (May 2004), <http://www.globalpolicy.org/component/content/article/185/42656.html>.

132. The United States has an immense power over the ICC yet is not a party to the Rome Statute, see *The States Parties to the Rome Statute*, *supra* note 18.

133. WILLIAM A. SCHABAS, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* 279 (2010).

134. For example, imagine if the ICC had worldwide jurisdiction once it was ratified or if the referral system was done more democratically via a consensus of the General Assembly rather than through the Security Council which requires unanimous voting. RHEA, *supra* note 116.

mechanism such as the General Assembly or an “ICC Referral Board” could be established which would operate under a majority vote. The other option is to allow the Security Council to continue making the referrals but to remove the veto power (for ICC discussions) and adopt a system of majority rules, or even a more stringent two-thirds standard etc. Removing the ability of one nation to completely derail justice in a dire situation like the one in Syria is more equitable and more in line with the goals that the ICC is supposedly established to fulfill. In the current situation, if Russia or China did not have the ability to block any discussion on the Syrian situation, it is likely that more affirmative steps would be taken by the international community either through the Security Council or the ICC.

## VII. CONCLUSION

The International Criminal Court needs to develop a way to measure its success. As is stated throughout this article, the ICC is a court of complement in that its role is to ensure that the crimes of genocide, crimes against humanity, war crimes, and eventually the crimes of aggression are prosecuted and the criminals perpetrating these crimes are brought to justice. One major criticism of the ICC is the fact that it has only produced one conviction in over ten years of existence.<sup>135</sup>

The poetic language in the opening lines of the Rome Statute in many ways reaches for lofty goals that the ICC is not even established or able to accomplish.<sup>136</sup> With the restrictions in place over the ICC including the jurisdictional problems of only prosecuting crimes which occurred internationally against a party or by a party to the statute, the restrictions on the type of crimes it is allowed to hear, and the overall logistical problems of policing a

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135. Other ad-hoc tribunals that were developed over the last ten years were not set up with the restriction of only hearing cases of alleged “international” crimes. These courts in many ways were more successful. A major point in establishing the ICC was to remove the necessity to implement a new “ad-hoc” tribunal for every situation that arose and these situations could simply be dealt with by one all encompassing court. PODGOR & CLARK, *supra* note 1, at 206.

136. “[M]indful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity . . . . 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 by taking measures at the national level and by enhancing international cooperation.” Rome Statute, *supra* note 26, at pmb1..

world with so many people and so many places to hide, the ICC in many ways is not set up to properly deal with many of the problems that the world's people believe it is set up to handle. There are only four major crimes that are under its jurisdiction.<sup>137</sup> For example, in cases of "genocide," where a dictator is committing murder and other violations "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group,"<sup>138</sup> the immediate practical solution, where genocide is being committed, is not to present a situation to the ICC, have them investigate, and then hopefully bring the dictator before the ICC, a process which could take months or years. What is likely to happen in a situation like this is armed conflict and military intervention to stop the dictator as soon as possible. Potentially, after the fact, if the dictator and his regime are still alive they could be brought before the ICC.

Finally, the United States, Russia, and China need to show some leadership in the world and ratify/accede to the jurisdiction of the International Criminal Court. All three hold tremendous power over the court via their veto power in the United Nations and their power under Article 16<sup>139</sup> yet none of the three are subject to the jurisdiction of the ICC.<sup>140</sup> If the International Criminal Court is to ever live up to its billing and ideology, the accession of these world powers to the Rome Statute would go a long way in making this happen.

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137. There are four crimes listed in the Rome Statute, however, only three are currently being prosecuted, as the "crime of aggression" has not been defined and ratified. See *The Crime of Aggression*, COALITION FOR INT'L CRIM. CT., [www.iccnw.org/?mod=aggression](http://www.iccnw.org/?mod=aggression) (last visited Jan. 15, 2014).

138. Rome Statute, *supra* note 26, at art. 6.

139. Article 16 of the Rome Statute prevents any discussion or prosecution of any situation for one year after a Security Council deferral resolution. This is a tremendous power that the Security Council members hold over the ICC, a power which is difficult to overstate. Imagine a situation where one of these super-powers was committing illegal international criminal acts in a foreign country. Now remember that the nation with the power has the ability to completely prevent the ICC from ever investigating the situation or the situation ever being discussed in front of the Security Council. Rome Statute, *supra* note 26, at art. 16.

140. RHEA, *supra* note 116, at 175.